PHD DISSERTATION

IRISH FINANCIAL REGULATORY ENFORCEMENT: REFORMING THE CRIMINAL LAW AND ADMINISTRATIVE SANCTION INTERPLAY STRATEGY

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DECLARATION

I hereby declare that this PhD dissertation is entirely my own work and that its only submission for any degree has been to the University of Limerick.

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DEDICATION

To Rose

“....the ground or basis for a belief is deliberately sought and its adequacy to support the belief is examined. This process is called reflective thought; it alone is truly educative in value....” (John Dewey 1910)
Irish Financial Regulatory Enforcement: Reforming the criminal law and administrative sanction interplay strategy

Author: Shaun Elder

**ABSTRACT**

The empirical genesis for this novel inter-disciplinary dissertation was the devastating global financial crisis. A separate and simultaneous Irish crisis was located in the banking sector. The financial market domain, based in its own unique set of norms, and replete with shifting risk concerns and a criminogenic nature, exceeded the authorisations and boundaries of the regulatory control domain with disastrous results. These crises revealed market actor conduct control issues including: questionable risk management practices; fraudulent behaviour; breaches of trust; business culture concerns; governance, control system and regulatory failure; business disclosure and transparency inadequacies; ethical concerns including conflicts of interest; and, ineffectual sanctioning. They presented as both opportunity and motivational driver for the public financial regulatory reform agenda, a socially significant issue. The chosen research lens was the financial regulatory police pairing of criminal and administrative sanctioning, where the prime research issue was coordinated interplay strategy reform, targeted to improve market actor compliance.

Three shifting paradigms, those of the financial markets and their two financial regulatory coercive control components, the criminal law and regulation, are the backdrop to the research interrogation. Each paradigm reflects a discrete normative system, and post-crisis each has not settled and is still shifting. Historically, they simultaneously developed and cross-fed. Hobbes and his contemporary Locke theorised contractarianism; the rule of law; and, political autonomy which the state took up from the market and re-branded as laissez faire. For modern democracy, Habermas has recognised that autonomy is the normative key with restriction secondary. Polanyi has argued that restriction was a societal countermovement which established control
autonomies, which themselves required constraint. Within public regulation, restriction is regulation, a synonym for coercive control, policing, enforcement and ultimately sanction. Because sanction lies across both the criminal law and regulation their interplay is a vital concern.

Within this public regulation, connections were sought between the two coercive policing components, the criminal law and regulation, so as to interrogate their interplay. Because it was ideally suited to a reform or change context the Kuhnian paradigm was engaged to accomplish this. This analysis entailed an instrumental approach based around the norms or assumptions underpinning the coercive control paradigms within the market paradigm context. Thus, a modern normative theoretical framework was developed to test the connections which were found. The framework drew upon both regulatory norms and rule of law values. It was based in Dicey’s rule of law values conceptualisation, drew upon Packer’s control and due process values complex continuum, and employed both Macrory’s accountability and transparency regulatory norms, and Braithwaite’s values-driven regulatory enforcement pyramid. Within the over-arching autonomy and restriction tension, the three exemplar connective tissues identified for specific interrogation between Teubner’s two black boxes of control, the criminal law and regulation were: (harm) risk management, the values complex, and the offence/sanction dependent axis.

Washing the normative theoretical framework through these connections identified the viability of a new enforcement system contained within an expert to expert regulatory contract, which re-balanced the autonomy and restriction dyad. It encompassed improved sanction capability, and promised improved compliance consistent with regulatory norms and rule of law values. A fused reform sanction interplay strategy consisting of various integrated parts was found to be viable. Irish financial regulation which pre-crisis failed to maximise the enforcement interplay, presented as an ideal case study for these reform proposals. Post-crisis, it was concluded that many international best practice standards which emerged from the analysis, were not operationalised in Ireland, while, the new regulatory contract model, and the sit-under fused interplay strategy, were equally not mobilised.
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BIBLIOGRAPHY and REFERENCES
LEGAL REFERENCES

Case Law

Ireland

A v The Governor of Arbour Hill Prison [2006] IESC 45 (SC)

AG v McCabe [1927] IR 129 (CCA)

An Blascaod Mor Teo v Commissioners of Public Works (no 3) (27 February 1998) (HC)

Attorney General v Mallen [1957] IR 344 (SC)

B v DPP [1997] 3 IR 140 (SC)

Banco Ambrosiano SPA v Ansbacher & Co Ltd [1987] ILRM 669 (SC)

Buckley v Attorney General [1950] IR 67 (SC)

Burke v Minister for Labour [1979] IR 354 (SC)

Business Communications Limited v Baxter and Parsons unreported, High Court, Murphy J., 21 July 1995 (HC)

C.C. v Ireland and Others [2006] IESC 33 (SC)


Chestvale Properties Ltd v Glackin [1992] ILRM 221(HC)

Clancy v Ireland [1988] IR 326 (HC)

Conroy v Attorney General [1965] IR 411 (HC & SC)

Considine v Shannon Regional Fisheries Board, [1997] 2 IR 404 (SC)

Cox v Ireland [1992] 2IR503 (SC)
Crotty v An Taoiseach & Others [1987] ILRM 400 (SC)

Cunningham v President of the Circuit Court [2006] IESC 51 (SC)

D v DPP [1994] 2 IR 465 (SC)

Deaton v Attorney General [1963] IR 170 (SC)


Director of Corporate Enforcement v Patrick Byrne [2009] 2 ILRM 328 (SC)

Donnelly v Ireland [1998] 1 IR 321 (SC)

DPP v Begley [2013] IECCA 32 (CCA)

DPP v Best [2000] 2 ILRM 1 (SC)

DPP v Cash [2010] IESC 1 (HC & SC)

DPP v Duffy & Anor [2009] IEHC 208 (HC)

DPP v Monaghan [2007] IEHC 92 (HC)

DPP v Thomas Murphy (Slab) 5 June 2013 unreported (SC)

DPP v Murray (1977) IR 360 (SC)

DPP v Paul Murray [2012] IECCA 60 (CCA)

DPP v O'Flynn Construction Company Ltd [2007] 4 IR 500 (CCA)

Dunphy (a minor) v Director of Public Prosecutions [2005] IESC 75, [2006] 1 ILRM 241 (SC)

East Donegal Cooperative Livestock Mart Ltd v The Attorney General [1970] IR 317 (SC)


Fyffes plc v DCC plc and Ors [2005] IEHC 477 and [2007] IESC 36 (HC & SC)

Georgopoulus v Beaumont Hospital Board [1998] 3 IR 132 (HC & SC)
Gilligan v Criminal Assets Bureau (no 2) [1998] 3 IR 185 (HC)

Glencar Exploration plc v Mayo County Council (No 2) [2002] IR 84 (SC)

Glover v BLN [1973] I R 388 (SC)

Goodman International v Hamilton (No 1) [1992] 2 IR 542 (HC & SC)

H v Director of Public Prosecutions [1994] 2 IR 589 (SC)

Hanrahan v Merck, Sharpe & Dohme [1988] ILRM 629 (SC)

Hardy v Ireland [1994] 2 IR 550 (HC & SC)

Heaney v Ireland [1996] 1 IR 580 (SC)

Hempenstall v Minister for the Environment [1994] 2 IR 20 (HC)

Hutch v Dublin Corporation [1993] 3 IR 551 (SC)

Iarnrod Eireann v Ireland [1996] 3IR 321 (HC & SC)

In re Solicitors Act 1954 (1960) IR 239 (SC)

In the matter of Custom House Capital Ltd [2011] IEHC 399 (HC)


Kiran P O’Duffy v The Law Society of Ireland [2005] IEHC 61 (HC)


Lovett v Minister for Education [1997] 1ILRM 89 (HC)

M & J Gleeson v Competition Authority [1999] 1 ILRM 401 (HC)

Magee v Culligan [1992] 1 IR 233 (SC)

Maher v Minister for Agriculture, Food and Rural Development [2001] 2 IR 139 (SC)

McCarrick v Leavy [1964] IR 225 (SC)

McDonald v Bord na gCon (1965) IR 217 (HC)
McGowan v Carville [1960] IR 330 (HC)
McGrath v The Commissioner for An Garda Síochána [1991] 1 IR 69 (SC)
McLoughlin v Tuite [1989] IR 82 (SC)
Melling v O’Mathghamhna [1962] IR 1 (SC)
Minister for Industry and Commerce v Steele [1952] IR 304 (SC)
Mooney v An Post [1994] ELR 103
Murphy v GM, PB, PC Ltd [1999] IEHC 5 (HC)
Murphy v GM (2001) 4 IR 113 (SC)
National Irish Bank, Re (No.1) [1999] 1 ILRM 321 (SC)
National Irish Bank, Re (No.2) [1999] IEHC 134, [1999] 2 ILRM 443 (HC)
O’Keeffe v Ferris [1997] 3 IR 463 (SC)
O’Leary v AG [1993] 1 IR 102 (HC)
O’Leary v AG [1995] 1 IR 254 (SC)
O’Neill v Ryan [1993] ILRM 557 (SC)
Orange v Revenue Commissioners [1995] 1IR 517 (HC)
Orange v The Director of Telecommunications Regulation & Anor [2000] 4 IR 159 (SC)
O’Sullivan v The Law Society of Ireland & others [2012] IESC 21 (SC)
Phonographic Performance (Ireland) v Cody [1998] 4 IR 504 (HC & SC)
Pine Valley developments Ltd v Minister for the Environment [1987] IR 23 (HC & SC)
PMPA v Attorney General [1983] IR 339 (SC)
PMPS v Attorney General [1983] IR 355 (SC)


Pudlizsewski v Judge Coughlan [2006] IEHC 304 (HC)


Re CB Readymix Ltd. Cahill v Grimes [2002] 1 IR 372 (HC)

Re Haughey [1971] IR 217 (SC)

Re Heffron Kearns Ltd [1993] IR 191 (HC)

Re Shields estate 1901 1IR172 (CA CHD)

Redmond v Ireland [2009] 2 ILRM 419 (HC)

Registrar of Companies v Judge Anderson [2004] IESC 10 (SC)

Rock v Ireland [1997] 3 IR 484 (SC)

Shannon Regional Fisheries Board v Cavan County Council [1996] 3 IR 267 (HC)

Sinnott v Minister for Education [2001] 2 IR 545 (SC)

Superwood Holdings plc v Sun Alliance and London Assurance plc [1995] 3 IR 303 (SC)

Taylor v Smyth [1991] IR 142 (SC)

The People (Attorney General) v O’Driscoll (1972) 1 Frewen 351(CCA)

The People (Attorney General) v Poyning [1972] IR 402 (CCA)

The People (Attorney General) v Shribman and Samuels [1946] IR 431 (CCA)

The People v Byrne [1974] IR 1 (CCA)

The People (AG) v Cummins [1972] IR 312 (SC)

The People v Dermody [1956] IR 307 (CCA)

The People (DPP) v Bowes [2004] 4 IR 223 (CCA)
The People (DPP) v R Mc [2008] 2 IR 92 (SC)

The People (DPP) v Roseberry Construction Ltd and McIntyre [2003] 4 IR (CCA)

The People (DPP) v Sheedy [2000] 2 IR 184 (CCA)

The People (DPP) v Smyth and Smyth [2010] IECCA 34 (CCA)

The People (DPP) v Tiernan [1988] IR 251 (SC)

The People (DPP) v Tuite [1983] 2 Frewen 175 (CCA)

The People (DPP) v WC [1994] 1ILRM 321 (CCC)

The People (DPP) v WD [2008] 1 IR 308 (CCC)

The People (DPP) v Woods [2010] IECCA 118 (CCA)

The State (C) v The Minister for Justice [1967] IR 106 (SC)

The State (Healy) v Donoghue [1976] IR 325 (SC)

The State (Keegan) v Stardust Victims Compensation Tribunal [1987] ILRM 202 (SC)

The State (McCormack) v Curran [1987] ILRM 225 (SC)

The State (Tynan) v DJ Keane and Anor [1968] IR 348 (SC)

Tuohy v Courtney [1994] 3 IR 1 (SC)

Ulster Bank Investment Funds Limited v Financial Ombudsman and McCarren & Ors [2006] IEHC 323

Webb v Ireland [1988] IR 353 (SC)


Z v DPP [1994] 2 IR 476 (HC & SC)

_Ireland Settlement Agreements_

xviii
Central Bank of Ireland and Alico Life International Limited dated 29 March 2012

Central Bank of Ireland and Aviva Life and Pensions Ireland Limited dated 07 March 2012

Central Bank of Ireland and Goldman Sachs Bank (Europe) plc dated 08 September 2011

Central Bank of Ireland and MBNA Europe Bank Limited dated 21 June 2011

Central Bank of Ireland and Merrion Stockbrokers Limited dated 21 March 2012

Central Bank of Ireland v Quinn Insurance Limited (under Administration) dated 18 February 2013

Central Bank of Ireland and Scotiabank (Ireland) Limited dated 2 June 2011


IFSAT

Quinn Employees Committee v The Irish Financial Services Regulatory Authority and Quinn Insurance Limited, case 005/2010 (IFSAT)

Tony Cottrell t/a Ferrybank Financial Services v The Irish Financial Services Regulatory Authority, case 002/2008 (IFSAT)

Westraven Finance Limited t/a Brinkspeed v Irish Financial Services Regulatory Authority, case 001/2007 (IFSAT)

Ireland Competition Authority

Competition Authority Decision No 6, Woodchester Bank Ltd/UDT Bank Ltd: 4 August 1992, Notification No. CA/10/92

Competition Authority Decision of 10 June 1994 relating to a proceeding under section 4 of the Competition Act 1991 Notification NO. CA/199/92E
UK

Allnut v Inglis (1810) 12 East 527


Attorney-General’s Reference No 7 of 2000 [2001] 1 WLR 1879 (CAC)

Attorney General for Australia -v- The Queen and the Boiler-makers' Society of Australia & Ors [1957] AC 288 (PC)

C PLC v P & Attorney General (Intervenor) [2007] EWCA Civ 493 (CA)

Council of Civil Service Unions v Minister for the Public Service [1985] AC 374 (HL)

David Janway Davies v Health and Safety Executive [2003] IRLR 170 (CAC)

DPP v Kent and Sussex Contractors [1944] 1 KB 810 (KBD)

DPP v Morgan [1976] AC 182 (HL)

Gammon (Hong Kong) Ltd v Att-Gen of Hong Kong (1985) AC 1 (PC)

Jefferson Ltd v Bhetcha1 [1979] 1 WLR 898

Lennard’s Carrying Co v Asiatic Petroleum Co Ltd [1915] AC 705 (HL)

McGhee v National Coal Board [1972] 3 AER 1008 (HL)

Miller v Minister for Pensions [1947] 2 AER 372 (KBD)

Moore v Bresler [1944] 2 AER 515 (KBD)

Mote v Secretary of State for Work and Pensions and Another [2008] CPR 13 (CA)

Purcell Meats (Scotland) Ltd v McLeod 198 SCCR 672


R v Birmingham and Gloucester Railway Co. [1842] 3QB 223 (QBD)

R v ChARGET Ltd (trading as Contract Services) [2009] 1 WLR 1 (HL)
R v Edward Coleman [1678] 7 St Tr KB 1

R v Connelly [1964] AC 1254 (HL)

R v Davies [2003] ICR 586 (CAC)

R v Director of Serious Fraud Office, ex p Smith [1993] AC 1 (HL)

R v DPP ex p Kebilene [2000] 2 AC 326 (HL)

R v Edwards [1975] QB 27 (CCA)

R v Edwards; R v Denton; R v Hendley; R v Crowley [2004] 2 Cr App R 27 (CAC)

R V Green [1993] CLR 46 (CAC)


R v Herbert [1990] 2SCR 151

R v Hinks [2001] 2 AC 241(HL)

R v Hogan [1960] 2 QB 513 (CCA)

R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249(CAC)

R v Hunt [1987] AC 352 (HL)

R v ICR Road Haulage Ltd [1944] 1 KB 551(CCA)

R v Institute of Chartered Accountants in England ex p Brindle 3 [1994] BCC 297 (CA)

R v Johnstone [2003] 1 WLR 1736 (HL)

R v (Kelly) v Warley Magistrates’ Court [2007] 171 JP 585 [2007] EWHC 1836

R v Lambert [2002] 2 AC 545 (HL)

R v Miles [1890] 24 QBD 423 (QBD)

R v P&O European Ferries (Dover) Ltd [1991] 93 CAR 72 (CAC)

R v Thomas [1950] 1 KB 26 (CCA)
R v Turner [1816] 5 M&S 206

Redge v Home Secretary, ex parte Khawaja [1984] AC 74 (HL)

Re Ro-Line Ltd. [1988] Ch 477 (CHD)

Sheldrake v DPP [2005] 1AC 264 (HL)

Sherras v De Rutzen (1895) 1 QB 918 (QBD)

State v Coetze [1997] 2 LRC 593

Sweet v Parsley (1970) AC 132 (HL)

Tesco Supermarkets Ltd v Natrass [1972] AC 153 (HL)

V v C [2001] EWCA Civ 1509 (CA)

Wilsher v Essex Area Health Authority [1988] AC 1074 (HL)

Woolmington v DPP [1935] AC 462 (HL)

EU

Case C-489/10 Lukasz Marcin Bonda 5 July 2012

Case 81/72 Commission v Council (Staff Salaries) [1973] ECR 575

Case C-176/03 Commission v Council [2005] ECR 1-7879

Case C-440/05 Commission v Council [2007] ECR 1-9097


Costa v Enel 6/64 [1964] ECR 585

Case C-350/88 Delacre v Commission [1990] ECR 1-395

Case 2/75 EVGF v Mackprang [1975] ECR 607

Case C-187/01 and Case C-385/01 Criminal proceedings against Huseyin Gozutok and Klaus Brugge [2003] ECR 1-1345
Case C-105/03 criminal proceedings against Maria Pupino [2005] ECR 1-5285

Case C 273/90 Meico-Fell v Hauptzollamt Darmstadt {1991} ECR 1-5569

Mulder v Minister van Landbouwen en Visserij [1988] ECR 2321

Spector Photo Group NV v Commissie voor het Bank-, Financie- en Assurantiewezen C-45/08 [2010] 2 CMLR 30 (CJEU)

Van Gend en Loos 26/62 [1963] ECR 1

ECtHR

Air Canada v UK [1995] 20 EHRR 150

Bendenoun v. France (1994) 18 EHRR 54

Engel v Netherlands (1979-90) EHRR 647

Garyfallou AEBE v Greece [1999] 28 EHRR 344

Heaney and McGuinnes v Ireland (2001) 33 EHRR 12

Janosevic v Sweden (2004) 38 EHRR 22

Jussila v Finland (2007) 45 EHRR 39

Lauko v Slovakia [2001] 33 EHRR 40

Lingens and Leitgens v Austria 4 EHRR 373

Lutz v Germany [1988] 10 EHRR 182

M v Italy App. No. 12386/86, 15 April 1991

Murray v United Kingdom (1996) 22 EHRR 29

Ozturk v Germany Application No. 8544/79 (ECtHR 21 February 1984)

Pham Hoang v France (1991) 16 EHRR 53

Salabiaku v France (1988) 13 EHRR 379
Saunders v UK (1997) 23 EHRR 313

X v Germany (1962) 5 Y.B. 192

X v Netherlands 16 D.R. 184

USA

Coffin v United States 156 US 432 (1895)


Gabelli et al v SEC case No. 11-1274 (US Supreme Court Feb. 27, 2013)


Kennedy v Mendoza-Martinez 372 US 144, 83 S.Ct. 554 (1963)


Meinhard v Salmon, 249 NY 458; 164 NE 545 (1928)

Re Winship (1970) 397 US 358

SEC v Dresser, 628 F.2d 1368, 1377 (D.C. Cir. 1980)

SEC v First Financial Group of Texas, 659 F.2d 660, 666-67 (5th Cir. 1981)

SEC v Galleon Management LP 683 F. Supp. 316 (SDNY 2010)

SEC v Rajaratnam 622 F.3d 159 (2d Cir. 2010)


US v Kordel 397 U.S. 1, 11 (1970)


US v Parrott 248 F. Supp. 196 (DDC 1965)

US v Plaza Health Labs., Inc., 3 F.3d 643, 648-49 (2d Cir.1993)


US v Stringer 521 F.3d 1189, 1191 (9th Cir. 2008)

US v White 322 US 694, 698-99 (1944)

Canada

Canada (Director of Investigation and Research) v Southam Inc. (1997) 1SCR at 748 (Canadian Supreme Court)

Re Ro-Line Motors Ltd (1988) BCLC 698

Regina v City of Sault Sainte Marine [1978] 85 DLR 161

R v Schwartz [1988] 2 SCR 443 (Canadian Supreme Court)

R v Wholesale Travel Group [1991] 3 SCR 154 (Canadian Supreme Court)

R v Whyte (1988) 51 DLR (4th) 481

The Queen v Oakes [1986] 1 SCR 103 (Canadian Supreme Court)

UN ICCPR

Constitutions

The Irish Constitution 1937

International Conventions, Protocols and Charters

Charter of Fundamental Rights of the European Union in force 1 December 2009


Council of Europe, Convention on Compensation for the Victims of Violent Crime (Strasbourg, Council of Europe 1984)


Universal Declaration of Human Rights, General Assembly of the United Nations, 10 December 1948


EU Treaties

Treaty of Amsterdam OJ C 340, 10 November 1997


Treaty of Rome, Treaty establishing the European Economic Community (TEEC), 25th March 1957

Statutes and Statutory Instruments

Ireland Statutes

Central Bank Act 1942 Part IIIC as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004

Central Bank Act 1971

Central Bank Reform Act 2010

Central Bank and Credit Institutions (Resolution) Bill (2011) 11

Central Bank (Supervision and Enforcement) Dail Bill (2011) 43

Central Bank (Supervision and Enforcement) Act 2013

Central Bank and Financial Services Authority of Ireland Bill 2003

Central Bank and Financial Services Authority of Ireland Act 2003

Central Bank and Financial Services Authority of Ireland Act 2004

Childrens Act 2001

Companies Act 1963

Companies Act 1990

Competition Act 2002

Competition (Amendment) Act 2012

Consumer Protection Act 2007

Court and Court Officers Act 1995

Criminal Justice Act 1984

Criminal Justice Act 1993

Criminal Justice Act 2006

Criminal Justice (Amendment) Act 2009

Criminal Justice (Money Laundering and Terrorist Financing) Act 2010

Criminal Justice (Theft and Fraud offences) Act 2001

Criminal Law Act 1997

Criminal Procedure Act 1967

Criminal Procedure Act 1993

Criminal Procedure Act 1996

Criminal Procedure Act 2010

Financial Stability and Reform Bill 2013 (Bill 41 of 2013)

Fines Act 2010

For establishing a bank by the name of the Governors and Company of the Bank of Ireland Act 1782 (21 and 22 George III c.16)

Interpretation Act 1937

Interpretation Act 2005

Irish Bank Resolution Corporation Act 2013 (no 2 of 2013)

National Asset Management Agency (NAMA) Act 2010
Petty Sessions (Ireland) Act 1851

Proceeds of Crime Act 1996

Prosecution of Offences Act 1974

School Attendance Act 1926

Solicitors (Amendment) Act 1994

The Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013

*Ireland Statutory Instruments*


Central Bank Reform Act 2010 (Sections 20 and 22) Regulations 2011, SI 2011/ 437

Central Bank Reform Act 2010 (Sections 20 and 22) (Amendment) Regulations 2011, SI 2011/ 615

Central Bank Reform Act 2010 (Procedures Governing the Conduct of Investigations) Regulations 2012, SI 2012/56


Criminal Procedure (Commencement) Order SI 414/2010

Emergency Powers (Control of Export) Order 1940

Emergency Powers (Pork Sausages and Sausage Meat) (Maximum Prices) Order 1943


xxix

**UK Statutes**

Banking Act 2009

Bribery Act 2010

Coroners and Justice Act 2009

Corporate Manslaughter and Corporate Homicide Act 2007

Criminal Justice Act 2003

Habeas Corpus Act 1679 (31 Car. II.C.2)

Insolvency Act 1986

Parliamentary Reform Act 1832

Regulatory Enforcement and Sanctions Act 2008

Theft Act 1968

Trade Marks Act 1994

Treason Trials Act 1696

**EU Legislation**


xxx


Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime [2001] OJ L 182/1


USA Statutes

Administrative Procedure Act 1946 5 USC 553


Regulatory Flexibility Act 5 USC 601-602

Securities Exchange Act 1934 17 CFR § 240.24c-1

Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank)

28 USC §2462

Australian Statutes

Corporations Act 2001
GLOSSARY

APRA Australian Prudential Regulation Authority (Australian regulator)

ASIC Australian Securities and Investments Commission (Australian regulator)

BIS Bank for International Settlements

CAB Criminal Assets Bureau (Ireland)

CAG Comptroller and Auditor General (Ireland)

CDO Collateralised Debt Obligations

CDPP Commonwealth Director of Public Prosecutions (Australia)

CESR Committee of European Securities Regulators (EU)

CIS Collective Investment Schemes

CF Controlled Function

CFTC Commodity Futures Trading Commission (USA regulator)

CJEU Court of Justice of the European Union (formerly ECJ)

CLRG Company Law Review Group (Ireland)

CRA Credit Rating Agencies

CSO Central Statistics Office (Ireland)

Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (USA)

DPP Director of Public Prosecutions

EBA European Banking Authority (EU)

ECB European Central Bank (EU)

ECHR Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECtHR  European Court of Human Rights

ECJ  European Court of Justice (EU) now known as the Court of Justice of the European Union (CJEU)

EFSM  European Financial Stability Mechanism (EU)

EIOPA  European Insurance and Occupational Pensions Authority (EU)

ESA  European Supervisory Authority (EU)

ESFS  European System of Financial Supervision (EU)

ESMA  European Securities and Markets Authority (EU)

ESRB  European Systemic Risk Board (EU)

EU  European Union

FCA  Financial Conduct Authority (UK regulator replacing the FSA 2013)

FCIC  Financial Crisis Inquiry Commission (USA)

FSA  Financial Services Authority (UK regulator abolished effective 2013)


FSB  Financial Stability Board (G20)

FSF  Financial Stability Facility (G20)

GDP  Gross Domestic Product

GFC  Global Financial Crisis

ICCPR  International Covenant on Civil and Political Rights (UN)

IFSAT  Irish Financial Services Appeal Tribunal (Ireland)

IMF  International Monetary Fund

MAD  Market Abuse Directive (EU)

MiFID  Markets in Financial Instruments Directive (EU)
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ML</td>
<td>Money Laundering</td>
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<tr>
<td>MS</td>
<td>Member State (EU)</td>
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<tr>
<td>NAMA</td>
<td>National Asset Management Agency (Ireland)</td>
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<tr>
<td>NSA</td>
<td>National Security Agency (USA)</td>
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<tr>
<td>ODCE</td>
<td>Office of the Director of Corporate Enforcement (Ireland)</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development (Global)</td>
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<tr>
<td>OTC</td>
<td>Over-The-Counter</td>
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<tr>
<td>PCF</td>
<td>Pre-approved Controlled Function</td>
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<tr>
<td>RFSP</td>
<td>Regulated Financial Service Provider</td>
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<tr>
<td>RRT</td>
<td>Responsive Regulation Theory</td>
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<tr>
<td>SEC</td>
<td>Securities and Exchange Commission (USA regulator)</td>
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<tr>
<td>TARP</td>
<td>Troubled Assets Relief Program (USA)</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union (EU) formerly the EC Treaty</td>
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<tr>
<td>UCITS</td>
<td>Undertakings for Collective Investment in Transferable Securities (EU)</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<td>US</td>
<td>United States of America</td>
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Chapter 1: Introduction: Background and Research Overview

1.1.1. Background

The empirical starting point for this dissertation, as more thoroughly outlined and referenced in Appendix A, was the global financial crisis (GFC). The GFC commenced with the mortgage securitisation sub-prime crisis within the United States of America (US) financial markets in 2007. This caused a global credit (liquidity) crunch, followed by transformation into a global financial crisis (both solvency and liquidity)\(^1\). It warranted the title of the most serious economic and financial crisis the world has ever known\(^2\). And, it precipitated a paradigm shift in financial regulation\(^3\). For Ireland, the crisis manifestation was a simultaneous banking crisis, where private debt became socialised public debt, causing the sovereign to seek a three-year, reputation-damaging international financial bailout. This occurred amid Euro-zone contagion fears, which arose when financial markets identified the risk associated with high public debt.

These crises revealed a massive loss of public trust in financial markets, due to national and international regulatory failure, market actor issues around risk management culture and behaviour, including mortgage origination fraud, and stresses upon regulatory


\(^3\) For the EU see especially the De Larosiere Report 2009 (n 1) which precipitated constitutional change; For the US see The US Dodd-Frank Wall Street Reform and Consumer Protection Act 2010. Generally, special if not bespoke resolution vehicles were created mid-crisis in many countries including: the US TARP programme and Federal Reserve interventions; the UK bank failure regime post Northern Rock bank run; in Ireland NAMA the property debt giant; in the EU the EFSF/ESM bailout fund curiously as a limited liability company; see WD Cohan, ‘House of Cards How Wall Street’s Gamblers Broke Capitalism’ (Allen Lane 2009); H Davies and D Green, Global Financial Regulation the essential guide (Polity Press 2009); S Elder, ‘The Ocean Currents of EU Financial Regulatory Reform: Irish Periscope, International Waters’ (2012) 3(8) ANUCES Briefing Paper; J Gray and O Akseli (eds), Financial Regulation in Crisis: The Role of Law and the Failure of Northern Rock (Elgar 2011).
enforcement practice and policy. Amid massive amounts of analysis and opinions, over thirty contemporaneous GFC causal effects in a combustible mixture, were identified\(^4\). While the crises, and their effects, are the context for this dissertation, they are not however its focus. Essentially, within shifting financial regulatory paradigms they ground both the opportunity, and the necessity, for financial regulatory enforcement reform which is the dissertation focus.

Ireland’s financial crisis hit in 2008, stemming on the economic side from a contraction in property prices and domestic output, and the spill-over effects from the US sub-prime crisis; and, on the regulatory side, from inadequate risk management practices globally, particularly copied in Irish banks, coupled with the failure of regulatory policy and supervision\(^5\). In the Irish banking system deregulation and light touch regulation, led to a lack of transparency and a lack of prudence in relation to risk taking\(^6\). The Irish regime had rested upon presumed ethical behaviour, and transparency in business dealings, at board level. It failed. It was also found that sanctioning was only reluctantly applied to micro-prudential functions. The prime culprit was the infamous Anglo Irish Bank, which operated a false loan paradigm, resulting in grossly excessive, and irresponsible lending, amid serious governance shortcomings\(^7\). Their relationship banking model started a disastrous, and highly competitive, national lending cycle among banking rivals. They operated inadequate risk models, based almost exclusively in a competition-feeding, and rising, property bubble. When the bubble burst, the enormous build up of debt caused bank nationalisation, gave rise to a catastrophic government blanket guarantee, and with disastrous social consequences transferred the financial calamity to taxpayers.


\(^7\) S Carswell, Anglo Republic: Inside the bank that broke Ireland (Penguin 2011); S Ross, The Bankers: How the banks brought Ireland to its knees (Penguin 2009).
The Irish government commissioned a series of reports purposed to identify causal links. Beyond the banks, an Irish hubris was identified in these commissioned reports, along with herding, group-think, national speculative mania, and head-in-the-sand disbelief; all within an international and domestic context of adverse culture, values and conduct change. A divers set of post-crisis aggravators, and unintended adverse effects of crisis response, as set out more fully in Appendix A, also exacerbated the Irish crisis.

By October 2012, over 200 million people globally were unemployed, and IMF estimates put GDP in the US and Europe at about 10-15 percent lower than they would otherwise have been. The IMF also estimated that GFC costs exceeded US$4 trillion, the vast majority of which was attributed to systemic failures of corporate, regulatory, and political oversight especially in the US. One EU legislator interviewed for this dissertation stated that the market temperature had changed, the laissez faire attitude had gone, and so had self-regulation to be replaced by more intrusive public regulation. The EU Commission pointedly highlighted enforcement as one of four essential reform pillars, and emphasised both an enhanced role for the criminal law, and a beefed up administrative sanction regime. It is the interplay of this sanction pairing of the criminal law and regulation which is the immediate lens for this research.

Market actor conduct control issues, which were identified for special attention within this interplay, as highlighted in the more in-depth Appendix A background included: questionable risk management practices; fraudulent behaviour; breaches of trust; business culture concerns; governance, control system and regulatory failure; business disclosure and transparency inadequacies; ethical concerns including conflicts of interest; and, ineffectual sanctioning. The heavily innovative financial markets exceeded control pre-crisis, or more particularly exceeded control or regulatory failure. Many advocated that

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10 See MacNeil and O’Brien ‘Introduction’ (n 2).

11 Interviewee T EU Legislator Brussels 10 April 2013.

those guilty of crime associated with the bank crisis must face jail. The role of the criminal law within the interplay thus became a key research focus.

Regulatory compliance within the financial markets’ complex and dynamic risk environment emerged as a fundamental issue. Compliance is the key objective for building and maintaining the essential quality of trust. Through its risk management manifestation, compliance may be seen by business as a competitive advantage, although it carries considerable baggage with it. This includes issues around expense, resourcing, circumvention, and regulatory error, in addition to the legal rules versus voluntary behaviour tension. A regulatory paradox has been highlighted, between politically and technically attractive, instrumental, regulatory policy-making, on the one hand, and specific risk, which is not amenable to narrow, targeted intervention, on the other. Methods and forms of defining and grounding enforcement within the interplay, essentially offences and their dependent sanctions, therefore assumed research significance.

The free spirit of the market, where risk management and regulation are central, is independent autonomy with restriction secondary. These values also underpin coercive control. Historically they developed contemporaneously across both markets and control and even cross-fed. My argument is that the crisis provides the reform opportunity and necessity for collaboratively re-ordering the pre-crisis balance between these two overarching values of autonomy and restriction. Within restriction, the research focus is public coercive control or public regulation of market actor conduct/misconduct. This control is ultimately exercised as sanctioning within what has been called a binary or police pairing consisting of criminal law and administrative sanctions. Post-crisis, the coordination and components of the interplay strategy for this pairing requires interrogation leading to reform. This includes interrogation of the values underpinning it.

14 See F Haines, The Paradox of Regulation (Elgar 2011); MacNeil and O’Brien ‘Introduction’ (n 2).
The ambition of this dissertation therefore, is to problem-solve towards formulating a reformed interplay strategy, within the over-arching re-ordering of the autonomy and restriction balance, purposed to maximising market actor compliance. The objective is to promote increased compliance through an improved system of enforcement which is more consistent with both regulatory norms and with the values associated with the rule of law, human rights conventions and the Irish constitution.

1.1.2. Dissertation Structure

This dissertation contains three textual Parts split into eight numbered chapters. It has extensive Oscola-style footnotes; a fulsome set of Legal References; a Glossary of abbreviated terms; Appendices containing dissertation specific research materials, background analysis, tabulations, and space spill-over material demonstrating the breadth and depth of the research; and, a full References and Bibliography of cited and consulted sources. It commenced with an Abstract providing an overview, and then moved into Part 1 with its three chapters.

Part 1 Chapter 1 which set out the Introduction: Background and Research Overview has six integrated sections, including the Background rendered above. Good housekeeping dictated that Research Justification and Scope was immediately established in paragraph 1.1.3; to be followed by Research Question(s) in paragraph 1.1.4. With the research set in context, justified, explained and scoped, the pivotal Research Methodology for identifying, devising and presenting a reformed coordinated interplay strategy, and an over-arching new regulatory contract, has been outlined in Part 1.1.5. The Research Findings Overview is found at Part 1.1.6.

To reveal the all-important market actor conduct environment, Part 1 Chapter 2 is entitled: The Market Domain and Market Actor Conduct Issues. Across five sections there is examination of the market domain, market actor conduct issues, discrete market features, and market-perfecting standards and rules.

Finally, in Part 1 Chapter 3, as set out in eight sections, the modern normative Theoretical Framework applicable to interrogating restriction as coercive control, which was applied to the research questions, and dissertation literature and data, was set within its reform
context. For validity and reliability it was drawn from extensively tested theorists. This enabled its application to financial regulation generally, and then to the substance of Irish financial services practice and policy, before a conclusion incorporating needed reforms was set out.

To interrogate financial regulation, in the form of coercive control, as the counter-movement to market autonomy, Part 2 in three chapters sequentially explored three select forms of the connective tissue between the sanction pairing of the criminal law and regulation. These three connections, risk management in Part 2 Chapter 1, the values complex in Part 2 Chapter 2, and the offence/sanction dependent axis in Part 2 Chapter 3, were progressively examined through the lens of the earlier constructed normative theoretical framework. A new regulatory contract, which over-arches a reformed coordinated interplay strategy, was explored, identified and detailed.

Part 3 started with a Rounding Up Review, and thereafter consisted of two chapters. It commenced in Part 3 Chapter 1 with a thematic interrogation of Irish financial regulatory practice and policy, set against the over-arching reformed regulatory contract, and within it the reformed coordinated interplay strategy, which had already been filtered through the modern normative theoretical framework provided. This resulted in the identification of reform gaps and proposals, and enabled the testing of Irish practice and policy against international comparators which had also been detailed in the Part 2 chapters.

The Part 3 Chapter 2 conclusion is entitled: Findings and Analysis Conclusions. Major findings have been disclosed, the two research questions were answered, and final conclusions drawn. Implications of the analysis were set out, along with limitations and suggestions for further research.

1.1.3. Research Justification, Arguments and Scope

The research justification was much-needed financial regulatory reform. Within the identified background, serious market actor conduct stresses have been exposed, and public regulatory reform post-crisis therefore is a justified necessity. Globally pre-crisis, inadequate coercive control, within most common law jurisdictions was rendered by a polarised enforcement pairing, where the criminal law inhabited the margins.
Administrative regimes were located at the centre but sanction suites were regarded as sub-optimum. Pre-crisis, Ireland operated a ‘soft-touch’ version of a principles-based approach to regulation, under which sat a ‘retreatist’ enforcement style. It failed.

The primary research issue thus was: maximising market actor conduct control within values standards to achieve improved regulatory compliance. This dissertation engaged this most important societal challenge. This work will not alone aid the further work of scholars, but also will inform policy-makers, and assist market actors, and, regulatory and arbitral authorities alike. Regulatory reform is ultimately purposed to improve Ireland’s international financial reputation, and investor confidence in its financial regime and structures. This dissertation argued, that the ongoing GFC and Irish crisis aftermath, as a time of deep uncertainty, provided an ideal opportunity to (i) re-examine failed financial regulatory enforcement models; (ii) to incentivise new bespoke proposals which reflect high standards; and (iii) to recognise that the unique and vitally important financial markets require discrete regulation. Ireland sits within the double EU cocoons of Eurozone and Union, populated by twenty-nine discrete legal systems, and impacted by the single integrated EU market. As a small open economy within the wider global economic and regulatory structure, Ireland therefore, must draw upon international influences and comparators as vital touchstones in the regulatory reform endeavour.

Furthermore this dissertation agued, that a collaboratively arrived at new regulatory contract is required to re-order the balance between autonomy and restriction, as between the market and the two coercive control paradigms. A fusion of the two governing enforcement strategies was promulgated. Here, a revamped values complex for the risk management endeavour will be of significance. Within such a contract, a new coordinated interplay strategy for the fused criminal law and administrative sanction pairing is also required. This strategy must incorporate many integrated parts with advance publication of enforcement pathway options, the selection or launching factors for the pathway of choice, sanction guidelines, and a single transversal sanction suite among them.

15 The EU financial regulatory process has been pre-occupied with the construction of a single financial market since the 1966 Segre Report; see Segre Report by a Group of Experts Appointed by the EEC Commission, The Development of a European Capital Market (1966). Treaty of Rome 1957 arts 2 and 3 set out the EU fundamental freedoms which underpin such market. On the 1st July 2013 Croatia joined the EU as the twenty-eighth member state adding a further legal system to the mix.
Greater protection for the innocent within a flexible, and none too hostile, and transparent enforcement style, and more disclosure requirements for the real infringer, is the better new regulatory contract rhythm. Specialist prosecutorial and specialist arbitral authority are recommended to wield the proposed six type sanction suite containing a disparate arsenal of sanctions. Financial regulatory enforcement, within the proposed strategic interplay, will work best when enforcers can call upon a mix of enforcement strategies, sanctions and incentives. The primary underpinning for a sanction fusion for instance, must include a well-defined cumulative ‘total price’ principle. The ‘real crime’ criminal law paradigm in terms of offences, sanctions, and practice and procedure must be transformed to sit within a fused pairing.

Enforcement pathway choices must be made within the fusion around parallel and/or double jeopardy approaches. This entails arrangement within a heuristic such as an enforcement pyramid with the tough top engaging the criminal law for serious, recidivist and settlement breach cases; the balanced and flexible middle mobilizing either or both criminal and administrative forms; and the base educating via regulatory protocol. While it is difficult to set out a definitive list of factors governing interplay decision-making, I argued for the inclusion of fourteen identified factors arranged in a mirror image. This pivots around ‘case differentiation’, recognises the individual and corporate entity differentiation, and includes self-regulatory and/or co-regulatory features incorporated in ‘cooperation’ as equally essential.

As regards research scope, certain assumptions underlie the approach taken within this dissertation. Public enforcement is the dissertational subject. The non-use or marginalisation of criminal law is decried; it is not regarded however, as trumping other enforcement forms, but it is argued to have a morally significant signalling voice of its own and as an influencer across both other public and private regulatory enforcement. However, it is acknowledged that private or self-regulatory enforcement must have a large and successful role, and in the literature it has been successfully depicted alongside public regulatory forms within a three-sided or dimensional enforcement pyramid

Internal compliance and third party engagement are features of private regulation which is as essential as public. This essential role and its influence will emerge at places within the text, for instance as cooperation, self-reporting or remediation. Furthermore, the thrust for instance, of Teubner’s work on regulation has been to identify the risks of juridification and the potential to stimulate self-regulation to promote better communication between legal, political and economic sub-systems. This dissertation focuses upon public regulation but fully acknowledges the significant part which private regulation, including self-regulation and co-regulation, plays in minimising juridification and in promoting compliance communication and structures\(^\text{17}\).

The current publicly preferred enforcement paradigm, consisting of the criminal law and administrative sanction regime dyad, is taken as a research given, although its workings are not. These workings are the interrogation fodder. Interplay strategy and policy to date have failed and reform is required. Within reform, issues around future strategic interplay policy and workings, its competence within risk and trust parameters, its effectiveness and fitness for purpose, and its acceptance by relevant stakeholders within recognised values, are broached where and as relevant.

Throughout this dissertation, the sanction interplay is described variously as involving a pairing, a dyad or a binary. The terms criminal law and regulation are sometimes used, as are the terms criminal and administrative sanctioning, to describe the two components. These are separate paradigms. Although the term a ‘binary’ has pejorative connotations for some, and may be viewed as a mutually exclusive pairing, this is not its usage here. Wells described regulation and the criminal law as a binary\(^\text{18}\). From this academic source and supplementary commentary the research has posed the question as to whether or not the components or poles are incompatible or connected. Teubner’s concept of two ‘black boxes’ has been drawn upon to conjure an answer. Connective tissue between these boxes was sought, and when found it yielded sufficient connection to proceed\(^\text{19}\). The over-riding term ‘binary’ therefore, may be seen not alone to incorporate its two component paradigms but also envisages a third paradigm or dimension that of their interplay or even fusion.


\(^{19}\) See Teubner ‘After Legal Instrumentalism? Strategic Models of Post-regulatory Law’ (n 17).
Within the identified sanction interplay dyad this dissertation is concerned with three actor categories. Consensually licensed, and regulated financial service providers (RFSPs), and their regulatory compliance; and, those legally unregulated but impacting, and those illegally operating and impacting, the regulatory control domain. This coercive control domain is parasitic to the socially constructed market which precedes it, and only exists because of it. It is acknowledged however that the law, as the primary form of social ordering or control, has some constitutive functions within the markets once constructed, for instance, around its authorisations and boundaries. The main areas of control domain coverage are banking, insurance, securities and fund management.

Misconduct is the key activity scrutinised. For all sanction events, whether criminal or regulatory, it is a primary argument that all sanctions should be regarded as punitive, and that criminal law proofs and procedures should always apply. Indeed, a preference is demonstrated for the defining of new financial regulatory offences which will cover or replace both current criminal and regulatory forms.

While clearly questions need to be addressed concerning the comparative operation of financial regulation both pre- and post-GFC, and this is addressed in Ireland’s case in Part 3 Chapter 1 where the enforcement jurisdiction which commenced pre-crisis (2004) was contrasted with post-crisis reforms (2010 and ongoing), this was not the main research focus. Such main focus was reform. Indeed, the pre-crisis regime was shown to be deficient and the post-crisis reforms to date were equally demonstrated to be insufficient.

Save where otherwise indicated the factual cut-off date for the research is December 2012.

Extensive appendices fulfil the role of detailing original research material synopsised in text; enlargement of text space; providing background to analysis; providing a number of original tabulations which directly arise from original research and which are both synopsised and referred to in text; and, a footnote overflow provided to present the ‘big picture’ of the complexity and dynamism of the financial markets and their interaction with coercive control.

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For research purposes, regulation is public regulation within the financial regulation sub-domain, where the state exercises social control through the coercive control power of the rule of law, subject to recognised values. It may take the form of legal restrictions, self regulation, social regulation (e.g. norms), co-regulation and/or market regulation. Operating through the modern medium of a regulatory control agency, it has been described as ‘government in miniature’ characterised by the delegation of rule making, monitoring and sanctioning powers to a single independent financial regulatory agency\textsuperscript{21}. It amounts to organised attempts to influence behaviour, using any combination of rules, monitoring, incentives, and sanctions\textsuperscript{22}. Because the necessary presence of both the criminal law and administrative sanctions – the binary poles - is a given, stresses upon such given are only peripherally interrogated. Thus, the primary focus was the working interplay relationship or potential fusion of these two poles.

Select issues, theories and examples were engaged from which broader conclusions may be drawn. Detailed case study research of Financial Regulation in Ireland, and international comparators, replete with pinpoint quotations, have provided a wealth of primary data. Because of space restrictions much is placed within the appendices. Data gaps have been identified. While a minute comparative analysis is not fully possible, nonetheless, from that available, the main policy and practical contribution of this dissertation, for a newly minted interplay strategy within an over-arching new regulatory contract, and their composition and workings, has been drawn.

\textbf{1.1.4. Research Question(s)}

Within urgent reform proposals, simultaneous to pronouncing enforcement as essential, the EU Commission also recognised both that the criminal law enjoys a qualitatively stronger moral signalling power than administrative forms, and that administrative regimes currently require enhancement. The interplay of administrative and criminal law

\textsuperscript{21} See T Prosser, \textit{Law and the Regulators} (Clarendon Press 1997) although Scott states that the Canadian John Willis is the source of the term.

sanctioning was identified as a key reform focus. This research therefore took up the reform challenge of interrogating the interplay and related issues.

To establish and develop a strong and effective reformed enforcement regime, will require significant conceptual and practical readjustment, and modification to traditional strategy and sanctioning approaches. This includes: re-ordering of market and regulatory autonomy and restriction; reappraisal of the underpinning regulatory values complex; trade-off between market experts and regulator experts around accountability and transparency; improved non-arbitrary discretionary decision-making; recognition that the criminal law enjoys a qualitatively unique and valid signalling role; re-appraisal of the adversarial approach; a single transversal sanction suite; adaptations from civil and administrative practice and procedure; wider application and enhancement of administrative remedy including a discrete ‘financial regulatory offences’ category; legislative if not Irish constitutional amendment; and, the rigorous application of pan-European legal norms, statutes, case law and structures. Internationally renowned theory and practice may act as comparators and guides in this vital national quest.

Recent financial regulatory abuses and failures have highlighted a number of important observations including: that the traditional criminal law has been marginalised as a financial regulatory sanction agent in most jurisdictions including Ireland; the limited value of administrative enforcement regimes; and interplay conflicts among the police pairing between their respective and discrete practice and procedure, and their sanction suites. Sanction interplay was revealed to be badly neglected, and the issue of an upgraded interplay strategy was identified as a primary reform focus. A combination of inherent features of financial regulation (not least complexity) and abuses, the global transnational and transcultural arena of financial activity, inherent limitations of sanctions themselves and their enforceability, geographic constraints and legal and cultural diversity, all contribute to limitations upon public coercive control. To this, the following market features must be added: a highly innovative, competitive and dynamic nature set against a backdrop of shifting risk concerns; identifiable endemic crises, boom and bust.

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24 There is an increasing wealth of academic literature and official reports advocating the marginalisation or peripheralisation of the criminal law and/or its confinement to serious offences, and for the most part this view is reflected in Irish financial regulatory sanction practice. See Appendix K for details.
cycles and conflicting trends; and, a criminogenic nature where ongoing scandals and misconduct, often of great magnitude and impact, are prevalent.

The modern democracy is an organised society, where coercive control within a consensual regulatory contract is a key element, and where the respective parent and off-spring criminal law and regulation pairing, society’s preferred control tools, police the market control domain within the rule of law. The criminal law is a standalone concept outside the binary, yet within it sits beside regulation, its one-time off-spring and now a burgeoning sibling, which is accompanied to the marriage by its own administrative sanction regime. Financial regulation in Ireland, a sub-domain of regulation, from an enforcement perspective, must therefore effectuate an interplay strategy via a pathway choice of exclusion or blending accommodation.

Accepting empirical evidence across the common law world, and the continental EU system, that both sides of the dyad play a part, informed this discussion, limited the parameters, and acted as the point of departure for devising a reformed interplay strategy. The backdrop was the unique and vitally important market domain, and its issues, as they impacted market actor conduct. Pre-GFC the market domain, and the conduct of actors within it, were unruly, exceeded the control domain as defined earlier through illegality or regulatory failure including ‘capture’, and severely damaged both the Irish economy and society. The real issue therefore, was reforming the interplay roles occupied by the criminal law and administrative sanctioning within public financial market regulation, purposed to enhance market actor compliance, and thus benefit society; and, supplementary to it their interplay roles in an Irish reform context. The research question therefore is framed thus:

When devising a strategically coordinated binary control policy which targets market actor compliance, what successful interplay enforcement roles may be occupied by criminal law and administrative sanctioning, within reform of financial market regulation as the control domain?

And supplemental to it:

*Drawing upon these findings, what strategic interplay enforcement roles should they occupy in an Irish reform context?*

The research question, has thus been framed, and scaffolded, in two perspectives. First to the general regulatory model, and it will be addressed in Part 2; and second, then carried forward and addressed to the discrete Irish financial regulatory practice and policy in Part 3.

Enquiry surrounding these scaffolded questions ranged across the vast literature available in relation to regulation and the criminal law, investigating their individual and blended paradigms, the impacting issues and concepts, and their interplay roles and antecedents, both theoretical and practical. The discourse encompassed financial regulation generally, and the Irish context specifically. The task was to interrogate public enforcement from a reform perspective. The lens was the criminal and administrative sanction pairing. The objective was to identify and explore interplay strategy improvement options purposed toward enhanced compliance.

Although not framed as a separate research question, within the research enquiry the argument that regimes of administrative sanctions, such as administered in Ireland, raise constitutional difficulties was tackled. For Ireland the ‘Mc Dowell doctrine’ propounded that administrative sanctions evade constitutional restrictions because they are based in consent. Thus, the rationale for Ireland’s predilection for negotiated settlement and Irish practice against domestic and international fundamental values was interrogated in Part 3 Chapter 1, and particularly sections 3.1.5 and 3.1.8. It resulted in unfavourable findings. Contract-style arrangements with regulators, resolved with administrative sanction techniques, suffer a clear perception problem when elites are thought to gain from a two-tier system of justice. Legitimacy suffers in such a limited enforcement structure.

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1.1.5. Research Methodology

The overall research context was reform, and within it the chosen method was primarily instrumental seeking both to problem solve and to marry theory and practice; while the analysis was conducted against a backdrop of a normative theoretical framework derived from instrumental origins. The detail, import and success of this will be apparent from reading ahead within later paragraphs of this section.

This inter-disciplinary dissertation was prompted by a literature and practice gap, as already explained, which was focused upon sanction interplay within financial regulation. This research is highly policy relevant and directed to socially important problem-solving. It was tasked against the primary and secondary research sources detailed below, to interrogate a reformed theoretical, coordinated sanction interplay strategy, targeted to maximising market actor compliance. In its playing out the underlying research identified the need for an over-arching new regulatory contract to frame and implement a successful interplay strategy.

Research success will be measured against future increased regulatory compliance on the part of market actors, although testing such is not part of this study. The chosen research method, and presentation, is mainly qualitative, with minimal input from quantitative analysis of primary Irish material. The quantitative elements may be found in Appendix F concerning settlement agreements, and Appendices G and H concerning criminal law statistics. They were all drawn from highly credible official sources and such sources are shown.

(a) Research Sources
The traditional legal method of rigorous analysis of case law, statutory provisions, regulatory practise, and other primary sources, including parliamentary debates and preparatory materials, Government sponsored and industry reports, in addition to regulatory guidelines and explanatory documentation and the speeches of regulators,

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27 R Matthews, ‘The Myth of Punitiveness Revisited’ (UCC North South Criminology/CCJHR Postgraduate Conference: Rights, Responsibilities, and Wrongdoings: Continuity and Change, University College Cork, 20 June 2013) drawing upon his critical (realist) criminology movement ambition, and his own literature base, propounded, as I also argue although from an instrumentalist perspective, that research must be policy relevant, must be practice relevant, and should not be lost in an abstract conceptual world.

28 See M Miles and AM Huberman, Qualitative Data Analysis: an Expanded Source Book (Sage 1994); A Strauss and J Corbin, Basics of Quantitative Research (2nd edn, Sage 1998).
websites, blogs, press releases and other media material, measured against select international comparative norms, has been married with pin-pointed case studies, and the results of qualitative interviews, to analyse the relevant inter-disciplinary topics.

Primary research has been supplemented by critical analysis of the secondary literature, in texts and the leading academic journals. To better render the ‘big picture’, this literature draws from a wide and eclectic literature pool across subjects including law, regulation, sociology, criminology, political science, and economics. The review is rendered holistically rather than sectorally.

Much original research material, extrapolated from both primary and secondary sources, has been set out in the several Appendices and synopsised in text.

An analysed and justified, normative theoretical framework was filtered through an extensive case study of the practice and policy surrounding Irish financial regulation. Exploration took the form of a discursive, themed examination where gaps were exposed, issues identified and explored, and reform proposals stated. In-depth case study of significant international comparators in Part 2, drawn from the US Securities and Exchange Commission (SEC), the Australian Securities and Investments Commission (ASIC), and the EU Commission, as well as prosecutorial guidelines from prosecutors in the US, Australia and Ireland, were drawn upon for comparative purposes, so as to benchmark international best practice.

In-depth interviews were conducted, aimed at describing real-time market and regulatory practice as experienced by a small cohort of pre-selected expert and knowledgeable interviewees, thus resulting in a fruitful marriage of both analytical theory, and relevant practice. The selection process was mainly arbitrary, often drawing upon contacts of this author. It was agreed in principle in advance with supervisors to ensure credibility, and was subject to refusals by some prominent potential interviewees fearing legal repercussions or other conflicts. This author was furthermore enabled, during a nine-month EU Erasmus Mundus scholarship to ANU Canberra, during September 2011 to June 2012, to personally engage with other interviewees of substance and dissertation relevance. Interview subjects were drawn, inter alia, from among the financial services industry, business leaders, regulatory officialdom, the judiciary, parliamentarians and academics. A list of those interviewed and quoted is set out in Appendix B.
Topics addressed at interview were wide-ranging, enabling subsequent filtering and pinpointing, and are also set out more fully in Appendix B. These topics were drawn up after an extensive literature review and were tailored to each category of interviewee prior to interview and were pre-notified. They included: market issues and market actor conduct; the maximisation of regulatory compliance; financial regulatory theory, practice and policy; criminal law and administrative sanction suites, and regimes, and their interplay; and, discretionary apparatus and deployment within such.

The interviews conducted, as intended, significantly filled-in back-ground, identified current trends, provided explanations beyond mere description, and rendered a more in-depth perspective. The qualitative paradigm drawn form the long standing and well respected Grounded Theory was the chosen methodology – phenomenological, inductive, holistic, subjective, and process-oriented. Based upon the topic-related, discussion guide, tailored to each interviewee sector, the questioning style was the ‘psycho-dynamic’ model, where open ended, non-directive techniques were used. Interviewees freely expressed their informed and expert personal opinions around these topics. For instance, interviewees described in some detail how financial regulatory enforcement was undertaken and settlements negotiated. Analysis and collection of data were carried out concurrently, the former guiding the latter. This data was presented within the text and beside the literature and generally either confirmed or extended it. Quotations and references were contained in-text and in the footnotes. Interviews were either noted in writing and thereafter typed, or taped and transcribed, in both cases with the appropriate permission. Full consent was obtained from interviewees and full confidentiality and anonymity was assured. This strategy was approved by, and carried out in accordance with the ethical standards of, the University of Limerick’s Research Ethics Committee.

(b) Research Approach

Casting a dragnet across these identified sources entailed interrogation of the crisis, the highly dynamic, complex and competitive market paradigm, the policing pairing of the criminal law and regulation, and their interplay fusion. Reflecting upon thematic issues, cross-fed enquiry between them, and engaged the wide-ranging information pool gathered from the sources.

29 See Miles and Huberman (n 28) and Strauss and Corbin (n 28).
As genesis, the financial crisis revealed inappropriate market actor conduct, including regulatory and risk management failure, questionable business culture and criminal fraud. Sources were initially located within the extensive post-crisis media commentary and official reports, with scholarship hurried and incomplete, although Avgouleas, Cwieroth, and Davies were helpful.\textsuperscript{30} Gaining a basic understanding of modern financial markets, and how they work, therefore became imperative. The market domain, as the behavioural theatre, was revealed as an entrepreneurial autonomy, dominated by risk identification, analysis, reduction, and pricing issues, with Buiter, Foy, Goodhart, and Mallaby prominent authorities.\textsuperscript{31} Sociological enquiry among Durkheim, Keynes and Weber highlighted greed as a market staple, and as dominating excessive market motivation.\textsuperscript{32} The market’s endemic crises which are impacted by oppositional cycles and trends was significant as demonstrated by Kaletsky and Reinhart and Rogoff;\textsuperscript{33} while a swathe of commentators from diverse ideological backgrounds, including Croall, Nelken, Punch, and Slapper and Tombs, persuasively argued that it exhibits a crimogenic nature.\textsuperscript{34}

Such a milieu requires restriction, within a control domain, to avoid severe societal distress. The normative assumptions of the market paradigm as researched, although only partially those of coercive control nonetheless intersect across the disciplines. Locke’s autonomy norm was recognised as paramount by Habermas, and Hobbes societal contract theory, was found to underpin the Polanyi proposition that a societal countermovement acted as public restriction, and established legitimate control autonomies with discretion, which also required restriction.\textsuperscript{35} Restriction emerged as a synonym for regulation, coercive control, enforcement, and ultimately sanction. Some of the pinpointed interviews yielded insights around financial regulatory and reform issues bearing upon market actor behaviour.

The vast literature around both criminal law and regulation, as normative systems, across the breadth of its streams and ideological positioning, is too extensive to fully identify. Together these poles rapidly emerged as public coercive control, policing the market control domain. However, much less attention has been paid to the actual sanction binary

\textsuperscript{30} As referenced in Appendix A and in Part 1 Chapter 1 section 1.1.1.

\textsuperscript{31} See Appendix A and Part 1 Chapter 1 section 1.1.1 and Part 1 Chapter 2 section 1.2.2 for references.

\textsuperscript{32} See Part 1 Chapter 2 sections 1.2.2 and 1.2.3 for references.

\textsuperscript{33} See footnote 2 above for references.

\textsuperscript{34} See Part 1 Chapter 2 section 1.2.3 for references.

\textsuperscript{35} See Part 1 Chapter 3 sections 1.3.2 and 1.3.3 for references.
or pairing, and how it works, when interfacing financial markets. This literature and practice gap is the major dissertation focus.

Financial regulation is proactively mobilised by control agencies, sometimes antagonistic, and of differing degrees of independence, Ashworth, Reiss and Bordua, and Scott argued36. Drawing from Locke and beyond, for contemporary society, Dicey’s rule of law and legality principle, which Fuller has broadened, grounds the essential values complex explored by Lacey, Wells and Quick, Scott and Yeung37. With no sanction without misconduct as an offence/sanction dependent axis baseline, and minimised coercion as de rigueur, Mill’s harm to others value grounds offence definition, but clearly requires broadening for market conditions, even beyond Feinberg’s scholarship which for market application was found wanting38. Control of the inevitable enforcement, and the often morally loaded, attendant discretions, is an imperative, and interviewee insights proved a valuable aid to its exploration.

Packer’s seminal due process obstacle course, drawn to protect suspects with rights, partially migrated from criminal to civil-style administrative forms, and its dyadic context begged exploration39. A values complex demanded attention within the regulatory space, added to by the Braithwaite, Lodge, and Macrory recognition of the centrality of accountability and transparency norms40. Braithwaite’s normative enforcement pyramid presented as a potential heuristic for testing the binary enforcement interplay strategy, with academic and regulatory interviewees helpful as to its deployment41. These realisations grounded a normative theoretical framework, tailored to interrogate the binary generally, and thereafter through an Irish lens particularly.

The criminal law spans the ages, and recognises morally culpable individual responsibility for conduct, within a rights-based paradigm argued Lacey, McAuley and McCutcheon, Walsh and Zedner42. Ashworth and Zedner, Bentham, Hart and criminal

36 See respectively Ashworth (n 97 and n 978); Reiss & Bordua (n 117); and, Scott (n 25) above for references.
37 See respectively footnotes Locke (n 73); Dicey (n 25); Lacey Wells & Quick n (290); Scott (n 25); and Yeung (n 437) for references.
38 See footnotes later Mill (n 721); and Feinberg (n 726) for references.
39 See Packer (n 273) later.
40 See Part 1 Chapter 3 section 1.3.7 for fuller references.
41 See Ayres and Braithwaite (n 90) later and Part 1 Chapter 3 section 1.3.7 and Appendix L.
42 See respectively footnotes Lacey (n 240); McAuley and McCutcheon (n 274); Walsh (n 281); and Zedner (n 274) for references.
practice, identified punishment theory based in proportionate ‘just deserts’ retribution, and consistency principles, as its raison d’être. One key criminological strand, originally identified by Sutherland, is the ‘white-collar crime’ of the business respectable, where the corporate form is seen as a knife and gun equivalent. Its enforcement has been asserted by Levi, McCullagh and Wells, to have created a two-tier system of justice, where business seeks lesser stigma and sanction, within administrative forms.

Once the criminal law bifurcated into the regulatory space, scholarship around moral culpability became a prominent literature exercise as demonstrated by Lacey, Scott, Wells and Zedner; while Simister and von Hirsch’s emphasis, that the criminal law embodies a moral signalling voice which is qualitatively far superior to the civil law, demanded its active presence in the enforcement regime. A second regulatory, criminal law strand, was described as instrumental and utilitarian, where risk-targeted sanctioning, is compliance-oriented, aimed at deterring future behaviour, with monetary penalties reified in a civil-style approach, according to Freiberg, Kilcommins, McGrath, Scott, and Wells.

The criminological economic perspective, of Becker and his adherents such as Posner and Stigler, while emphasising actuarial targeting, and cost and resources issues, both relevant to regulation also, acknowledged that civil coercion must be buttressed by the criminal. Argued to be two of Teubner’s black boxes, the issue became whether the criminal law and regulation binary poles are incompatible, or enjoy sufficient connective tissue, to render a workable fusion possible. To identify four connective tissues, for purposes of interrogating such fusion, a fundamental examination of the normative assumptions, underpinning the criminal law and regulation paradigms, was conducted through Kuhn’s theoretical model. The first of these was the autonomy/restriction tension which opened the gateway to re-ordering the control balance.

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43 See Part 1 Chapter 3 section 1.3.5 (c) for these and wider references.
44 See for instance Sutherland (n 128) later.
45 See respectively footnotes Levi (n 1011); McCullagh (n 199); and Wells (n 18) for references.
46 See respectively footnotes Lacey (n 240); Scott (n 25); Wells (n 18); and Zedner (n 274) for references.
47 See Simister and von Hirsch (n 125) below.
48 See respectively footnotes Freiberg (n 119); Kilcommins (n 310) and elsewhere; McGrath (n 335); Scott (n 25); and Wells (n 18) for references.
49 See Part 2 Chapter 1 section 2.1.3 for more detail and references.
50 See Teubner ‘After Legal Instrumentalism? Strategic Models of Post-regulatory Law’ (n 17) above.
51 See Kuhn (n 540) later and Part 1 Chapter 3 section 1.3.6.
It quickly became apparent that the Smith et al argued disconnections or incompatibilities between the criminal law and regulation pairing would be unlikely to yield sufficient connection to interplay viability\textsuperscript{52}. On their own disconnections could never disprove viability, whereas on the other hand if connections did not work they could prove non-viability. The research view was therefore formed that if the binary could not work across fundamental connections then it could not work at all. Of course, even if the connections worked it would just show partial viability and it was recognised that for completeness disconnections would have to be researched later beyond this work. Accordingly, three essential connections were chosen as the best testing ground. It was necessary to determine these optimal connections to enable interrogation throughout Part 2 against the normative theoretical framework. Since risk and its management is market fundamental, values underpin and mobilise the legal and regulatory environments which deploy control, and the offences and sanctions dependency are the face of enforcement, they were chosen as the three research foci.

A third way solution to sanction interplay issues was debated by Coffee and Mann to no lasting effect, because of the inbred, classic legal boundary conundrum, exclusive and polarised civil (administrative) versus criminal\textsuperscript{53}. This literature and practice gap thus became the dissertation focus. Ashworth and Zedner, Clarke, Ogus, and Scott, cited criminal law deficiencies around offence definition, proofs and procedures, as well as jostling among the different manifestations of the authoritarian state, the preventive state and the regulatory state, as grounds for establishing the sanction dyad in the first place\textsuperscript{54}.

Major international financial regulation theorists, including Black, Braithwaite, Gunningham and Parker, recognised as part of a discrete community if not a network, therefore became a prime focus\textsuperscript{55}. Riddled with paradoxes, bound up in a risk approach, and a five-point enforcement style typology, regulation is grounded in rules and principles, argued Black, Ford, Haines, McAllister and Prosser\textsuperscript{56}. Discernible themes across the literature, included a consensus that criminal law participation is limitable to

\textsuperscript{52} See Smith et al (n 546) later and Part 1 Chapter 3 section 1.3.6.

\textsuperscript{53} See Part 1 Chapter 3 section 1.3.7 and footnotes Coffee (n 252) and Mann (n 584).

\textsuperscript{54} See respectively for instance Ashworth and Zedner (n 407); Clarke (n 188); Ogus (n 1022); and Scott (n 25).

\textsuperscript{55} See the extensive References and Bibliography at the end of this dissertation where multiple references are provided for each of these authorities.

\textsuperscript{56} See for instance respectively footnotes Black (n 403); Ford (n 635); Haines (n 14); McAllister (n 708) and Prosser (n 21).
serious misconduct, that control requires a flexible, responsive approach, and, that market actor motivations, within the control domain, vivify well beyond the jibe of ‘profit-maximisation’. Absent a discrete ‘regulatory offences’ category, exploration of such became imperative.

But, the real emerging issue was strategising a coordinated interplay system, where business and regulators responsively collaborate with other stakeholders, to business, regulatory and societal advantage. Braithwaite, Gunningham, Macrory, Rawlings and Sparrow identified regulatory goals targeting improved compliance, with the broadest range of tools and tactics for success, and flexible, balanced deployment of the deterrence and cooperation sanction strategies, under a values complex umbrella, within a judicious mix.\(^\text{57}\)

In essence, the need for a reformed discrete regime for market enforcement/sanction, within the unique market theatre for market actor conduct, erupted as an imperative, a literature position hinted and prompted by, a diversity of opinion, including Braithwaite, Hart, Locke, Macrory, Norrie, Weber, Yeung and others.\(^\text{58}\) Within these climes the interviewees pinpointed business and regulatory concerns for research interrogation, and particularly aided a fulsome case study of Irish financial regulation. The research questions emerged from this endeavour and then required writing up.

(c) Writing Approach
Data collected against the issues, and research questions, from exploring this primary and secondary research trove, has been analysed, distilled and synthesised, and the first shoots of a strategic interplay theory have been developed. A new, fused sanction interplay strategy, within a reformed regulatory concept is suggested, and because it is incomplete, requires further stipulated research beyond the boundaries of this work. While as this dissertation progressed, a renewed financial regulatory contract unfolded, entailing alterations to current conceptual perspectives, nonetheless, it was formed mainly out of gaps in regulatory concept, normative assumptions, and the existing law and practice. No fanciful formulation was promulgated. The normative assumptions or values complexes

\(^{57}\) See respectively for instance footnotes Braithwaite (n 90 and elsewhere); Gunningham (n 513 and elsewhere); Macrory (n 120 and n 122); Rawlings (n 1136); and Sparrow (n 1154).

\(^{58}\) See footnote 273 below for more complete referencing.
interrogated, underpinned the market domain, and its control domain police, where they intersected in the guise of three shifting paradigms post-GFC.

Research presentation commenced with exploration of the market domain, where market actor conduct/misconduct originates, and is measured. The fundamental theoretical underpinning – the first paradigm connection - of the three shifting or still restless paradigms, all discrete normative systems where risk is a primal focus, are the common over-arching values located in Habermas’ philosophical argument that autonomy is the normative key; and, then in Polanyi’s socio-economic restriction countermovement proposition. These values in tension were initially interrogated from Locke’s three hundred and fifty year old perspective of liberal political freedom, which developed contemporaneous to the coercive control of the criminal law, and the regulation of a market society, where they all cross-fed. And it was tempered by Hobbes’ equally ancient abstract political theory of contractarianism, otherwise describable as the consensual societal or regulatory contract, whence coercive control draws its legitimacy.

Market regulation was justified by the welfare restriction of market failure, and the two coercive control tools, the criminal law and regulation, were explored. The reform-centric instrumental approach, grounded in the Kuhnian paradigm concept, enabled identification of the earlier described three select or fundamental connective tissues between these binary poles or black boxes, the regulatory topography for interplay blending or fusing. Deeper again a normative theoretical framework was established to guide the analysis, where essential values ground, and were generated by, consensual restriction which ultimately leads to sanction. Within financial regulation the market autonomy/restriction tension engages experts on both sides, whether market actors or control agencies/regulators, and thus an expert to expert reciprocity dynamic emerged as significant to interplay strategising.

The core consensual values, around such behavioural relationships, were illuminated through the rule of law incorporating the principle of legality, with Dicey’s well established constitutional law conceptualisation drawn upon throughout. Here the exercise of non-arbitrary discretion is a key feature. Packer’s theoretical due process

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59 See Part 1 Chapter 3 for all references not specifically shown yet relevant to this entire sub-section (c) and the next sub-section (d).
values complex, which is rights-based and drawn from within the criminal law, and
described by him as a procedural obstacle course for criminal practise, has also
influenced. It is also mobilised in part across civil-style administrative sanction regimes.
From the regulatory sphere, Macrory, like his many predecessors, has identified the
essential regulatory enforcement values of accountability and transparency, which are
equally applied to criminal practise within the rule of law, and furthermore, both to
control agencies and market actor conduct.

Drawing from this pool, the judicial and administrative autonomies known as separation
of powers and delegated discretion, as they impact interplay strategy, were tested in
relation to the necessary enforcement pathway, enforcement decision-making criteria or
factors, and sanctioning suites and their mobilising guidelines. Contributions from
interviewees pepper the text and enrich the exploration of interplay strategy issues. The
salient coercive control paradigm parts, as the policing pairing, were tested by filtration
through a theoretical heuristic, which has enjoyed much practical application and
commentary world-wide, namely Braithwaite’s Enforcement Pyramid. This pyramid was
found to require a tough top, a balanced middle and an educational baes which the
interplay strategy must address.

The effective course this dissertation took, therefore, commenced with identification of
market actor conduct issues, to a statement of the research question/s around interplay
strategy, and then progressed through an analysis and defence of a normative theoretical
framework in the remainder of Part 1. Part 2 proceeded to the application of the
framework to test the substance of coercive control within the three identified connective
tissues between the criminal law and regulation paradigms, and thus fully addressed the
first research question. In Part 3 the Irish financial services practice and policy was
equally interrogated, addressing the supplementary research question, before a conclusion
setting out needed reform was drawn.

While there are of course discrete theories such as Becarra’s social contract theory,
Bentham’s deterrence (punishment) theory which followed it, and Durkheim’s social
solidarity theory, for instance, which seek to justify coercive control, no single theory on
its own justifies it. Accepting therefore, that there is no single grand justification theory for coercive control, and that a concoction of many mediates the fundamental underpinning, enabled this conclusion: that a dissertation-purposed instrumental approach, aided by pinpointed interviews, through a normative theoretical framework drawn from an eclectic literature, reflecting a marriage of theory and practice, had merit. This conclusion has required the outlining of a select cadre of mainstream theories, among the social, political, legal and/or moral philosophical perspectives, that directly or indirectly have contributed to present understandings, of the nature and role of criminal law, and by extension regulation.

(d) Research Methodology Appraisal

Although problem-solving a reformed, coordinated interplay strategy for sanctioning was the pivotal dissertation focus, nonetheless collectively the wide-span theoretical literature, other research material and practice, was also found to re-confirm what was initially taken as a given: that there is dynamism, complexity, reflexivity and recursivity within and between both the financial markets, and market control. Taking an eclectic approach to sourcing therefore, was found to be valuable and pertinent for both issues.

Myriad impacting interplays or layers of interplay tension, if not conflict, were also unearthed by engaging the eclectic sourcing approach as the research unfolded. This identification and subsequent exploration as relevant was aided by the qualitative methodological approach. It was also aided by the conducted interviews. This myriad included:

(i) conflicting civil society public interest and market self-interest in wealth creation;

(ii) those drawn from the market and control tension such as the apparent conflict between disembedded markets and civil society; and the self-policed market and competition;

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61 For instance, RA Dworkin, Taking Rights Seriously (Duckworth 1977) argued that lawyers adopting a professional approach to jurisprudential issues, used one or more of three skills: analysis of statute and judicial opinion as official sources to extract doctrine, analysis of complex factual situations to summarise the essential facts, and, thinking in tactical terms to design statutes and legal institutions to bring about pre-thought social changes.
(iii) in normative terms: the key autonomy/welfare tension, which included market and risk management and incorporated both their control and RFSP conduct; expert RFSP to expert regulator relational and values issues; and markets and morality (ethics); and,

(iv) many within restriction itself such as: the coerced or voluntary behaviour issue highlighted by the Frank v Hancock debate; the coercion/negotiation tension which engaged a wide arc across policy formulation to sanctioning; Packer’s values continuum where the control and due process tension is mediated by adversarial justice; Dicey’s rule of law components including non-arbitrariness amid discretionary decision making; the sanctions strategy continuum across punishment and persuade and its nomenclature variants; the tension between ‘real’ crime and regulatory crime including ‘offence’ definition; and, the offence/sanction dependency.

Drawing upon the many insights gleaned from the select cohort of interviewees, enabled issue pinpointing, extended and affirmed trends and knowledge gained from the literature and other research material, and supplied a richness of texture, confirming the wisdom of engaging interviewees across both the market and the regulatory paradigms.

Laying the groundwork mainly in a qualitative methodology avoided a cold and overbearing statistical rendition. Drawing across the eclectic literature base, allowed construction of the tiered and inter-connecting, normative theoretical framework; and, its subsequent filtration through a fruitful expose of Irish financial regulatory practice and policy.

Kuhn’s instrumental methodology, as applied across Part 1 Chapter 3 by drawing out the fundamental normative assumptions, demonstrated sufficient connective tissue between the criminal law and regulation paradigms. Choosing important connections to interrogate the coercive control paradigms successfully established sufficient material to test the validity of a new interplay strategy. Invoking the normative theoretical framework throughout Part 2, to interrogate this connective tissue, found a reformed, flexible fused binary to be workable, with potential to yield regulatory improvement, and increase market actor compliance. Because the objective was reform, the Kuhnian paradigm approach based in ‘scientific revolution’ or change proved ideal for commencing the research. Since Kuhn’s instrumental approach was both empirical and engaged a
theoretical framework, it met the preferred marriage of theory and practice approach to problem-solving. Furthermore, since it engaged the identification of the fundamental underlying norms or assumptions – the paradigms- this process immediately presented optimum values to both interrogate and engage the paradigm connections. Not alone did this apply to the two coercive control components, the criminal law and regulation, but it also applied to their individual and collective interaction with the financial markets.

The eclectic literature sourcing, fully referenced within Part 1 Chapter 3, enabled the marriage of Habermas’ legal and Polanyi’s sociologicl studies, and exposed the true worth of the autonomy/restriction tension which Ashworth and others identified as an important justification for coercive control. It also enabled its placement within the centuries old abstract reasoning of Hobbes and Locke from which the significant political autonomy, contractarianism and rule of law concepts emerged. In turn this rule of law conceptualisation found a modern society (rights-based) constitutional values focus within Dicey’s prescription, and Packer’s control versus due process tension drawn from a criminal law origin. To equalise this values complex for the financial regulatory setting, Macrory’s accountability and transparency values drew primarily from regulatory literature, although they were mirrored in criminal text. And finally, Braithwaite’s very modern enforcement pyramid ideation grounded in norms confirmed the value of richly sourcing across disciplines and interlacing the research pool.

But building this edifice was not sufficient. The new regulatory contract and the sit-below interplay strategy which emerged required a real testing ground. The novel and detailed Irish case study which was so used drew heavily upon the dissertation interviews, a collection of speeches by regulators, and a host of regulatory guidelines and documents. It also required constitutional, legislative and case law sources, and a trawl across comparative international practice. While the original quantitative material, both richly enhanced the case study and authenticated assumptions and conclusions. Thus, the theory of the literature was successfully married to the regulatory practice and met research objectives.

Testing enhanced compliance however, was never a dissertational ambition. Engaging such a longitudinal exercise requires time, funding and resources. There is a real need for future Irish research and ‘hard evidence’ in this area. In any event it has been a
longstanding criticism of the criminal law and its practise – which may be extended to wider coercive control - that it is difficult to determine the real effects and success, if any, of deterrent or compliance orientated policy and law-making.

1.1.6. Research Findings Overview

The major research arguments have been set out above. In a nutshell, the major findings relevant to these arguments synopsised from Part 3 Chapter 2 include:

The first shoots of a values-based new binary enforcement fusion theory or policy direction for financial regulatory sanctioning have emerged. It favoured a collaboration methodology for identifying and establishing components of a new over-arching regulatory contract, designed to improve both sanction capability and compliance, and set out some of those components. A sit-below flexible and coordinated interplay strategy has been demonstrated to be viable; and similarly some of the integrated parts have been identified. Conceptual, normative and practice gaps and deficiencies within the current Irish financial regulatory practice and policy have been identified and interrogated and reform proposals made.

The post-crisis period has shown itself a timely opportunity for reform. Within it the binary enforcement pairing of the criminal law and regulation as defined have been found to have a viable third dimension called fusion. This fusion was based in a commonality of culpability, procedure, sanction suite, strategy, independent specialists, values complex, all ‘crime’ coverage, statutory defences, discrete financial regulatory offences, enforcement pathway, launching factors, and sanction guidelines.

Some other significant insights have also been highlighted, for instance, that the financial markets cannot be allowed to exceed the authorisations and boundaries of the control domain; and, that such financial markets are a societally vital expert to expert environment which requires a unique regulation approach. A more complete picture of the interacting market and maket control paradigms has been disclosed.
Chapter 2: The Market Domain and Market Actor Conduct Issues

1.2.1. Introduction

Central to this dissertation is the market domain, which absent control freely operates as a milieu with its own values and principles. It is here that the GFC originated and out of which the already highlighted reform agenda has emerged. It is the behavioural theatre in which market actors operate, and is both the origin and measuring location of market actor conduct/misconduct, within and against its standards.

1.2.2. The Market Milieu

A market, as a fundamental social construct, is a voluntary and cooperative value exchange, and a relational exchange, where transactions take place. Generally it has a classic neo-liberal ethos where questionable, efficient market self-correction is claimed\(^\text{62}\). The market for financial assets, which are intangible assets where mostly the benefit or value is a claim to future cash, is otherwise known as the financial market, and is one part of the \textit{factor} market, the market for the factors of production (labour and capital)\(^\text{63}\). Financial assets are exchanged or traded, under circumstances where market interactions determine price or required return, the signal purpose being to direct economic resources most efficiently\(^\text{64}\). Community confidence and trust are essential market underpinnings. Innovation is the critical dimension of economic growth and change and entrepreneurs its driver\(^\text{65}\). Price (competition) is the great mediator of the market, and it equally applies to

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\(^{64}\) Fabozzi et al (n 63).

risk. There are many different types of financial market classification, for instance debt and equity markets, cash or derivative instruments markets, the money market (short-term debt) and the longer-maturity capital markets. Law mediates power in such capitalist market society. Yet for over a century it has been advocated that among the main organising principles of economic life, lies the acceptance of profit and capital accumulation as motives with genuine moral legitimacy.

Capital and capitalists are one of the three productive components from which Smith declared that the wealth of nations derives. Emphasising a Calvinistic moral ethic, Weber identified a number of fundamental socio-economic factors which underpin modern capitalism, all of which originated in the European experience. Weber’s ‘spirit of capitalism’ justification for individual acquisitive maximisation, tempered by aesthetic frugality, was reframed by Keynes into ‘the love of money’ only being justified by a good ethical life. More recently Kaletsky defined capitalism in terms of ambition – Weber’s competitive spirit – and “the desire for sensual gratification and mastery of the material world”, otherwise pejoratively called ‘greed’. Almost two hundred and fifty years ago, Smith advocated that those pursuing their own self interest unintendedly promote the interests of society, by the operation of an ‘invisible hand’, referring to market forces.

Money became a utility itself, as opposed to being the means to acquire goods which possess utility, a traditional perspective described as utterly alien to all but the religious, ...
because wealth as an object of desire – greed - if so desired should be available to attain\textsuperscript{75}. Thus, while trade in commodities once ruled unopposed, with financial services an adjunct, over time many investors began to ‘trade’ in finance in its own right. This resulted in financial services becoming more sophisticated, and financial regulation has followed.

Writing in 1998 Irish Supreme Court judge Frank Murphy, proclaimed, ‘\textit{An effective financial services industry is indispensable to commercial expansion}’\textsuperscript{76}. Capital markets fundamentally provide a mechanism for the transfer of investable funds from those who have to those who need funding, effectively the raising of new cash in exchange for financial claims\textsuperscript{77}. They are split into two parts, a primary market where funds are raised by the issuance of new shares and bonds, and a secondary market where these holdings may be sold onwards, the requisite liquidity ensuring market success\textsuperscript{78}. Financial markets have been conceptualised in terms of market actors by Mallaby as, ‘\textit{mechanisms for matching people who want to avoid risk with people who get paid to take it on: There is a transfer from insurance seeker to insurance seller}’\textsuperscript{79}.

In a nutshell there is no single financial market, but multiples, which often intersect, contain contagion effects, and sometimes with devastating consequences\textsuperscript{80}. They are consensual, private social constructs, where market actors interact, risk management or manipulation their aspiration, and cultures influence. They rest upon pyramids of breakable promises, which in turn rest upon assets of fluctuating value\textsuperscript{81}. They exist within the domestic and global spheres. On the international level, capital for instance, flows to credit-worthy nations and such credit-worthiness therefore, is a comparative

\textsuperscript{75} See Skidelsky (n 72).
\textsuperscript{76} F Murphy, ‘Foreword’ in A Foy, \textit{The Capital Markets Irish and International Laws and Regulations} (Round Hall Sweet & Maxwell 1998). He was later appointed the chairman of the Irish Financial Regulator’s Appeals Tribunal (IFSAT).
\textsuperscript{78} See Foy (n 77).
\textsuperscript{79} S Mallaby, \textit{More Money Than God Hedge Funds and the Making of a New Elite} (Bloomsbury 2010).
\textsuperscript{81} See M Wolf, \textit{Fixing Global Finance} (Yale University Press 2010).
advantage\(^82\). Financial markets are innovative exchanges. They are occasions of risk, even systemic risk, where the prime purpose is risk identification, analysis and reduction, otherwise termed risk management\(^83\). Risk pricing within these markets depends upon constantly changing conditions\(^84\). There are information asymmetries. Pricing accuracy is difficult therefore, and pre-GFC risk was underpriced\(^85\). Markets are opportunities for speculation, replete with moral hazard. They promise lucrative rewards to market actors. They consist of boom and bust cycles\(^86\). Crises are endemic to the highly competitive and inherently criminogenic capitalist market system, where market actors are highly independent\(^87\).

Their domain is self-interest, which in turn collides with the public interest, and within such intersection lies the financial regulatory control domain. The control system which polices it is a binary of regulation and criminal law\(^88\). This space where regulation and law and the markets meet is characterised by dynamism, complexity, competition, innovation, reflexivity, and recursivity\(^89\). It is true to say that the wealth generated by the markets both causes and enables such regulation\(^90\). For over twenty years, high standards in regulation have been recognised as assisting competitive market forces, and the

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\(^{83}\) See Foy (n 77).

\(^{84}\) See Mallaby (n 79).

\(^{85}\) See Goodhart (n 2). Also see De Larosiere Report 2009 (n 1), 7 which concluded that, ‘In [an] environment of plentiful liquidity and low returns, investors actively sought higher yields and went searching for opportunities. Risk became mis-priced’.

\(^{86}\) See J Braithwaite, *Regulatory Capitalism* (Edward Elgar 2008); Kaletsky (n 2); Reinhart and Rogoff (n 2).


\(^{88}\) Wells ‘Corporate crime: opening the eyes of the sentry’ (n 18).

\(^{89}\) See Black ‘Empirical Legal Studies in Financial Markets’ (n 22). Also see M Everson, ‘The Fault of (European) Law in (Political and Social) Economic Crisis’ (2013) 24(2) Law and Critique 107 who has recently advocated that law has transformed itself into an economic technology, and a power locus within the EU soft law context.

commonality of interest between business, the community and the state in establishing such high standards equally so. The behaviour of business enterprise similarly has been recognised as integral to national competitive advantage. These markets embrace many categories of actors: initiate risk insurance sellers and risk insurance buyers; investors, consumers and traders; financial service providers; regulators in all their hues both domestic and international; political masters who control the legislative pathway; commentators such as lobbyists and consumer interests, but principally the credit rating agencies; the public and of late of utmost importance the taxpayer as paymaster of last resort.

The private financial market domain is unique, and enjoys a valuable economic and societal function. It existed before public regulation, which in reality sets the control domain. Privacy in the form of self-regulation often enforced by a ‘club’ system, or during the last most recent decades de-regulation, has been its preserve. The self-correcting efficient or rational market was its credo. Ethical codes were thought to govern. Pre-GFC however, the market domain exceeded the control domain to devastating effect as both credo and code failed. In his new adapted form of capitalism envisaged post crisis, Kaletsky propounded that post-GFC markets can only operate in an economic and political context that is set by politicians and officials responding to different incentives from those of the market itself. The big lesson is that the private market domain cannot exceed the control domain, either by acting illegally outside of control, or by capturing the regulatory function within it. Otherwise financial stability is at risk. The ideal policy approach seeks and finds balance between preserving the safety and soundness of the financial system, and allowing financial institutions and markets to perform their intended functions, and this in turn requires both that appropriate market-framing and market-perfecting rules are in place, and the establishment of a proper structure for reviewing financial innovations. A recent IMF sponsored empirical survey exercising the cost calculus, found that regulatory reform, which averts or minimises risk,
is worth the relatively small long-term economic costs. Reform is perhaps best expressed as economic welfarism within the context of harm protection, where social context and the general good objectively determine competing rights in the community. Here, the real worth of financial regulation is judged by its capacity to contextually define the public interest by implementing regulatory mandates, while simultaneously taking account of constraining conditions, special opportunities, and multiple values.

The central actors within these private markets, the subjects of public financial regulation, are the market initiates. These are tacit-knowledge or specialist-knowledge experts. They are individuals mainly located under the corporate umbrella which enjoys a discrete legal persona and culture. They drive the market. Their overall business objective is sustainable competitive advantage which yields wealth accumulation. The regulatory focus is their conduct, and from a sanction binary perspective it is really their misconduct. Regulators too are experts, although they run adrift of market innovation.

The dynamics of market capitalism demand recognition of both long-term trends and financial cycles which sometimes overwhelm those trends. Trends and cycles are rivals, a dualistic inter-play between change and permanence, a creative tension between progress and repetition from which crises emerge. From their highly lauded research and analyses spanning 800 years of history and 66 countries, Reinhart and Rogoff extrapolated a number of important conclusions concerning crises, including that they have always been with us, that they come in different guises and sizes, where debt is a common theme, and they follow a boom and bust rhythm because human nature does not change. Tracing the range and depth of the forces of endemic market actor hubris, which particularly existed pre-GFC, Gamble has enlightened:

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100 See Kaletsky (n 2).

101 See Kaletsky (n 2).

102 See Reinhart and Rogoff (n 2). See Appendix K for the more complete catalogue.

103 Gamble (n 87), 37.

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The great booms of capitalism have thrived on exuberance, and the readiness to take risks and to embrace change. The longer a boom lasts the more complacent and careless many people become, from those in charge of governments and banks down to the humblest investor. The calculations of risk change. By degrees everyone comes to believe that the boom will last forever, and that, finally, the secret of everlasting growth has been discovered.

For market governance, Ireland legislates nationally, but as an EU member is heavily impacted by EU legislation and policies, which in turn influence, and are influenced by, international trends and events and standards\(^\text{104}\). EU directives require transposition into national law, where enforcement is left to the national legal culture. This highly alluvial process since the mid-1980s has witnessed both repeat and new initiatives, around investment instruments, banking and insurance industry capital requirements, up-dated money-laundering restrictions, and pass-porting credit rating agencies\(^\text{105}\). Driven from the executive level by political and economic imperatives, EU legislation is preambled by rationale and policy direction, while domestically both are head-noted with statutory regulatory objectives partly directing policy. Moloney has explained that\(^\text{106}\):

>A veritable juggernaut of [EU] regulation now bears down on the financial markets, addressing all stages of the trading cycle and governing investment firms, issuers, investors, investment products and instruments, trading markets, gatekeepers, and market infrastructure.

Expert committees, with underlying networks, the distinctive EU regulatory architecture where standards and codes are established, were transformed post-crisis from advisory supervisors into supervisory authorities\(^\text{107}\). The EU system of governance is a vast administration, where economic motivations are prevalent, and is the most developed and


\(^{105}\) This includes the re-cast MiFID II Directive 2007/16/EC, the revised 2009/138/EC Solvency II Directive which introduced quantitative capital requirements for the insurance industry, the up-dated Money-Laundering III Directive 2005/60/EC, and the directly applicable Regulation 1060/2009 concerning Credit Rating Agencies which established an EU-wide licensing ‘passport’ system.

\(^{106}\) N Moloney, EC Securities Regulation (2nd edn, Oxford University Press 2008), 4-5.

progressive trans-national system in the world. The rise of EU regulatory agencies, and the expansion and institutionalization of EU regulatory networks, which include national regulators, in part due to increased Europeanization, liberalization and market integration, are a central part of the multi-level EU system. The pre-crisis aim of such regulatory control agencies, and networks governance in the financial sector, was to build a pan-European supervisory culture, by fostering supervisory and enforcement convergence. It failed.

Post-GFC, changes and reforms were thus needed, with an enhanced enforcement capacity. Writing from a UK financial regulatory viewpoint, mirrored in Irish and EU developments, Julia Black stated, ‘The crisis has also led to the creation of novel and challenging roles for the state, and the creation of a bespoke administrative apparatus to manage them’. The EU financial crisis response, with or without international drivers, appears to presage increased centralised command-and-control governance, with a regulatory convergence around ‘risk’. Donnelly has characterised an, ‘ongoing constitutionalization of Europe’. The EU financial regulatory paradigm described by him is located within a vertical and horizontal relationship; with a mix of EU and member state institutions and procedures; legitimate national variations in economic and social policy; a single integrated market; a bottom-up norm formation approach at two levels, EU-member state and member state-the market; and, three policy regimes, one each for companies, financial markets and accounting standards. The establishment of four new

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109 See Levi-Faur ‘Regulatory Networks & Regulatory Agencification’ (n108); and P Craig and G de Burca, EU Law Text, Cases, and Materials (5th edn, Oxford University Press 2011). See Appendix K for an enlarged statement of The EU financial regulatory enforcement paradigm.

110 See N Moloney, ‘Financial Services and Markets’ in R Baldwin M Cave and M Lodge (eds), The Oxford Handbook of Regulation (Oxford University Press 2010).

111 J Black, ‘The Credit Crisis and the Constitution’ in D Oliver T Prosser and R Rawlings (eds), The Regulatory State (Oxford University Press 2010), 127; and see K Alexander ‘Sovereign debt restructuring in the EU’ (n 80); Elder ‘The Ocean Currents of EU Financial Regulatory Reform’ (n 3).


113 See Donnelly (n 107), 1 and 240. Also see T Christiansen and C Reh, (eds) Constitutionalizing the European Union (Polgrave 2009).
pan-European watchdogs in September, 2010, as a financial crisis response, with limited powers to over-rule national regulation, moved the financial regulatory model into paradigm shift\textsuperscript{114}. New EU mechanisms, some outside strict EU ambit in the form of limited liability companies, were also created to forestall emergencies such as the Eurozone crisis contagion\textsuperscript{115}. A new EU banking union is currently under construction.

Lagarde from her IMF vantage post-GFC acknowledged the dilemma, challenge and solution to market reform. Locating her commentary in a community welfare approach, buttressed by a greater market control agenda, she encapsulated the obvious concern\textsuperscript{116}:

\begin{quote}
[W]e need a stronger and safer financial sector that puts societal interest ahead of its own financial gain. This means better, and more coordinated, regulation....... We simply cannot carry on with the financial sector that gave us the global financial crisis.
\end{quote}

1.2.3. Criminogenic Financial Markets

The control domain pre-crisis was mistakenly thought to be a seamless web of tightly articulated rules and roles\textsuperscript{117}. Lessons learned, include that the global economy is incredibly complicated and interconnected, and that it is riven by financial fault lines capable of transmitting economic tremors, at both lightning speed, and in all directions\textsuperscript{118}. One key challenge to emerge, therefore, concerned the relevance or efficacy of coercive financial regulatory enforcement in controlling corporate and individual financial market behaviour around supply-side financial innovation. This included product innovation (especially derivatives), business plans, and the use of superfast technology by the increasing numbers of market traders. Market failure, for instance, where the market domain exceeds the authorisations and boundaries of the control domain, is a primary rationale for government regulatory intervention or escalation\textsuperscript{119}. When coupled with the market invitation for state control to rectify such failure, it is the origin of the post-crisis

\textsuperscript{114} See EU Regulation 1095/2010 of 24 November 2010; Regulation (EU) No 1094/2010 of 24 November 2010; Regulation No 1093/2010 of 24 November 2010; and Regulation No 1092/2010 of 24 November 2010; All regulations have been published in ([2010] OJ L331). See Appendix K for an enlarged footnote.

\textsuperscript{115} See Elder ‘Ocean Curents’ (n 3). For examples see Appendix K for an enlarged footnote.


\textsuperscript{118} See Shafik (n 80).

\textsuperscript{119} See A Freiberg, \textit{The Tools of Regulation} (The Federation Press 2010).
regulatory response. Failure runs a spectrum across criminal, reckless and negligent behaviour.

Explaining the origin of the post-crisis regulatory response, and the broad thrust of impact of such regulation, and especially regulatory reform, Macrory wrote: "Regulation almost by definition is introduced where the unconstrained market cannot by itself guarantee goals that society wishes. An effective system of sanctions underpins any regulatory structure." At the political power level, Locke recognised a limitable public good that coercive laws are fulfilled by sanctions. Within the binary, the need for sanctions across the regulatory pole was emphasised by Black, while Goodhart stated, "their considered formulation is an integral and essential element in any well-designed regulation system." On the criminal law side of the binary, Hart regarded sanctions as a natural necessity, and a rules-based way of guiding behavioural standards. Shaping social reality through sanctioning, transforms moral to normative, through both law and its process. This is especially manifest within the criminal law and its administration. It is a special regulatory tool for influencing behaviour, enjoying a social significance beyond civil law, where conviction and sanction send clearly understood messages, and where criminal law embodies a moral communicative voice lacking in the civil arena.

Financial regulation as a control tool, with its binary poles, fulfils many inter-locking roles, including societal and economic protection and prevention, ensuring market efficiency, and punishing market wrongdoers, where misconduct definition and consequent sanctions are a vital and dependent foundation.

Thus, enforcement does not start with sanctioning. Setting out the stall for coercive control, and especially criminal law involvement in the enforcement binary, a concept mirroring regulatory objectives, Husak somewhat obviously stated: "In deciding what behaviours are deserving of penal sanctions we decide what conduct we want to deter".

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121 See Locke Two Treatises of Government (n 73).
122 See Black, ‘Empirical Legal Studies in Financial Markets’ (n 22); Goodhart (n 2), 86. Also see Macrory Review, Final Report on Regulatory Justice: Making Sanctions Effective (2006); Macrory ‘Reforming Regulatory Sanctions’ (n 120).
Behaviour is first identified, the harm revealed, incentives considered and implemented, the offence/contravention drafted, and the sanction potential stipulated. In terms of sanction goals, deterrence is the criminal law goal, and compliance the regulatory preference. Where compliance has a positive essence, to keep standards, deterrence has a negative, to dissuade from standards deviation. Compliance tends to individual autonomy, where consent and acquiescence lie, and deterrence to oppositional restriction, where frightening and hinderment are paramount.

Market behaviour and its source therefore, assumed major significance in the research interrogation. It is a fundamental proposition of this dissertation that the capitalist market system, which includes the financial markets, is criminogenic or is prone to criminogenic pressures. This statement means that financial markets are occasions of, or are conducive to, the commission of criminal offences and/or regulatory contraventions. It does not mean or imply that all financial actors are criminals, commonly act with criminal intent, or have a pre-disposition to crime\textsuperscript{127}. But it does mean that lure, opportunity and risk hubris, which are all market prevalent, as well as the ability to hide from personal responsibility beneath the corporate shell, or lax supervision within it, create the crucible for criminal misconduct\textsuperscript{128}. Financial markets are a risk casino landscape, part regulated and part unregulated, where a new form of primeval hunt unfolds. They are places where a highly competitive and egotistical, money meritocracy, enforce a dare-devil risk discipline, speculatively manipulating the money of others toward the prey of profit; and, where private rewards are unrelated to social returns or disasters\textsuperscript{129}. Here, reckless adventurers and scoundrels are drawn, scandals are intrinsic, and activities rapid and covert, often operating through conspiracies of silence\textsuperscript{130}. The use of the near

\textsuperscript{127} See Part 1 Chapter 2 section 1.2.4 where business motivations are explored more fully.


\textsuperscript{130} J Gobert and M Punch, Rethinking Corporate Crime (Butterworths/LexisNexis 2003); WS Laufer, Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability (University of Chicago Press 2006); WS Laufer, ‘Secrecy, silence, and corporate crime reforms’ (2010) 9(3) Criminology &
impenetrable corporate form, to devastating effect across a range of regulatory issues, heightens the capacity to remain under the radar, and poses threat to financial regulatory enforcement. The dominant market values of individualism, powerful and privileged self-interest, and autonomy have been recognised to increase criminogenic impact, and account for a ‘dirty tricks’ culture and personnel, while the global spread of market society has also accentuated criminogenic patterns. As Punch has stated:

*The evidence on exposure of business deviance indicates that some managers are engaged in, and even become specialized in, dirty tricks.........In short, corporations on occasion need executioners, bag-men, spies, computer hackers, pimps, entertainers, intelligence-gatherers, burglars, bug-placers, phone-tappers, gophers, moles, frighteners, safe-breakers, forgers, vote-riggers, saboteurs, debt-collectors, garbage rummagers, hatchet-men, and ‘escorts’.*

Market sharp practice and fraud can be traced at least to the South Sea Bubble scandal nearly three hundred years ago. Over the past three decades many observers highlighted financial market crime potential, and offence parameters shifted. What was once thought as acceptable conduct and norm is now viewed as crime. For instance, at one point market manipulation was thought business fair-game, but no longer, and business leaders fully recognise it as crime. Concealment of market activity from public view inevitably assists market violation, and because of it financial regulation was purposed to detect and thwart irregular practices and fraud. As ‘Big-Bang’ deregulation dawned upon ‘the City of London’ in 1986, it was observed that the dramatically large amounts of money circulating in the system, and its many...

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131 See Gobert and Punch (n 130). Also see Laufer (n 130); N Passas, ‘Anomie and Corporate Deviance’ (1990) 14 Contemporary Crises 157; Punch (n 87); and, Slapper and Tombs (n 87). See Appendix K for an enlarged footnote.


133 Punch (n 87), 233-234.

134 M Clarke, Regulating the City: Competition, Scandal and Reform (Open University Press 1986).

135 RCH Alexander, Insider Dealing and Money Laundering in the EU: Law and Regulation (Ashgate 2007); Interviewee Z Business Leader England 29 November 2012 stated: ‘[I]nside trading is a classic example. When you get somebody like Raj Gupta put away for a number of years it teaches a lesson’.

manipulations, rendered scandals and fraudsters an intrinsic part of business\textsuperscript{137}. Lure, inadequate oversight, opportunity and a supply of tempted insiders have been identified as causes of financial crime\textsuperscript{138}. Huge financial conglomerates were allowed to coalesce and grow to a stage of being too-big to-fail, while subjective feelings of superiority dominated or even subverted moral hazard to their own ends. Tremendously powerful corporate entities with globalised business tentacles may be, or may consider themselves to be, beyond effective government control\textsuperscript{139}. The pathology of corporations reflects concerns around organisational and systemic deviance, where risk control as a cost may not be regarded as commensurate with profit maximation\textsuperscript{140}. Unfortunately, national or regional police forces, or indeed financial regulators, may not have the competence, resources or experience to tackle complicated corporate crime, and if so, a culture of increased crime risk may result\textsuperscript{141}.

From the 1980’s onwards governments globally have encouraged small investor market participation and, lacking the resources to fully get to grips with complicated markets, they are ripe for the taking. This too may include the hard-working employee whose decades of contributions to the company pension scheme have been side-tracked to business ends which have come a cropper\textsuperscript{142}. The principal-agent relationship with its in-built expertise and knowledge inequality, where self-interest ethics abound, is a fertile field for fraudulent activity; the corporate-employee/officer relationship requires efficient and competent real-time oversight to ensure crime compliance, but if internal controls are not operationalised sufficiently or at all, cultures of carelessness have increasingly become central to financial ‘failures’\textsuperscript{143}. The ubiquitous nature of financial technology, complicated mathematical modelling, automatic event-triggered counter-measures, and the rapidity and gigantic volume of electronic transactions, undermine the capacity for both internal and external oversight. When this accompanies the granting of extensive

\textsuperscript{137} See Clarke \textit{Regulating the City} (n 134).
\textsuperscript{139} See Gobert and Punch (n 130). Also see Horan (n 87); Punch (n 87).
\textsuperscript{140} See G Mars, ‘Rethinking Occupational Deviance and Crime in Light of Globalisation’ in J Minkes and L Minkes (eds), \textit{Corporate and White-Collar Crime} (Sage 2008); Horan (n 87); Slapper and Tombs (n 87); Wells ‘Corporate crime: opening the eyes of the sentry’ (n 18).
\textsuperscript{141} See Gobert and Punch (n 130).
\textsuperscript{143} Punch (n 87); See Apendix K for more.
powers to individuals to move massive amounts of other people’s money around markets so constructed, there is ample opportunity for covert activity, concealment and compounding of errors and misconduct, and the outright rip-off.

At least three business ideologies have been credited with contributing to the invisibility of corporate crime: the survival of the fittest; anything goes in business; and, business is an amoral occupation where moral flexibility or even immorality is required. Promises of overly generous, or incorrectly constructed, bonuses and other payments to financial service operatives, or the ‘guarantee’ of impossibly lucrative returns on investment to equally greedy ‘punters’, accentuate the possibilities of deliberate misconduct. The market avenues to express greed have been enormously extended. Thus, the instrumentalist conclusion is that the financial market environment is criminogenic.

Even post-crisis the markets and its agents have not been scandal free and prominent examples include: the international LIBOR rate-rigging deceit; the JP Morgan ‘whale’ trading loss in excess of $6 billion; corruption in the EU has been estimated to cost the European economy around €120 billion annually with approximately forty-three percent of companies involved; the Irish-Russian Quinn family asset-concealment conspiracy; the Irish Central Bank closure and market sale of Bloxham stock-brokers due to financial irregularities; the appointment of a liquidator to Custom House Capital Limited an Irish investment fund management company after misuse of €56 million in

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144 See Slapper and Tombs (n 87). Also see A Carr, ‘Is Business Bluffing Ethical?’ in J desJardins and J McCall (eds) Contemporary Issues in Business Ethics (Wadsworth publishing 1985); Punch (n 87); also see AB Thomas, Controversies in Management (Routledge 1993), 84. See Appendix K for more.

145 A Greenspan (Speech US Senate Committee on Banking, Housing and Urban Affairs, July 2002) <www.federalreserve.gov/BoardDocs HH/2002/july/testimony.htm> when in the wake of the Enron scandal he stated: ‘It is not that humans have become any more greedy than in generations past. It is that the avenues to express greed had grown enormously’.

146 UK Treasury Select Committee Report (n 13); Wheatley Review (n 13).

147 In 2012. See for instance, Reuters, ‘JPMorgan to pay $920m over ‘London Whale’ scandal’ The Irish Times (Dublin, 19 September 2013); K Scannell. ‘‘Whale’’ loss charges for former traders at JPMorgan’ The Irish Times (Dublin, 15 August 2013).


149 See among many print media references C Keena, ‘Anglo takes contempt of court action against Quinns’ The Irish Times (Dublin, 14 February 2012); S Carswell, ‘Cypriot court lifts Quinn injunction, The Irish Times (Dublin, 16 March 2012); C Keena, ‘Court told Quinn nephew advised on foiling Anglo’ The Irish Times (Dublin, 22 March 2012); M Carolan, ‘Claims that Quinns put assets beyond bank’s reach’ The Irish Times (Dublin, 22 March 2012). This litigation in part resulted in Sean Quinn snr and Sean Quinn jnr being jailed for contempt of court.

150 In May 2012. See for instance, S Carroll, ‘Bloxham halts regulated activities over ‘irregularities’’ The Irish Times (Dublin, 28 May 2012); S Carswell, ‘Central Bank wants to talk to financial partner at Bloxham’ The Irish Times (Dublin, 29 May 2012).
client assets and cash\textsuperscript{151}; frauds perpetrated by fiduciaries such as solicitors Thomas Byrne\textsuperscript{152}, sentenced to sixteen years imprisonment for a record €52 million property fraud, Heather Perrin\textsuperscript{153} a District Court judge convicted and sentenced to two and a half years imprisonment for an attempted will deception fraud while a solicitor, and Mary Miley sentenced to three years for a fraud involving bridging loans\textsuperscript{154}; the fourteen UK insider trading convictions between March 2009-July 2012\textsuperscript{155}; the UK and Ireland PPI mis-selling episode\textsuperscript{156}; and numerous dramatically large financial regulatory sanctioning examples, such as Goldman Sachs $550 million by the US SEC concerning subprime mortgage information disclosure\textsuperscript{157}; JP Morgan Chase $228 million paid as restitution penalties and disgorgement over bid-rigging in the US municipal bonds sector\textsuperscript{158}; Barclays fined stg£290 million, and RBS separately fined €455 (US $615) million by UK and US regulators concerning LIBOR rate-rigging\textsuperscript{159}; in a settlement agreement with the US SEC, its largest in seventy-five years, UBS ($22.5 billion) and Citi group ($7 Billion) agreed to release liquidity to misled customers concerning auction rate securities\textsuperscript{160}; the

\textsuperscript{151} In 2011. See In the matter of Custom House Capital Ltd [2011] IEHC 399.

\textsuperscript{152} From the wide pre-trial and trial coverage see especially C Gallagher, ‘Thomas Byrne convicted of stealing €52 million from banks and defrauding 13 clients’ The Irish Times (Dublin, 19 November 2013), R Mac Cormaic, ‘Trawl of boomytime hubris shone unflattering light on ‘frenzied’ era’ The Irish Times (Dublin, 19 November 2013), and R Mac Cormaic, ‘Ex-solicitor Byrne moves to Mountjoy to begin jail term’ The Irish Times (Dublin, 04 December 2013). Byrne was unanimously found guilty of all charges/counts on 18 November 2013 after the largest fraud and theft trial €51.8 million in the history of the State (27 day trial; jury 17.5 hours out deliberating over 6 days) and on 02 December 2013 he was sentenced to 16 years imprisonment with the last 4 years suspended.

\textsuperscript{153} Widely covered media trial coverage includes ‘Heather Perrin sentenced to two and a half years in jail’ The Irish Times (Dublin, 28 November 2012).

\textsuperscript{154} In January 2014, Miley, a middle-aged solicitor who pleaded guilty to fraudulently borrowing nearly €1 million in mortgage bridging loans between January 2006 and February 2008, in what was described by the sentencing judge as an “elaborate and sophisticated deception”, was jailed for three years. See ‘Ex-solicitor Mary Miley gets three years for €1m fraud on mortgage loans’, The Irish Times (Dublin, 27 January 2014).

\textsuperscript{155} See www.fsa.gov.uk.

\textsuperscript{156} See for instance F Walsh, ‘Banks count the cost of a massive scandal’ The Irish Times (Dublin, 20 February 2013); U McCaffrey, ‘Banks to return €25m to customers over insurance breaches’ The Irish Times (Dublin, 4 October 2013); U McCaffrey, ‘Banks forced to refund €67m in ‘mis-sold’ payment protection’ The Irish Times (Dublin, 7 March 2014).

\textsuperscript{157} In 2010. See US SEC Press Release, ‘Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO’ (Washington DC 15 July 2010). In agreeing to the SEC’s largest-ever penalty paid by a Wall Street firm, Goldman also acknowledged that its marketing materials for its subprime mortgage product contained incomplete information.

\textsuperscript{158} In 2011. See Department of Justice Press Release, ‘JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $228 Million to Federal and State Agencies’ (7 July 2011).

\textsuperscript{159} Barclays in 2012 and RBS in 2013. See Bloomberg, ‘Barclays fined £290m over bank rates’ The Irish Times (Dublin, 28 June 2012); Reuters, ‘RBS fined $615m over rate scam’ The Irish Times (Dublin, 6 February 2013).

\textsuperscript{160} Also see Bloomberg, ‘Citigroup to pay $730 million to settle claims of misleading investors’ The Irish Times (Dublin, 19 March 2013) when it was revealed that in addition to the $590 million paid to settle a
JP Morgan Chase & Co $13 billion fine settlement, the largest US financial crisis penalty, to settle allegations surrounding the quality of mortgage-backed securities it sold in the run-up to the 2008 financial crisis; the Raj Rajaratnam insider trading conviction in the US resulting in an 11 year imprisonment sentence and record criminal/civil penalties including disgorgement of $156.6 million; the Allen Stanford $7 billion fraud conviction in the US resulting in a 110 year prison sentence; the HSBC money-laundering, multiple regulator imposed, across multiple states, monetary penalty of $1.9 billion in 2012; the AU Optronics international price-fixing cartel suffering a $500 million record criminal fine in the US; the SAC Capital hedge fund $1.8 billion monetary penalty for insider trading after a decade-long regulatory probe; the $131.8 million penalty imposed upon Merrill Lynch by the US SEC settling inter alia faulty disclosure charges about collateral selection for two collateralized debt obligations (CDO) that it structured and marketed to investors in 2006-2007; the international scale of charges and convictions against and guilty pleas of bankers; the JP Morgan Chase deferred prosecution agreement to pay $2.6 billion to head off a criminal prosecution and lawsuit brought by mislead stock investors in 2012, Citigroup, the third-largest US bank by assets, agreed to pay $730 million ($564 million) to settle claims it misled debt investors about its condition during the financial crisis, thus resolving a lawsuit by investors who bought Citigroup bonds and preferred stock from May 2006 through November 2008.


See B Protess and J Silver-Greenberg, ‘HSBC to pay $1.92 billion to Settle Charges of Money-laundering’ New York Times (New York, 10 December 2012). In addition, see Reuters, ‘HSBC unit hit with $2.46bn judgment in class action’ The Irish Times (Dublin, 19 October 2013) concerning a US securities civil fraud class action commenced in 2002, in which it was alleged that executives made false and misleading statements that inflated the company’s share price, which resulted in a record $2.46 billion final judgment against a business formerly known as Household International which was purchased by HSBC in November, 2002.


See ‘Prosecuting bankers Blind justice’ The Economist 4 May 2013 63 for international examples of prosecutions post-GFC quoting media and own sources.
private litigation over failures to act on its suspicions dating from 1998 concerning Bernie Madoff\textsuperscript{169}; and, generally the truly remarkable observation that from GFC outset to late 2013 that US and European banks had paid out fines or monetary penalties topping a whopping €100 billion to regulators\textsuperscript{170}.

If this empirical evidential trove is not sufficient justification for my otherwise sweeping assertion about markets being criminogenic, since there has always been crime, and the simplistic syllogism suggests that crime opportunity being general then markets cannot be discretely criminogenic, there is yet more evidence, often, but not exclusively, drawn from the socialist or Marxist perspective. Twenty years or so before the GFC saw massive market change Taylor asserted that there had been such significant changes in the social, economic and cultural paradigms over the previous fifty years to amount to a momentous shift\textsuperscript{171}. These he placed in the late twentieth century connection between an accentuated philosophy of individual autonomy and dominant free market liberalism. Society became steeped in consumption, new social relations the product of competitive market individualism, powerful gender and technological change, and, the development of a defined winner/loser culture. A discernible transformative shift within economic organisation in established democracies, toward consumption and service industry rather than production, with a prominent move on the part of financial services to the economic centre commenced in the early 1980’s. While, in the case of both society and economy, there was a manifest spiralling of risk and danger for the new cultural centre, the sovereign individual as a consumer, acquirer and player of private goods, in a highly globalised and technologically articulate environment. Even before rapid and transformative technological change, Hobsbawm and Beck identified three major social transformation logics where risk tendencies lie: globalisation; disintegration of older

\textsuperscript{169} In January 2014; see, for instance, ‘JPMorgan had Madoff concerns in 1998 Authorities informed decade later’ \textit{The Irish Times} (Dublin 08 January 2014). This was split up as to $1.7 billion payment to the US department of justice in the largest-ever bank forfeiture, $350 million to the office of the comptroller of the currency, $325 million to Irving Picard, trustee for the Madoff bankruptcy, and $218 million to plaintiffs in class-action lawsuits.

\textsuperscript{170} ‘Financial firms on the defensive A culture of fear’ \textit{The Economist} 2 November 2013.

social patterns and values; and, the attenuation of the Eurocentric cultural dominance which Durkheim and Weber had trumpeted\(^\text{172}\).

Paradoxically, risk culture was contemporaneously embraced by risk-takers and risk-averse alike, as a new social order, replete with amoral ethical standards. The profit result is what counts, the means irrelevant, and the consequences ignored. Because society encourages ostentatious display of wealth, within an environment where the social costs of accumulation are ignored, Slapper and Tombs argued that there is a ‘relative indifference to the illegality of methods of profit maximisation’\(^\text{173}\). Taylor argued that market society and social order itself have conspired to unleash new forms of contemporary crime as market phenomena. This is complicit both with unregulated marketing of particular products, including debt as a consumer product, and with competitive individualism encouraged by such markets\(^\text{174}\). For Taylor this market society culture included accelerating inequality of economic prospects, which was expressed in increased property crime, and in a burgeoning transnational hidden economy of capital accumulation. The decades-long de-regulatory spiral and soft-touch regulatory control pre-GFC handsomely contributed to an unruly market mix. It is unsurprising that Braithwaite recognised that within such, the concentration of wealth and power opens up new types of criminal opportunities, and new paths to immunity from accountability\(^\text{175}\).

Furthermore, the dynamism of counter-reaction to market regulation, must be factored-in, Schanze argued\(^\text{176}\). At the borders of legitimate markets new innovative markets spring up and escape regulation. These lie beyond both recognised regulatory structure, and governing legislation, where all is allowed save where prescribed. This diligent evasion is tolerated by the courts in Schanze’s view as a regulatory bifurcation – a clear departure from universal application of criminal law theories - since regulation tends to be partial in any case. He accused courts, wise legislators, and administrative agencies of displaying sympathy for smart operators circumventing regulatory regimes.

\(^{172}\) EJ Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914-1991* (Michael Joseph 1994), who tackles the subject from a Marxist perspective. Also see Beck *Risk Control* (n 171). See Appendix K for an enlarged footnote.

\(^{173}\) See Slapper and Tombs (n 87), 2; Punch (n 87). See Appendix K for more.

\(^{174}\) See Beck *Risk Control* (n 171); also see Kaletsky (n 2); Taylor (n 87). See Appendix K for more.


Innovation is market fundamental, while most crime in society also takes the form of innovation under circumstances where wealth creation is stymied by the unavailability of institutionalised means to its achievement. Theoretically, the justification may readily be located instrumentally. The criminogenic nature of societal inequality or tensions has been recognised for centuries. Warnings of the perennial tension between financial market risk-taking and innovation, the reflexive relationship of law and market innovation, the highly competitive and powerful corporate sector, the combined commercial and political pressures which regulators find difficult to fend off, regulatory power itself and the ever present and recurring financial crises, have been proven amply justified post-GFC. To these observations may be added the abuse of trust and confidence within expert/novice relationships, moral hazard, and the rise of concupiscence as an end in itself. The very fabric of wealth accumulation culture, and particularly its regulatory forms, has become a societal wide focus. The context is the market, formerly attaining apotheosis and now no longer a ‘power of destiny’, rather regarded as an instrument to shape and order a vitally important part of human relationships. At the sociological level, Durkheim addressed the corruptive conjunction of autonomy, wealth creation and morality thus:

Wealth....by the power it bestows, deceives us into believing that we depend upon ourselves only. Reducing the resistance we encounter from objects, it suggests the possibility of unlimited success against them. The less limited one feels, the more intolerable all limitation appears.....wealth, exalting the individual, may always arouse the spirit of rebellion which is the very source of immorality.

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177 RK Merton, ‘Social structure and anomie’ (1938) 3(Oct) American Sociological Review 672; Also see Slapper and Tombs (n 87), who for instance at 133-136 cite Box (n 87). Also see MB Clinard, Corporate Ethics and Crime: The Role of Middle Management (Sage 1983); C Keane ‘Loosely Coupled Systems and Unlawful Behaviour’ (n 128); S Simpson, ‘The Decomposition of Antitrust: Testing a Multi-Level Longitudinal Model of Profit Squeeze’ (1986) 51 American Sociological Review 859. See Appendix K for more.

178 See Radzinowicz History (n 25), Vol 4; Also see WJ Chambliss, On the Take: From Petty Crooks to Presidents (Indianan University Press 1978); Friedrichs (n 82); S Henry, The Hidden Economy (Martin Robertson 1978); Slapper and Tombs (n 87). See Appendix K for an enlarged footnote.

179 See Reinhart and Rogoff (n 2); Laufer ‘Secrecy, silence, and corporate crime reforms’(n 130).


181 E Durkheim, Suicide: A Study in Sociology (1897, Routledge and Kegan Paul 1979), 254. Also see Slapper and Tombs (n 87).
Weber first advocated in 1904 that, among the main organising principles of economic life, lay the acceptance of profit and capital accumulation as motives with genuine moral legitimacy, although he did highlight that unlimited greed for gain is not in the least identical with capitalism. Almost two hundred and fifty years ago, Smith propounded that self-interest, the essential motivator, yielded the wealth common interest. Weber for his part heralded that the ‘capitalist spirit’ was born out of the doctrine of predestination, the idea of calling by God, an election, particularly prominent among Calvinists, which supplied the moral energy and drive of the capitalist entrepreneur. Giddens concisely explained this morality logic and its accompanying restriction: ‘The accumulation of wealth was morally sanctioned in so far as it was combined with a sober, industrious career; wealth was condemned only if employed to support a life of idle luxury or self-indulgence’. Exemplifying the dark-side of the greed issue pre-GFC, an EU legislator interviewed for this dissertation recommended the removal of limited liability from an industry shown to have misbehaved and lost its moorings. He added that the shadow banking industry consisted at one time of partnerships, and that after they became limited companies by way of IPO, ‘all reputation concerns went out of the window, principle went, and money became the issue’.

Greed is manifest throughout the markets by different actors in different forms, for instance, the lucrative if not excessive bonus culture of bankers, the desire of shareholders to maximise their return, the uncontrolled capital flight of investors seeking rich pickings globally. The real conundrum for coercive control is how to deal with this inflated,

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182 See Weber The Protestant Ethic (n 62).
183 Weber The Protestant Ethic (n 62).
186 In Ireland, a societal wide speculative culture and greed was identified as a crisis contributor. See Nyberg Report (n 8). Also see Punch (n 87), 249; A Szasz, ‘Corporate resistance to effective regulation of environmental hazards’ (Occasional Paper American Sociological Association, Detroit 1983 as cited by Punch). See Appendix K for more.
deeply established and fiercely driven ‘greed’ self-interest. As one dissertation interviewee remarked:\footnote{187}

\textit{If you create a culture where the dominance of the trader or of the decision maker making the money on a particular transaction is such that they can override or effectively ignore compliance and regulatory issues then you have a problem no matter what regulation and who your regulator is.}

Explaining the intersection of ‘crime’ and the market role of ‘greed’, greed motivation and fulfilment, Clarke\footnote{188} concluded:

\textit{The danger of unfettered private enterprise is that it degenerates into greed, ruthlessness and deceit, to the oppression of the interests of those insufficiently cunning, skilled, wealthy or powerful to protect themselves, and so polarizes the have from the have-nots.}

Over a century ago Veblen, when exposing American and Western European class systems, related personal greed to the broader social construct of materialism or consumerism\footnote{189}. Culturally, economic dominance of society – greed - contributes to crime by promoting anomic or social strain\footnote{190}. Merton equated anomie with social chaos or strain due to a lack of balance between social goals and legitimate means of attainment\footnote{191}. Recognising the huge pressure to successfully complete business goals around profit, growth and efficiency maximisation, Passas thus argued that all or any means are deemed business legitimate, especially where corporate continuity is at stake and where individuals realise their fortunes are tied to corporate success and/or longevity\footnote{192}. This strain theory or frustration at wealth accumulation, for Brightman, is not exclusive to a specific social class\footnote{193}. Furthermore, in his view white-collar crime is not alone about greed irrespective of social class, but also about protecting loss of status. Wealth, power and a wide liberty of action, engender antipathy towards restrictions upon the

\begin{footnotesize}
\footnote{187 Interviewee Z Business Leader England 29 November 2012.}
\footnote{188 M Clarke, \textit{Business Crime Its Nature and Control} (St Martin’s Press 1990), 31.}
\footnote{189 See T Veblen, \textit{The Theory of the Leisure Class: An Economic Study of Institutions} (Macmillan 1912, 1994).}
\footnote{190 See Messner and Rosenfeld (n 171).}
\footnote{191 See Merton (n 177); Also see Box (n 87); Croall \textit{White Colar Crime} (n 87); Durkheim \textit{Suicide} (n 181); Messner and Rosenfeld (n 171); Passas (n 131); Slapper and Tombs (n 87). See Appendix K for an enlarged footnote.}
\footnote{192 See Passas (n 131). And see Slapper and Tombs (n 87).}
\footnote{193 See HJ Brightman, \textit{Today’s White-Collar Crime Legal, Investigative, and Theoretical Perspectives} (Routledge 2009); also see Passas (n 131), 158 as quoted in Appendix K.}
\end{footnotesize}
accumulative tendency, Durkheim noted\textsuperscript{194}. Nelken identified the origin of the growth of business crime thus\textsuperscript{195}:

\[\text{[M]uch white-collar and financial crime grows out of the opportunities to exploit objective changes in organizational forms of business trading (particularly marked in a period of increasing global competition)in ways which the law, especially national laws, are slow to deal with or incapable of catching in time. Other crimes are connected to the cycles of boom and bust which seem inherent in global capitalist expansion.}\]

Very aware of rich ‘robber barons’ who operated ‘respectable’ businesses accumulating profits in violation of regulatory norms, ruthlessly eliminating competitors and creating cartels, Sutherland over seventy years ago coined the phrase white-collar crime to refer to crimes committed by the respectable in the course of their occupation\textsuperscript{196}. Deceit, deception and concealment, breach of trust or illegal circumvention are grounding elements, whether as individual or group misdeeds\textsuperscript{197}. Clarke has described business crime, which by definition takes place within the private environment of legitimate business, as a distinctive social phenomenon\textsuperscript{198}. Corporations can in effect manipulate the boundaries between lawful and unlawful behaviour\textsuperscript{199}. Immoral, illegal or bad corporate decisions, and the dilemma of the individual in such a corrupt corporate world, has been explained in terms of an abundance of individual decision makers, and a lack of personal responsibility for the ultimate outcome\textsuperscript{200}. Detection and control are primarily a matter of internal controls within business privacy or secrecy, and in this covert world crime breeds\textsuperscript{201}. For many white collar offenders, their offences are episodic events that

\textsuperscript{194} See Durkheim \textit{Suicide} (n 181); also see Slapper and Tombs (n 87).
\textsuperscript{196} EH Sutherland, ‘White-collar criminality’ (n 78). And see EH Sutherland, ‘Is “White-Color Crime” Crime?’ (1945) 10 American Sociological Review 132; EH Sutherland, \textit{Criminology} (Lippincott 1947); EH Sutherland, \textit{White-Collar Crime} (Holt Reinhart and Winston 1949). Also see Gobert and Punch (n 130); C McCullagh, ‘How Dirty is the White Collar? Analysing White Collar Crime’ in P O’Mahony (ed), \textit{Criminal Justice in Ireland} (Institute of Public Administration 2002); Slapper and Tombs (n 87), 1-3 who highlight that Sutherland was not the first social scientist to address white-collar crime. They identify EA Ross, ‘The Criminaloid’ (1907) 99 Atlantic Monthly 44 over a century ago excoriating directors speculating with corporate securities, officialdom obtaining bribes or holding back graft, and builders and labour leaders who engineer strikes and anti-competitive behaviour.
\textsuperscript{197} See Brightman (n 193).
\textsuperscript{198} M Clarke, \textit{Regulation, The Social Control of Business} between Law and Politics (Macmillan 2000).
\textsuperscript{199} C McCullagh, ‘Two-Tier Society; Two-Tier Crime; Two-Tier Justice’ in S Kilcommins and U Kilkely (eds), \textit{Regulatory Crime in Ireland} (First Law 2010).
\textsuperscript{200} See Parker ‘Compliance Professionalism and Regulatory Community’ (n 128).
\textsuperscript{201} Clarke \textit{Regulation, The Social Control of Business} (n 198).
occur within a background of conformity, or occur under circumstances of increased personal or external pressure\textsuperscript{202}. Unlike the separate street crime category, most white-collar offenders are drawn from the middle class, enjoying moderate incomes and ordinary jobs, and are small time entrepreneurs and low level office workers, while a substantial proportion are repeat offenders\textsuperscript{203}.

Emphasising that this type and level of crime is situationally dependent, and that crime opportunity only becomes available once a certain occupational level is reached, three pre-requisites for white-collar crime motivation were outlined by Cressey sixty years ago\textsuperscript{204}: situation; knowledge, skill and ability; behavioural rationalisation. All three situationally exist in the financial service sector in abundance. Concerning behavioural rationalisation for ‘real crime’ criminal misconduct, criminologists Sykes and Matza almost six decades ago built upon Sutherland’s learned behaviour theory of differential association\textsuperscript{205}. They identified five relevant neutralising techniques or justifications (rationalisations) which law-abiding citizens may draw upon all of which are relevant to white-collar crime: denial of responsibility (‘following corporate orders’); denial of injury (‘no harm caused’); denial of the victim (‘no real victim’); condemnation of the condemners (‘all are at it’); and, appeal to higher loyalties (‘the company depended on me’).

Another approach is the rational choice theory which is taken up in Part 2 Chapter 1 section 2.1.3. This approach presupposes that crime is based on calculative reasoning, in which the actor coldly weighs up the perceived benefits and ranges them against the expected costs (likelihood and consequences of detection). Yet another is the labelling or Marxist perspectives amoral profit maximisation critique taken up later in Part 1 Chapter 2 section 1.2.4 and Part 1 Chapter 3 section 1.7.2, which espouse that it is a mistake to see


\textsuperscript{203} D Weisburd S Wheeler E Waring and N Bode, Crimes of the middleclasses: White-collar offenders in the federal courts (Yale University Press 1991); D Weisburd and E Waring, White-collar crime and criminal careers (Cambridge University Press 2001); Piquero and Benson (n 202).

\textsuperscript{204} D Cressey, Other People’s Money: A Study in the Social Psychology of Embezzlement (Free Press 1953); Piquero and Benson (n 202).

\textsuperscript{205} G M Sykes and D Matza, ‘Techniques of Neutralization: A Theory of Delinquency’ (1957) 22(6) American Sociological Review 664. Also see Part 1 Chapter 2 section 1.2.4 where from a regulatory perspective market actor motivation is heavily referenced within Parker and Nielsen and their contributors.
deviance simply as the infraction of some agreed rule (positivism). To do so they argue, is to ignore the fact that what constitutes crime is to some extent a product of the capacity of powerful groups to impose their definitions of crime on the behaviour of other groups.

Business environments seek to structure and excuse endemic crime and misconduct, via inevitable opportunity and misconduct management, concluded Clarke\textsuperscript{206}. Re-thinking corporate crime a decade ago, Gobert and Punch argued that companies often deliberately and, sometimes repeatedly, flout the law, in an environment where prosecution likelihood is remote, conviction prospects are not promising and sanctions can be derisory\textsuperscript{207}. In their recent empirical survey, Nguyen and Pontell argued that white-collar crime played an important role in the GFC\textsuperscript{208}. As far as Ireland is concerned, a culture of ‘legal corruption’ has been identified, accusations of economic treason have been levelled against Irish bankers, and a culture of tolerance towards white-collar financial crime is suspected\textsuperscript{209}.

In a nutshell therefore, a conjunction, if not concatenation of factors and their reflexive interaction, grounds my submission that financial markets are criminogenic or prone to criminogenic pressures including: markets inherently being competitive, risk-centric, replete with information asymmetry, crisis endemic, suffering boom and bust cycles and conflicting trends, and adopting a questionable predominant market efficiency ideology; the dominant market values of individualism, powerful and privileged self-interest, and autonomy; greed; lure; excessive wealth accumulation culture and opportunity; distinctive opportunity and situational factors including skills and behaviour rationalisation; market actors burdened with highly competitive and conflicting pressures, contradictory alternatives and ambiguous situations; a never-ending supply of wiling risk-takers, some reckless, if not offenders; fiduciary market opportunities for breach; secrecy/covert opportunities and/or operations especially at corporate level; business/corporate culture; lax white collar crime and/or regulatory enforcement culture; a regulatory framework

\textsuperscript{206} Clarke Regulation, The Social Control of Business (n 198).
\textsuperscript{207} See Gobert and Punch (n 130).
\textsuperscript{209} For examples see Appendix K for an enlarged footnote. See H McGee Irish Times (Dublin, 24 February 2009); F O’Toole, ‘Rise and fall of a Tiger tycoon’ The Irish Times (Dublin 17 July 2010); furthermore, G Fitzgerald, as quoted at the MacGill Summer School, Glenties, Co Donegal, in D de Breaduin, ‘Moral defects’ of society underpin crisis’ The Irish Times (Dublin 19 July 2010) ; and see E MacConnell, ‘FF spokesman says Anglo bankers should be tried for treason’ The Irish Times (Dublin, 26 June 2013).
always in the wake of market innovation; shoddy and dirty tricks business practice and models; conflicts of interest; the rise of (modern) neo-liberalism; social and economic change after World War II; and, three decades of de-regulation.

The criminogenic nature of market capitalism is central to consideration of ongoing sanction control of the highly charged, competitive, potentially lucrative and individualised market society post-crisis. Three years before the crisis unfolded, Baldwin critically identified a ‘new punitive regulation’, where greater emphasis was placed upon criminal sanctions\(^\text{210}\). He argued that one alternative approach, which today post-crisis would likely be derided, was to move towards more corporate self-regulation. Nonetheless, he warned, presciently as it turned out, that such control may lack legitimacy, prove unfair, and be exclusive and inefficient. Concerning a discrete regulatory space like the financial sector, Norrie however, has recognised the legitimacy of deterrent penal policy formed and implemented to deal with particular offenders, in peculiar time-relevant circumstances, where a display of firmness and vigour is necessary\(^\text{211}\). It is my contention that dealing with white-collar criminals in the financial sector – and particularly bankers - where systemic risk is the peculiarity, sits squarely within such rubric. Special legal treatment for special legal categories in protection of society and/or its stability is not unknown to Irish law, where for instance, terrorist offences and gang membership are statutorily dealt with by non-jury courts. Within the rule of law the rights of the accused are still protected, as are the rights of society generally and victims within it. Failure to restrain markets, results in increasing crime rates, both nationally and globally, while the dismantling or insufficient mounting of the counter-balancing welfare state adversely impacts crime and social control\(^\text{212}\).

The nature of markets, the devastating economic and social consequences of financial market crime unearthed by the GFC, coupled with the outstandingly unique nature of the markets themselves, all support my argument that a special if not unique regime for dealing with financial misconduct is required. This must involve a regulatory collaboration between business and regulator, and, an enhanced if not upgraded binary

\(^{210}\) See Baldwin ‘The New Punitive Regulation’ (n 16).

\(^{211}\) See A Norrie, Crime, Reason and History (Butterworths 2001). Also see Hart The Concept of Law (n 123); Weber The Theory of Social and Economic Organisation (n 66).

fusion of criminal and administrative sanction, an issue central to the further unfolding of this dissertation. The market domain is a criminogenic breeding ground, albeit where ideology and political pressure suppress business misconduct below criminal process\textsuperscript{213}. Resultant recognition of such a peculiar environment, I argue, demands discrete regulatory reform intervention post-GFC.

### 1.2.4. Market-Perfecting Standards and Rules: The Reinforcement Role of Law

Because markets originated as private social constructs, relational exchange sat beside the vitally important market exchange, while cultural conformity was cemented by factors such as trust and reputation which minimised risk\textsuperscript{214}. But as markets grew, relational interplays widened, and a weightier medium for standard setting and business risk culture-compliance was required. Pre-GFC for instance, Foy warned: ‘Anyone who has blind faith in the competence or efficiency of financial institutions or corporates is a fool’\textsuperscript{215}. Presciently as far as banks like Anglo Irish Banks are concerned, Barth et al argued that bank owners enjoy the risk upside, but are largely protected downside by limited liability, and thus have a, ‘strong incentive to take on risk and conceal it’\textsuperscript{216}. The following cameo therefore, illustrates that the lines are drawn between legal and voluntary behavioural imposition, the real nub of the distinction between private (self) and public regulation.

Shortly after the Great Depression, US SEC chairman Jerome Frank, rendered a famous lengthy speech to the US accountancy profession. He advocated the use of a sound and recognised, statutorily stipulated, body of uniform accounting standards in the form of principles and practices. He did so in the wake of a harsh critique from investment banker John M. Hancock who had earlier advocated unregulated annual corporate reports to

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\textsuperscript{213} M Levi, ‘Serious Fraud in Britain: Criminal Justice versus Regulation’ in F Pearce and L Snider (eds) \textit{Corporate Crime: Contemporary Debates} (University of Toronto Press 1995. Also see Horan (n 87); L Snider, \textit{Bad Business: Corporate Crime in Canada} (Nelson 1993).


\textsuperscript{215} See Foy (n 77), xvi.

\textsuperscript{216} See JR Barth G Caprio jnr and R Levine, \textit{Rethinking Bank Regulation} till Angels Govern (Cambridge University Press 2006), 27. Interviewee T EU Legislator Brussels 10 April 2013 opined that the best remedy for financial service misconduct was to remove the limited liability protection.
stockholders. Part of the Frank v Hancock debate centred around integrity, probity, ability and judgement in relation to corporate management, with Hancock propounding that legislation or regulation could not inject these essentials where absent, and that he held little belief in the power of the law to make men honest. Frank forcefully rejoined:

*Laws have their effects, partly because fear of punishment for a violation of the laws acts as a deterrent and – far more important – because, after a while, the existence of the standards of minimum morality enacted into law creates habits and customs so strong that most men will not break with those habits and customs, will not even contemplate doing so, because they accept their operations as they do the air they breathe.*

Financial regulatory reform is all about gaining or re-gaining control under a circumstance where markets thrive. Markets are an absolute necessity. Market standards, or market-perfecting rules, are a policy imperative in these endeavours, which both the EU and the US have addressed although to differing effects. Law has an essential precipitating and reinforcement role to play in such market standard setting. However, the relationship between law and regulation and the markets, where crises are endemic, has rightly been recognised as complex and contingent, with dynamic tensions and inter-connections paradoxically commingling. Within both the primary market values to act innovatively and competitively in an unrestricted way, and democratic government encouragement of market activity subject to restriction, lies the business morals dimension. This dimension, according to Yeager, operates across two competing logics, the utilitarian outcome-centred best results philosophy, and deontological arguments for action-centred constraints upon the means to achieve, around considerations of right and wrong affecting others. The current task is identifying the

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217 Of all firms Lehman Brothers.
219 See Frank (n 218), 28.
220 Black, ‘Empirical Legal Studies in Financial Markets’ (n 22); Haines *The Paradox of Regulation* (n 14); Reinhart and Rogoff (n 2).
221 See Lumpkin (n 95); Schumpeter (n 65).
best action achiever. In Part 1 Chapter 3 the origins of law as such achiever will be explored in more detail, but below *de bene esse* it is taken as given.\(^{223}\)

Within modern democracy, where legitimacy is a paramount value, enforcement and sanctioning around standards can only arise through legal establishment and operation. Social action, Weber recognised, runs across a continuum from increasing rational control, persistence to legal compulsion.\(^{224}\) Its medley commences with mere consensual action, moves across ad hoc agreement, and the varieties of regulated action and enduring association, and ends with the organisation and compulsory institution. This is the spectrum of private to public control. In the US yet common law context, Pound argued that law is the paramount agency of social control, which itself is primarily the function of the state, and that the ultimate effectiveness of law depended upon the application of force (punishment) exercised by bodies, agencies and officials established or chosen for that purpose.\(^{225}\) Regulatory law, in its widest sense, has been described by Teubner as the most ambitious, modern, goal-oriented, sociologically informed, type of law representing a political mechanism of social guidance.\(^ {226}\) Vigilant and determined oversight, via the mobilisation of regulatory law, therefore, has the potential to protect against the worst excesses of greedy capitalism.\(^ {227}\)

The general use and effectiveness of coercive laws as moral agents to enforce flexible societal (business) norms or ethics, which alter as circumstances warrant, especially where they engender systemic effects, as do greed and ethics, is not a new discourse.\(^ {228}\)

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\(^{223}\) Yet to be proven, but allowed for the purposes of argument.

\(^{224}\) See Weber *Economy and Society* (n 25). Also see M Weber, *From Max Weber: Essays in Sociology* H Gerth and C Wright (eds) (Oxford University Press 1946) the originator of the notion of bureaucracy as the ideal type of rational authority, possessing formality, precision, clarity, regularity, reliability, and efficiency achieved through a fixed division of tasks in which roles are circumscribed by limits to authority, hierarchical supervision, and detailed rules and regulations conceivably covering every possible contingency. Also see C Keane, ‘Loosely Coupled Systems and Unlawful Behaviour’ (n 128); G Morgan, *Images of Organization* (Sage 1986).


\(^{228}\) See E Vucheva, ‘Laissez-faire capitalism is finished, says France’, EUObserver.Com (26 September 2008) and Sarkozy as quoted in Appendix K; Interviewee E Academic Australia 22 March 2012 advised that the best way to deal with financial regulatory enforcement matters was through ethics/integrity outside formal regulation.
The recognition that punishment was a societal necessity, established the need for a political state to legitimately provide and administer such within the rule of law, a form of restrictive norm fixing by the state\(^{229}\).

More recently, the Hart v Devlin and Hart v Fuller debates, which are not relevant to the financial market ethics issues because they fundamentally concerned a morally paternalistic government criminalising private moral issues, nonetheless lend aid when wider issues are considered in the public sphere\(^{230}\). While markets are private constructs, and some market activity is privately undertaken, they are essentially public in manifestation of effects and salient harms, including moral or ethical breaches, and are publicly litigated. Within the rule of law, Fuller described a morality of duty, meaning reciprocity beyond self-interest pre-condition, where market actor duty is performed for its own sake in Kantian-style\(^{231}\). Corporate bureaucracies however, are inherently ends-oriented, contingent actors, where efficiency is emphasised. Shaping and restriction upon moral issues for individual decision-makers stem here from the pursuit of profit and wealth within the competitive market economy\(^{232}\). Furthermore, the primary moral issues concerning the market are ‘greed’ and ‘business ethics’, and not private sexual preferences, and although the relevant theoretical justification on both sides is individual autonomy (freedom of choice), the market justification is tempered by social welfarism rendering a public interest focus, and not a private interest preference (privacy of morality)\(^{233}\). In my argument, morality within this public interest focus, where accountability and transparency norms hold a prominent role, will be a crucial factor in

\(^{229}\) T Brooks, ‘Introduction’ in T Brooks (ed), *Locke and Law* (Ashgate 2007). Also see S Elder, ‘Sanctions and Financial Regulation: a meditation upon natural necessity’ (2013) DULJ 217; Hart *The Concept of Law* (n 123); Locke *Two Treatises of Government* (n 73). Constitutional norms as interpreted by the Irish courts are not cast in stone, may shift, and rely upon a ‘prudence, justice and charity’ yardstick, heavily influenced by the religious background of Constitutional concept originators such as Locke, but adhere nonetheless, to Durkheim’s social solidarity value. See the detail in Appendix K.


\(^{231}\) See Fuller *The Morality of Law* (n 230). Fuller contrasted Kant’s categorical imperative where duty is performed for its own sake and not in pursuit of other ends, with the hypothetical imperative (principle of conduct), a conditional rule of action, where means (not duty) justifies ends. Business decision-making in the form of business crime or infraction is a socially destructive act like ‘real’ crime, but it is always carried out in a socially valuable space.

\(^{232}\) See Yeager (n 222). Also see M Friedman, *Capitalism and Freedom* (University of Chicago Press 1962); Kaletsky (n 2). The morality of the market is a commercial ethic, an economic exchange based in duty born out of the relationship e.g. fiduciary, arm’s length etc..

\(^{233}\) See Appendix K.
any new collaborative regulatory approach. Trust in financial products, financial institutions and regulatory institutions have been betrayed both by GFC events, and greed, and must be restored.\(^{234}\)

Devlin advocated a conjunction between an all-reaching law (reflecting minimum standards) and majoritarian morality, appealed to the notion of society’s ‘moral fabric’, and promulgated that society (majority rule) is justified in taking steps to preserve its moral code and protect social cohesion.\(^{235}\) In Devlin’s terms, I argue that protecting the fundamentals of economy and society are prime candidates for bespoke preservation. In Hart’s legal positivist response, he adversely critiqued popular sentiment, or sectoral viewpoints, as a legitimate source for fixing societal norms. Instead, he propounded a humanistic and individualistic legitimation.\(^{236}\) In his view, and relying upon Mill’s ‘harm principle’, the state’s right to interfere in the lives of individuals could only be legitimated to forestall societal harm. One Irish judge stated the question as: has a pressing social need been demonstrated which justifies restriction to property rights, and is such encroachment proportionate to the legitimate aim pursued?\(^{237}\) The contention of this dissertation is that harms performed in the market context are societal, and not solely ‘disembedded’ economic in effect, and that a shift in restriction post-crisis is both legitimate and proportionate. Within the current Irish legal and constitutional context however, the interpretive courts have encountered difficulty in defining the applicable Thomist ‘common good’ balancing standard. Nonetheless, it has still been applied to justify restriction, where the community (including victims) are gaining centre-stage; and, is described as reviewable after it leaves the legislature, which, enjoying the primary competence to enact it, arguably reflects a more majoritarian view.\(^{238}\) And further,


\(^{235}\) See Devlin The Enforcement of Morals (n 225). Post crisis the Irish Court of Criminal Appeal drew upon the concept of social solidarity as a sentence principle concerning crimes against the public purse (social welfare fraud); See DPP v Paul Murray [2012] IECCA 60 as discussed in Appendix K.

\(^{236}\) See Fuller The Morality of Law (n 230) and HLA Hart Essays in Jurisprudence and Philosophy (Clarendon Press 1983).

\(^{237}\) An Blascaod Mor Teo v Commissioners of Public Works (no 3) (27 February 1998) (HC) Budd J at 111. Also see Orange v Revenue Commissioners [1995] 1 IR 517 (HC), 524 and R Walsh, ‘The Constitution, Property Rights and Proportionality: A Reappraisal’ (2009) 31 DULJ 1, 21 and see Appendix K for more..

\(^{238}\) T Aquinas, Summa Theologia (1265-1274); GW Hogan and GF Whyte, J M Kelly: The Irish Constitution (4th edn, LexisNexis Butterworths 2003). Also see Buckley v Attorney General [1950] IR 67 (SC); Crotty v An Taoiseach & Others [1987] ILRM 400 (SC); and cases whre the common good restricts
perhaps a more real-time view, since courts only interpret in arrears, interpretively build incrementally, and only do so where issues are litigated mainly by self-interested parties.\(^{239}\)

From the legal realism of the US, Fuller contended from a natural law viewpoint that the purpose of law was to provide a governing set of rules for human conduct\(^{240}\). Reflecting the essence of the rule of law, he mandated eight basic principles of legality, all of which must be simultaneously present, to constitute the ‘internal morality of law’ and ground its moral legitimacy\(^ {241}\). Among them he highlighted the need for congruence between statute book and practice, and advance publication and transparency. For Hart, the Fuller principles did not amount to a morality, but instead merely provided an efficacy, and he promulgated that while purposive activities may depend upon internal principles, such principles need not necessarily be moral\(^ {242}\). This dissertation is not promulgating that enforcement need not conform to moral principle. But if Hart is correct, then pragmatic instrumentalism may nonetheless ground it, and all within a values complex which includes congruence and transparency.

The moral dimension or value system, impacting regulatory control issues, may be defined as ‘business ethics’ or standards expressed as principles/rules of conduct. These ethical standards, the public external codes, and the private internal custom and practice,
are key components of business culture\textsuperscript{243}. This is particularly pertinent for instance, to the conduct of investment intermediaries (experts) in their relationship with investors/consumers (often non-experts), as well as the more expert levels of rate fixing for instance\textsuperscript{244}. Both regulators and business leaders have recognised that, an ethical culture at organisational level, and a commitment to integrity by individuals, buttressed by strong and timely legal sanction, is a marketplace essential\textsuperscript{245}. Conflicts of interest cannot be allowed to go unchecked by lack of supervision\textsuperscript{246}. Accurate, targeted contextualising in fixing the standards, and ongoing renewal or updating, are essential compliance foci, as Bottoms argued\textsuperscript{247}.

\textit{Morality is always practised within a specific social context, and \ldots moral standards can change. A consequence of this is that intendedly crime-reductive policies of a normative kind need to pay close attention to the normative understandings of the society in which they are being proposed \ldots for if they do not, they run the serious risk of being judged to be irrelevant by the very people at whom they are principally targeted.}

Change in crime-reductive policy of a normative kind, reflecting changed societal perception clearly affects issues around moral and legal culpability. This change rationale grounds new business offence forms and definitions, and their enforcement, for instance. Within the quasi-moral judgement system known as the criminal law, a prime example is the insider trading offence, which two decades ago was not alone not considered a crime, but was a badge of business acumen\textsuperscript{248}. Now it is also prosecuted in administrative sanction regimes where interplay issues arise. Post-crisis, newer again norm and policy change are a societal focus. Ethical standards in business, and their enforcement, are under severe scrutiny.

\textsuperscript{247} Hasnas identified three normative theories within modern society as they impact business and with legal effects: the stockholder profit self-interest; the stakeholder all interests equally considered; and, the contract theory where the individual is subordinated to authority fixing the public interest. There is some cross-over between them. See J Hasnas, ‘The Normative Theories of Business Ethics: A Guide for the Perplexed’ (1998) 8 Business Ethics Quarterly 19.

\textsuperscript{244} See UK Treasury Select Committee Report, (n 13), paragraph 191 concerning needed culture change as discussed more fully in Appendix K.

\textsuperscript{246} See Wheatley Review (n 13) where it was found that they were not talking about a few rogue individuals, but instead a systemic conflict problem as discussed in Appendix K.

\textsuperscript{247} A Bottoms, ‘Morality, crime, compliance and public policy’ in A Bottoms and M Tonry (eds), Ideology, Crime and Criminal Justice – A symposium in honour of Sir Leon Radzinowicz’ (Willan 2002), 42.

\textsuperscript{248} See RCH Alexander Insider Dealing and Money Laundering in the EU (n 85); and see Fennelly J in the Supreme Court in Fyffes plc v DCC plc and Ors [2005] IEHC 477 and [2007] IESC 36; MacNeil and O’Brien ‘Introduction’ (n 2).
Public law acknowledges at least five ethical supervisory models, three based in private arrangements with different moral stricture as Hanrahan has outlined\(^{249}\); the fourth due diligence; and, the fifth while a common international approach, is a new statutory reform jurisdiction in Ireland\(^{250}\). The first three, when applied to the financial world, are all context specific. First is the well known ‘arms-length’ approach of contract/commercial law, where self-interest governs, and the interests of others are protected in law principally around outlawed misrepresentation and unconscionability. Second is the ‘even-up’ model of consumer law where an adjustment is made in favour of a disadvantaged party for instance, in disclosing information. Third fiduciary relationships groomed in the realms of equity, where the fiduciary is required to act selflessly, and yield priority to the other party’s interests\(^{251}\). In each of these three models the primary enforcement mode is the civil law, save where obvious criminality, and offence capability, is involved\(^{252}\). The fourth due diligence, is synonymous with integrity according to Laufer, and compels acceptance of responsibility and the affirmative obligation to disclose infringing practice\(^{253}\). As such, it combats the criminogenic covertness described earlier. It is the base point for the final category the larger fitness and probity codes, directed to future behaviour change, which inter alia set fitness to practice standards, prescribe pre-employment criteria and authorisation requirements, and establish ethical responsibility hierarchically related to responsibility and experience level.

Within the predominant limitation of ethical constraint to the private contract-style arrangement, and the peripheralisation of the criminal law, there appears little justification for excluding professional third parties from scrutiny. Especially since the governing professional bodies espouse regulation of professional conduct by ethical code, and auditors are cast with statutory duties concerning disclosing offences apparent in


\(^{250}\) See Moloney *EC Securities Regulation* (n 106), 417 as quoted in Appendix K.


\(^{252}\) See JC Coffee jnr, ‘Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It’ (1991-92)101 Yale Law Journal 1875, 1879 for a critical observations upon the practice of US criminal courts to extend the civil fiduciary standard to mail and wire fraud cases.

\(^{253}\) See Laufer ‘Secrecy, silence, and corporate crime reforms’ (n 130); and see A Hill, ‘Bankers back in the classroom’ Financial Times (London, 17 October 2013) in Appendix K for bank reforms tailored to post-crisis re-training business culture and values re-modelling, seeking to eliminate the ‘say-do’ gap.
company accounts\textsuperscript{254}. Furthermore, integrity systems are commonplace, whether the reactive type including criminal investigation units, and complaints and discipline systems; or the preventive type including occupation-based ethics training, transparent organisational process, and independent boards of directors\textsuperscript{255}. Indeed, financial regulation itself, replete with supervision and enforcement functions, is an overarching public form of integrity system. Widening the bands of control is a matter for policy-makers.

Another pertinent question is the stricture and style of the code within those bands. As seen the three civil law models effect differential strictures. They also reflect differential styles. For instance, the key consideration of the fiduciary approach is the pragmatism and flexibility of the law of equity, which enables adaptation to commercial relationship context\textsuperscript{256}. A positive and primary obligation of loyalty to the other party is the essence, where one party is entitled to expect that the other will act in the other’s interests, to the exclusion of his own several interest\textsuperscript{257}. This standard has grown in use in the financial world where its continuance is therefore, not a pie in the sky possibility. If embedded in marketplace morals, it would form a valuable benchmark, both for defining the public interest and for the Irish reform agenda\textsuperscript{258}. Business may object that this standard is too high across the board, but, after the debacle of the GFC then, at least its extension across a wider front must be considered. Concerning business conduct standards, and clearly


\textsuperscript{255} See Miller (n 234).

\textsuperscript{256} See Hanrahan (n 249).

\textsuperscript{257} PD Finn, ‘The Fiduciary Principle’ in TG Youdan (ed), \textit{Equity, Fiduciaries and Trusts} (Carswell 1989); Hanrahan (n 198).

\textsuperscript{258} See for instance, IOSCO, Summary of Responses to the Questionnaire on Principles and Best Practice Standards on Infrastructure for Decision Making for CIS Operators (May 2000) and IOSCO, Report on CIS Governance (June 2006).
advocating a model entailing both a significant role for self-regulation, and a key supervisory role for the regulator, one business leader interviewee stated\textsuperscript{259}:

\[T\]he empowerment within the financial services sector, the empowerment of the compliance function, of the seniority of the compliance function, and the effective self-policing authority, within a financial services company is the crucial answer........... the key issue is for the [regulator] to insure and to look at the cultural development of the companies in question in terms of their remuneration strategy, in terms of the obligations, in terms of the power of the compliance function to veto transactions where necessary.

Another dissertation interviewee, similarly advocating a mixed collaborative approach but considerably broadening the catchment, observed of professional integrity systems\textsuperscript{260}:

You need to spell out ethical standards. It’s a form of co-regulation (market and regulator jointly discuss and determine the standards). This is the velvet glove. [The] corporation/actor specifies their commitment and [the] regulator prosecutes if [they] deviate, on the basis the infringement is ‘unconscionable conduct’. And the place to start this is against those with fiduciary duties namely lawyers and accountants.

Within the velvet glove therefore, market actor behavioural motivation stands all important. Bottoms theoretically outlined four motivations from criminological literature including calculated self-interest, constraint, morality and routine\textsuperscript{261}. According to post crisis investigative interrogation, excessive risk taking at top board level may be ascribed to broad behavioural and cultural drivers, where dominant executive personnel overly believe in their own strategies, rather than by rationalising around financial incentives\textsuperscript{262}. Regulatory literature contends that, motivations extend beyond mere amoral profit maximisation, as Marxist and economic theorists suggest. Instead, the literature recognises, responsible social positions including reputational concerns, understandable fear of detection and legal punishment, moral duty and, when the perception is that regulatory procedures are fair, even establishing and keeping standards beyond what regulation demands. This realisation does not however, adversely impact the earlier claim

\textsuperscript{259} Interviewee Z Business Leader England 29 November 2012.
\textsuperscript{260} Interviewee E Academic Australia 22 March 2012; also see Prosser Law and the Regulators (n 21) and Haines The Paradox of Regulation (n 14) for instance as discussed more fully in Appendix K.
\textsuperscript{261} See Bottoms ‘Morality, crime, compliance and public policy’ (n 247), 29-32. Also see P Cohen, Modern Social Theory (Heinemann Educational 1968). See Appendix K for an extended note..
\textsuperscript{262} See ‘The Turner Review’ (n 2).
that financial markets are criminogenic. It is the market that has this characteristic, drawn from many sources as demonstrated, albeit adversely impacted by the behaviour of the unruly minority, the behaviour of market actors generally being impacted by a range of sources.

Drawing upon a host of authorities across a wide range of policy areas – in a ‘crystallization of illuminating empirical scholarship’ – Parker and Nielsen\(^\text{263}\), their contributors and others, very recently identified and reached conclusions upon each of four business motivation/response categories\(^\text{264}\). For instance, Kagan et al identified three interacting motives, economic (material), social and normative, as aiding compliance and even ‘beyond compliance’\(^\text{265}\). Citing numerous authorities, Parker and Nielsen confirm the orthodoxy, that compliance behaviour is affected by economic and other resources, technical knowhow, legal knowledge, and managerial capacity and oversight\(^\text{266}\).

Furthermore, beyond externally driven pressures around impending regulation introduction or reform, compliance influence has been found in internal factors such as firm size, internal compliance support, and the history, if any, of engaging with third party activists or commentators\(^\text{267}\). Compliance behaviour is also influenced by regulatory enforcement strategy and style. Institutional influences come from three sources, according to Parker and Nielsen, the external regulative (laws and rules); internal, societal, and interactive, internal and external normative (norms and values); and the cultural cognitive (administrative practices and routines) across regulatory relationships including peers, stakeholders and consumers. Significantly, firms perceive and respond to multiple strands of simultaneous regulatory action, May and Winter have concluded, and

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\(^{263}\) C Parker and V Nielsen (eds), Exploring Compliance Business Responses to Regulation (Edward Elgar 2011).

\(^{264}\) See Parker and Nielsen (n 263) and Appendix K for an extended note.

\(^{265}\) See R Kagan N Gunningham and D Thornton, ‘Fear, duty and regulatory compliance: lessons from three research projects’ in C Parker and V Nielsen (eds), Exploring Compliance Business Responses to Regulation (Edward Elgar 2011) as discussed more fully in Appendix K.


thus, a nuanced and plural enforcement style is apposite. In a very important and newer strategic development, employee whistle-blowing as a form of ‘regulation’, its potential rewards, and its affect upon cooperative compliance outcomes must be factored into both internal and external explanations of compliance, since the actions or potential actions of such help to construct the overall compliance culture and approach of the firm, and the prosecutor’s approach to enforcement.

The GFC has exposed the market as crisis endemic and criminogenic, the market domain as a unique and vital function of economy and society, the behaviour of market actors as being standards-benchmarked from a diversity of sources, and crisis systemic effects as adversely impacting the very fabric of society. Civil society is justified therefore, in mobilising the criminal law and regulation both to impose standards and to prevent and protect against systemic market harms, where moral guilt must be proven. Offender categories which investigators must consider cover a wide spectrum as one dissertation interviewee stated:

\[Y\]ou get people who are incompetent, you get people who are careless, you get people who are reckless and then you get people who are simply bad minded and criminal. And you have to cater for that entire spectrum.

The central issue is: how best to maximise enforcement for welfare protection, while still sufficiently maintaining individual market autonomy. Pragmatism and flexibility have emerged as important considerations. Within a new collaboratively formulated contract, co-regulated standards, and the fiduciary principle with a wider extension, promise benefit to a variety of market actors. Recognition that most market actors abide reputational, regulatory, and business constraints provides a useful backdrop to such collaborative consultation, establishes a moral legitimacy for sustainable support of regulatory reform, and promises market actor return from even-handed accountability and transparency innovations. Current Irish Supreme Court judge, McKechnie J, encapsulated the issue thus post-crisis: ‘Assertive, even aggressive enforcement will be welcomed, but

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270 By way of contrast to the deterministic, strict-liability model, so far unused in financial regulation in Ireland, as espoused for instance, by E Ferri, Criminal Sociology (Little Brown 1905), a strict scientific positivist. Of such principle, see the opposing Radzinowicz History (n 25), 53 quoted in Appendix K.

271 Interviewee L Judiciary Ireland 7 January 2013.
heavy-handedness and overzealous behaviour risks undermining that moral legitimacy critical for sustainable support.

Such support is needed from the control subject, the ethical RFSP. He as an individual, or it as a corporate entity, is a specialist knowledge expert, industry licensed, who must account to licence conditionality and ethical standards, and who as an executive at upper echelons carries out controlled functions and often self-polices and reports. As an innovator, market leading, and market risk creating and managing, he is imbued with expert specialist knowledge both tacit and explicit. He must be accountable and transparent as a subject of control. Post crisis, market licence and its codes and conditionality – authorisation and limitation - are the primary explicit part where standards are set for the regulatory contract for both the expert RFSP and the expert regulator. Following self-regulation, regulation and market failure, RFSPs by invitation limited autonomy and extended restriction power to the state, namely, civil society and its control agents. Regulators too, acknowledged in regulatory failure, impose and are subject to their own restriction. Purposive reform, therefore, of market standards as set and enforced by regulatory law are necessary.

1.2.6. Summary

A compelling combination of reflexively interacting reasons already and yet to be, explored, grounds my proposition that financial markets enjoy a unique, vitally important and special position in society, especially post-GFC; and further, that they require a special enforcement regime where the law buttresses ethically moral behaviour purposed to compliance. These reasons include that:

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273 See peppered throughout this dissertation statements by, references to, and diverse elements of and reasons for, this proposition, located in a wide-ranging cadre including: Ayres and Braithwaite (n 90); Croall White Collar Crime (n 87); Devlin The Enforcement of Morals (n 225); Foucault ‘Governmentality’ (n 579); Freiberg The Tools of Regulation (n 119); Hart The Concept of Law (n 123); Laufer ‘Secrecy, silence, and corporate crime reforms’ (n 80); J Locke, A Letter Concerning Toleration (Tully J ed, Hackett 1983) (n 312); Macrory Review (n 122) and Macrory ‘Reforming Regulatory Sanctions ’ (n 120); Norrie Crime, Reason and History (n 211); H Packer, The Limits of the Criminal Sanction (Stanford University Press 1968); Weber The Theory of Social and Economic Organisation (n 66); Yeung Securing Compliance (n 437). In practise the provision of an enforcement binary for financial regulation even pre-crisis was recognition of uniqueness.
(i) The economy enjoys a unique and fundamentally important place within civil society and is not dis-embedded from it, while a stable financial system is a vital public good;

(ii) The capitalist market system is criminogenic as defined and extensively explored;

(iii) Crises are market endemic where boom and bust cycles conflict with trends, and the market-centric market risk is oft-times unpredictable;

(iv) Market sentiment, confidence and trust are paramount and as a priority must be maintained;

(v) Market restriction is based in societal consent, expressed through laws perceived as legitimate, and not just in market consent. The GFC highlighted the need for reform and presented the ideal conditions for it, the reform agenda requiring a new regulatory contract, with the newly informed and aggrieved taxpayers of last resort a fundamental consideration for the new contractarianism;

(vi) RFSPs operate under the market-constitutive authority of licence privilege arising from a consensual application to a state control authority with powers over entry and continuation subject to conditions;

(vii) Post-GFC market actors asked for greater state intervention and thus clearly consented to it;

(viii) The markets encompass Expert to Expert relationships not a David v Goliath gulf;

(ix) Autonomy is the key norm with restriction parasitic for both markets and coercive control, in an environment where all three shifting paradigms are still restless post-crisis;

(x) The concept of coercive control, as revealed in the literature via diverse ideological proponents, recognises that in times of need that special coercive
arrangements are legitimately acceptable for sectoral application when universally applied across such sector, and I argue that a reformed financial regulatory interplay strategy seeking greater market actor compliance lands four-square within this concept;

(xi) As a matter of practice, inter alia, white collar business crime is perceived and treated differently as a sub-species, regulatory and arbitral rhetoric reflects difference, and unique financial regulatory enforcement regimes exist.

To this point the GFC and the separate Irish crisis have provided the catalyst for reform interrogation. A thorough examination of financial markets and their workings has revealed discrete issues and features for further reform focus. The markets have been demonstrated to be criminogenic or prone to criminogenic tendencies; they have also been revealed as vitally important to society and as requiring a discrete financial regulatory regime replete with the highest of standards and values. To assist in establishing principles and processes to underpin and implement such a standards-and-values-based regime, the identification and design of a normative theoretical framework is next undertaken in Part 1 Chapter 3, preparatory to its application in Part 2 across three select connections between the two coercive control paradigms, the criminal law and regulation.
Chapter 3: The Normative Theoretical Framework

1.3.1. Introduction

This section engages the fundamental theoretical concerns relevant to this dissertation. Within the reform context, and an instrumental marriage of theory and practice, a normative analysis approach is adopted throughout with an overview provided. Impacting all three paradigms, the market and the coercive control pairing, the overarching values of autonomy and restriction are examined in some detail. It is here that the welfare justification for regulation is located. This in turn introduces the modern control domain and concept, preparatory to identification and exploration of select elements of the connective tissue for the policing pairing. Finally, a modern normative theoretical framework is presented, and analysed, ready for application to the substance of Irish financial services practice and policy, and a conclusion setting out what reforms are needed.

1.3.2. Overview: A Normative Approach

The debate about crime, the criminal law which prescribes, and, criminal justice which systemises its process to sanction, arises at three levels: the historical, the sociological, and philosophical. Regulation, the offspring of the criminal law concept, draws from the same well, deploying as an instrumental welfare restriction. At all three levels, law and thus regulation, is a normative system, a rule of law originated in norms, and in turn generating its own values. On occasions, the same norms underpin both market and coercive control, on others they differ, and even so between the control binary poles. Norms/values and laws reflexively impact each other, while laws, which grow out of national culture and society, effect norm change with the aid of social persuasion and

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274 Ashworth *Principles of Criminal Law* (n 97); Dicey (n 25); F McAuley and JP McCutcheon, Criminal Liability A Grammar (Round Hall Sweet and Maxwell 2000); Norrie *Crime, Reason and History* (n 211); Polanyi (n 62); Radzinowicz *History* (n 25); Wells and Quick (n 180); L Zedner, *Criminal Justice* (Oxford University Press 2004).

275 See Dicey (n 25) as discussed more fully in Appendix K.

276 Ashworth, *Principles of Criminal Law* (n 97); Dicey (n 25); Weber *The Theory of Social and Economic Organisation* (n 66); Wells and Quick (n 180); Zedner (n 274). Also see J Habermas, *Between Facts and Norms* (MIT Pres 1998),125 as quoted in Appendix K; and GW Hogan and DG Morgan, *Administrative Law in Ireland* (4th edn, Round Hall 2010) as discussed more fully in Appendix K.
The legal system delegated to financial regulation, as part of its constitutive function, has power to define the market zone, authorise and impose conditionality upon consensually sought market entry and continuation and determine/impose market exit, and additionally delimit market control boundaries. Social notions of the rule of law as framed by Dicey, and based in national legal culture, such as Packer’s due process obstacle course, permeate the financial regulatory enterprise, where the legal system exercises a gigantic goods and resource rationing role. In terms of the criminogenic market, the paradoxical task is to nurture a culture which supports market behaviour, but also restricts or qualifies it via sufficiently powerful control institutions unguided by market norms. A link between the legal system, and its social environment which includes the markets, is necessary. Messner and Rosenfeld encapsulated the dilemma:

*The market promotes crime when the freedom of action that it encourages is left unchecked by considerations of collective order and mutual obligation. Political and social values, likewise, assume degraded forms in the absence of attention to individual rights and liberties.*

Values, beliefs and norms underpin the binary paradigm, and are an essential part of any new regulatory contract construct, including its enforcement forms which are the dissertational focus. Expresssed to the individual, including the corporate form, they are found in differing degrees, and here are expressed across three categories. There are a priori values expressed as individual rights, so fundamental that they are absolute rights which cannot be removed. Hobbes and Locke called them natural or God-given rights, Pound expressed them in five jurisprudential postulates related to harm risk, Fuller eight principles underpinning the rule of law, Dworkin propounded basic liberties, Sen

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279 See Messner and Rosenfeld (n 171). Also see Ayres and Braithwaite (n 90).

280 See Messner and Rosenfeld (n 171), 24.

281 See generally from a vast literature: Bottoms ‘Morality, crime, compliance and public policy’ (n 247); P Charleton PA McDermott and M Bolger, *Criminal Law* (Butterworths 1999); Dworkin *Taking Rights Seriously* (n 61); M Forde, *Constitutional Law* (2nd edn, First Law 2004); Fuller *The Morality of Law* (n 230); Habermas (n 276); T Hobbes, *Leviathan* (1651, Macpherson CB (ed), Penguin 1968); Hogan and Whyte (n 238); Locke *Two Treatises of Government* (n 73); Packer (n 273); PJ Richardson, (ed.) *Archbold Criminal Pleading, Evidence and Practice* (Thompson Sweet& Maxwell 2006); D Walsh, *Criminal Procedure* (Thomson Round Hall 2002).
advocated human rights of universal application, Rawls ‘justice’, and the US and Irish Constitutions fundamental rights derived under God from the people282. These include the rights to life, liberty, health and property. Being absolute rights, as values they therefore sit outside and above the instrumental Kuhnian paradigm concept, but heavily influence its construct.

Then there are rights and/or principles, some too regarded as fundamental, declared such by legitimate authority, such as the EU freedoms of establishment, and free movement of goods, services, persons and capital which underpin the fundamental EU notion of the single, integrated market283. When expressed as constitutional law, they emanate from political, fiscal or legal instruments, and regulate political, and its delegated action, including rule-making regarding domestic financial affairs284. As constitutional norms, they both establish state structure, and limit state power, as well as providing rights-based protection for the citizen in her relationship with the state. Nonetheless, and although describable as a form of super-law they are amendable, and thus, Kuhnian paradigm inclusive285. In Ireland, the amendment process entails popular referendum, a form of expression representing explicit social contract making. Furthermore, while subject to judicial interpretation, it has been recognised that the relevant case law reveals a multiplicity and inconsistency of interpretive approaches286.

Finally, there are norms expressed as rights, generated within legal process or method, often declared such by legitimate judicial or regulatory authority287. These include procedural protections, including accountability and transparency, discretionary decision-making which relies heavily upon the previous two, adversarial justice a mobilisation

282 Dworkin Taking Rights Seriously (n 61); Fuller The Morality of Law (n 230); Hobbes (n 281); Locke Two Treatises of Government (n 73); Pound (n 225); J Rawls, A Theory of Justice (Harvard University Press 1999) and J Rawls, ‘Justice as Fairness’ (1958) 67 Philosophical Review 164.

283 See TFEU articles 65-71. Also see Craig and de Burca (n 109); A Klip, European Criminal Law an Integrative Approach (2nd edn, Intersentia 2011); T Tridimas, The General principles of EU Law (2nd edn, Oxford University Press 2006). Further, see Commission Report, ‘On the Application of the EU Charter of Fundamental Rights (2012), 95 which contrasts between absolute fundamental rights which cannot be restricted, and those other rights including the article 50 right not to be tried and punished twice, which can be restricted where justified by the principle of proportionality.

284 See Forde Constitutional Law (n 281); Hogan and Whyte (n 238). Also see H Kelsen, General Theory of Law and State (1949), 63 who stated: ‘Law is the primary norm which stipulates the sanction’.

285 See Forde Constitutional Law (n 281); Hogan and Whyte (n 238).

286 Hogan and Whyte (n 238), 3 and footnote 1 thereof where the five relevant approaches are set out as are extensive authorities.

strand where the presumption of innocence is fundamental, double jeopardy prohibition one enforcement pathway, and Packer’s due process obstacle course including the right to silence. Most have been ‘real crime’ originated, are accused-centric, forged to proportionality, and purposed to equalise the power divide between the all-powerful state and the consenting, yet less powerful, individual. Some, over time, become elevated to constitutional values, and as such are subject to prioritisation considerations and societal balancing. These real crime rights, as part of control trends, impact both attitudes toward and treatment of elite crime, sometime regarded as victimless or being more like civil wrongs, but more lately as warranting special attention.

1.3.3. Over-arching Values: The Autonomy/Restriction Tension

The normative key, and thus the starting point for the normative framework is autonomy, according to Habermas, rather than well-being restriction, an argument I adopt. Equally, I accept Polanyi’s restriction as counter-movement supplementary. Habermas has argued that a just society concept incorporating equality is connected with emancipation and human dignity, and has concluded:

*The distributive aspect of equal legal status and equal treatment – the just distribution of social benefits – is simply what results from the universalistic character of a law intended to guarantee the freedom and integrity of each.*

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288 See Packer (n 273), 173. See also for instance, Part 2 Chapter 2 section 2.2.2 ft 765 regarding the presumption of innocence and its journey to become a constitutionally protected right. See Appendix K for more.


291 See Habermas (n 276).

292 See Polanyi (n 62).

293 See Habermas (n 276), 418. Also see Dworkin *Taking Rights Seriously* (n 61).
The dyadic individual autonomy (liberty) and welfare (restriction) counter-balancing tension, is not alone fundamental to market theory and its control, but they also developed simultaneously. The liberal position was regarded by Radzinowicz as a foundational contribution to the architecture of modern criminal justice. In the case of the former autonomy theory, the rationale is protection of individual interests from collective and state interests. It has two perspectives: firstly, the factual namely that the individual enjoys free will; secondly, the normative where the individual is respected as a moral agent. The religious tradition is clearly evident. Later, liberty theory was rationalised from a class society for a class society, and, although influenced by it, is a self-interest remove from the ancient republican libertarian notion steeped in public good. Modern individual autonomy theory has decried extending criminalisation or overregulating as an ‘evil’ threat, and leading to injustice, has espoused a minimalisation of restriction imperative, and as expressed within Packer’s due process model has been accused-centric and rights-based in its protective socialisation of individual rights. Individualisation and self-interest are at its very core. The individual victim however, has only emerged as a consideration within the last two decades alongside restorative justice demands. The nub of this theory therefore, centres upon what minimal restrictions and protections are legitimately justifiable upon self-interest, in the public or civil society interest.


295 D Garland, ‘Ideology and crime: a further chapter’ in A Bottoms and M Tonry (eds), Ideology, Crime and Criminal Justice – A symposium in honour of Sir Leon Radzinowicz’ (Willan 2002). Also see Radzinowicz History (n 25), 127-128 as quoted in Appendix K.

296 See Ashworth Principles of Criminal Law (n 97). Polanyi for instance, highlighted the dangers of reliance upon market mechanisms (self-regulation) in organising economic life, and argued that free market rein was self-destruction; for him, capitalist societies responded to the social devastation of such by developing welfare capitalism, a means of re-embedding the economy by regulating markets. See Polanyi (n 62); and see Messner and Rosenfeld (n 171).


298 Ashworth Principles of Criminal Law (n 97); Coffee jnr ‘Paradigms Lost’ (n 252); D Husak, Overcriminalization: The limits of the Criminal Law (Oxford University Press 2008); Packer (n 273), 153. And see Appendix K for more.

299 See Beck Risk Control (n 171); S Kilcommins I O’Donnell E O’Sullivan and B Vaughan, Crime, Punishment and the Search for Order in Ireland (Institute of Public Administration 2004), 6 and see Appendix K for more.

The ideas of the two seventeenth century English philosophers, Hobbes and Locke, underpin the autonomy and restriction theories\(^\text{301}\). Although contractarianism was Hobbes ideation, he eschewed a separation of powers and propounded a sovereign or regal authority with absolute power ceded by the populace, and where the risk of abuse of power was part of the contract price\(^\text{302}\). Nonetheless, his championing of the individual and the equality of man, and the notion that political power was grounded in the contractual consent, was extended beyond politics into the markets, and their coercive control conceptualisations\(^\text{303}\). Modern argument supportive of the social contract, the rights of the individual, and the curbing of state power however, although introduced by Hobbes, were developed by, and thus draw mainly from Locke\(^\text{304}\). His perspective spanned the boundaries of politics, law, society and economics, and in turn influenced each. While both Hobbes and Locke rejected anarchy, they differed as to the checks and balances applicable to the legitimate exercise of sovereign/state power. For both, rationality was pre-eminent\(^\text{305}\). Heavily influenced by their revolutionary times, they in turn heavily influenced political, market and legal control paradigms\(^\text{306}\). Locke promulgated a positive theory of government, where force and violence were secondary to antecedent God-given natural rights, and the social contract, founded upon an implicit transfer of some of those rights by the population to a central government\(^\text{307}\). Political economy later conceived civil society as a sphere of commodity exchange governed by economic law\(^\text{308}\). In the US a written constitution with Lockean fundamental rights

\(^{301}\) Both Oxford educated and abstract philosophers as discussed more fully in Appendix K.

\(^{302}\) See Hobbes (n 281). The social contract theory is a process whereby citizens vest authority in the state in order to maintain order; the criminal law protects individuals and their property by prosecuting and punishing offenders, provides for efficient functioning of society and ensures predictability in accordance with the rule of law.

\(^{303}\) Drawing from hypothetical abstractions which he built upon, and relying upon a methodology he learned from Galileo, the ‘resolutive-compositive’ method, Hobbes introduced the four famous concepts of state of nature (no restraints), right of nature (liberty), law of nature (self-evident prescriptive rules discovered by reason), and the social contract (where man out of self-interest transfers his power to an authority in return for protection). See MacPherson (n 294).


\(^{305}\) See Appendix K for more.

\(^{306}\) See Appendix K for references and more discussion and explanation.


\(^{308}\) See Habermas (n 276), 45 as quoted in Apendix K.
provisions, notably the private right to property, and separation of executive, legislative and judicial powers, spawned imitators including the 1937 Constitution of Ireland\textsuperscript{309}.

For Locke, political power or civil government, where coercive laws are made replete with sanctions, was only acceptable for the public good and under three circumstances: for regulating and preserving private property, for employing the force of the community, and for defending the commonwealth from foreign injury\textsuperscript{310}. The government and the populace effectively owe each other duties, protection is guaranteed for the governed, and justice is an essential societal mediator. The institutional authority may legitimately punish since the existence of a natural executive right to so punish is citizen conceded\textsuperscript{311}. The God-given right of survival for Locke included the means to that survival, namely life, health, liberty and property, and for him the Golden Rule was that violation of the individual’s rights, or civil interests, by the government or violation between individuals was outlawed\textsuperscript{312}. Such violation in economic terms arose once money, and the inequalities its unlimited accumulation breeds, entered the economy\textsuperscript{313}. Effectively he recognised money society to be criminogenic. Within Locke’s restriction concept, law mediates, it commands what is best for man, it is a rule of law enjoying an independent autonomy, and it is devised by reason. However, punishment, as opposed to reparation, to be just must be proportionate, and state imposed, although as relevant to financial market offences may both disgorge the offender’s illegally taken profit and deter others\textsuperscript{314}. In essence, he advocated the protection of accumulation by restriction, and not the restriction of accumulation, innovation and enterprise. His concept however, envisaged a minimal protection for the individual self-interest, rather than the man-claimed maximal protection.

\textsuperscript{309} Nineteenth century criminal justice evolved a little differently in Ireland due in particular to responses to agrarian agitation and crime see Scott ‘Regulatory Crime’ (n 25). Also see the Irish Constitution (1937); Universal Declaration of Human Rights, General Assembly of the United Nations, 10 December 1948; Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Rome Italy, 4 November 1950 <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-de13-4318-b457-5c9014916d7a/0/convention_eng_web.pdf>. See the enlarged footnote in Appendix K.

\textsuperscript{310} See MacPherson (n 294); S Kilcommins and B Vaughan, ‘The Rise of the Regulatory Irish State: A Response to Colin Scott’ in S Kilcommins and U Kilkely (eds), Regulatory Crime in Ireland (First Law 2010), 90 refer to public protection and security as essential goods of the criminal justice system, and argue that this includes protection from white collar crime. See the enlarged footnote in Appendix K.

\textsuperscript{311} Locke Two Treatises of Government (n 73); JA Simmons, ‘Locke and the Right to Punish’ in T Brooks (ed), Locke and Law (Ashgate 2007).

\textsuperscript{312} See Locke Two Treatises of Government (n 73), paragraph 6 and J Locke, A Letter Concerning Toleration (Tully J ed, Hackett 1983), 26 both quoted in Appendix K.

\textsuperscript{313} See Adelman (n 65); AJ Leddin and BM Walsh, The Macroeconomy of the Eurozone (Gill & Macmillan 2003).

\textsuperscript{314} See Locke Two Treatises of Government (n 73), paragraph 12 quoted in Appendix K. Also see Simmons (n 311).
of today. Thus, as an absolute right and paradigm superior, property is subject to degree qualification, and in that condition paradigm inferior and subject to shift. So too is liberty subject to shift in times of emergency.

Within Locke’s worldview, the three-fold legitimate functions of a civil government include preservation of citizens’ natural property rights, prosecution and punishment of citizens who violate the rights of others, and, pursuit of the public good even where conflicting with individual rights. To do this, an impartial arbiter separate from the civil government, found constitutional embodiment in courts of law, operating the rule of law as a separate yet dual autonomy and restriction. This rule of law conception was later defined by Dicey to include four essentials, all of relevance to binary interplay and potential fusion: equality of all citizens before the law; uniformity of independent courts; the non-availability of reason of state as a lawful excuse; and, no crime, and thus no punishment, save where legally prescribed.

Within the market milieu, clearly for centuries espousing Locke’s autonomy philosophy as laissez-faire, law must rule, and may both sanction breach of the societal and/or regulatory contract, drawing from a diverse sanction suite, and protect market actors in their lawful endeavours. Indeed, such market ideology either pre-dated or arose contemporaneous to Hobbes social contract ideation, while the criminal law grew alongside them, each reflexively feeding each other. Thus, a far-seeing Hobbes drew inspiration from bourgeois market society as it emerged to replace the old hierarchical order. Man’s value became market value determined, an objective value not based in customary hierarchical force, while man theoretically enjoyed equal legal rights to use or offer his power in such market, or indeed generate the market. Here lies the essence of the resistance of elite market actors to regulation/restriction. Man became market autonomous, espoused market forces which inter-supported his autonomy, his equality,

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315 In Crotty v An Taoiseach & Others [1987] ILRM 400 (SC) for instance, in a post EU accession context, the Supreme Court inter alia held that where the Government acted beyond the powers entrusted by the Constitution to it, then the courts were the sole arbiters upon breaches of constitutional constraints, and they were obliged to retrain the Government from so acting.

316 R Michener, ‘Foreword’ in AV Dicey, Introduction to the Study of the Law of the Constitution (Liberty Fund 1982). Dicey drew upon comparative, empirical constitutional material from England, the US and the continent. The final requirement above is often referred to as the ‘legality’ principle.

317 See MacPherson (n 294), 58 and Radzinowicz History (n 25), Vol 2 Preface vii and also see Gill (n 294), 534 as set out in Appendix K.

318 See Habermas (n 276); MacPherson (n 294).
and their source the market, developed a presumptive preference for private (contract) market ordering and self-regulation, and grudgingly ceded minimalist restriction rights to the state as the protective social contract party. In Dicey’s rendering, man’s private rights are the source of the constitutional code, enhancing the supremacy of the market autonomy notion. In Polanyi’s view the laissez-faire of Smith was society based, and economic liberalism only recognisably emerged beyond a ‘spasmodic tendency’ in 1820, although others assert a debt culture borne of this liberalism of greater longitude. Thereafter in Polanyi’s view, the economy-society developed as the new laissez-faire and became a militant creed, enforced by the state, where increased state regulatory bureaucracy paradoxically, both de-regulated restriction, and institutionally enabled the creed to flourish. The newer de-regulatory three decade period which commenced in the 1980’s, and ended with the GFC, where market rapture in a private-public ordering prevailed, resonates with this analysis as a later market corrective oscillation. Thus, even now in the latest reform era post-GFC, an era of corrective welfare oscillation in the public-private mode, any criminal or regulatory law seeking to regulate such markets, deemed so fundamental to man’s economic and social rights, must for legitimacy and consensual ordering, engage man’s well-entrenched, if not embedded, market freedoms, rights and interests. And, any post-crisis reform proposals, a new control model, will require collaboration to maximise efficiency and efficacy, when imposing agreed restriction, in a new form of regulatory contractarianism, where a social bond is formed and strong interests are involved. Since market elites are concerned, because no-regulation, de-regulation or self-regulation, have to date been their preference, any new contract discussions can only off-set their viewpoint by state power enhanced by dramatic

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See Polanyi (n 62), and the enlarged footnote in Appendix K.
See Dicey (n 25), 121 as quoted in Appendix K.
See Polanyi (n 62), and the enlarged footnote in Appendix K.
See extended footnote 321 above for detail. Also see Plumb (n 304), and the enlarged footnote in Appendix K. As Polanyi has asserted labour became the last market to be organised.
See Bottoms ‘Morality, crime, compliance and public policy’ (n 247), 23; also see D Beetham, The Legitimation of Power (Macmillan 1991). See Appendix K for more.
See T Hirschi, Causes of Delinquency (University of California Press 1969); Bottoms ‘Morality, crime, compliance and public policy’ (n 247), 38 and Croall White Collar Crime (n 87), 140 as set out more fully in Appendix K.
GFC effects, and the elites own explicit invitation to bail them out. This amounts to an implicit concession that further restriction trade-off is acceptable and beyond moral critique. In any collaborative negotiation, this same invitation/concession will ground the sectoral nature of the restriction, and its terms, upon the universal freedom right.

This introduces the conflicting or oppositional Welfare theory, where the social context and the common good, or public good as Locke framed it, are the claimed justifications for rights restrictions and protections. Also based in contractarianism, welfare is about state protection. Polanyi described it as a protective countermovement purposed to create stability, and to resist the dis-embedding of the economy from society, which unless checked may itself create a dangerous political-economic stalemate. Packer also highlighted stability and continuity within his oppositional values complexes, situating them within the constitutional framework and underlying unarticulated assumptions. Habermas characterised market restriction in terms of self-stabilisation. As a negative restriction, welfare is the antithesis of autonomy, the tension in dialectic terms yielding the public interest synthesis. But paradoxically, welfare is also to be found in autonomy. After all licences by definition simultaneously allow and restrict. Here it is proactive and positive, affording autonomy through its protection and prevention mandates. Indeed, these two competing principles may simultaneously operate to benefit the same market actor, for instance in providing freedom or licence to operate on the one hand, and enhanced market reputation by eliminating the recalcitrant, or by regulating to encourage increased consumer activity, on the other. Thus, there is inter-twined competing power, to use Hobbes’s analogy, in production of the synthesis. Relating to the market, this power competition fluctuates, the paradigm shifts, due to market and other forces. Pre-GFC power lay in the market, but passed to the state due to crisis effects, where significantly market actors themselves voluntarily sought state protection or deliberately adopted a moral hazard position, and now await a new collaborative future.

Furthermore, this power conflict enables welfare to identify the harm risks, for regulatory

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326 See Appendix K for a very full substantiation concerning the market elite invitation and its effects.
327 See Polanyi (n 62). Also see Ayres and Braithwaite (n 90) whose Responsive Regulation Theory is based around breaking the stalemate between business self-interest and common good regulatory restriction.
328 See Packer (n 273).
329 Habermas (n 276), 44 from a socialist if not Marxist stance, in similar vein critiqued autonomy as restriction. See Appendix K for more.
330 See footnote 324 above.
actors, regulators and civil society, and thereafter to mandate its offence prescription and ascribe condign punishment for breach. This in turn, due to its potential benefit to civil society, provides legitimacy for the restriction. All gain except the wrongdoers, actors which not even the staunchest of autonomy advocates want in market activity.

Clearly however, within and between these two broad rubrics of autonomy and welfare there is a great deal of scope for lobbying, special pleading, and political and social manoeuvring. This tension and its machinations, produces a definition of the public interest which shifts, as civil society and its self-interest groups gain or lose power ascendency. If Polanyi is correct in his assertion however, that society includes the economy, and should not be dominated by it, and that the changelessness of man is as a social being, where his economy is submerged as a rule in his social relationships, then tension resolution will always fall upon the side of the collective interest. But for almost two centuries it has not always done so, and calls for coercive intervention increased post-GFC.

Of central concern to the research questions and this tension, Husak has condemned over-criminalisation as pernicious and unjust, because it produces too much state punishment, some of which is excessive, and some of which arises from conduct which should not be criminalised at all. Welfare at common law spoke to ‘real’ crime, and did so in protection terms, but with the advent of statute and increasing sophistication in its techniques, the harm focus broadened. Statute now often stipulates statutory objectives, or mechanisms for their non-statutory establishment. In the case of EU financial legislation such as Directives the EU Commission is particularly vigilant to set out the detailed and extensive harm rationale in preamable, and in domestic transposition also demands a justificatory preambled statement of purpose, while financial regulation has moved beyond the real crime protection to include prevention also. When viewed in this light it is disappointing that ‘regulatory offences’, and especially financial regulatory

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331 See Polanyi (n 62).
332 See for instance, P Hinton and R Patton, ‘Trends in Regulatory Enforcement in UK Financial Markets Fiscal Year 2011/12’ (Nera Economic Consulting Report 2012) <www.enforcement trends.com> accessed 14 January 2014 in which it was highlighted that in the UK stg£19.8 million total fines 2011/12 imposed on individuals exceeded the amount levied by the UK FSA in all prior years from 2002/3 combined.
333 See Husak Overcriminalisation (n 298). Over-criminalisation here may be taken to include over-regulation also.
334 See I McLeod, Principles of Legislative and Regulatory Drafting (Hart 2009).
offences, are not discretely defined, especially since statutory mandates in the financial regulatory area have been\textsuperscript{335}.

Oscillating variation or shift in the power balance within the autonomy/welfare tension enhances Husak’s argument that ‘justice’, Locke’s rule of law, must be the standard against which punishment and criminalisation should be measured\textsuperscript{336}. The Irish Constitution also reflects this justice administered by courts standard\textsuperscript{337}. Of course, obvious issues arise around the meaning of ‘justice’ and its borders, provenance, and the nature and legitimacy of its defining authority. Many have lauded an ‘objective’ criterion or mediator. Who or what would do it of course has led to much scholarly rancour. For Locke, the government established by the voluntary consent of the populace, albeit the consequence of economic inequality, must be based in the will of the majority, and allow for resistance without anarchy\textsuperscript{338}. The notion of the simple yet skilled ploughman of agrarian capitalism was promulgated almost two hundred and fifty years ago\textsuperscript{339}, from the same source came the impartial spectator absent contract participation\textsuperscript{340}; while the civil law has relied upon the ordinary or reasonable man simulation, drawn from an economic under-class who frequents the Clapham omnibus and who has spawned many imitators\textsuperscript{341}. More recent philosophers and others, still drawing upon the contractarian insight, have extended the objective mediation pool to the widest consensus or participatory

\textsuperscript{335} See Connery and Hodnett (n 6); McAuley and McCutcheon (n 274); J McGrath, ‘The Colonisation of Real Crime in the Name of All Crime: The Traditional Court Approach to the Definition of Crime’ in S Kilcommins and U Kilkely (eds), \textit{Regulatory Crime in Ireland} (First Law 2010). There is a more complete discussion of ‘financial regulatory offences’ in Part 2 Chapter 3 section 2.3.2. In the broader twin-peaks Australian approach, the key drivers are financial safety and systemic stability as grounded in one regulator (Australian Prudential Regulation Authority), and market integrity and consumer protection in another (Australian Securities and Investments Commission). As to Ireland, and its single regulator, Interviewee C Regulator Ireland 6 February 2013 stated: ‘[W]e do have a markets mandate and if you look through the objectives of the Central Bank there is a markets mandate in there. Our mission statement is safeguarding stability and protecting consumers. We could have said something about markets but it was to get something quite snazzy inside and then they started off as the prudential and the consumer but they are not the only things. We have to make these our statutory objectives’.

\textsuperscript{336} See Husak \textit{Overcriminalisation} (n 298); Locke \textit{Two Treatises of Government} (n 73), paragraph 19; Rawls \textit{A Theory of Justice} (n 282) and Rawls ‘Justice as Fairness’ (n 282). And see Appendix K for more.

\textsuperscript{337} Article 34.1 provides: ‘Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and........shall be administered in public’.

\textsuperscript{338} For Locke, at the political level the majority may establish monarchy, oligarchy, or democratic republic as in Ireland.

\textsuperscript{339} See A Smith \textit{Wealth of Nations} (n 63).

\textsuperscript{340} A Smith, \textit{The Theory of Moral Sentiments} (first published 1759, Haakonsen K ed. Cambridge University Press 2002). Also see Polanyi (n 62) and Sen ‘Normative Evaluation and Legal Analogues’ (n 277).

\textsuperscript{341}McQuire v Western Morning News [1903] 2 KB 100 (CA) at 109 per Collins MR.
democracy. Habermas suggested new elements of participation and control, including domain-specific public spheres, which clearly includes a new collaborative sanction binary within a regulatory setting. Suggesting a link between morality or norm-making, and the mutual sympathy among individuals and the society to which they belong, Smith argued for in-built ‘fair play’ likelihood.

Another option is EU network governance. This engages webs of dialogue, where absent coercive means, complex interdependency motivate to agreement and compliance, including praise and shaming rituals. The recognised downside is the potential for opaqueness damaging democratic legitimacy. A potential solution offered to that is accentuating public goods via a robust legal framework. The literature traces the bearer of the public interest to three sources: minimalist where regulators network within closed settings and negotiate and bargain; middling where watchdog non-governmental agencies or official and expensed stakeholder groups promulgate the interest, the latter an EU preference; maximalist where democratic steering based in principles and consequences ensues. Whichever vehicle bears the burden, it is my argument that business must be involved as one of the stakeholders, that a participatory system promises most legitimacy, and success, while grounding principles or values within a legal framework are needed for the vehicle, and must also be generated by it as market (including behaviour) standards.

342 See Ayres and Braithwaite (n 90); Polanyi (n 62); Rawls A Theory of Justice (n 282); and, Sen ‘Normative Evaluation and Legal Analogues’ (n 277). And see the EBA’s consultation with stakeholders, <http://eba.europa.eu/about-us/organisation/banking-stakeholder-group > accessed 25 June 2013; Dorn ‘The Governance of Securities’ (n 185), 35. And see Appendix K for more..

343 See Habermas (n 276), 391 as quoted in Appendix K.

344 A Smith The Theory of Moral Sentiments (n 340).


348 See Dorn ‘The Governance of Securities’ (n 185). Also see Ayres and Braithwaite (n 90); F Snyder, ‘Economic Globalisation and the Law in the 21st Century’ in A Sarat (ed) The Blackwell Companion to Law and Society (Blackwell 2008).
There is nothing in any of these philosophies, to suggest that a collaborative approach involving business, regulator and public will not work, and indeed there is much to suggest it will work. The real task is in finding the acceptable balance, the balance in legal freedoms and values, the balance in establishing and operating the social and political institutions of distributive justice, and, the balance in offence (misconduct) definition and sanction. The rationale for extending the means to define the public interest beyond the executive imprimatur, or the regulator’s sole discretion, lies in the fact that markets innovate and lie ahead of regulatory control, that post-crisis the markets themselves need to rectify market actor culture and risk management behaviour, the markets invited more government steering, and because market elites are so powerful they will adversely seek to circumvent restriction unless engaged in its production.

Socially acceptable norms relevant to the research questions, generated via law and its process, may also be illuminated through the lens of Pound’s five jural postulates – his paradigm of a civilised society with strong resonance to both Hobbes and Locke. These include assumption by individuals of no harm infliction, property rights, societal good faith and managed risk, and the restoration of property loss. The ‘unreasonable’ risks which financial regulation seeks to deal with include prudential risk, bad faith risk and complexity/unsuitability risk. But it isn’t just identifying the principles or the risks which so excites the juices. It is also who defines them and who does the rank ordering thereafter. Once the authority is nominated all know that individual or sectional prejudices, and preferences, shall apply or at least impinge.

This is at the base of the Marxist critique of the rationality of law, where the law of property became the rule of law at the behest of the men of property, themselves rendering crime a crime against capitalist principles, and not wrongs per se. This argument is grounded within two competing legal defence discourses: crime commission caused by need; and, lack of moral or legitimate legal right to property protection in the first instance. According to Norrie, the drama between these two positions exercised criminal lawyers from the late seventeenth to the nineteenth centuries, the formative period of the institution known as capitalism, when liberal political thought developed.

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349 See Pound (n 225). Pound’s postulates are set out in Appendix K.
350 See Gobert and Punch (n 130). The UK FSA’s four risk areas are set out in Appendix K.
free market thinking\textsuperscript{352}. It thus set up the present day conflict between liberal individual autonomy – the laissez faire of neo-liberalism – and other individual’s needs-rights, or moral objection rights, to acquisitive wealth accumulation. This is now played out in the arena of regulating well invested – and thus legitimate – market dominant positions, where more recently meritocracy is a key variable, untrammelled by Weber’s Calvinist ethical brake\textsuperscript{353}. Returning to Norrie, the result of the competing liberalities was the drawing of boundaries around the subject-citizen which respected liberty within the limits of the newly evolving social, political and economic relational order. This paradoxically resulted in legal individualism, both freeing and subjecting moral subjectivities, and in recognising, and thus solidifying, civil and political status within the capitalist free market context. In effect in Norrie’s view, rights of property economics ordered society, rather than society ordering economics\textsuperscript{354}.

In a nutshell, the argument is not about whether to criminalise/sanction at all, since it is almost universally accepted that punishment is a necessary evil, and that some quantum of punishment is necessary\textsuperscript{355}. Greater social goods, such as crime prevention and reduction, providing prevention/protection and reparation for the vulnerable particularly, upholding or restoring market efficiency and reputation, and ensuring societal stability are all clear justifications. The problem is how to do it, and to what degree. Effectively, the task of public regulation is to optimally order assumptions within society to benefit individuals, and to provide both prosperity and protection for individuals and society itself. In business terms the objective is economic growth, where enforcement ordering is foundational, and regulation is both pitched at the correct level and in dialogue – responsive – with those regulated. Three hundred years of liberal political tradition and the values it underpins cannot be overthrown willy-nilly. Correspondingly, the seriousness of market misconduct as shown pre-GFC provides, not alone an ideal opportunity for reform, and an ideal case for it, but also a compelling rationale for a new,

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{352} Norrie ‘“Simulacra of Morality”?’ (n 351).
\item\textsuperscript{353} Polanyi (n 62) and F Block, ‘Introduction’ in K Polanyi, \textit{The Great Transformation: The Political and Economic Origins of our Time} (1944 Beacon Press 2001).
\item\textsuperscript{354} See Polanyi (n 62), 48; also Radzinowicz \textit{History} (n 25), Vol 4, 9 as quoted in Appendix K.
\item\textsuperscript{355} Hart \textit{The Concept of Law} (n 123); Husak \textit{Overcriminalisation} (n 298); Locke \textit{Two Treatises of Government} (n 73).
\end{enumerate}
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specialised enforcement framework. A transformational sanction paradigm shift on the criminal law side particularly, is required to maximise binary interplay for all participants. Additional restrictions, including new offences and procedures dealing with business complexity and extending the ‘evil’ of sanctioning are justified. The exact detail is a matter for the policy-makers in defining the public interest, but the bulk of the learned philosophy (rationality) favours some form of participatory consensus, and an improvement upon prior attempts.

Operationally it is essential to obtain business and public buy-in when designing a societal enforcement regime if changes are to be successful. Business individuals drive the innovation which produces economic growth; taxpayer individuals are the last resort economic bulwark for business risk. Transparency and accountability, which accentuate the likelihood of justice, equality and respect for private property, which benefits both business and investor profit-seekers and society generally, are essential modern democratic elements in such a design. The possibilities of accountability are enhanced where an array of principles speak to those regulated, and where the source of power bows to the use of such protecting norms as rights, within a context of scrutiny of both performance and the actual power as delegated. The carrot for the honest business person is the provision of an equitable world-class regulatory regime based upon clear and legitimate values, which enhances business culture and reputation, and where enforcement bites and is seen to bite against the wrongdoers. For the regulator, a collaborative approach, husbands resources and promises self-policing high standards of conduct and risk management, which market forces will underpin. For the taxpayer, such a system protects both their investment risk and last resort funding risk. The really hard part is getting the balance right, mixing the three major social orders, three major actor sectors, and their aims. As far as sanction reform is concerned, there is need for a tough

356 James Hamilton on the 16th May, 2010 informed RTE 1 television viewers that the criminal justice system had a need for exceptional measures in the area of financial crime. See Appendix K for an extended footnote.

357 Patrick Honohan (Central Bank Governor) was quoted at a plenary conference of the British-Irish Parliamentary Assembly in Cavan, as reported in D de Breadun, ‘Honohan says those guilty of bank crisis crime must face jail’ Irish Times (Dublin, 23 February 2010). See Appendix K for an extended footnote.

358 The De Larosiere Report 2009 (n 1), as quoted in Appendix K.

359 See Financial Stability and Reform Bill 2013(Bill 41 of 2013) introduced to the Dail on the 19th April 2013 and described in its own preamble as an act to promote the financial stability of Ireland by improving accountability and transparency in the financial system.

360 See Nonet and Selznick (n 304).
top, a balanced middle and an educational base. The harm to be prevented or protected against, as will be clear from later discussion will best be negotiated, but if this proves impossible in a timely manner or at all, then in default it’s parameters must be imposed by the controlling democratic state in, and defining, the public interest. And, in doing so, the responsive democratic state must correspondingly be cogniscent of societal (including business) acceptance and legitimacy strain.

1.3.4. Regulation and the Autonomy/Welfare Tension

The original theoretical underpinning for regulation is located in the autonomy/welfare tension where public interest is defined. Here, the utilitarian ideal of social welfare predominates, albeit based around notions of the worth of the individual. Although social regulation and economic regulation are separate entities, most regulatory policies combine features of them both. The underpinning rationale commenced with faltering steps in the seventeenth century after the Glorious Revolution when an elite Parliament gained ascendency, and gradually more local administrative authorities sprang up, until the early nineteenth century saw an administrative revolution. It reached its high point during the latter part of the nineteenth century and the early part of the twentieth, where the criminal law was the selected enforcement regime. The field of action was legislative intervention at the urging of social reformers, especially including utilitarians like Bentham and the two Mills senior and junior. Its introduction enjoyed a contemporaneous two-fold focus effectuated by mini-codifying legislation. This involved both the workplace (workers) and public health (public) areas in the first instance, as well as the commercial transactions (investors) sector in the second. By utilising standards and inspectorates for supervisory and monitoring purposes the governmental bureaucratic
control model advanced by Weber was effectuated\(^{366}\). The modern regulation trend however, at both private and public levels, which pre-GFC moved toward standalone ‘arms length’ agencification, post-GFC has seen transformation toward more politically dependent control agency governance and risk management (stakeholders including taxpayers). The two strands of modern regulatory origin therefore, may be located to social intervention and commercial activity, both hereafter explored in turn.

Social Regulation: Workplace and Public Health

Clearly grounded in a state control rationale as a methodology, much like the criminal law paradigm, the social regulation proposition asserted was that criminal sanctioning in the form of an instrumental deterrent was necessary to protect the public from dangers against which they were unable to protect themselves\(^{367}\). The perceived need to address the welfare of the workforce, as well as the greater public, widened the then regulatory loop. Reform was target specific and instrumental in character\(^ {368}\). Nineteenth century statutory regulatory reform in the workplace and food safety sectors, found regulatory norms preceeding institutional reforms for monitoring and enforcement by a considerable timeline according to Scott\(^ {369}\). For instance, the Factories Acts catch-up machinery only arrived 31 years after the initial legislation. Because of the active involvement of the criminal law its ‘real crime’ paradigm baggage came with it.

However, procedural concerns around the proof of the culpability or intent element of offences led to a 20\(^{th}\) century growth in strict liability – the absence of intent – as an essential element in ‘regulatory’ offences, although not yet applied to financial indiscretions. These newer mala prohibita offences, in turn led to the development of a discretionary enforcement style where the once central criminal law was peripheralised, and where criminal prosecution became a last resort, a model that has been extended to financial regulation\(^ {370}\). This regulatory approach favouring minimal criminal law use came about as a form of negotiated control. It emerged out of a long history of negotiation between business groups, regulators and governments\(^ {371}\). It thus resulted in a


\(^{367}\) Croall ‘Combating Financial Crime’ (n 365); Haines *The Paradox of Regulation* (n 14).

\(^{368}\) See Scott ‘Regulatory Crime’ (n 25).

\(^{369}\) See Scott ‘Regulatory Crime’ (n 25).

\(^{370}\) See Croall ‘Combating Financial Crime’ (n 365).

\(^{371}\) See Croall ‘Combating Financial Crime’ (n 365).
mixed bag of techniques on the statute book, the three criminal law approaches of rarely applicable common law, and the statutory duality of intent and non-intent offences, together with the administrative breaches where civil style sanctioning pertained. In practise however, when business bargaining power triumphed, this meant negotiated administrative enforcement and sanction where in the main courts were excluded.

Both enforcement approaches, the criminal and administrative, have been well rehearsed in the literature. The tension between the activities of business and their control by the state has broadly been traced to three different theoretical and political traditions by Croall. All have already been broached. The first, is the classic conservative laissez faire free market view – the autonomy principle - where market forces are primarily expected to self-correct; the second, a broad spectrum liberal position accepting regulation as necessary but requiring balanced sanctioning; and, the third more radical grouping which regards strong criminalisation as necessary to thwart pervasive business interests and influence.

Irrespective of the strand adopted however, where criminalisation is concerned, the normal criminal proof burden and standard apply. The regulatory strand has been pronounced a bifurcation in the criminal law by Scott. It may be regarded as a double bifurcation when the initial statutory break from the old common law canon, and the newer move to strict liability offences, are factored in. The degree of criminalisation however, depends upon which of the dual approaches is adopted. The regulatory approach theoretically favours the establishment and maintenance of high standards in business, and thus is directed more at business culture with a future behaviour objective; while the crime control approach is aimed against past business misconduct and emphasises prosecution and punishment. This tension is directly reflected in the predominant, yet two very different, enforcement strategies employed at the criminal and regulatory workface.

372 See N Garoupa and F Gomez-Pomar, ‘Punish Once or Punish twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties’ (20040 6 (2) American Law and Economics Review 410, 411 who set out in tabular form that worldwide, regulatory agencies and courts impose administrative measures, and in the main pecuniary sanctions, while courts exclusively impose imprisonment.

373 See for instance, Clarke Regulation, The Social Control of Business (n 198); Connery and Hodnett (n 6); Croall ‘Combating Financial Crime’, (n 365); BM Hutter, Compliance: Regulation and Environment (Oxford University Press 1997); F Pearce and S Tombs, 'Hazards, Law and Class: Contextualising the Regulation of Corporate Crime’ (1997) 6(1) Social and Legal Studies 79; Scott, ‘Regulatory Crime’ (n 25); S Simpson, Corporate Crime, Law, and Social Control (Cambridge University Press 2002).

374 See Croall ‘Combating Financial Crime’ (n 365).

375 See Scott ‘Regulatory Crime’ (n 25).
These are confrontational deterrence based around the Benthamite utilitarian punishment tradition as located in crime control; and, cooperative compliance, sometimes referred to as responsive compliance, the darling of the regulatory approach, with a future behaviour outlook. In the latter the expert regulator often favours stratagems based around persuasion, education and advice\textsuperscript{376}.

Within these two strategic bookmarks, other strategic enforcement styles, adopted in practice by regulators, sit across a continuum running from legalistic to the retreatist base. These are explored in more detail later. At one end lies coercion with the threat of prosecution, where deterrence and incapacitation are prominent, while at the other lies the more administrative persuasive and cooperative approach where licensing, certification and qualifying techniques are applied. Croall summarised the advantages of the latter as promoting good regulatory relationships based on mutual trust, and as providing a more effective means of disposing of complex matters where detection is difficult and prosecution lengthy and costly. The downside is perceived weakness, regulatory ‘capture’, the undermining of the moral force of the criminal law, and the creation of an easier and inequitable enforcement for the favoured few.

Financial regulation enforcement, where economic welfarism is the social focus, has moved beyond self-regulation and been broadened to reflect the dual criminal law and administrative sanctioning approach but with an additional twist. The crime control element is equally marginalised often by non-use, but widely utilising a double jeopardy or parallel proceedings pathway depending upon the jurisdiction concerned, the dual regulatory approach is operationalised in an administrative sanctioning regime. Here, the preferred sanction options are located in a civil law approach and the proof standard is that applicable to the civil law. This has been referred to as a third way\textsuperscript{377}. It is based around negotiation, and is somewhat akin to commercial forms of it\textsuperscript{378}.

\textsuperscript{376} Croall ‘Combating Financial Crime’ (n 365); and see Ayres and Braithwaite (n 90).
\textsuperscript{377} See for instance Mann (n 584). See Part 1 Chapter 3 section 1.3.7 and Part 2 Chapter 3 where this matter is more fully discussed.
\textsuperscript{378} Interviewee C Regulator Ireland 6 February 2013.
(b) Commercial Activity: The Markets, Law and Regulation

Public regulation of industry and commerce can be traced for over six hundred years in Europe and England\(^{379}\). Indeed, the Tudor and Stewart periods were the most regulatorily extensive and intensive in British legal history\(^{380}\). Additionally, self-regulation via the guilds system in a form resembling modern models was prevalent\(^{381}\). In Europe, French medieval champagne markets, diamond markets, cotton markets and medieval guilds, operated merchant ‘courts’ or bodies which, rapidly applying the *lex mercatoria*, enforced obligations by reputation loss or ultimately expulsion from the commercial group or club\(^{382}\). In the 17\(^{th}\) and 18\(^{th}\) centuries both in England and in Ireland competition between courts led to the *lex mercatoria* being incorporated into the domestic common law\(^{383}\). In Europe the *lex* was nationalised by being codified in accordance with civil law, for instance, the Code Napoleon, and this divergence resulted in the *lex* losing its international character\(^{384}\). International colonisation, and especially the expansion of foreign trade, and speculation surrounding it, forced legislative intervention. This included dealing with the disastrously speculative South Sea bubble in 1720 which effectively outlawed most joint-stock companies\(^{385}\). This initial tentative governmental involvement in business regulation accelerated with the Industrial Revolution and as already seen during the early nineteenth century social reformers and government sponsored reports prompted greater controls especially in factory employment (first legislation 1802)\(^{386}\).


\(^{381}\) See Prosser *Law and the Regulators* (n 21).


\(^{383}\) White (n 382).

\(^{384}\) White (n 382).

\(^{385}\) See Gobert and Punch (n 130).

\(^{386}\) See Gobert and Punch (n 130).
The role of the law, as evidenced from the economically important London and Liverpool commodities markets of the nineteenth century however, was to provide the framework, while markets themselves provided the mechanics, in a re-constitution of the market ‘club’ system. This legal framework although not strictly ‘regulation’ consisted in market constitution and governance, rules for transactions and clearance and settlement, standard form dealing contracts, and arbitrated dispute settlement by market savvy experts. Simultaneously, the British common law developed principles analogous to modern regulation. For instance, drawing upon much older principles, by the early 19th century the use of monopoly power was regulated so as to require its exercise for the benefit of the public and other traders. A mass of conflicting case law however, resulted from nationalisation of the lex mercatoria in Ireland and England, and in an attempt to both simplify commercial law and render it more accessible, the already broached process of individual legislative provisions, described as ‘mini-codifying’ was adopted although not a full civil law style code as on the continent.

State intervention establishing offences to protect the public welfare originated in the seventeenth century, according to McAuley and McCutcheon, but reached its height in the nineteenth, as society industrialised and appropriate contemporary standards became necessary. Early commercial legislation included the Statute of Frauds 1695, which reflective of the asset classes of the time dealt with real property and particularly its transfer, and the Life Assurance Act 1774, the preamble of which indicated it had been introduced to thwart a mischievous kind of gaming. The first partnership statute in Ireland was enacted in 1741 for the better Regulation of Partnerships to encourage Trade and Manufacture in Ireland and was amended in 1771, while the first limited partnership in the common law world was legislated into effect by the Irish Parliament in 1781. To deal with the control of banking after various scandals, the Irish Banking Acts 1755-1825 were passed. Following the Act of Union 1800, the British parliament legislated for

389 See Prosser Law and the Regulators (n 21).
390 M Forde, Commercial Law (2nd edn, Butterworths 1997); White (n 382).
391 See McAuley and McCutcheon (n 274).
393 M Twomey, Partnership Law (Butterworths 2000).
394 See Twomey (n 393).
Ireland, and during the first half of the century economic specific legislation was passed\textsuperscript{395}. In the latter half of the century the amount of commercial legislation significantly increased, and some of it passed still survives\textsuperscript{396}. Criminal offences and penalties provided for were uncommon, and where utilised centred around fraud, falsification, misappropriation, and failure to comply with requirements like making returns, with small imprisonment tariffs (maximum two years) if any, and often fines being the main punishment\textsuperscript{397}. Thereafter, inertia was rampant and in 2002, White remarked, that as far as Irish commercial law was concerned, that not much had changed over the previous 100 years!\textsuperscript{398}

While criminal law was the original control choice, and over time its role increased, because of difficulties around the private context and complexity of business, antagonism towards coercion within ongoing regulatory relationships, and the definition and prosecution of offences coupled with resource issues, newer regulatory forms were located to administrative structures via alternative civil law modes and procedures\textsuperscript{399}. Public financial regulation was mainly originally located in Central Bank structures, although the US pioneered regulatory Commissions toward the end of the nineteenth century, and the discrete control agency ideation spread\textsuperscript{400}. In the UK control agencies emerged after the Second World War, and, in Ireland only in the last two decades when driven by the EU. It was only during the 1990s that discrete financial regulatory control agencies emerged, and Ireland copied in 2003. Post-crisis Palmer explained the control role: ‘...the right approach conceptually is a dynamic regulatory regime that looks sceptically at the boardrooms and strategies of financial institutions and is capable of intervening effectively when need arises’\textsuperscript{401}. With compliance the objective, two separate systems within financial regulation now occupy the enforcement pathway and their launching and interplay is of paramount concern.

\textsuperscript{395} This included the Bills of Exchange (Ireland) Act 1828, Carriers Act 1830, Railway and Canal Traffic Act 1854, and the Bills of Lading Act 1855. See Quinn (n 341).
\textsuperscript{396} White (n 382); Parliament revisited Bills of Exchange in 1864 and 1882, Insurance in 1866 and 1867, and passed laws in respect of promissory notes, bills of sale, merchandise marks, factors, partnerships, sale of goods, industrial and provident societies, trustees, and money-lenders (see Quinn n 341).
\textsuperscript{397} See Quinn (n 392).
\textsuperscript{398} White (n 382).
\textsuperscript{399} See Clarke Business Crime Its Nature and Control (n 188).
\textsuperscript{400} See Braithwaite and Drahos (n 346); Connery and Hodnett (n 6); Gobert and Punch (n 130); Goodhart (2); Noll (n 362).
\textsuperscript{401} See A Palmer, ‘Rebuilding the Banks’ (a special report on international banking The Economist 16 May 2009).
1.3.5. The Modern Control Domain and Concept

The control domain is the regulatory domain, covering that part of the market domain which is publicly regulated, and that privately regulated, and yet influenced by public regulation. It may be defined globally, regionally or nationally and events in one may impact another. Regulation does not have a single definition. It is not a single domain, and as a rubric has many sub-domains, of which financial regulation is one. The regulation conceptualisation which began to be separately recognised in the academic literature during the 1970’s in the US, by the mid-1980’s had spread particularly to Australia and was significantly developed there, while by the late 1980’s and early 1990’s a regulatory state was recognised in the EU and throughout many European countries. It arrived a little later to Ireland. Around the millennial turn the international focus moved from government to governance. The aspiration was that public and private interaction would jointly shape internationally promulgated Better Regulation standards, representing a shift towards market intervention to redress market failure. It failed.

Modern justification of regulation ‘embodies the promise of modernity’, Haines has argued. It encompasses in her view three inter-twining strands: governance itself, now in its new post-GFC flux with greater government steering; regulation as instrumentality; and, appropriate regulatory enforcement. At the instrumental or functional level, the literature widely recognises financial regulation as policing, coercive control, enforcement, and thus sanctioning.

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403 See J Black, Rules and Regulators (Clarendon Press 1997); and Prosser Law and the Regulators (n 21).
404 See for instance, Nonet and Selznick (n 304); Ayres and Braithwaite (n 90); G Majone, ‘The Rise of the Regulatory State in Europe’ (1994) 17(3) West European Politics 77; Prosser, Law and the Regulators (n 21); J Black, ‘Critical reflections on regulation’ (2002) 27 Australian Journal of Legal Philosophy 1; Gilardi (n 363); Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310); Connery and Hodnett (n 6); Levi-Faur ‘Regulatory Networks & Regulatory Agencification’ (n 108); Haines, The Paradox of Regulation (n 14) and especially chapter 2 containing a full account of recent regulatory trends; Levi-Faur ‘Regulation & Regulatory Governance’ (n 402); K Yeung, ‘Better regulation, administrative sanctions and constitutional values’ (2012) Legal Studies 1.
405 See Department of the Taoiseach, White Paper, Regulating Better (2004) <http://www.betterregulation.ie> accessed 5 May 2011. Interviewee H Parliamentary Draughtsman Ireland 20 December 2012 opined that regulators are independent in carrying out their duties, but usually the government Minister concerned gives directions, and periodic reports have to be made to the Minister.
406 Haines The Paradox of Regulation (n 14); also see Kaletsky (n 2), 294 as quoted in Appendix K.
Because the prime market objective is financial risk identification, analysis and reduction\(^{408}\), improved risk management and the need for a detailed understanding of the system being regulated are post-crisis priorities\(^{409}\). Here risk levels within different financial market sectors, and as applicable to different market actors, are not always consistent, and furthermore risk conditions constantly change\(^{410}\). The prime objective of regulation is control, and when married to market expectation effectively means risk control in a shifting environment. Underneath this imperative it also means control of the conduct of market actors charged with risk management. Financial regulation is a highly variable instrument of public policy, depending upon national and regional context, meaning in this dissertation Ireland, within its two EU cocoons\(^{411}\). The real catalyst was the EU treaty known as the Single European Act 1986, whereafter Moloney’s transposed legislative ‘juggernaut’ followed\(^{412}\). Enforcement including sanctioning has largely been left to each member state, leading to a recognised divergence, in forms and effects, across EU legal systems, and despite a vibrant transatlantic dialogue, between the EU and the US\(^{413}\).

(a) The Control Domain

Post-crisis, a new definition of regulation beyond rules has emerged, where mechanisms and institutions are central, and it is concerned with increasingly complex financial products and institutions and adaptive and innovative markets\(^{414}\). Because not all of the

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\(^{410}\) See Moloney ‘Financial Services and Markets’ (n 110); Mallaby (n 79).


\(^{412}\) For instance in the areas of capital adequacy, information transparency, market abuse, competition law, and investment vehicles such as MiFiDS and UCITS and see Moloney (n 106).


\(^{414}\) M-A Frison-Roche ‘General Presentation’ (n 62); Regling and Watson Report (n 8).
multiple financial markets are regulated however, some being part regulated and part unregulated, this limitation obviously has implications for enforcement and sanctioning beyond business concerns. Public regulatory control, whether by licence or otherwise, is not a complete restraint and results in a split market domain. The regulated part has an outer sphere of influence where loophole or uncertainty locate, or where illegality lurks, while the deliberately unregulated part is left to market values where control influence is irrelevant, ignored or only permitted to enhance self-interest.

The main types of financial services regulated throughout the EU, and since November, 2010 covered by its three revamped supervisory watchdogs, include banking, insurance, securities and asset management. Financial regulators oversee multiple categories of financial service provider, which require licence authorisation or approval, to which business and conduct conditionality apply including many codes of conduct. Financial products, actors, institutions, concepts and risks are myriad. Financial derivatives; rapidly burgeoning complex and innovative forms of securitization; the stock market and the discredited notion of ‘the rational market’; scheme operators; credit ratings agencies and their liability; financial regulation itself; banking generally, both commercial and shadow, and especially lending, but not limited to capital requirements; intermediaries and fund investment within the insurance industry; the establishment and operation of hedge, sovereign and private equity funds; tax havens; financial disclosures; the establishment and mobilisation of bespoke special recovery mechanisms like NAMA, the EFSF, the EFSM and TARP\textsuperscript{415}; transnational capital movements; sovereign debt; and the Euro-zone and its effects; are all among the many subjects that provide ample scope for the development of modern regulatory models, which include strategy around market actor behaviour within the dependent offence and sanction axis context. While not all are found in the Irish context, because of their international presence, they impact Ireland’s small, open economy, and thus the wider civil society. Enforcement all comes down to national level, within the divergent global context, where consequently rich arbitrage opportunities abound.

Pre-GFC the market was unruly and exceeded, if not dominated, the control domain with disastrous effects. Gill expressed the usual regulatory response as follows: ‘Much state

\textsuperscript{415} See glossary for detailed descriptions.
intervention regarding crime is aimed formally at the repression of illegal markets while states also seek to regulate legal ones. This statement imputes a dual repress/regulate response, and delineates market legality as the boundary. As Goodhart has highlighted regulation as market restriction becomes more unpopular with business interests, the more effective it becomes. The boundary problem between legality and illegality may increase operating costs of the RSFP, then may yield competitive advantage to those unregulated, and business may flow in their direction. Furthermore, information about the unregulated market may be opaque or non-existent and thus increase market risk. So the real aim of regulation at the prudential level is to prevent key financial institutions from over-stretching themselves and thus failing, without imposing disproportionate costs. In other words, regulatory restriction cannot be imposed so as to incentivise the market to circumvent the restriction, and insufficiently restricted market autonomy cannot be allowed to bring about full or partial market destruction. But, as Goodhart also emphasised, this balancing role is always in flux as the boom/bust cycle oscillates, and thus market incentives must constantly be reviewed and change. This reflects Polanyi’s thesis of the two conflicting movements within market societies, market freedom and the protective countermovement of restriction. The key challenge for policy-makers is to narrow the space for oscillation between market autonomy and welfare restriction. The key challenge for financial regulatory advocates, especially those concerned with market conduct/misconduct, is to obtain technical market compliance when publicly mobilising discretely defined legislation, where the underpinning rationale is that, unless conduct is specifically prescribed, then it is regarded by market actors as irreproachable.

The origination of financial regulatory policy, Fullenkamp and Sharma have explained, essentially emerges from three agents with conflicting roles, ostensibly working together

416 Gill (n 294), 523.
418 Goodhart (n 2); also see Braithwaite Regulatory Capitalism (n 86); Kaletsky (n 2); MacNeil and O’Brien ‘Introduction’ (n 2); Wheatley Review (n 13 See Appendix K for an extended footnote.
419 See Block (n 353), xxviii.
These are politicians, regulators, and the financial industry. Regulators as rule-making and enforcement agents are sandwiched between their politician principals (taxpayer representatives), and the financial sector, to whom they in turn are principals in charge of supervision and enforcement. These linked and problematic principal-agent relationships, and the complex of associated incentives, temptations, and constraints within them, sometimes result in sub-optimum supervision and enforcement quality which is well below public expectation. Taking account of market risk complexity, the pace of market innovation, and a clear need for multi-layered regulatory strategies, both static rule-bound regulation and soft touch application of principles has failed. Something in-between is needed, where business is, by dint of circumstance, sufficiently concerned to raise the prospect of improved regulatory return.

Essentially, market actors – the control subjects - consist either of individual persons or corporate entities which are controlled by individuals, while in the eyes of the law both are regarded differently. The person of the individual offender is not fully mirrored by the artificial or fictional nature of the corporate form, an abstraction incapable of thinking or doing by itself. Regulation thus, of both the individuals within those corporate entities, and those entities themselves is essential. It has been recognised that the modern more flexible corporate organisation, a long way from Weber’s formal bureaucracy, allows autonomy under supervisory control systems. A different and wider range of sanctions has been promulgated for corporations, which recognises the uniqueness of the corporate form. Regulation, as opposed to real crime enforcement, has recently been

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421 See Moloney ‘Financial Services and Markets’ (n 110).

422 H Croall and J Ross, ‘Sentencing the Corporate Offender: Legal and Social Issues’ in C Tata and N Hutton (eds) Sentencing and Society (Ashgate 2002); McAuley and McCutcheon (n 274); Slapper and Tombs (n 87); Wells ‘Corporate crime: opening the eyes of the sentry’ (n 18).

423 C Keane, ‘Loosely Coupled Systems and Unlawful Behaviour’ (n 128). This has resulted in criminality where control systems are lax for instance, Leeson at Barings Bank, Kerviel at Societe General, and Adeboli at UBS. Also Rusnak at AIB (ALLFirst) about whom see S Carswell, ‘Clean living: The man who cost AIB $691m’ The Irish Times (Dublin, 12 September 2014).

promulgated as the more likely location for more effective enforcement of the corporate entity\textsuperscript{425}.

Restriction upon market autonomy in the form of regulation is imposed for one or more of three main reasons: control of monopoly power and prevention of competitive distortion; protection of uninitiates around information asymmetry (lack of disclosure) where mistakes could devastate welfare; and, where the potential social and final costs of failure from over-riding externalities, may overpower private failure costs plus the extra costs of such regulation\textsuperscript{426}. Financial regulation, while tasked to maintain trust in the market’s pyramid of breakable financial promises, is recognised as having two essential generic types or mandates for rule generation, which at national level are generally statutorily enshrined, and require regulatory goal focus\textsuperscript{427}:

1) Prudential regulation otherwise known as the Prudential Mandate where the enforcement of market standards is a key activity\textsuperscript{428};

2) Conduct of business regulation otherwise known as the Consumer Mandate which focuses on how RFSPs conduct business with their customers, particularly by helping consumers make informed financial decisions in a safe and fair market\textsuperscript{429}.

Post-crisis, Oakes highlighted that a regulatory vista, which equated better regulation with less regulation, had been a costly fallacy\textsuperscript{430}. Henceforth he asserted, financial markets face a world of increased regulation, albeit where new regulations and regulatory structures suffering resource constraints, do not unintentionally and unnecessarily hamper economic growth, or a return to a sustainable future\textsuperscript{431}. He extolled a model geared to

\textsuperscript{425} Wells ‘Corporate crime: opening the eyes of the sentry’ (n 18).
\textsuperscript{426} See Goodhart (n 2).
\textsuperscript{427} D Llewellyn, ‘The Economic Rationale for Financial Regulation’ (UK Financial Services Authority (FSA) Occasional Papers Series paper 1, April 1999); McDowell Report (n 26); Comptroller and Auditor General, The Financial Regulator (Special Report 2007) (CAG Report 2007); M Wolf, Fixing Global Finance (Yale University Press 2010). Also see the EBA definition of market risk as set out in Appendix K.
\textsuperscript{428} Prudential regulation focuses on the solvency and safety and soundness of financial institutions (and especially banks), when disseminating guidance and standards; controlling market entry and exit; carrying-out ongoing supervision and inspections; and, enforcing standards.
\textsuperscript{430} Oakes was then Director of the Irish Central Bank’s Enforcement Directorate,
coordinate white collar crime actions, while extracting the best value for the Irish taxpayer, and simultaneously paying dividends in terms of securing white collar convictions. Drawing from US and UK frameworks, consideration of essential financial regulatory pursuits required a specialist national economic crime command to set the crime agenda; control agency partnership focus upon investigation and prosecution of significant financial crimes; and, both ensuring just and effective punishment, and recovery of proceeds for victims. Elderfield added three recommendations to the mix: a coordinated strategic approach for effective enforcement, adopting best practice enforcement techniques from other leading jurisdictions, and, reviewing the success orientation of the existing legal framework for collecting evidence, including interviewing suspects and pursuing cases. Within the broader agenda of interplay strategy, this dissertation takes on board these challenges. The real enforcement reform issue therefore, concerns identifying an internationally compatible, business-enhancing, strategically coordinated binary control policy, within the coercive control domain.

(b) The Modern Coercive Control Concept

A modern democracy like Ireland, within the EU, is an organised society, where normatively regulated action is only one form of social action as Weber explained. Both the criminal law and regulation its offspring, are the coercive institutional end, simultaneously the controlling, and the controlled, use of societal power. Within the policing binary generally, criminal law engagement draws primarily from the ‘real crime’ paradigm, but was demonstrated insufficient by the addition of an administrative regime, espousing civil law attributes.
Control here consists of three essential components: the already mentioned standards, norms or goal set reflected as a legal rule; a triggering, monitoring or feedback mechanism such as the financial regulator; and, the triggered actions in the form of sanctions, designed to align the controlled variables, as perceived by the regulator, within the established overlying statutory objectives and underlying goals, including process values\textsuperscript{437}. Law in general enjoys both a facilitative and an expressive role as Morgan and Yeung have argued\textsuperscript{438}. Facilitative as an instrument to shape social control, and expressive when institutionalising values; respectively, proscribing conduct, threatening deterrent sanction, and creating and policing secure societal boundaries; and, enabling negotiation around coercion which it legitimates and consensual community values which it reflects. Writing a decade ago but still apposite, although mainly tilting at the UK and US experience, Garland\textsuperscript{439} argued that crime control changes from the 1980’s were driven both by criminological considerations, and historical forces, that transformed social and economic life\textsuperscript{440}. As crime control moved beyond the technical operation of law enforcement and adjudication, to become a centralised feature of liberal government, itself increasingly pluralised and complex, two new contrasting currents emerged\textsuperscript{441}. The first current involved stressing instrumentally rational, morally neutral, knowledge-based, pragmatic solutions, which clearly includes regulation by independent control agency. The second current regards the social order as a problem of system integration, where the social processes and arrangements which people inhabit, need to be integrated. Within this logic, the component parts of social systems and situations require redesign, resulting in fewer opportunities for crime. In the case of post-crisis financial regulation there is clearly an element of cross-over between these two currents, especially instrumental redesign.

\textsuperscript{437} Scott ‘Regulation in the age of governance’ (n 16). Also see C Hood H Rothstein and R Baldwin The Government of Risk (Oxford University Press 2001); K Yeung, Securing Compliance (Hart 2004); K Yeung, ‘Better regulation, administrative sanctions and constitutional values’ (2012) Legal Studies 1.
\textsuperscript{440} See Appendix K for an extended footnote; and see Part 1 Chapter 2 section 1.2.3 above; also K Stenson and A Edwards, ‘Rethinking crime control in advanced liberal government: the ‘third way’ and the return to the local’ in K Stenson and RR Sullivan (eds.) Crime, Risk and Justice: The politics of crime control in liberal democracies (Willan 2001), 68.
\textsuperscript{441} See the various contributors to K Stenson and RR Sullivan (eds.) Crime, Risk and Justice: The politics of crime control in liberal democracies (Willan 2001). And see Garland The Culture of Control (n 25).
Contemporaneous to these trends, the growth of a risk society was noticed, where economic reasoning prevailed. It impacted perceptions and approaches in the criminal law, mainly grounded in security considerations. On the regulatory side pre-GFC, within risk-based regulation, a trend developed toward greater regulatory incursion into internal business management and strategies, and a change in regulatory rhetoric, commencing from the mid 1980’s, re-drew the boundaries between collective and individual responsibility. Risk became the dominant regulatory focus, governmental bureaucracy became riddled with the rhetoric of risk, and incorporated risk management processes, while organisations were enjoined to deploy risk management strategy, and embed it in everyday working routines and activities. Risk came to represent a new way to conceptualise what regulation could offer and potentially achieve. More recent regulatory trends demonstrate a dynamic regulatory landscape of multiple regulatory cycles, which oscillate between tightening and loosening regulatory control across diverse policy contexts. In her full review of the literature, Haines depicted harder ‘command and control' approaches being replaced by softer ‘comply or explain'.

In Ireland at the criminal law level, from the mid 1990s there was a much needed and marked move toward new legislative criminal law reform, where new replaced old, and

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443 Fisher Risk Regulation and Administrative Constitutionalism (n 108); Gray and Hamilton (n 408); P O’Malley, Risk, Uncertainty and Government (Glasshouse Press 2004); M Power, The Risk Management of Everything: Rethinking the Politics of Uncertainty (Demos 2004). The De Larosiere Report 2009 (n 1), 8 stated of risk management pre-GFC: ‘There have been quite fundamental failures in the assessment of risk, both by financial firms and by those who regulated and supervised them’. See Appendix K for a more comprehensive quotation.


445 Ayres and Braithwaite (n 90); Braithwaite Regulatory Capitalism (n 86); Haines The Paradox of Regulation (n 14). See Appendix K for an extended footnote.

446 Haines The Paradox of Regulation (n 14); and see Garland ‘Ideology and crime’ (n 295), 9 as quoted in Appendix K

447 Within Irish corporate governance the old ‘command and control’ form best associated with the imposition of standards backed by criminal sanctions, gave way from around 1992 to the alternative ‘comply or explain’ style; see Connery and Hodnett (n 6). However, uniquely in the EU, Ireland did not have its own country-specific code, although post crisis in 2010 a voluntary Swift 3000 code surfaced; see Cadbury Report, Report of the Committee on the Financial Aspects of Corporate Governance (Report with Code of Best Practice London: Gee ISBN 0 85258 915 8 - 1992); also see, D Ahern, ‘Replacing ‘Comply or Explain’ with Legally Binding Corporate Governance Codes: An Appropriate Regulatory Response’ (ECPR Standing Group on Regulatory Governance Biennial Conference Regulation in an Age of Crisis Dublin, 17-19 June 2010).
newer forms and concepts were introduced; much use of judicial review, which was later curtailed; a move to locate confiscatory justice within more civil forms; and, since the early millennium, Packer’s two model theory of due process and crime control has veered more to the latter. A decade ago, the ‘stuttering nature of an Irish culture of control’ was noted, where the lack of administrative structures hindered the peripatetic popular and political fixation upon the issue, while the effects of the crime complex was reckoned to have seeped into the public mind through a ‘series of incremental adjustments’.

More recently, it is clear that more statutory interventions have increased the increments. Kilcommins and Vaughan have flagged the fragmented nature of contemporary justice, where justice is becoming more disaggregated and more contradictory, embodies more authoritarianism but paradoxically more pluralism, retains adversarialism yet encourages more executive fact-finding and guilt determination in non-court settings, with a more directed gaze at white collar crime. As far as financial regulation is concerned, from the late 1990s, moves were in train toward enhanced civil law enforcement capability within the shift described. Perhaps Levi’s observation best explains:

The need to be seen to be doing something about vast and visible crimes – given considerable publicity by the media – versus the desire to minimise costs and risk incrimination of ‘respectable entrepreneurs’ involves structural balance more delicate than those caused by regulation of the poor.

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448 See Charleton et al (n 281); G Coffey, Criminal Law (Roundhall 2010); V Conway Y Daly and J Schwepppe, Irish Criminal Justice: Theory, Process and Procedure (Clarus Press 2010); A Hardiman, ‘Preface’ in D Walsh, Criminal Procedure (Thompson Round Hall 2002); Hogan and Whyte (n 238), preface; Walsh Criminal Procedure (n 281). Regarding confiscation see C King, ‘Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland’ (2013) Legal Studies 1; New Irish legislation has includes Proceeds of Crime Act 1996; Criminal Justice (Drug Trafficking ) Act 1996; Bail Act 1997; Criminal Justice Act 2006 regarding witness statements; Criminal Justice (Surveillance) Act 2009 which allowed covert surveillance of criminals upon District Court authorisation; Criminal Justice (Miscellaneous Provisions ) Act 2009; Criminal Justice Amendment Act 2009 regarding inferences etc; Criminal Justice (Search Warrants) Act 2012 ; Also see Packer (n 273).

449 See Kilcommins O’Donnell O’Sullivan and Vaughan (n 299), 291.

450 See Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310); and S Kilcommins and B Vaughan, Terrorism, Rights and the Rule of Law (Willan 2007); Department of Justice Equality and Law Reform, White Paper on Crime, Organised and White Collar Crime (Discussion Document No 3, October 2010); Horan (n 87), 22 refers to a proposal for a Criminal Justice (White Collar Crime) Bill in December, 2010 as quoted in Appendix K

451 McDowell Report (n 26); Also see M Butler et al, (eds) Criminal Litigation (Cambridge University Press 2011); J Hamilton, ‘Do we need a system of administrative sanctions in Ireland?’ (Two Tier Criminal Law System Conference Common Law and Regulatory Enforcement: Is the Traditional Role of the DPP Diminishing? Law Society Dublin, 25 April 2009); Horan (n 87); M McDowell, ‘Non-Criminal Penalties and Criminal Sanctions in Irish Regulatory Law’ in S Kilcommins and U Kilkelly (eds), Regulatory Crime in Ireland (First Law 2010).

452 See Levi ‘Serious Fraud in Britain’ (n 213), 194.
Post-crisis, the Irish trend is encompassed within rhetoric of increased criminal law control, tentative judicial recognition for the need for Durkheim’s social solidarity, but a practice floundering for political will, ideological guidance, and practice implementation\(^\text{453}\). While pre-crisis, the use of the criminal law within the financial regulatory binary was peripheralised, by the exclusive use of negotiated resolution procedures, the rhetoric post-crisis demands its greater involvement\(^\text{454}\). In the wider financial regulatory reform response, there has been greater institutionalisation; command and control has re-emerged as a vital force, updating Haines viewpoint; a greater recognition of the criminal law as encompassing a qualitatively more significant moral signalling voice has occurred; and, as a corrective to decentralised and independent regulatory interests, a greater recognition of the need for an enhanced punitive capacity for the criminal law, of itself, and as a signal to the ‘lesser’ administrative regime, has emerged\(^\text{455}\).


\(^{454}\) Even considerably before the GFC, after which attitudes appreciably hardened, there was resistance to the rise of the lighter persuasion approach, and the need for state capacity in the form of criminalisation was espoused; see J Braithwaite, *Punish or Persuade: enforcement of coal mine safety* (State University of New York Press 1985); Haines *The Paradox of Regulation* (n 14); L Snider, ‘Towards a Political Economy of Reform, Regulation and Corporate Crime’ (1987) 9 Law and Policy 37. The vigorous and routine enforcement of the criminal law as an antidote to serious corporate crime risk, and the individual crime which underpins it, was seen by some, and is now increasingly seen, as an intrinsic component of regulatory enforcement strategy; see Haines, *The Paradox of Regulation* (n 14); Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310); Oakes *The role of enforcement* (n 453); L Snider, ‘The Sociology of Corporate Crime: An Obituary’ (2000) 4(2) Theoretical Criminology 169; C Wells, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2001).

At this instrumental level, regulatory discretion is a key feature at design and implementation stages, for instance, for the regulator in the choice of appropriate risk regulation technique in selecting and enforcing conduct of business norms. Risk regulation is both politically and technically attractive, but simultaneously faces a massive challenge however, when the risk at issue cannot be subjected to a narrow and/or targeted intervention. The real work then, is in finding the correct enforcement and sanction balance, around RFSP behaviour concerning the perceived, and yet complex, market risks. Risk manifests in the specific nature of the harm, its impact, and its likelihood of occurrence, as well as specific reduction methodology. Worryingly however, risk analysis is often accomplished by assessing and sanctioning the greatest threats, and no more.

For Garland, the cultural criminological conditions of late modernity grew up around the changing structures of work, welfare and market exchange. Civil society, for him, is now more than ever defined by institutions of policing, penalty and prevention. He concluded:

*Crime control today does more than simply manage problems of crime and insecurity. It also institutionalises a set of responses to these problems that are themselves consequential in their social impact.*

Needing the fundamental institutions called the markets as all societies do, and even more so to retrieve the economic disaster caused by the crisis and its aftermath, a new engagement between civil society and market forces is therefore required. The emergence of a new institutionalised, and values-based, set of responses, which may consequently have social impact, and the role which public social control can play in such new engagement or collaboration, are essential and inter-twined considerations.

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456 MacNeil, ‘Risk Control Strategies and the Credit Crisis’ (n 408). Also see the post-GFC de Larosiere Report (n 1), 4 as quoted in Appendix K

457 Haines *The Paradox of Regulation* (n 14). And see Scott ‘Regulation in the age of governance’ (n 16). As an illustration of the problems involved, the de Larosiere Report (n 1), 10 explained the pre-GFC risk issues as including corporate governance failures in a highly competitive milieu. See Appendix K for a relevant quotation.

458 Haines *The Paradox of Regulation* (n 14); also Gray and Hamilton (n 408), 8-9 as quoted in Appendix K.

459 This is one concern for the new Irish PRISM risk-targeting approach introduced in 2011. It is one of the instrumental commonalities between criminal law pre-targeting and post offence monitoring, and regulatory enforcement at the supervisory level. See Appendix K for more.

460 Garland *The Culture of Control* (n 25), 194.
(c) The Coercive Control Tools

This dissertational section highlights the essential paradigmatic characteristics of the coercive control tools. Within the modern democracy, man is (God-given) free unless restricted. Coercive restriction, in the form of prescription, must be legitimate, voluntary and minimised. Legitimate restriction is purposed to prevent and prohibit public interest harm or harm risk. Dicey’s rule of law as tempered by Packer’s due process values complex, is the acknowledged legitimate, yet restrictive, control power exercised in the common good, where multiple legal and administrative discretions interplay, and the criminal law and its administrative variants are the control tool, with a scrutinised police function as social protection. The first justificational shoots for coercive control anciently appeared from pragmatism, advanced to normative morality as judicially pronounced, and extended to newer humanist themes suffusing from a revolutionary epoch. In the modern liberal democratic society, newer again resonating humanist values justify restriction (including criminalisation) when conduct is harmful, for instance to the economy, wrongful such as reckless, and of public concern such as adversely impacting financial stability. The harm effacing ‘offence’, and the punishing ‘sanction’, form a dependent axis, the one redundant without the other, while risk and its management is the harm focus. This is the crime/misconduct concept, the justification for both criminalisation and regulatory sanction, where the contracting individual, in return for guaranteed state protection and prevention, is restricted in his fundamental liberties of life, health, freedom and property.

The criminal law commenced as a ‘common’ law of universal application, where each individual is entitled to equal concern and respect within the rule of law. Hart

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461 See Dicey (n 25). Also see Radzinowicz History (n 25) Vol 4, and Polanyi (n 62). In Ireland, the written Constitution, and its rights as stipulated and interpreted backdrop the Dicy rule of law concept, although property rights so central to this dissertation interrogation, do not enjoy an unassailable position. In A v The Governor of Arbour Hill Prison [2006] IESC 45 (SC) Murray CJ stated that the Constitution provides a full and complete framework for an ordered society in accordance with the rule of law, the due administration of justice and the interests of the common good. See Appendix K for a more complete footnote.

462 See McAuley and McCutcheon (n 274); and see Ashworth Principles of Criminal Law (n 97); Radzinowicz History (n 25) Vol 1 Preface ix, as quoted in Appendix K.


464 Dworkin Taking Rights Seriously (n 61).
recognised that the characteristic coercive control technique designated guiding behavioural standards by rule, either for members of society generally, or for special classes within it. Exceptional circumstances may warrant sectoral criminalisation or lesser coercive control, and sectoral treatment, including a specialised sanctioning suite, especially where the stability of the national economy is at stake. Applying a targeted, coercive deterrent policy in time-relevant circumstances, with firmness and vigour where necessary, such as economic crisis adversely impacting the social fabric, of course would require real ‘skill’. Developing a format deemed ‘relatively’ common or universal throughout the financial sector, would be obligatory in order to be viewed as legitimate and as enhancing compliance.

The cornerstone sanction concept of ‘deterrence’ lies in the mid-19th century expression of the British Law Commissioners when they stated: ‘The great object of the penal law is to deter men..... by holding out privation and suffering as the consequences of transgression’. Bentham had earlier argued that since pain and pleasure are man’s well-springs, anticipated punishment (pain) would deter crime (pleasure) by incapacitation, removal of desire or fear. Bentham regarded all punishment as ‘mischief’ or ‘evil’, much as Hobbes did over a century earlier, and argued it could only be justified by utility – excluding some greater evil- and must be avoided if groundless, inefficacious, unprofitable or needless. Accordingly, punishment needed societal

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465 Hart The Concept of Law (n 123).
466 See J Hamilton, ‘Prosecuting Corruption in Ireland’ (Burren Law School, Clare, 1 May 2010); J Hamilton, when Irish DPP interviewed by Brian Dowling, Sunday 16th May, 2010 on The Week in Politics, RTE 1 TV; Hart The Concept of Law (n 123); Norrie, Crime, Reason and History (n 211); Polanyi (n 62); Weber The Theory of Social and Economic Organisation (n 66). Also see Dellway Investments & ors v NAMA & ors [2011] IESC 14 (SC) where the Supreme Court upheld the post-crisis special resolution vehicle NAMA and its powers; and, Pringle v The Government of Ireland, Ireland and the Attorney General [2012] IESC 47 (SC) where the Supreme Court held that the ESM Treaty ratification was not constitutionally incompatible absent a referendum.
468 See Criminal Law Commissioners, Seventh Report (Parliamentary Papers XIX - 1843), 92.
470 Bentham clearly drew upon Hobbes and others. See Hobbes (n 281), 353 as quoted in Appendix K
legitimacy, even within the consensual societal contract. Dicey’s legality principle therefore, propounded no punishment, save where legally prescribed. Fifty years ago, Hart explained \(^{471}\): “In the case of a rule of criminal law we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage it”. Ashworth and Zedner have argued that punishment is both the consequence, and the raison d’ètre of the criminal law, and, echoing Polanyi’s countervailing constraint, that it has operated as a carefully calibrated, and time-limited, curtailment of the rights of the individual\(^{472}\).

The original underlying assumptions in common law jurisdictions, may clearly be located to pre-political authority, to biblical scripture and principle. There is a law given, a punishment fixed, a repentance granted, and mercy claims the penitent\(^{473}\). This is substantive justice, the Divine rule of law, a counsel in wisdom designed to the future of the repentant forgiven, not mere procedural or past justice. The men of political reason, such as Hobbes and Locke, lay across this foundation, to develop the humanist rule of law, where law precedes punishment; but, repentance and mercy dropped away to deterrence (social utility) and/or retributivism, while reparation and reintegration became distinctly secondary\(^{474}\). A moral right (a natural executive right) was claimed by the classicists to punish moral wrongdoers (who forfeit their rights), which later bifurcated to those just deemed wrong absent culpability. Although punishment for past misconduct is the criminal law norm, common law comparators are problematic, and punitive practice is internationally divergent\(^{475}\).

When confronting contemporary punishment, Hart identified five essential elements, including the pain or unpleasant consequence – the British Law Commissioners ‘privation

\(^{471}\) Hart The Concept of Law (n 123), 34.

\(^{472}\) Ashworth and Zedner (n 407); Packer (n 273), 293 as quoted in Appendix K. At a practice level see Part 2 Chapter 2 concerning the ECHR and the categorisation of criminal matters.

\(^{473}\) See especially Old Testament Genesis 4 and Exodus 20-24; also Hobbes (n 281), 336 as quoted in Appendix K

\(^{474}\) Hobbes (n 281) and Locke Two Treatises of Government (n 73); Also see B Calvert, ‘Locke on Punishment and the Death Penalty’ (1993) 68 Philosophy 211; Simmons (n 311); LRC Report ‘Mandatory Sentences’ (n 469), 3 recites that the specific aims of criminal sanctions in Ireland are deterrence, punishment, reform and rehabilitation, reparation, and incapacitation. See Appendix K for a fuller footnote.

\(^{475}\) See M Tonry, ‘Punishment Policies and Patterns in Western Countries’ in M Tonry and RS Frase (eds) Sentencing and Sanctions in Western Countries (Oxford University Press 2001), 14-15 and 25 as quoted in Appendix K.
and suffering’ conceptualisation. Such punishment for Hart, was justified, where there
was breach of legal standards of behaviour (whether or not moral standards) established
by criminal legislation, and not merely purposed to extract a penalty, a claim sometimes
aimed at financial regulatory sanctioning. John Gardner synopsised Hart’s view as: ‘Any
action or practice that has costs – and what does not? – needs to pay its way in
countervailing benefits’. Gardner then asked the perplexing question about what
constitutes a ‘countervailing benefit’. For Hart, according to Gardner, the thwarted future
wrongs never committed constituted such benefit. When viewing market misconduct
however, issues arise as to whether this view of deterrence can solely prevent future
infringement, or whether a compliance strategy will be more successful, and lead to
behaviour change as well as behaviour stoppage.

While rational explanations for punishment within the law, tend to the abstract, and
suggest an unvarying institution, the practice reality finds its forms and functions
changing over time, in parallel with cultural and societal shift. Sociologically,
Durkheim explained that punishment is a mechanism of social ordering, a denunciation of
wrongdoing against the collective, with its objective continuing societal stability and
solidarity, while crucially aiding development and maintenance of social bonds. But,
treating punishment as a legal and administrative device, as opposed to an expression of
outrage enhancing the societal value impugned, may render it merely functional, or
worse, an arena where conflict and class-power are primarily exhibited. Weber
rebalanced this viewpoint, when arguing that law is a separate institutionalised autonomy,
occupying a discrete social space, where legitimately appointed or elected judges/arbiters
preside, and fairly exercise discretion in public, a bureaucratic rationality, normatively

476 See Hart *Punishment and Responsibility* (n 230) the classic, *Prolegomenon to the Principles of
Punishment*. These six principles are set out in Appendix K. Also see Packer (n 273) who set out six criteria
for choosing the criminal sanction as optimum and see Part 1 Chapter 3 section 1.3.7 below ft 565.
477 See Hart, *Punishment and Responsibility* (n 230), xii; Gardner writing in the Introduction to the second
478 Bottoms (n 247); Zedner (n 274). Tonry (n 475), 14 as quoted in Appendix K. Also see A Bottoms, ‘The
Philosophy and Politics of Punishment and Sentencing’ in CMV Clarkson and R Morgan (eds) *The Politics of
Sentencing Reform* (Clarendon Press 1995) who seminally described the causes and consequences of
‘populist punitivism’; A Freiberg, ‘Three Strikes and You’re Out – It’s Not Cricket’ in M Tonry and RS
Frase (eds) *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001) as set out in
Appendix K.
479 See Durkheim *The Division of Labour in Society* (n 60). Note the case of DPP v Paul Murray [2012]
IECCA 60 where post crisis Durkheim’s social solidarity was used as a sentencing principle in a crime
against the public purse.
based in rules and procedures, and a formal system of law-making. In its extreme form however, punishment eschews moral judgement, and becomes a bureaucratic routine, or even nothing more than a negotiated settlement. This viewpoint finds succour in the more recent managerial versions of its practice, discussed more fully in Part 2 Chapter 1 section 2.1.3, and in financial regulation’s administrative sanction regimes.

As a sui generis field, Simester and von Hirsch argue the criminal law to be a special body of law, distinctly motivated by the imposition of sanctions as punishment as others cited above have argued. The argument is that the criminal law is a disciplinarian, existing to punish culpable misconduct, and that it has three functions which resonate with regulatory sanctioning: criminalisation of conduct by stipulating offences; trial to conviction for such offences; and sanction of offenders via a potent moral voice, imposing hard treatment as an integral aspect. Primary issues thus surround what to criminalise and thus punish; and, how to avoid counter-productive over-criminalisation or over-regulation. These questions meet the autonomy/welfare tension head-on, when factoring in the dominant liberal ideation that coercive control must be minimised.

Minimalism, as defined through the control lens, has four components: respect for human rights; the citizens right that state punishment activity is conditional; that criminalisation is a last resort; and, there must be no criminalisation if matters are made worse.

Viewed as practice and technique issues, because sanction values around these components alter, as popular opinion, special interest pleading or lobbying, or political expediency dictates, then the sanctions as punishment theory, can never amount to the bedrock single theoretical grounding for the fusing of coercive control. Equally, because the four components of minimalism, amount to underpinning values, for each of the polarised criminal (punishment), and regulatory (persuade), sanction paradigms, they must be part of any fusion.

Coercive control as a social process, based in an implicit community contract or guarantee, requires advance prescriptive warning, where standards are set out, breach is punished, fair procedure is applied, and where actual and potential offenders are deterred.

480 See Weber Economy and Society (n 25).
481 See Simester and von Hirsch (n 125).
482 See Ashworth and Zedner (n 407); Simester and von Hirsch (n 125).
483 See Ashworth Principles of Criminal Law (n 97).
and thus harm is reduced\textsuperscript{484}. Its underlying values are located in legal precedent, legislation, and constitutional imperatives most especially fundamental rights stipulations. Notions of public protection and security, as essential goods purposed to self-preservation, well-being and happiness, are fundamental\textsuperscript{485}. Legally grounded in Dicey’s constitutional rule of law and legality, independent courts administer criminal law, while financial regulation is grounded in delegated statutory rule where independence is curtailed\textsuperscript{486}. The so-called criminal justice control system, is not a system at all, but instead an inter-connected set of autonomous and independent, control institutions, which occupy complementary but sometimes antagonistic roles, and exercise considerable jurisdictions of discretion\textsuperscript{487}. Some have described this as a process and others as a grinding machine\textsuperscript{488}. It is based around a bureaucratic hierarchy of control, just like regulatory control agencies with a command chain and formal institutions, rules and procedures, upon some of which financial regulatory control also draws\textsuperscript{489}. The successive parts are the executive as policy formulator, parliament as legislator, independent police as investigator, independent prosecutorial service as prosecutor, independent judiciary as arbiter and sentencer, and the executive apparatus again, this time as enforcer, especially in the guise of the prison service. It carries a non-trivial element of moral force, mainly involves enquiry into the accused’s mental state, and stipulates a higher standard of proof.

The distinctive criminal law is a tool of state control; its conduct norms were originally heavily subscribed by moral standards, custom and precedent, and now increasingly by democratic legitimacy. Harm risks in rules-based fashion are defined as offences which aim to prescribe societal harms, and they mainly emphasise culpability or moral

\textsuperscript{484} Fuller\textit{The Morality of Law} (n 230); Hart \textit{Punishment and Responsibility} (n 230); Hobbes (n 281); Garland \textit{The Culture of Control} (n 25); Wells and Quick (n 180).

\textsuperscript{485} See Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’(n 310).

\textsuperscript{486} See Dicey (n 25). As to independence, for regulators the establishment of autonomous agencies by design does not guarantee \textit{de facto} autonomy from their political masters; see K Yesilkagit and OA Danielsen, ‘Transnational Regulatory Networks As a Solution to the Community Credibility Crisis? The Case Of The European Competition Network’ (Jerusalem Papers in Regulation & Governance Working paper no 31 January 2011 \texttt{<http://regulation.huji.ac.il> accessed 10 February 2011}). Also for Scott ‘Regulatory Crime’ (n 25) enforcement agencies enjoy too little autonomy in the application of sanctions for regulatory infractions.

\textsuperscript{487} A Ashworth, \textit{The Criminal Process: An Evaluative Study} (2\textsuperscript{nd} edn, Oxford University Press 1998); Reiss and Bordua (n 117).

\textsuperscript{488} See Zedner (n 274).

\textsuperscript{489} Weber \textit{The Theory of Social and Economic Organisation} (n 66).
blameworthiness. It is a response to failure, a misconduct deviance from conduct norms. Its discrete practice and procedure are overshadowed by norms such as Packer’s due process, innocence until proven guilty, the right to silence, fair trial and proof beyond reasonable doubt. Sanction is a vital element, and it is punishment oriented as distinct from civil law compensatory, with just deserts retributivism in the ascendancy. Based around the values of liberty and personal autonomy, society deliberately chooses to react to crimes ex-post rather than take extreme measures of prevention, and when so reacting to apply the minimised sanctions already highlighted.

Yet, more recently, these ‘real crime’ distinctive characteristics have become blurred from diverse interests, including its application to non-traditional enforcement functions such as regulatory control. This includes within the public regulatory space of economic control, where private markets dominate, and yet the public interest is impacted, where risk management is the agenda, and where civil enforcement elements sit beside it in a hybrid binary approach. One of the manifestations of such is a pronounced use of sanction discount, a feature not unknown to the criminal form, but generally confined to early pleas of guilty.

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490 Note Lord Wright’s famous dicta in Sherras v De Rutzen that there is a presumption that mens rea, or intent, must be proved in all cases save where displaced by statutory wording or statutory subject-matter. See Sherras v De Rutzen (1895) 1 QB 918 ((QBD); and Sweet v Parsley (1970) AC 132 (HL), and for Ireland see The People (DPP) v Murray (1977) IR 360 (SC); Gammon (Hong Kong) Ltd v Att-Gen of Hong Kong (1985) AC 1(PC). While there can be little doubt that offences in the general area of financial services or financial regulation are potentially amenable to the strict liability doctrine, it has not occurred to date. Statutory strict liability offences are often accompanied by the creation of statutory defences see Scott ‘Regulatory Crime’ (n 25). See Appendix K for more.

491 See generally for instance, Ashworth Principles of Criminal Law (n 97); Ashworth and Zedner (n 407); Charleton et al (n 281); Conway Daly and Schweppe (n 448); J Davis, ‘The Science of Sentencing: Measurement Theory and von Hirsch’s New Scales of Justice’ in C Tata and N Hutton (eds) Sentencing and Society (Ashgate 2002); Garland The Culture of Control (n 25); JH Langbein, The Origins of Adversary Criminal Trial (Oxford University Press 2003); Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310); McAuley and McCutcheon (n 274); Radzinowicz History (n 25); Walsh Criminal Procedure (n 281); Wells and Quick (n 180); Zedner (n 274).

492 Scott ‘Regulatory Crime’ (n 25) tabulated and juxtaposed the contrasting features of both ‘real’ and ‘regulatory’ crime generally. See Appendix K for an extended footnote and discussion.

A member of the judiciary interviewed for this dissertation stated the modern financial regulatory agenda:

*The primary agenda it seems to me of the regulators is to regulate. To insure that for the future, corporate governance is engaged in, to certain minimum standards, with a view to preventing misconduct, and to insure public confidence in the nature of corporate commerce. If people can’t trust companies, can’t trust financial institutions, can’t trust banks, well, that’s contrary to the interests of society.*

Regulation, as restriction within such a trust imperative, is in essence about a double P control methodology of prevention/protection, a clear companion to its parental criminal law paradigm. Asserting a public interest focus, for legitimacy it must include at least a way to perceive, and preferably deliver, such interest. As Weber demonstrated, being an economically rational policy associated with the growth of formal market freedom, and yet paradoxically restrictive, regulation has a long and diverse history. Regulation is inherently derivative, and acts as a parasitic process upon valuable, substantive market (indeed social) activity. Substantive restriction significantly may be group or circumstance selective, according to Weber, when effectively enforced upon market freedom, and thus allows for special treatment for financial markets. Within the regulatory contract construct, the three dominant models of social ordering, the market, the community and the state bureaucracy, intermix their respective governing principles of dispersed competition, spontaneous solidarity, and hierarchical control, in such a way as to allow cooperation and conflict according to legally grounded patterns of rules and principles.

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494 Interviewee L Judiciary Ireland 7 January 2013. Also see the De Larosiere Report 2009 (n 1), 13 which defined financial regulation as quoted in Appendix K.
495 See Noll (n 362).
496 Weber *The Theory of Social and Economic Organisation* (n 66), 183 as quoted in Appendix K. Polanyi (n 62) agreed with Weber as similarly quoted in Appendix K. McLean (n 314), 46 expounded upon regulatory origin as also quoted in Appendix K. Also Braithwaite and Drahos (n 346), 88 as quoted in Appendix K and as set out more comprehensively in Appendix K.
497 See Selznick (n 98).
498 Weber *The Theory of Social and Economic Organisation* (n 66), 182. Also see footnote 222. Weber identified four modes as set out in Appendix K. This effectively is Weber’s rule of law underpinning for the regulatory contract. As to the regulatory contract also see Black *Rules and Regulators* (n 403) and Prosser *Law and the Regulators* (n 21).
The prevalent form of modern financial market control is the statutory delegated establishment of a specialist government control agency. Its first essential agency tasks is to identify and define the public interest, and then publicly disseminate that finding; its second, to channel, and alter if necessary, an economic activity of social worth, effectively financial market activity; and its third, to provide elaborate procedural and evidentiary rules (e.g. Packer’s obstacle course) to protect constitutionally enshrined financial market property rights. Control agencies make discretionary decisions affecting economic efficiency, the conduct of regulatory actors and the dynamic activity of regulated markets. Kagan has both observed and warned:

_The emphasis on legal rules and orders as a mode of control highlights the degree to which regulatory agencies are legal institutions. Regulatory officials are legal officials; they make and enforce and apply law. Their decisions are subject to challenge and review in the courts and to reversal for failure to adhere to the canons of legal justification......political pressure, bureaucratic convenience, ideological preferences, and even outright corruption are often significant factors in particular regulatory decisions._

In terms of performance assessment, as Polanyi argued and Kagan confirmed, agencies themselves as autonomies are controlled and operate in what has been described as theatres of external judgement. These are institutional settings, where a third party outsider, such as a court or executive power with policy or budget control, passes judgement, or equally likely the aggrieved public vents to political masters or media interlocutors, who may consult academic research for ammunition. They cannot exceed their statutory delegated power, for instance, the obligation to refer serious financial crime to higher prosecutorial authority. Where the delegated ‘vires’ or boundary is exceeded then judicial review will lie. Furthermore, where process values around the exercise of discretion, such as constitutional justice, are breached, they also may be judicially enforced. The inherent, capture danger and corruption criminality, similarly require correctives at both market actor and regulator levels.

*Organisation* (n 66), 331 who wrote that regulation may be by rules or norms, the application of which must be based in technical expertise to be fully rational.

500 See Noll (n 362); Packer (n 273).
502 See Noll (n 362).
503 See Noll (n 362).
504 See Hogan and Morgan (n 276).
It is trite perhaps to record Weber’s view that, ‘voluntary market regulation has not appeared extensively and permanently except where there have been highly developed profit-making interests’. This clearly includes financial markets. Regulation begins with the identification of harm or the risk of it within the market context, some of which is complex, inter-connected and recursive, while state control involvement is central. Connery and Hodnett have detailed six forms of state regulatory control – state capacities and resources- of industrial, economic and social policy, most of which are relevant to the Irish crisis response. These include direct state command, the use of incentives in such purpose, and the conferring of property rights. For purposes of this dissertation, regulation is public financial regulation via control agency where the state polices society-valuable private activity, exercising social control in the public interest, and mobilising incentives, through the coercive power of the law. All six control forms are involved. It may take the form of legal restrictions, self regulation, social regulation (e.g. norms), co-regulation and/or market regulation. It is ‘government in miniature’ involving discretionary decision-making. This means that there is a depth to discretion with constraint, there is flexibility, and there is the possibility of mutual and recursive norm construction, where legally grounded regulatory action and its implementation, are interdependent with social relations in which they are embedded. At its best, it is accountable, consistent and transparent and certainly post-GFC revolves around targeting, and further is subject to cost-benefit control. Regulators and their staff obtain a position of superiority by virtue of technical expertise, which specialist skill is augmented from continuing experience, while it is matched by specialist knowledge, expert market

505 For instance, see European Banking Authority (EBA) <http://eba.europa.eu/risk-analysis-and-data/risk-assessment-reports> accessed 25 June 2013). Also see EBA Joint Committee Report on Risks and Vulnerabilities in the EU Financial System (March 2013) which outlined six risk categories and see page 7 as set out in and quoted in Appendix K. Also see O’Hanlon (n 463), 294 who stated: ‘Risk is intrinsic to economic enterprise’; while Bernstein, Against the Gods: The Remarkable Story of Risk (1996), 21 added that capitalism is the epitome of risk-taking.

506 Connery and Hodnett (n 6).These are: To command: Achievement of policy objectives via legal authority and the command of law; To deploy wealth: Sectoral conduct is influenced by incentive deployment in the form of contracts, grants, loans, subsidies and the like; To harness markets: Government channels competitive forces to particular ends; To inform: Information is deployed strategically; To act directly: The state takes direct physical action; To confer protected rights: Rights and liability rules are allocated and structured to create desired incentives and constraints.


509 Haines The Paradox of Regulation (n 14).
actors, who as entrepreneurs, innovate the market, and thus, lie ahead of regulatory skill and experience\(^{510}\).

Prosser, described regulation as controlling, directing or governing but always according to a rule or principle. He concluded that at its most specific extreme, regulation refers to legal rules and other measures expressing command and control arrangements, the conscious ordering of activity in accordance therefore with norms\(^{511}\). He amplified that affecting the operation of markets through command and control, may be delegated through the use of ‘self-regulation’. Julia Black has described command and control regulation as state regulation based in rules and backed by criminal sanction\(^{512}\). Effective enforcement, where regulators enjoy considerable discretion, according to Gunningham, is mandatory to the successful implementation of social legislation, whatever the system employed\(^{513}\).

The need for new and specific, civil sanction tools to add to the mix, was highlighted as essential even for pre-crisis Irish financial regulatory control\(^ {514}\). Julia Black recognised the role of both public and private regulatory control, and encapsulated sanctions as an essential element in her definition of regulation, which this dissertation adopts as its working definition. She stated\(^{515}\):

\[\text{Regulation is taken to be organised attempts to influence behaviour, using any combination of rules, monitoring, incentives, and sanctions, which may or may not have legal status.}\]

Within binary enforcement, and exhibiting a divergence in sanction objectives, regulation essentially is about changing the future behaviour of market regulatees, unlike the criminal law which as seen involves backward critique and previous behaviour punishment\(^{516}\). Nonetheless, deterrence is known to both poles, as is compliance, while


\(^{511}\) Prosser Law and the Regulators (n 21); see Hogan and Morgan (n 276); also see Levi-Faur ‘Regulation & Regulatory Governance’ (n 402).


\(^{514}\) McDowell Report (n 26); Also see Butler et al (n 451); Hamilton ‘Do we need a system of administrative sanctions in Ireland?’ (n 451); Horan (n 87); McDowell (n 451).

\(^{515}\) See Black ‘Empirical Legal Studies in Financial Markets’ (n 22), 3.

\(^{516}\) See Llewellyn (n 427).
the divergence demonstrates the need for the presence of both strategies in the available mix. Working like a precision instrument in theory according to Haines, and adopting a targeted problem-solving approach, regulatory enforcement policies and practices principally target the highest risk categories, although criminal targeting is also increasingly practised\textsuperscript{517}. In a nutshell, Regulation equals Restriction equals Policing equals Enforcement equals Sanction, via either and/or both binary poles\textsuperscript{518}. The regulator fixes both an over-riding regulatory approach, and an underlying enforcement style, in this endeavour.

Regulatory objectives around ensuring compliance, the preferred regulatory enforcement strategy, are also influenced by the contested and ambiguous nature of many business offences\textsuperscript{519}. The surrounding context is one of resource inequalities, and consequently, what is at issue is not condemnation but instead the negotiation of agreed practice\textsuperscript{520}. This is regularly seen in the negotiation of settlement agreements by financial regulators, some of which earn limited or no judicial scrutiny, a policy noticeable right across common law jurisdictions, and particularly evident in Ireland\textsuperscript{521}. Commentating upon the enforcement policy of negotiating norms and sanctioning within them, a policy which still largely persists post-crisis, and reflects criminal norms as demonstrated, Croall stated\textsuperscript{522}:

\begin{quote}
A regulatory approach is ....associated with a minimal use of regulatory sanctions, although it is important to recognise that this emerged out of a long history of negotiation between business groups, regulators and governments.
\end{quote}

In considering a new third way, extrinsic influences must be considered. Regulatory enforcement on the one hand, suffers numerous influence strains. It is an intrinsically political endeavour at agency establishment, supervision, and enforcement levels. Political support for regulatory enforcement therefore, is contingent and often short-

\begin{footnotes}
517 Haines \textit{The Paradox of Regulation} (n 14); Wells ‘Corporate crime: opening the eyes of the sentry’ (n 18).
518 See for instance, Ayres and Braithwaite (n 90); Black ‘The Credit Crisis and the Constitution’ (n 111); Haines, \textit{The Paradox of Regulation} (n 14); Hart \textit{The Concept of Law} (n 123); Macrory Review (n 120) and Macrory ‘Reforming Regulatory Sanctions’ (n 120).
520 Croall ‘Combating Financial Crime’ (n 365); Yeung ‘Quantifying Regulatory Penalties’ (n 290); Yeung ‘Better regulation’ (n 437).
521 See Appendix F.
522 See Croall ‘Combating Financial Crime’ (n 365), 45.
\end{footnotes}
lived\textsuperscript{523}. For regulators, the establishment of autonomous agencies by design does not guarantee de facto autonomy from their political masters, a matter of some concern to market actors\textsuperscript{524}. Enforcement agencies enjoy too little autonomy in the application of sanctions for regulatory infractions for instance, according to Scott\textsuperscript{525}. Outside the immediate agency there is recent European based empirical evidence that economic factors impact prosecutors, while both economic and political factors impact both court and police behaviour, throughout the criminal enforcement regulatory sector\textsuperscript{526}. From the ideological viewpoint, there is evidence that investigators are increasingly drawn from a police background, that former criminal prosecutors are being employed by regulators, and positively, that this ingrained expertise is cementing the use of higher protection techniques across the continuum\textsuperscript{527}.

Each regulatory agency’s legal and political mandate, is found in its underpinning delegating legislation, and provides the regulatory regime with its sense of police-mission and policy-making style\textsuperscript{528}. Where ‘choice problems’ are left to the regulator, there is risk of being left without reliable political support for stringent enforcement or decisions adversely affecting the commercial orthodoxy; alternatively, a forceful political mandate and articulation of specific, stringent rules in the authorizing legislation may potentially result in more consistently stringent regulatory policy\textsuperscript{529}. Wider discretion, and wider again delegation across the full investigation, prosecution, rule-making and adjudicative functions raises clear values issues including bias and conflict of interest. The necessity for governing norms is abundantly apparent. A blended binary, to be successful, will at

\textsuperscript{524} See Yesilkagit and Danielsen (n 486).
\textsuperscript{525} See Scott ‘Regulatory Crime’ (n 25).
\textsuperscript{527} Kagan Regulatory Justice (n 501); Interviewee K Regulator Australia 24 May 2012; JW Barnard, ‘Making a Deal with the SEC: Candor, Cooperation, Contrition and Cultural Change’ (The International Conference on Law and Society, session no TBA 02 Financial Regulation: The Soul Searching Continues Hilton Hawaiian Village Hawaii, 8 June 2012).
\textsuperscript{528} See Kagan Regulatory Justice (n 501). N Garoupa A Ogus and A Sanders, ‘The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?’ (2011) 70(1) Cambridge Law Journal 229 highlighted control agencies, with not alone investigative and prosecutorial powers, but also, rule-making and adjudication roles. A Bhagvat, ‘Modes of Regulatory Enforcement and the Problem of Administrative Discretion’ (1998-1999) 50 Hastings Law Journal 275, found a deep relationship between the procedures gifted to control agencies to formulate and enforce rules and policies, and the power such agencies possess to shape the substance of those same rules and policies.
\textsuperscript{529} See Kagan Regulatory Justice (n 501).
least require a firmly and clearly formulated, and stated, political will, a fully
independent, and preferably specialist, prosecutorial decision making body, operational
directions subject to public scrutiny, a role for vetting of negotiated settlement
arrangements, and advance publication of written sentence guidelines.

Social and political relationships pertaining to regulators in practice tend in Kagan’s
observation, towards the regulatory accommodation already highlighted as negotiated
outcomes530. This view is vindicated by the Irish practice of only mobilising voluntary
settlement agreements as financial regulatory sanctioning. Implementation stage,
including regulatory agency performance, thus diminishes as a salient political issue. But
capture, as occurred in Ireland, is a constant threat. In that regard, regulatory policy is
often moulded by the interaction between the regulator and relevant interest groups,
where consumer activists are often less organised, less informed and less resourced than
the fully engaged and highly organised business lobby531. In a post-crisis, reformed
regulatory collaboration these issues will require redress.

Criminalisation in practice is similarly directly linked to political opportunism and power.
Conceptions of harm and wrongdoing are defined within the current political ideology,
and resort to the criminal law is parasitic upon or ancillary to the established legal order
of rights and duties532. National social, institutional and cultural characteristics influence
how crime control is viewed533. Norrie has argued that the liberal view that criminal law
co-exists with a consensual world, can only operate if the deep social and political
conflicts in society are kept out of discretionary decision-making, such as prosecutorial
evaluations, judicial rulings and sentencing534. This is his contribution to the justice
value. However, he concluded that responsibility and punishment relative thereto, cannot
be judged as an apolitical, asocial, and amoral abstraction, since crime control is primarily
about the social and political elite controlling the lowest social classes who are not free
and equal subjects, a classical ‘them and us’ divide. Allowing Norrie as correct, and
Levi’s structural balance observation, principles accumulated over the centuries therefore,
find difficulty validly informing a criminal/regulatory binary concerned with business or

530 See Kagan Regulatory Justice (n 501).
531 See Kagan Regulatory Justice (n 501); Fullenkamp and Sharma (n 420).
532 See Ashworth Principles of Criminal Law (n 97); DN MacCormick, Legal Right and Social Democracy
(Oxford University Press 1982); Norrie Crime, Reason and History (n 211); Selznick (n 98).
533 Garland The Culture of Control (n 25).
534 See Norrie Crime, Reason and History (n 211).
white-collar infringers or criminals drawn from the ranks of the same governing elite. Here lies the diversity in approach to criminality and sanctioning of blue and white collar offending: ‘them’ theories cannot be applied to ‘us’.535

A person of high status who commits a criminal act, is usually less likely to be labelled, and eventually attributed a deviant character, than is a low status person, while most people – upper, middle, and lower statuses – have trouble thinking of high-status individuals as deviant or criminal, no matter what they do536. The crimes of the powerful have been recognised as differentially enforced within rhetoric of clampdown and control, and the Irish compliance-oriented approach has been claimed as creating a two-tier legal system which privileges corporate elites in the financial sector537. All of this is amply expressed post-GFC, within the recognition among governance scholars, and elite business persons, that elite cultures are as crucial to financial regulatory reform as the economics of the markets538. However, since ‘street crime’ committed by actual individuals dominates the harm focus, corporate harm finds itself doubly removed in that corporations are hard to perceive as criminals, and further hard to capture within the law’s individual forms539.

Arising from this discussion, the respective criminal law and regulatory paradigms, as they sit within the binary, are synopsised in Appendix C and Appendix D. They enjoy a similar spine, a control methodology based in welfare restriction related to harm risk, are

535 Over sixty years ago Edwin Sutherland coined the phrase ‘white-collar’ crime. See Appendix K for an extended footnote. Gobert and Punch (n 130), cited the leading modern scholar Braithwaite, in support of their view that beyond the acts of individuals, the phrase includes corporate crime. See J Braithwaite, Punish or Persuade: enforcement of coal mine safety (State University of New York Press 1985); Gobert and Punch (n 130); Horan (n 87); McCullagh ‘How Dirty is the White Collar? Analysing White Collar Crime’ (n 213); T O’Malley, Sentencing Law and Practice (1st edn, Round Hall 2000), 442; Slapper and Tombs (n 87); E H Sutherland ‘White-collar criminality’ (n 128).


537 McCullagh ‘Two-Tier Society; Two-Tier Crime’ (n 199); J McGrath, ‘Two-tier system puts corporate criminals above law’ The Irish Times (Dublin, 21 December 2010); Wells ‘Corporate crime: opening the eyes of the sentry’ ( n 18). Levi ‘Serious Fraud in Britain’ (n 213), 183 asserted that the elite receive preferential treatment. Also see M Levi, Regulating Fraud: White-Collar crime and the Criminal Process (Routledge 1987). See Appendix K for more.


539 See Norrie Crime, Reason and History (n 211).
institutionalised, principled, legally grounded, and contract underpinned, but have their own special features.

1.3.6. Coercive Control: Identifying the Connective Tissue

The continuing ambition of this dissertation is to more deeply interrogate specific normative control elements, drawn from the two paradigms explored above, as they impact the market. Kuhn’s paradigm model is used to identify and interrogate these select paradigm elements, and in particular diagnose situations, illuminate societal vision, and open up interpretive perspectives in turn upon the market autonomy and restriction values complex.\(^{540}\)

Engaging the Kuhnian paradigm conceptualisation entails setting out the basis of the salient field, the concrete model, i.e. the fundamentals. The paradigm concept as a theoretical framework or guide, within which both conjecture and practice operate, sits at the heart of the national or sectoral culture. It amounts to the commonly held, taken for granted normative assumptions, which commence as values and beliefs, and which in turn are filtered through recognised behaviours. In dissertational terms it amounts to distilling the normative fundamentals of coercive control.

Fixing or identifying paradigms, according to Kuhn, is a pragmatic exercise in instrumentalism, where theories or ideas are instruments of action for practical purposes, namely problem solving.\(^{541}\) In this dissertation, pre-paradigm values and beliefs (theories) are filtered via Teubner’s black boxes of the criminal law and regulation binary. They are filtered through behaviours (observations) and synthesised into the paradigm, the underlying assumptions which amount to the theoretical statement or framework of the observed namely, the criminal law or regulation or their binary blend.\(^{542}\) The Kuhnian paradigm however, is a changing conception, and is not an absolute truth capable of evaluation. Because of this change or scientific revolution feature the Kuhnian paradigm conceptualisation is an ideal vehicle to test a reform context. As a pragmatic evaluation,

\(^{540}\) TS Kuhn, *The Structure of Scientific Revolutions* (2nd edn, University of Chicago Press 1970); also see Habermas (n 276).

\(^{541}\) See J Dewey, *How We Think* (Heath 1910); Kuhn (n 540).

\(^{542}\) Teubner ‘Juridification: Concepts, Aspects, Limits Solutions’ (n 226); Kuhn (n 540).
determined by what is actually observed from the behaviours, the paradigm therefore
speaks to a practice-centred evolution of values and beliefs, and eschews both a static
cast-in-stone approach, and pure or speculative theoretical rationalising.

It is impossible in a work of this type and size to interrogate all relevant issues across the
vast swathe of market autonomy and regulatory restriction. Discrete selection from the
binary parts, and their interplay, is grounded in the connective tissue between their
respective coercive control paradigms, identified by deploying this instrumentalist
Kuhnian approach. As Habermas has explained of legal paradigms:\n
\[\text{Legal paradigms make it possible to diagnose situations so as to guide action. They illuminate the horizon of a given society... Paradigms open up interpretive perspectives from which the principles of the constitutional state.... can be related to the social context... They throw light on the restrictions and possibilities... the proceduralist paradigm... contains both normative and descriptive components.}\]

Binary policing interplay within the financial market control domain is a crucial element
in repression of illegal, and regulation of legal, markets.\(^{544}\) Sanction mobilised according
to constitutional values, gives force to the market restriction geared to societal goals, and
thus, the illuminating perspective is that its maximised delivery is the desired outcome. In
practice, this sanction interplay begs whether criminal law and regulation are
incompatible ‘black boxes’, as a restriction upon possibilities, or a true binary, liberating
such possibilities and possessing a concerted connective tissue.\(^ {545}\) Smith et al argue, a
proposition not fully accepted in this dissertation, but one interrogated, that:\n
\[\text{Criminal Justice is founded on principles of independence and impartiality and regulation promotes pluralistic and flexible pragmatism... they appear as conceptually incongruous control systems suggesting... little scope for synthesis or fusion.}\]

\(^{543}\) See Habermas (n 276), 437.
\(^{544}\) Wells ‘Corporate crime: opening the eyes of the sentry’ (n 18); Also see Elder ‘Financial Regulation Enforcement and the Criminal Dimension: Irish Perspective, EU Context’ (n 404).
\(^{545}\) See Teubner ‘After Legal Instrumentalism? Strategic Models of Post-regulatory Law’ (n 17). Teubner has argued that social systems such as law, politics and regulated sub-systems are ‘black boxes’ in the sense of being mutually inaccessible to each other. He further argued that, these black boxes may become ‘whitened’ in the sense that an interaction relation develops among them. One central problem is perceived as creeping legalism or juridification which damages any other sub-system with which law interacts. See Scott ‘Regulation in the age of governance’ (n 16), 151-154. See Appendix K for a larger footnote.
Exploring the fundamental assumptions underpinning the binary paradigms as juxtaposed in Appendix C, locates four prominent normative areas of connection. The first two find a direct connection between the control paradigms and the market. These are the autonomy/restriction tension already extensively interrogated, and risk management which will be interrogated in Part 2 Chapter 1. The third is the offence/sanction dependent axis, while the fourth is located in the coercive control values complexes. Both more fully interrogated in Part 2 Chapters 3 and 2 respectively. It is these four links, and more particularly the last three, which upon interrogation within the financial regulatory reform context, are purposed to yield a reformed interplay strategy and an upgraded sanction fusion. A normative theoretical framework for examining restriction as coercive control is next established to aid such interrogation.

1.3.7. Coercive Control: Modern Normative Theoretical Framework

Polanyi’s thesis is that market societies are constituted by two conflicting movements, on the one hand, the laissez-faire movement to expand the market, and on the other hand, the protective, if not stabilising, countermovement (of all groups in society) that emerges to resist the dis-embedding of the economy. He highlighted the dangers of reliance upon market mechanisms (self-regulation) in organising economic life, and argued that free market rein was self-destruction. For him, capitalist societies responded to the social devastation of such by developing welfare capitalism, a means of re-embedding the economy within civil society by regulating markets. However, he pointedly recognised that restrictive regulation by bureaucratic means, via the establishment of control autonomies, may result in over-regulation or its abuse, and thus itself required constraint. Polanyi declared: ‘The true answer to the threat of bureaucracy as a source of abuse of power is to create spheres of arbitrary freedom protected by unbreakable rules’.

Public constraint of autonomy, as exemplified by coercive control techniques therefore, must be carried out in accordance with law to be legitimate. Within Locke’s concept as explained, law mediates as a rational rule of law enjoying an independent autonomy. Coercive control, located in the criminal law, has been described by McAuley and

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547 See Block (n 353), xxviii.
548 See Polanyi (n 62), 264.
McCutcheon, as a continuum spanning the ages which moved from barbarity to a recognisable rule of law. At the modern constitutional level, this rule of law promulgated by Dicey, lies within a tripartite separation of powers of government, as recognised by the Irish Supreme Court in Re Haughey. For Dicey, the universal rule of law incorporated three distinct, though kindred, normative concepts: subordinating arbitrary discretionary authority to that administered by independent judicial authority; subjecting every citizen equally to the law and its judicial administration; grounding as constitutional principles by judicial decisions determining private rights in individual cases, meaning that the constitutional code was not the source, but instead the consequence, of the rights of individuals. Akin and included is the principle of legality he also advocated, and under the Latin tag *nullum crimen sine lege* retrospection of criminal offences and sanctions was outlawed. Further, under administrative law it was required that law and not discretionary whim be applied. Thus, all law must be clear, be capable of being ascertained, be applied, and be non-retrospective. These principles require advance statement of sentence and sanction principles; their maintenance for past misconduct; a stated sanction suite; and the exercise of control agency discretion in accordance with legally devised and promulgated criteria in relation to enforcement pathway (including double jeopardy issues) and charge and sanction decision-making. Beyond Dicey, constitutional and international norms copper fasten his theory, for instance, ECHR article 7 prohibits retrospection and forms of double jeopardy; article 15.5 of the Irish Constitution legislative retrospection; and, the UN ICCPR, special court arrangements not based upon reasonable or objective grounds.

Of course Dicey’s view, although superceded by the written Irish constitution and its fundamental rights provisions, is upheld by the continuing willingness of the Supreme

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549 See McAuley and McCutcheon (n 274).
550 See Hogan and Whyte (n 238), 108 onwards; Re Haughey [1971] IR 217 (SC).
551 Dicey (n 25), especially 110-121, who formulated his concept, which the prior written US constitution encompassed and the subsequent written Irish constitution enveloped, from an empirical and comparative survey of British (unwritten), US and continental constitutional and administrative forms.
552 Literally, no crime without law; It can be extended to no punishment without crime, and vice versa, if there is sanction there must be a breach.
553 See Magee v Culligan [1992] 1 IR 233 (SC), 272 and Finlay CJ as quoted in Appendix K.
Court to interpret such rights within and from the living, breathing document. Nonetheless, the essential point emerges that the autonomy of the rule of law is also subject to constraint within Polanyi’s proposition. For Dicey’s rule of law, liberty or freedom as a right, meant protection from arbitrary arrest, imprisonment or other coercive force, save in accordance with law, secured by an independent and vigilant judiciary with extensive Habeas Corpus powers. On the administrative side judicial review of administrative action in its procedural forms is the equivalent although merit review is extremely rare. Generally, divers categories of law impinge upon regulation, and impact its form and effectiveness. For instance, criminal law and its offspring regulation where coercive control resides, constitutional law where control corrective values mainly congeal, contract law where ‘arms length’ terms are negotiated, trust law where ethical and fiduciary duties are defined, administrative law where vires boundaries are set and the exercise of state power is judicially reviewable, and so on.

While the Irish state, as set out in article 43 particularly, acknowledges private property ownership, it also recognises that its exercise in civil society is capable of regulation in accordance with social justice, within which restrictive legislation reconciles private property rights against the common good. Until the early 1980s this provision featured little in constitutional jurisprudence. Property rights guarantees enumerated by the Supreme Court, applicable to both individuals and corporate entities, include land, moveable property, money, pension rights, livelihood and carrying on a business, intangible intellectual property rights and contract rights. Contrastingly however, economic interests generated as a result of state market regulation, such as licences, enjoy

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555 See Hogan and Whyte (n 238). In Sinnott v Minister for Education [2001] 2 I.R. 545 (SC) Murray CJ expressed the view that the Constitution is a living document interpreted in accordance with contemporary circumstances; Walsh J in McGee –v- The Attorney General [1974] I.R. 287 (SC) explained that the potential shift in norms may be conditioned by the passage of time; while in State (Healy) –v- Donoghue [1976] I.R. 325 (SC) O’Higgins C.J. observed that Constitutional rights may gradually change and develop as society changes and develops.

556 See Dicey (n 25); also Polanyi (n 62), 264 as quoted in Appendix K.

557 See Hogan and Morgan (n 276).

558 See Hogan and Whyte (n 238).

little protection\textsuperscript{560}. In \textit{Maher}\textsuperscript{561} it was made clear by two Supreme Court judges that 
regulated market operators were subject to changes in the regulatory regime, when made 
in accordance with regulatory rationale and objectives, save where substantive rights, 
independent of the regulatory regime, or fundamental rights, were infringed. Further, and 
of great interest to bank shareholders post-crisis, in \textit{O’Neill}\textsuperscript{562} the Supreme Court rejected 
the proposition that a shareholder may mount a personal civil action for damages, for the 
reduction in share value, resulting from damage to the company caused by a party causing 
such damage.

Fleshing out the values concept, Packer envisaged paradigm competition, where 
‘negative’ due process protection, which limited official power and its exercise, 
normatively competed for priority with crime control, along a societal value systems 
continuum, where wrongdoing was processed in accordance with the criminal law\textsuperscript{563}. He 
described two oppositional and discrete values complexes or models in normative 
antimony, where the two major conflicting views about process values, on one hand 
favour efficient suppression of crime, and on the other subordination of the exercise of 
state power in favour of individual protection as a right\textsuperscript{564}. For him the validating 
authority was judicial, and required an appeal to supra-legislative law as found in the 
constitution. He freely acknowledged that, the day-to-day functioning of the process 
required a constant stream of minor adjustments and normative tension resolutions 
between the two models, within competing policy claims. Further, he recognised that his 
models were theoretical distortions of reality, and that their formulation ran the risk of 
polarisation. For him, efficiency from apprehension to disposal, a premium on speed and

\textsuperscript{560} See Hogan and Wyite (n 238). See Hempenstall v Minister for the Environment [1994] 2 IR 20 (HC); 
Kerry Co-Operative Creameries Ltd v An Bord Bainne [1990] ILRM 664 (HC) [1991] ILRM 851 (SC); 
Maher v Minister for Agriculture, Food and Rural Development [2001] 2 IR 139 (SC).

\textsuperscript{561} Maher v Minister for Agriculture, Food and Rural Development [2001] 2 IR 139 (SC), 233-4 Murray J, 
with whom Fennelly J agreed; and see Hogan and Whyte (n 238),1973.

\textsuperscript{562} See O’Neill v Ryan [1993] ILRM 557 (SC). Nonetheless, Hogan and Whyte (n 238), 1976 at least as far 
as legislative interference in the guarantee is concerned, point to two decisions under the different article 
40.3 where protection was recognised see PMPA v Attorney General [1983] IR 339 (SC) and Pine Valley 

\textsuperscript{563} See Packer (n 273), 153; In what he described as, ‘\textit{contemporary American society’}, of the mid-1960s.

\textsuperscript{564} See Packer (n 273). Described as the oppositional crime control model and the due process model, 
Packer identified four assumptions as common ground between the two models, which he regarded as 
opposite ends of the criminal process continuum. As to due process and consideration of the interests of the 
individual accused and society, in the pre-trial publicity context, in D v DPP [1994] 2 IR 465 (SC) and Z v 
DPP [1994] 2 IR 476 (HC & SC) which followed it, it was held that on a hierarchy of constitutional rights, 
the right to a fair trial was superior to the community’s rights to have a crime prosecuted.
finality, fact establishment preferably at interrogation, the use of extra-judicial processes, and a routine administrative if not managerial screening model, reflect the epitome of control.

Within the criminal process continuum, where adversarialism mediates, Packer identified four assumptions as common ground between the two competing models: Dicey’s constitutional requirement that defining criminal misconduct occur prior to processing the miscreant; such criminal process is invoked by proper authority, after crime commission, where there is a reasonable prospect of apprehension and conviction; legitimate limitations to powers of government and its control agencies to investigate and prosecute misconduct, including scrutiny of enforcement personnel and activities; a complex of assumptions, around the central theme that the accused is an individual independent entity with rights, including the right to require the prosecutor to prove its assertions as a form of obstacle course, before an independent tribunal via adversarial process, to all due process standards. In practise, administrative sanction regimes similarly adopt a values complex, drawn from the criminal law as exemplar, incorporating similar assumptions, although it is usually grounded in the civil law. Relevant issues which consequently arise, include whether in a binary fusion there is room for both where somewhat different values apply, and if so in what interplay, and how the general values theoretically expressed may deploy to real-life utility. Packer stipulated six criteria to determine when criminal sanction was optimum, including deterring socially unacceptable conduct, in even-handed enforcement, provided there was no reasonable alternative, but avoiding inhibiting socially desirable conduct like market activity\(^\text{565}\). Additionally, the use of criminal sanctions within the regulatory setting was described by Packer as ‘ancillary reliance in the economic sphere\(^\text{566}\).

Beyond due process, two hugely significant modern values which flow from the century old, but still robust, Dicey rule of law framework, while simultaneously underpinning restrictive regulatory control, are integral to balancing regulatory ordering and review mechanisms. These are accountability and transparency, where trust, confidence and

\(^{565}\) For the six criteria see Packer (n 273), 296 as set out in Appendix K.

\(^{566}\) See Packer (n 273), 355.
cooperation are essential elements\textsuperscript{567}. Because regulatory choices, and discretionary decisions, may be value-based, they automatically impact legitimacy. They also impact the way in which power is allocated and negotiated within the regulatory regime. For participants in a new form of market regulatory contract, regulation by these norms is vital, especially since risk uncertainties abound, the market leads the regulatory response, experts claim prescient knowledge or greater insight, and the taxpayer is the last resort\textsuperscript{568}. Information asymmetry is a key source of concern, not alone for both dealings by market actors and their accounting for such conduct, but also for control of the market-controlling regulators themselves. Traditionally, accountability for the regulatory agency has been defined around accounting to a higher regulatory authority, such as a government department or a review court, since regulatory decisions must be justified, explained and subject to public scrutiny; while transparency has been associated with standards, making regulatory activities accessible and assessable, as well as justifiable\textsuperscript{569}. This includes the publication of enforcement policies, targets and outcomes, and even the decision-making process itself\textsuperscript{570}. Accountability arises at various levels, such as the legal, where the focus includes transparency of rules and standards making against fair and proportionate criteria; the bureaucratic, relating to answerability of both regulators and regulated entities for regulation implementation; the professional, concerning the role of regulatory officers in exercising professional judgement regarding rules and/or process adherence; and, the political, relating to the ability and willingness of government to evaluate regulatory regime effectiveness\textsuperscript{571}.

\textsuperscript{567} M Lodge, ‘Accountability and transparency in regulation: critiques, doctrines and instruments’ in J Jordana and D Levi-Faur (eds) The Politics of Regulation (Elgar 2004). Also see Freiberg The Tools of Regulation (n 119); Grabosky ‘On the interface of criminal justice and regulation’ (n 455); Hood Rothstein and Baldwin (n 437); Macrory Review, (n 122) and Macrory ‘Reforming Regulatory Sanctions’ (n 120). Also see De Larosiere Report 2009 (n 1), 4 as quoted in Appendix K; DPJ Walsh, Human Rights and Policing in Ireland (Clarus 2009), 781 as set out and quoted in Appendix K.

\textsuperscript{568} See Dorn ‘The Governance of Securities’ (n 185); For a contrary view as to the use of a regulatory contract see Sampford (n 251), 39; also see Black Rules and Regulators (n 403), 136. See Appendix K for an extended footnote.

\textsuperscript{569} Lodge (n 567). Also see CBI Enforcement Strategy (n 453), 18-19 as quoted in Appendix K; A Persaud, ‘Macro-prudential Regulation’ in I MacNeil and J O’Brien (eds), The Future of Financial Regulation (Hart 2010), 453 as also quoted in Appendix K; and the EBA for instance, as quoted in Appendix K see <http://eba.europa.eu/regulation-and-policy/transparency-and-pillar-3> accessed 25 June 2013.

\textsuperscript{570} See Freiberg The Tools of Regulation (n 119); Lodge (n 567); Macrory Review (n 122); The Law Commission of England and Wales, Consultation Paper on Criminal Liability in Regulatory Contexts (LCCP 195, pubd 25 August 2010); Walsh Human Rights and Policing in Ireland (n 567).

\textsuperscript{571} See Freiberg The Tools of Regulation (n 119); Lodge (n 567).
In a new financial regulatory contract form, both sets of specialist knowledge experts need to aspire to both norms. Market actors must disclose potential risk consequence, and reveal its tacit knowledge around market innovation effects, and this may entail for instance, consideration of new positive duties tailored to licence or authorisation conditionality. Regulatory authority must be open as to its control elements: standard-setting, behaviour modification and information-gathering\textsuperscript{572}. Lodge has eschewed a ‘best-in-world’ solution, highlighted the diversity of potential instruments, yet suggested a transparency toolbox of broader dimension\textsuperscript{573}. The following may all validly feature in a newer construct: regulatory response to detection information; feedback dissemination to RFSPs; ongoing participation by RFSPs in updating regulatory requirements; reflexive regulatory interplay between RFSPs and regulators; responsiveness tailored to the specific needs of the financial regulatory policy domain; the setting of boundaries to self-regulatory or co-regulatory activity; cooperative if not responsive RFSP communication practice; the meaningful provision of ‘voice’ to a wider participatory constituency; and the development of fiduciary-style market and regulatory practice including voluntary disclosure. Lodge has advocated a more responsive or contingency-based view, and an awareness of the relevant trade-offs involved. He concluded\textsuperscript{574}: ‘Accountability and transparency should be designed in a way that is responsive to the specific circumstances of particular policy domains’. In Part 2 Chapter 1 this is explored regarding market actor disclosure within an adversarial setting; Part 2 Chapter 2 does so within the discrete area of discretionary decision making around an enforcement pathway and prosecutorial launching factors.

Another newer and yet related administrative law norm is that of legitimate expectation. Where an RFSP has a legitimate expectation, for instance around regulatory promises or practice around accountability and/or transparency which has been ignored, then judicial review will lie. The concept of legitimate expectation, as far as Ireland is concerned, only emerged from the Supreme Court a little over twenty-five years ago\textsuperscript{575}. This doctrine is traceable to German administrative law, the European Court of Justice (ECJ), and

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\textsuperscript{572} See Lodge (n 567). Also Prosser Law and the Regulators (n 21), 277-279, 281 as set out in Appendix K.
\textsuperscript{573} Lodge (n 567).
\textsuperscript{574} Lodge (n 567), 142.
\textsuperscript{575} See Hogan and Morgan (n 276); Webb v Ireland [1988] IR 353 (SC).
equitable remedies such as estoppel and its familiars. It is now well established, and there is a burgeoning case law, although its parameters are uncertain, and not all relevant precedents are reconcilable. In essence, a legitimate expectation arises where an express promise has been made by a public authority, or a regular practice of such an authority can reasonably be expected to continue. It thus, has particular relevance to regulatory norms created by a financial regulatory authority around its operations, any newer form of regulatory contract, and as far as devising an interplay strategy is concerned, prosecutorial discretionary decision-making and sanctioning especially.

Salient to the public good and these norms, and the neo-liberal market viewpoint so prevalent pre-GFC, where the role of law is limited, is Foucault’s ‘governmentality’ theory. This theory, based in recognition of bureaucratic control, is purposed to a happy and stable society, both prominent aims post-crisis. Developing a new understanding of power as being de-centred and thus sited within the minimalist source, he broadened out from Weber’s bureaucratic hierarchy of control. Foucault included forms of institutionalised disciplinary or regulatory control, including self-control, and forms of knowledge (political economy). In its most far-reaching sense, this is the economic theory of the self-correcting market, and the individual autonomy theory of the self-correcting individual with rights and freedoms acting within it. Foucault highlighted the paradox however, that the neo-liberal imperative toward freedom mandated or forced individuals to be free, where control and intervention amounting to ‘welfare’ operationalise such freedom! So be it, the absolute freedom of the able and self-interested few cannot legitimately override the welfare needs of the less able or

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576 See Glencar Exploration plc v Mayo County Council (No 2) [2002] IR 84 (SC), Keane CJ 129 and Fennelly J 161.
577 Hogan and Morgan (n 276); Case 81/72 Commission v Council (Staff Salaries) [1973] ECR 575 described as the locus classicus by Fennelly J in Glencar Exploration plc v Mayo County Council (No 2) [2002] IR 84 (SC), 161; Case 2/75 EVGF v Mackprang [1975] ECR 607; Case C-350/88 Delacre v Commission [1990] ECR 1-395; and especially Mulder v Minister van Landbouwen en Visserij [1988] ECR 2321; also see E Sharpston, ‘Legitimate Expectations and Economic Reality’ (1990) 15 European Law Review 103.
580 He recognised as one strand, the state of justice of the Middle Ages which in his view transformed into the administrative state during the fifteenth and sixteenth centuries, and gradually became ‘governmentalized’ during and from the eighteenth century, with complex bureaucracies emerging.
582 Foucault’s argument is set out in Appendix K.
opportunity-hindered majority. In this regard Foucault reflects Polanyi’s oppositional free market and countermovement proposition.

Foucauldian theory was conjured pre-GFC, where state restriction, and not market restriction, is the premise, whereas post-GFC, where the very fundamentals and stability of sovereign economies and societies have been shown to be risk vulnerable, the ethics of business and its actors have been proven risk questionable, and business itself voluntarily sought a state bailout, the issue must be reframed in the reverse. This market restriction reframing need not eliminate responsible and accountable – as opposed to absolute – self-policing of risk, where dynamic knowledge and competition with reward reside. But it must enhance flexible regulatory engagement, where law mediates the power, and provides common good welfare prevention and protection albeit as market restriction; and, where the full panoply of enforcement and sanction options at least persuade at first, and then coerce if necessary, toward optimal risk policing of such markets. Since Governmentality advocates envisaged risk control of group risk behaviour or activity pre-crisis, then post-crisis presumably they must accept that proven risk centres, such as banking and other financial market activity, must be a prime focus for increased risk control albeit with buy-in583. This buy-in, sited within the bearer of the public interest, would seem best located therefore in neither of the extremes, the minimalist which failed pre-crisis, and the maximalist state domination which will clearly evoke market opposition and may amount to Polanyi’s feared over-regulation. This leaves the middle-ground where all stakeholders are concerned, and where the interplay of criminal and administrative sanctioning, including their sanction strategies, is vitally relevant.

The two real problems which a hybrid third justification or third way to date have addressed are: 1) the stalemate between the resource limited financial regulator (welfare: public interest constraint) and RSFPs (individual autonomy imperative), over the best regulatory enforcement/sanction method; 2) the tension between over-regulation alienating business, and under-regulation rendering itself useless. To this in a post-crisis imperative, where business fears a hostile countermovement, must be added: 3) the regulatory involvement of, and values obligations of, and protections for, RFSPs in devising and working a better way.

583 See Gray and Hamilton (n 408).
A good starting point within the literature is the US debate between Coffee and Mann\textsuperscript{584}. This presented against the prevailing background of the straight choice between criminal or civil sanction as the exclusive enforcement pathway, which McGrath and Wells earlier highlighted in the more modern regulatory setting. Both Coffee and Mann accepted the proposition that over-criminalisation was not alone unacceptable but also unproductive. The traditionally reparative civil law alone however, they conceded, like the later cited Becker and his adherents, could not meet requirements. Thus, increased regulatory agency sanctioning of a punitive nature, based around lesser civil procedural norms, became more prevalent in the US. Because of these realisations, and responses to them, for Coffee and Mann the line between civil and criminal law was collapsing. The issues raised in the debate centred upon recognising that the criminal law is distinguished by its punitive purposes and sanctions, high procedural barriers to conviction, and blameworthiness of the defendant; while in contrast, the civil law is defined as a compensatory scheme, focusing on damage rather than blameworthiness, and providing less severe sanctions and lower procedural safeguards than the criminal law.

Mann thus proposed a hybrid middle-ground jurisprudence, where the purpose of sanction is punishment, with procedure drawn primarily from the civil law. He advocated four basic interventions: that the civil law should encroach upon the criminal law and overlap it; that punitive civil sanctions should overlay criminal penalties; that punitive civil sanctions should largely parallel criminal sanctions, and thus reduce the need to use the criminal law in order to punish; and, that the availability of more punitive civil penalties for the same conduct would dissuade prosecutors from resorting to criminal sanctions. While it never took off, some of the ideas have current relevance, including the overlapping of binary territory, the tendency to peripheralise the criminal law due to over-criminalisation concerns, and the common sanction suite. Clearly, it has been by-passed by events such as the introduction of sanctioning by parallel proceedings in the US, the emergence of theories such as Responsive Regulation and its variants discussed in more detail below, and the case law of the ECtHR which interpreted article 6 of the ECHR as

requiring that procedural fairness safeguards, drawn from the criminal side, be applied to all matters where punitive sanctions are imposed\textsuperscript{585}.

Civil sanction use and procedures did however, become more prevalent in some countries\textsuperscript{586} within new administrative financial regulatory enforcement frameworks, albeit sitting beside the criminal alternative. This was the third way attempt. Effectively therefore, the old binary pair survived within a new instrumental administrative framework, absent discrete definition of ‘regulatory’ offences, while the research and policy focus shifted to better working of the binary divide. This still left the two colliding binary parts however. In Australia for instance, most of the decisions around which pole to choose went the way of the criminal pole, because that was the regulatory culture\textsuperscript{587}. In Ireland, the culture moved in the opposite direction, and similarly in the UK. In the US, both poles were used in their parallel approach. In general, there was a new third-way administrative system, no convergence in national approaches, and still literally poles apart!

A second third-way movement was based around the flexible Responsive Law concept of Nonet and Selznick which originated in the US\textsuperscript{588}. This manifested through various different approaches. In a public/private marriage of regulation, Rees took up the cudgel and examined the US work safety practice of a two tier treatment of good firms, who self-policed and were favourably treated, and bad firms who received the full public regulatory treatment\textsuperscript{589}. Obvious legitimacy and fairness problems abounded. There are resonances however, within the more modern targeted risk-based regulation approach post-GFC, discussed more fully later, where higher risk RFSPs and sectors receive most resource allocation and supervisory attention.


\textsuperscript{586} For instance, in the UK, Ireland, and Australia; in Ireland, the McDowell Report (n 26), para 7.5 propounded the necessity for civil sanctions. Also see Butler et al (n 451); Horan (n 87). See Appendix K for more.


\textsuperscript{588} See Nonet and Selznick (n 304).

Drawing from this pool, other authority, and wider sociological studies, Ayres and Braithwaite in a joint US-Australian approach, promulgated the hybrid Responsive Regulation Theory (RRT), seeking to bridge the space between free markets and government regulation. A tit-for-tat approach for creating regulatory policy solutions, RRT is a normative theory based in public interest, social justice and deliberative democracy, from which Braithwaite devised an equally normative enforcement pyramid to deal with sanction strategy. This heuristic has proven markedly enduring and useful world-wide.

RRT’s hybrid strategy mixes punishment and persuasion –deterrence and compliance – akin to the punitive/reparative divide. It grew empirically out of dissatisfaction with the then current yet resonating business regulation debate, promulgating that compliance is optimised by regulation that is contingently cooperative, tough and forgiving. Macrory in the UK asserted that he built on RRT, promulgated maximum flexibility, and recommended sanction tailoring to specific firm and industry needs, further cementing the calls of others for discrete sectoral sanctioning capability. For Macrory, regulation within a compliance approach must be transparent, targeted, effective, and proportionate, where strong deterrent action is a last resort. In contrast to Mann, Macrory argued for the extension of the criminal proofs standard to all administrative sanctioning.

Also from a UK vantage, Baldwin and Black promoted Really Responsive Regulation (RRR), a move they also argued to be beyond Ayres and Braithwaite. Tailored to flexibility and supporting rapid in-built reform, RRR demands that regulators are responsive, not alone to compliance performance by RFSPs, but also across five additional regulatory areas including the different logics of regulatory tools and strategies.

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590 See Ayres and Braithwaite (n 90); J Braithwaite, Restorative Justice (n 300); also see Scott ‘Regulatory Crime’ (n 25) as set out in Appendix K.
592 See Macrory Review (n 122); Macrory, ‘Reforming Regulatory Sanctions’ (n 120). This approach appears to promulgate a regulatory ‘proportionality’ which may amount to a remove beyond that recognised by the criminal law and discussed more fully in Part 2 within which principle as recognised at criminal law the sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused.
similarly supporting sectoral intervention\textsuperscript{594}. Another variation on RRT was the Smart Regulation framework of Gunningham and Grabosky\textsuperscript{595}, who advocated a three-faced pyramid where public and private regulation interfaced. Here markets, civil society and other institutions were envisaged to more successfully accomplish policy goals by acting as surrogate regulators, with enhanced social acceptance, and at less cost to the public purse. However, they willingly conceded limitations upon pyramid enforcement escalation. Post-crisis, transnational RRT has been advocated based in intergovernmental organisations deploying collaboration and orchestration\textsuperscript{596}.

In their full review of relevant authorities, Nielsen and Parker identified three similar ‘ideas’ or strategies\textsuperscript{597}: (a) flexible enforcement discussed later in Part 2 Chapter 1 section 2.1.4 regulatory styles\textsuperscript{598}; (b) tit-for-tat regulatory enforcement which at its simplest presupposes that regulators progressively move tit for tat up the enforcement pyramid following RFSP interaction, and which contains elements of the perfunctory enforcement style\textsuperscript{599}; and (c) creative enforcement strategy\textsuperscript{600}. Nielsen and Parker nonetheless, concluded that in practice the original, ‘Ayres and Braithwaite’s version of

\textsuperscript{594} These are the regulatees’ own attitudes, their operating and cognitive frameworks; the broader institutional regulatory environment; the different logics of regulatory tools and strategies; the regulatory regime’s own performance; and, changes within the previous five. Freiberg The Tools of Regulation (n 119), 98 extended criteria as far as sanction was concerned to also cover wider circumstances including the effects on the RFSP in terms of markets, administrative burdens imposed, resources required to employ the option, and the consequences if no action is taken.

\textsuperscript{595} See Gunningham and Grabosky Smart Regulation (n 16); N Gunningham, ‘Prosecution for OHS Offences: Deterrent or Disincentive’ (2007) 29 Sydney Law Review 359.

\textsuperscript{596} KW Abbott and D Snidal, ‘Taking responsive regulation transnational: Strategies for international organizations’ (2013) 7 Regulation & Governance 95.


responsive regulation is, however, the most sustained and influential account of how and why to combine deterrent and cooperative regulatory enforcement strategies.\(^{601}\)

The argument that compliance is more likely, when the regulatory agency deploys an explicit enforcement pyramid or hierarchical representation of sanctions approach, was first promulgated by Braithwaite.\(^{602}\) As a practical strategy of market governance, enabling the free laissez faire market to operate, without state abdication of necessary preventive and protective market control functions, RRT and its enforcement pyramid is a valuable touchstone for this dissertation for sanction paradigm analysis.\(^{603}\) Braithwaite’s pyramid concept, as upgraded by subsequent critique will re-emerge, in Part 2 Chapter 3 section 2.3.5, as a heuristic to measure the coercive control model, and its competing sanction strategies, before its application to the discrete Irish financial regulatory regime. Within the regulatory literature the preponderance of opinion favours ‘flexibility’ of enforcement, while even in a divergent binary context, the real issue is not which strategy pole to adopt, but when and to what degree.\(^{604}\) Enforcement strategies within such pyramidal practise are arrayed at the regulator’s discretion at credible case dependent different sanction levels. In Braithwaite’s original ideation, they were depicted in a five level ascending and descending order, with criminal penalty a rung below apex, where the objective – the presumptive preference - was to maintain maximal enforcement activity at

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601 See Nielsen and Parker ‘Testing responsive regulation in regulatory enforcement’ (n 597), 377. C Parker, ‘Twenty years of responsive regulation: An appreciation and appraisal’ (2013) 7 Regulation & Governance 2, 2 described RRT as ‘one of those “canonical” texts that helped constitute the very field of which it is a part’.

602 See Braithwaite Punish or Persuade (n 535).

603 See Ayres & Braithwaite (n 90). Also see Braithwaite Punish or Persuade (n 535), Braithwaite Restorative Justice (n 300), and J Braithwaite, ‘The Essence of Responsive Regulation’ (2011) 44 University of British Columbia Law Review 475. From the vast literature about RRT also see for example P Grabosky, ‘Discussion Paper: Inside the Pyramid: Towards a Conceptual Framework for the Analysis of Regulatory Systems’ (1997) 25 International Journal of the Sociology of Law 195, and Grabosky ‘On the interface of criminal justice and regulation’ (n 455); N Gunningham, ‘Negotiated Non-Compliance: A Case Study of Regulatory Failure’ (1987) 9 Law and Policy 69; N Gunningham, ‘Enforcement and Compliance Strategies’ in R Baldwin M Cave and M Lodge (eds), The Oxford Handbook of Regulation (Oxford University Press 2010), and N Gunningham, ‘Strategizing compliance and enforcement: responsive regulation and beyond’ in C Parker and V Nielsen (eds), Exploring Compliance Business Responses to Regulation (Edward Elgar 2011); Baldwin and Black (n 593); Nielsen and Parker ‘Testing responsive regulation in regulatory enforcement’ (n 597); Macrory ‘Reforming Regulatory Sanctions’ (n 120); Wood et al (n 591).

604 See for instance, Ayres and Braithwaite (n 90); Baldwin and Black (n 593); Freiberg The Tools of Regulation (n 119); Gunningham and Grabosky (Smart Regulation (n 16); Gunningham ‘Negotiated Non-Compliance’ (n 603); Gunningham ‘Enforcement and Compliance Strategies’ (n 603); Gunningham ‘Strategizing compliance and enforcement’ (n 603); Haines The Paradox of Regulation (n 14); BM Hutter, The Reasonable Arm of the Law (Clarendon Press 1988); Macrory Review (n 122); Macrory ‘Reforming Regulatory Sanctions’ (n 120); Rees Reforming the Workplace (n 589).
the pyramid base. However, it is only after collaborative consultation with RFSPs, and taking into account context, regulatory culture and history, that the regulator devises the pyramid. And, after doing so, in the interests of accountability and transparency, publishes it along with the operational guidelines. Cost and resource factors have to be considered both at design and implementation. To achieve durable regulatory cooperation, sanction solutions must be dynamic and multi-motivational.

Within implementation, debate surrounds the notion of a presumptive preference. Although there is no absolute need for a presumptive preference for enforcement inception, such a provision signals to the market both what the overall enforcement style really is, and the level at which the regulator presumes RFSP virtue. Escalation and de-escalation must be possible, once a case specific starting point has been identified, although I accept that in the absence of a ‘credible capacity’ to move sanctioning up the pyramid however, both escalation and de-escalation suffer a diminished effectiveness. I also accept the critique that escalation and de-escalation are complex actions, and that genuine dialogue and information flow between regulator and RFSP are essential.

Despite misgivings, Grabosky has nonetheless lauded the pyramid concept and shape as providing flexibility, and preventing either regulatory over-kill or under-achievement:

*The concept of a pyramid embracing a range of regulatory instruments is a compelling one, as it depicts the basis for much greater regulatory flexibility than would accompany the existence of but a single deterrence option.*

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606 This approach is advocated by many authorities including Appleby ‘Compliance and Enforcement’ (n 605); Ayres and Braithwaite (n 90); B Fisse, ‘Rethinking Criminal Responsibility in A Corporate Society: an Accountability Model’ in P Grabosky and J Braithwaite (eds), *Business Regulation and Australia’s Future* (Australian Institute of Technology 1993); Grabosky ‘Discussion Paper: Inside the Pyramid’ (n 603); Gunningham ‘Enforcement and Compliance Strategies’ (n 603); Wood et al (n 591). Also, Interviewee X Regulator Ireland November 2012 expressed the view that there should be a pyramid, that it should be publicly available, be available in advance of any actions taken by a Regulator, that it should be transparent, and it should be obvious how it’s going to be operated. P Westerman, ‘Pyramids and the value of generality’ (2013) 7 Regulation and Governance 80 argued that a differentiated approach to regulation and enforcement that is more responsive to RFSP behaviour is not inconsistent with a system of general or uniform rules.

607 See Scott ‘Regulatory Crime’ (n 25), 12. Also see Gunningham ‘Strategizing compliance and enforcement’ (n 603); Gunningham ‘Enforcement and Compliance Strategies’ (n 603).

608 Gunningham ‘Enforcement and Compliance Strategies’ (n 603) drew six broad observations of the pyramid approach as set out in Appendix K. Also see Baldwin and Black (n 593).

609 Grabosky ‘Discussion Paper: Inside the Pyramid’ (n 603), 197.
Furthermore, as the effective ‘originator’ of the deterrence/compliance sanction continuum, which will be discussed more fully in Part 2 Chapter 3 section 2.3.4 (b), and a very savvy RRT commentator, Gunningham outlined the marriage of the theoretical construct to the practical value of the pyramid, for both optimal tool choice and intervention point for financial regulatory enforcement, within the market risk environment, when stating:\footnote{610}{See Gunningham ‘Strategizing compliance and enforcement’ (n 603), 206.}

\begin{quote}
But even where regulators find it impractical to use the pyramid in its entirety (as where regulators make only infrequent inspections), it may nevertheless be useful in determining which regulatory tool to employ in a given instance ....at what point in the pyramid it would be appropriate to intervene, given the characteristics of the regulated entity and the degree of risk or type of breach.
\end{quote}

Although RRT, and the currently used risk-based regulatory approaches, are not regarded as antithetical, Gunningham argues that at least three challenges arise\footnote{611}{See Gunningham ‘Strategizing compliance and enforcement’ (n 603).}: the danger of focusing upon a small number of high risks at the expense of a greater number of low ones; the context and degree of sophistication of risk analysis; the quality of risk evidence available. The former raises issues around universal application, equity and legitimacy of enforcement capability. The latter two reflect the importance of controlling market actor conduct, and of requiring market actor disclosure, around the accountability and transparency norms already discussed. Significantly, most of the studies from which Braithwaite's central theoretical ideas are derived, consisted in fieldwork centrally observing the process of enforcement via the inspection/supervision process. It has been argued that responsiveness works best where inspection involving market actor engagement amounts to a strong proactive element in enforcement\footnote{612}{See Kingsford Smith (n 455).}. Hence, the importance of business involvement in the establishment of the new regulatory contract forms of enforcement as broached.

A final variant ‘Meta-Regulation’\footnote{613}{See C Parker, The Open Corporation: Effective Self-Regulation and Democracy (Cambridge University Press 2002); C Parker, ‘Meta regulation: legal accountability for corporate social responsibility?’ in D Mc Barnet A Vioculescu and T Campbell (eds), The New Corporate Accountability: Corporate Social Accountability (Cambridge University Press 2004).} involves in its most common form, the regulated enterprise itself accepting responsibility for submitting plans and proposals to the

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\footnote{610}{See Gunningham ‘Strategizing compliance and enforcement’ (n 603), 206.}
\footnote{611}{See Gunningham ‘Strategizing compliance and enforcement’ (n 603).}
\footnote{612}{See Kingsford Smith (n 455).}
\footnote{613}{See C Parker, The Open Corporation: Effective Self-Regulation and Democracy (Cambridge University Press 2002); C Parker, ‘Meta regulation: legal accountability for corporate social responsibility?’ in D Mc Barnet A Vioculescu and T Campbell (eds), The New Corporate Accountability: Corporate Social Accountability (Cambridge University Press 2004).}
regulator, while the sit-above regulator risk manages the entities own risk management. It clearly resonates with a soft-touch principles-based regulatory approach. One advantage is that it encourages sufficiently large organisations to develop specialist skills and knowledge, and tailored internal controls, to self-regulate or self-police its own complexity. Like smart regulation, this variant relieves the state of part of the regulatory burden, and lets such burden fall where it lies easiest to the understanding of complexity. The obvious downside includes the need for a great deal of trust in the regulated entity, a receptive corporate culture, and a sufficiently resourced entity, as well as eliminating regulatory understanding gaps and regulatory capture. This ‘softer’ approach failed pre-GFC.614.

Within these general responsive surroundings, Sherman has argued that the issue of punishment controlling crime/misconduct is not the correct focus.615 Instead, he posed his ‘better’ question thus: under what conditions does each type of sanction affect future crime? From this responsive compliance comparator, and reviewing the then relevant authorities, he concluded that sanctions which deliver ‘reintegrative’ shaming, directed against the act and not the actor, are perceived as fair and thus legitimate, and hence, more likely to be crime control effective. If such a result could be obtained through an effective interplay of the criminal and administrative dimensions, delivered within a collaborative framework, all for the better, especially since, the recognition of elite cultures has been identified to be just as important to regulatory success, as the recognition of market economics.616

Mann, in his debate contribution, also raised five specific issues pertinent to policymakers, and fundamental to the formulation of interplay strategy. Firstly, when should regulatory enforcement agencies choose criminal sanctions over punitive civil sanctions? It is my argument that this matter should be specifically dealt with in a published, written interplay document, so as to aid prosecutorial discretionary decision-making. The relevant launching factors will be discussed in Part 2 Chapter 2 section 2.2.4 in relation to Responsibility and the Law (Cambridge University Press 2007); Gunningham, ‘Strategizing compliance and enforcement’ (n 603).614 See Black ‘Paradoxes and Failures’ (n 442).


616See Arup (n 538). Also see B Clarke, ‘Is ’Corporate Governance’ an Oxymoron?’ in I MacNeil and J O’Brien (eds), The Future of Financial Regulation (Hart 2010), 269 as quoted in Appendix K.
the exercise of discretionary decision-making within Dicey’s prescription. Secondly, should criminal law protection apply to civil sanction process, and, thirdly, to what degree may civil sanctions be strengthened in punitiveness before the criminal law must intervene? These two issues are highly pertinent to Packer’s due process values complex and have been determined to considerable degree by the line of case law of the ECtHR commencing with *Engel* in 1979, and which did not apply to the US. Fourthly, is there a proper place for parallel proceedings? This issue will be specifically taken up later when considering enforcement pathways in Part 2 Chapter 2 section 2.2.3. And finally, should legislation encourage punitive private suit, a move away from the state? This raises the spectre of class actions which are prevalent in the US, where there is competition among lawyers to institute the first proceedings, thus cornering the market and, forcing all subsequent proceedings to come in under its eagerly outstretched wings. An alternative in an Irish setting would be to establish the form, but to require the fiat of a specialised court to join such an action, under the auspices of a ‘prosecution’, and where all parties seeking compensatory and other orders could be readily identified in a time limited way, so as to maximize rapid litigation closure, and minimize litigation costs.

Examining wrongdoing within the separate criminal and civil paradigms, with constitutional values as an additional variable, Yeung reflected that legal norms or standards have both a substantive and procedural dimension. In her view, reflecting the earlier Mann/Coffey deliberations, while moral culpability involving punishment was the essence of criminal liability, the social function on the civil side was the imposition of ‘obligations of repair’. This limited view of criminal practice however, fails to recognize considerable compensatory effects in financial regulatory sanctioning in the US particularly. In Ireland, increased statutory compensation order jurisdiction, while on the statute books as regards criminal offence victims suffering personal injury or loss, has not been reflected in widespread practice mobilisation. Furthermore, civil-sided norms have more recently been applied to quasi-criminal confiscatory capability in both Ireland

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617 See ft 583 above and ft 822 below.
619 Yeung *Securing Compliance* (n 437); and see P Cane, Responsibility in Law and Morality (Hart 2002).
and the UK. The battleground in many jurisdictions has been the oppositional punitive v reparative approaches. Procedural protections under the ECHR have been applied to both binary sides, including third-way administrative sanctioning when seen as punitive. In any event, and not stepping into what Yeung has dubbed a ‘shadowy twilight’, there is however, nothing to prevent statute from establishing a common system, inter alia forging new paradigmatic norms between punitive and reparative strategies, requiring a common high procedural standard for investigations and contested criminal trials or administrative enquiries, a settlement procedure for uncontested (negotiated) matters which preferably is court approved on pre-published principles, and stipulating practice guidelines as underpinning. Forging a distinctive ‘middle-ground jurisprudence’, for the sanctioning of ‘regulatory wrongs’, was approved by Yeung. Her solution included establishing norms capable of effectuating collective regulatory goals, and upholding Packer’s recognized due process values for individuals, as limitations upon state power.

More recently, and despite intervening third way attempts, Yeung revisited the issue. She argued in relation to sanctions, effectively recognizing the lack of a discrete regulatory offence/sanction capability as already broached, that their nature, character and severity still rest on the criminal and civil law distinction. These two poles she sees as both generating and encapsulating a series of normative standards around legal wrongdoing. She raised no new objection as to whether a third way, administrative or otherwise, cannot similarly generate such norms, and do so in a new way, if necessary, or appropriate. When considering post-GFC reforms, logic suggests little room for an ideation imprisoned by inertia or ancient practice. Hybrid forms, offences and sanctions need not be trapped within a criminal or civil exclusivity, although the likelihood is that these as discrete paradigms will heavily influence the hybrid variants. Similarly, particularly because the negotiated outcomes so prevalent within administrative regimes, whether in the US, Australia, the UK or Ireland, have not been transparently dealt with, publicly approved or been subject to publicly available standards guidelines, Yeung has revived her ‘shadowy twilight’ jibe. I argue that this is easily remedied by setting out in advance and publishing in writing, the salient standards pertinent to regulatory

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621 See Criminal Procedure Act 1996. And have been similarly accepted by the ECtHR. Also see King (n 448).

622 See Yeung ‘Quantifying Regulatory Penalties’ (n 290); Yeung ‘Better regulation’ (n 437); and also Coffee jnr ‘Paradigms Lost’ (n 252), 1888 as quoted in Appendix K.
discretionary decision-making, including the plea bargaining rules, providing a single transversal sanction suite, and requiring court approval of all settlements. And, at the same time the relevant pathway choice or choices, and the launching factors and sentence guidelines pertinent to prosecutorial discretionary decision-making, may equally, and contemporaneously, be devised and published\textsuperscript{623}. Any pre-determined standards over time must of course yield to updating and improvement. They will contribute to, and be influenced by, the underpinning constitutional values which will draw from the richness of Dicey, Packer and others. And unlike Yeung’s suggestion that such standards may be relaxed or stiffened relevant to the seriousness or gravity of the wrongdoing, since they are procedural standards, their application to ensure objectivity must be uniform across all sectoral wrongdoing\textsuperscript{624}.

However, I accept they may be relaxed or stiffened viz a viz other sectors, when universally applied to or within a particular sector such as the vitally important financial markets. And where offence seriousness differs, while for contested matters maximal protections must apply, for voluntary negotiated settlements which are incentivized for the benefit of the accused, then by agreement lesser stipulations may be apposite. This promotes fairness, equality before the law, Dicey’s legality, and legitimacy, and recognizes the flexibility requirements of regulatory scholars and commentators such as Macrory and Braithwaite. Yeung’s reasoning however, is in danger of being stuck in a criminal versus civil mindset where difference may be legitimate. This is one approach; another is for a single, common administrative approach, a mix which draws all across the binary, so as to allow maximum regulatory flexibility; a third is a parallel approach where both poles are deployed exclusively, but contemporaneously, or in commonwealth; obviously other forms may be grounded in single pole exclusivity. This dissertation in Part 2 interrogates issues salient to such in identifying a reformed interplay strategy.

For a fused binary to be sufficiently advantageous to warrant reform, several beneficial characteristics must be apparent. They will vary between the Market actor RFSP and the regulator, but within the trade-off, should make for better collaboration pre-action, resulting in a clear agreed vision and agreed values and norms, underpinning a new reform regulatory contract. In a nutshell, reform objectives include and should result in:

\textsuperscript{623} See Part 2 Chapter 2 sections 2.2.3 and 2.2.4 for a more comprehensive discussion.

\textsuperscript{624} See Yeung ‘Better regulation’ (n 437).
the recognition of the autonomous market, subject to agreed restriction, having a special value and place within civil society, warranting a legitimately unique enforcement regime; the creation of a dynamic regulatory control structure; greater accountability and transparency for both RFSPs and regulator; greater legitimacy for restrictive regulatory control, where constitutional and ECHR values are automatically applied by the regulator; a better prospect of closer ‘real-time’ regulatory intervention; more rapid regulatory reflective learning and continuing reform; more rapid reform of over-regulation effects harmful to market innovation; the capability to draw across a more flexible, potent and wider sanction base and control methodology; and, the equitable sanctioning of RFSPs procedurally and in sanction quantum\textsuperscript{625}.

1.3.8. Summary

The normative conceptualisation as interrogated has drawn from the disparate patchwork of sources and theoretical justifications for criminal coercion, where regulation is an instrumental version of welfare restriction\textsuperscript{626}. Normative justification seeks a just ordering of modern society under the criminal/coercive justice rubric, where legitimate interests are balanced, and where historical and criminological, sociological and liberal political forces impose\textsuperscript{627}. There is governance, institutional collaboration, dispute resolution, crime/misconduct response, and a normative (principled) underpinning\textsuperscript{628}. When business or the markets mix with restriction, then balance and flexibility are key components. The common theme across the last millennium is control, but behind control must sit a reason, for instance, fear of (harm) risk. Control is the objective rationale, a methodology. A criminal justice process is coercive, with extensive sanction effects based mainly around moral judgement, and thus, for the state power which operates ‘criminalisation’ to be differentiated from the criminal power it seeks to order, there must be a ‘moral’ legitimate justification. Regulation too is purposed and behaves similarly, and, in its current financial regulation guise post-GFC, seeks to re-order the balance between market liberty and regulatory restriction.

\textsuperscript{625} Advantages revealed from within this entire dissertation discussion are set out more fully in Appendix K.
\textsuperscript{626} MacCormick (n 532); Also see Ashworth \textit{Principles of Criminal Law} (n 97).
\textsuperscript{627} See MacCormick (n 532); Ashworth \textit{Principles of Criminal Law} (n 97).
\textsuperscript{628} See Zedner (n 274).
Control issues therefore, are extensively interrogated in Part 2 through the normative theoretical framework which has just been drawn out of the eclectic literature sources and established in Part 1 Chapter 3. This framework is values-based, drawing mainly across regulation for accountability and transparency but with significant criminal law input; and, on the criminal law side across constitutional and other norms which are procedurally rights-based. From here on in the focus is restriction manifest as public regulation, where connections between the enforcement pairing of the criminal law and regulation are interrogated against the framework to determine the viability of interplay fusion.

Disconnections or incompatibilities between the criminal law and regulation pairing must be recognised as unlikely to yield sufficient connection to interplay viability. On their own disconnections can never disprove viability, whereas on the other hand if connections do not work they can prove non-viability. If the fusion of the binary cannot work across fundamental connections then it cannot work at all. Accordingly, three essential connections were chosen as the best testing ground. Since risk and its management is market fundamental, values underpin and mobilise the legal and regulatory environments which deploy control, and the offences and sanctions dependency are the face of enforcement, they were chosen as the three research foci.

These three connections therefore, as identified in Part 1 Chapter 3 section 1.3.6 and namely, risk management, the values complex, and, the offence/sanction dependency will next be progressively interrogated throughout the following three chapters of Part 2. This is purposed to determine the viability of a fusion of both the criminal law and administrative sanctioning as was heralded in the immediately preceding Part 1 Chapter 3 section 1.3.7 as a literature and practice gap awaiting fulfilment.
PART 2

Chapter 1: Connective Tissue: Risk and its Management

2.1.1. Introduction

The nature of financial regulation, where risk is a central focus, and where harm in the form of risk is the offence/sanction kernel, is deeply rooted in the legal structure of each country and the origins of its laws, while its consequent institutional design is critical to regulatory quality and extent629. Downward-spiral layering, reflecting essential Weberian bureaucratic origins, may be noted in the operational form of risk management630. Institutionally, three differing national financial regulatory control models were identified from securities market regulation, and they incorporate common threads631. They sit above the regulator’s own approach and enforcement style sub-set. Ireland adopts the flexibility model. Whatever model, approach or style is discretionally selected, however, each structure intrinsically incorporates its own internal paradoxes in the form of weaknesses, contradictions and pathologies632. Each also requires a tool and technique method of operation.

Rules, principles and codes sit at the heart of risk regulation, and either are the regulatory norms or assist their generation633. They define the models and run the sit-below approaches. They are the key tools and techniques of financial regulation. As essential control techniques, offences and contraventions draw upon them for definition. Rules are detailed coercive, concentrated, prescriptive controls or commands applicable across a set and/or sub-set of factual circumstances; principles are more flexible yet concentrated or packaged, essential standards of personal conduct equally applicable across a variety of

630 Financial regulation, perhaps reflecting market complexity and dynamism, is characterised by a cumulative downward spiral of layering: components, models, approaches and enforcement style as a sub-set.
631 S Gadinis and HE Jackson, ‘Markets as Regulators: A Survey’ (2007) 80 Southern California Law Review 1239. These three models are set out in Appendix K.
632 See Black ‘Paradoxes and Failures’ (n 442).
633 See for instance, Hart The Concept of Law (n 123), 121 as quoted in Appendix K
factual circumstances; codes are representative expectations, aspirations or guidelines – best practice standards - which are even more flexibly originated and mediated, and are applicable either voluntarily or involuntarily. The objective of all three is to provide aid in clear and cogent decision-making, even under the most confusing and compelling of circumstances. Ford extensively reviewed the relevant authorities concerning the relationship between rules – regulator determines factual issues based on pre-determination of permissible conduct – and principles – regulator determines both permissible conduct and factual issues – and found they are both points on a continuum. She argued that there is a good deal of overlap and convergence, and that no statutory scheme is a pure type, instead oscillating such continuum. She stated: ‘Rules still admit of considerable discretion and interpretation. Principles, in the fullness of context, may congeal around a particular meaning.’ Expounding further, Dworkin typified arguments of principle as generating individual rights, whereas arguments of policy, a clear regulatory origination, establish collective goals. When restricting these rights by defining or drafting the enforcement techniques of offences, the criminal law draws upon the stricter rules, whereas administrative contraventions are more widely based in rules, principles, and regulatory directions sometimes found in codes.

Risk has been identified as central to market activity. Its management, the control systems around such management, and market actor behaviour around the deployment of same, are therefore part of both the market autonomy and the restriction paradigms, and amount to a fundamental connection between criminal and administrative sanctioning. But throughout regulatory history, the expression of regulatory risk control has not been uniform across enforcement models, approaches or styles, while the differing norm concepts discussed above are the clay for the control enterprise.

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636 Ford (n 635), 9.
637 See Appendix C for a more detailed overview of Irish financial regulatory binary practice.
2.1.2. Financial Regulatory Risk Management Approach

Sitting under the three over-riding national models already outlined, national regulators must either choose or be policy directed toward a regulatory approach. Drawing upon these techniques, and the national central bank model preference, most countries pre-GFC adopted either a principles-based or a rules-based financial regulatory approach. Both failed.

A rules-based approach relies upon detailed and specific rules, while a principles-based approach de-emphasises specific rules which can be side-stepped. A rules-based approach is very legalistic without scope for interpretation, and is characterised by detailed rules across the whole range of regulatory powers, clearly setting out what must be done, and importantly, what will happen in the event of default. It is slow to react to change and both the compliant and the non-compliant are equally punished. The regulator relies on supervision and detailed analysis in a prescriptive way; detailed rules are established in a tick-the-box approach with little qualitative data.

Principles-based approaches, on the other hand, focus financial institutions on regulatory goals and outcomes, and transfer from regulators to financial institutions the task of devising relevant implementing strategies. Hallmark characteristics include flexibility, the facilitation of regulatory innovation around supervision, leveraging industry learning, purposed to lessen the state regulatory burden, and enhancing business competitiveness. Clearly a collaborative regulatory structure has much to draw from in this approach. Principles of relevance, which of course must be implemented, may include: sound governance; transparency and accountability; prudence and integrity; risk control, oversight and reporting; sufficiency of financial resources; and, timely

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639 Honohan Report (n 6).

640 R Cain, ‘Rules-based Regulation versus Principles-based Regulation’ (Irish Centre of European Law Conference Financial Services Update: Regulation in a Time of Economic Crisis panel discussion Royal Irish Academy Dublin, 23April 2010); Teuten (n 641 below).


642 Ford (n 635); Black ‘Forms and Paradoxes of Principles Based Regulation’ (n 638).
information production\textsuperscript{643}. Their very generality and lack of specificity highlights problems in regulating around them.

The principles based approach equates more closely to the comply or explain style\textsuperscript{644}; the rules based approach to the command and control style\textsuperscript{645}; while mixed or hybrid approaches with risk based elements, as now preferred in Ireland, at the functional or instrumental level, appear to have taken the Better Regulation ribbon\textsuperscript{646}. Varied forms of self-regulatory elements may be found in each of these approaches. For instance, Black identified meta-regulation (self-regulation, self-confessed) and enrolment (e.g. utilising gatekeepers) as variant models\textsuperscript{647}. Risk has always been a financial regulatory focus. Traditionally, it was viewed either through principles designed to control it, or by specific rules, often contained in a huge hand-book or manual, to suppress it.

Immediately pre-GFC, attempts were made in some jurisdictions like the UK, to operate a risk-based approach where strategically targeted risk was the focus, failure the desired identification, and blame ascription the sought-after end result\textsuperscript{648}. A set of strategic aims targeting achievement of statutory objectives, was designed to drive prioritisation and resource allocation for regulatory response at four levels, the firm, consumer products, the market, and the wider industry, with financial crime reduction and financial understanding especial contexts\textsuperscript{649}. Rules were utilised to identify the failure within the discretely targeted risk, and principles underpinned those rules. Reflecting the difficulty in understanding the approach, one observer argued that it was principles-based with risk as its key tenet, where statutory objectives were flexibly met, by firms allowed to customise and innovate in the most cost effective manner aligned to their own business strategy\textsuperscript{650}. The ultimate goal was to embed best risk management, and compliance practices, into day-to-day business operations in a self-policing mode, purposed to uphold

\textsuperscript{643} Honohan Report (n 6).
\textsuperscript{644} Teuten (n 641); H Smith ‘Legal and compliance risk in financial institutions’(n 641); Honohan Report (n 6); D Ahern ‘Replacing 'Comply or Explain' (n 447).
\textsuperscript{645} See Honohan Report (n 6); Black Rules and Regulators (n 403).
\textsuperscript{646} M Elderfield, Untitled (The European Insurance Forum in Dublin, 29 March 2010); Honohan Report (n 6).
\textsuperscript{647} Black ‘Paradoxes and Failures’ (n 442); Also see Gray and Hamilton (n 408).
\textsuperscript{648} Black ‘The emergence of risk-based regulation’ (n 442); Black ‘Managing Regulatory Risks and Defining the Parameters of Blame’ (n 442); Black ‘Paradoxes and Failures’ (n 442). Also see M Douglas, Risk and Blame: Essays in Cultural Theory (Routledge 1992), 15, as quoted in Appendix K.
\textsuperscript{650} See Teuten (n 641), 36.
the regulatory principles. In a move redolent of the soft touch principles approach, the effectiveness of the system depended upon agreement with the regulator about identifying risks to control, and the manner of such control\footnote{C Sergeant, ‘Risk-based regulation in the Financial Services Authority’ (2002) 10(4) Journal of Financial Regulation and Compliance 329; Stewart (n 649); M Valencia, ‘The gods strike back’ The Economist (Special Report on financial risk 13th February, 2010) as set out more fully in Appendix K. Also see Braithwaite and Drahos (n 346); Goodhart (n 2); R Sollis, ‘Value at risk: a critical overview’ (2009) 17(4) Journal of Financial Regulation and Compliance 398.}. In a development which hopefully characterises post-GFC risk-based models, risk monitoring was planned for a real-time basis, the rationale being that risk is constantly changing\footnote{See Teuten (n 641). Post-GFC the De Larosiere Report 2009 (n 1), 32 as quoted in Appendix K}. While real-time supervision on-site is a possibility, enforcement however is not, the nearest form being found in the negotiated settlement procedure so favoured in Ireland.

More recently, the ‘new governance’ literature trend, grounded as it is in a risk management imperative, has emerged in a wider application to financial regulation with a post-GFC focus\footnote{See for instance, BC Karkkainen, ‘“New Governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping’ (2004) 89 Minnesota Law Review 471; Ford (n 584); C Ford and M Condon, ‘Introduction to “New Governance and the Business Organization” Special Issue of Law and Policy’ (2011) 33(4) Law and Policy 449; C Ford and D Hess, ‘Corporate Monitorships and New Governance Regulation: In Theory, in Practice, and in Context (2011) 33(4) Law and Policy 509; BM Hutter ‘Understanding the New Regulatory Governance: Business Perspectives’ (2011) 33(4) Law and Policy 459; ST Omarova, ‘Wall Street as Community of Fate: Toward Financial Industry Self-Regulation’ (2011) 159 University of Pennsylvania Law Review 411; J Sarra, ‘New Governance, Old Norms, and the Potential for Corporate Governance Reform’ (2011) 33(4) Law and Policy 576.}. The underpinning theory salient to interplay strategy is of a more collaborative and stakeholder-driven approach to corporate governance\footnote{De Larosiere Report 2009 (n 1), 32 as quoted in Appendix K.}, albeit where corporate economic self-interest requires bridling by legal constraint. Here, ongoing deliberation between the state as expert and specialist knowledge regulated entities (RFSPs), through formal and informal deliberative processes, enhances policy design and practice. This allows for problem solving amid experience-based revision, and provides for accountability through transparency and peer review\footnote{Haines The Paradox of Regulation (n 14); Macrory Review 2006 (n 122).}. Within this new governance, Black has recently typified a post-crisis, expert, oversight agency within a process of its organisation, acting upon the wider and more diverse market set of organisations, all of which enjoy widely different regulatory capacity and organisational complexity\footnote{See Black ‘Paradoxes and Failures’ (n 442).}. Here, she argues a multitude of regulatory dimensions must be factored in to the complex task
of regulation. Risk control under such parallel regulatory or wider organisational regimes, reveals differential foci, sometimes conflicting. For instance, to protect creditors, directors and shareholders are legally constrained in relation to limited liability risk issues, but risk prohibition mainly occurs ex-post since it is only after insolvency that an application to restrict or disqualify a director may be brought, and even then the ‘penalty’ is only ordered to protect future misconduct.

Risk, resources and reputation are colliding variables in this mix. Market rules are seen to serve regulatory goals. Risk reduction encapsulates insurers, non-governmental agencies, and government alike, in negotiated public and private agreements. Market instruments may be employed as incentives or ‘taxes’. The role of the law, and thus the state, may decline where responsible market governance or negotiated agreement prevails, but increase in the opposite. In effect, this loosely means that on the former hand, rules constitute the market, whereas on the latter, state regulation intervenes to redress market failure. Public interest, born out of the tension within the market liberality and market restriction dyad, is the theoretical justification for state intervention to correct market inefficiency. This risk may occur at the level of price gouging or monopoly; negative externalities imposing costs without any intervening transaction, for instance the socialisation of banking debt; information asymmetry (lack of availability to all); the under supply of public good services or goods for instance, requiring the nationalisation

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657 These dimensions include the public and private organisational dimension already described, the functional dimension of regulatory logics and assumptions, the cognitive or market understanding level of both regulator and regulated, the normative dimensions of the regulatory relationship, the behavioural dimension of the relevant actors, and the communicative or discursive dimension between them as they so act.

658 See MacNeil, ‘Risk Control Strategies and the Credit Crisis’ (n 408). Also see I Lynch-Fannon, ‘Controlling Risk taking: Whose Job Is It Anyway?’ in S Kilcommins and U Kilkely (eds), Regulatory Crime in Ireland (First Law 2010); Companies Act 1990 (Ireland) ch 2 and especially sec 160; MacCann and Courtney Companies Acts 1963-2009 (n 463). And see Business Communications Limited v Baxter and Parsons unreported, High Court, Murphy J., 21 July 1995 (HC) as approved in Director of Corporate Enforcement v Patrick Byrne [2009] 2 ILRM 328 (SC); also see Re Ro-Line Motors Ltd (1988) BCLC 698. Interviewee X Regulator Ireland 12 November 2012 however, perhaps expressed the matter most practically when stating: ‘I mean it certainly is the case that disqualification is not regarded as such as a sanction and is regarded as a penalty imposed for the future betterment of society. That may be the case but the individual who is potentially the subject of a disqualification order is not going to see it in that fashion...... I think whatever the law or whoever the law regards disqualification I think it is a sanction and I think simply because it does have a serious effect on the individuals in question so I think for all practical purposes it must be regarded as a punishment for past behaviour obviously as well as a potential in terms of guarding against future similar behaviour’. See Appendix K for more.

659 See Black ‘Paradoxes and Failures’ (n 442); Also see Gray and Hamilton (n 408).

660 Goodhart (n 2), 37 as quoted in Appendix K.
of the banking industry; or the conduct of market actors. Where market failure is addressed, and the GFC reflects market failure, regulation as policing tied to enforcement is emphasised. Modern risk-based market regulation, being premised upon the two assumptions that identification and measurement are possible, and that risk can be controlled, now lies at the heart of the regulatory endeavour and determines regulatory response.

Thus, an essential element of public interest theory is to avoid business dominance of the regulator under the ‘capture thesis’ as occurred in Ireland pre-GFC. The objective is to policy generate widely-distributed regulatory enforcement costs and benefits, resulting in a majoritarian pattern, where self-interest or highly focused sectoral interests do not dominate. The two ends of the regulatory enforcement continuum which apply, and will be discussed more fully later, are punishment (deterrence) and persuade (compliance). This sanctioning continuum, operated absent capture, albeit with business buy-in, where the public interest wins out, and in a risk management context, is the interplay strategy focus.

At the wider macro-prudential level, contagion risk necessitated the EU regional response, and its new institutions and mechanisms. Some, operating outside strict EU ambit were created, and expanded the definition of financial regulation itself. It has been reckoned that an emphasis upon macro-prudential regulatory policy will require greater rules-based regulation through tighter ex-ante rules-based constraint upon the risk exposure of individual RFSPs. At the international macro-prudential level, systemic

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662 MacNeil, ‘Risk Control Strategies and the Credit Crisis’ (n 408). Should such assumptions prove false, or overly ambitious, then risk-based regulation will not be able to deliver.
665 Ayres and Braithwaite (n 90); Braithwaite Punish or Persuade (n 535); F Haines, Corporate Regulation: Beyond ‘Punish or Persuade’ (Clarendon Press 1997). See Part 2 Chapter 3 section 2.3.4 (b).
666 Black ‘The Credit Crisis and the Constitution’ (n 111); Elder ‘Ocean Curents’ (n 111); Gray and Akseli (n 3); J O’Brien, ‘Reregulating Wall Street: Substantive Change or the Politics of Symbolism Revisited’ in I MacNeil and J O’Brien (eds), The Future of Financial Regulation (Hart 2010).
risk or stability is the key focus, while at national level it is prudential stability, and RFSP conduct. According to Black, regulators, upon identifying the different risks to their objectives, focus their resources and ‘regulatory effort’ on the critical targeted concerns. The aim is to embed behaviour change. For vitally important corporate entities such as banks, robust corporate governance where the board, management and shareholder owners, are incentivised to understand the salient risks and to efficiently price them, requires protection of both immediate corporate, and wider society costs. The great attraction in fact, at the political/regulator interface, is the regulatory promise of organising and prioritising regulatory action toward managing risk uncertainty across multiple outcomes. Black has concluded that, ‘The aura of “risk-based regulation”.... combines a sense of strategy and control in the face of uncertainty in a way that is politically compelling.’ Since this form of regulatory risk targeting is calibrated to the inherent risk and impact of a particular financial firm or sector, and the prime foci post-crisis are the most ‘risky’ activities, or the most likely ‘risk’ candidates, however, one potentially significant politico-regulatory risk is that some significant misconduct may slip between the cracks. Measuring high risk actors and high risk activity in a score-card approach is now the primary supervisory activity. This has reversed the focus from the traditional rules and principles approaches, although hybrid risk-based approaches still rely upon such rules and principles with all of the confusion risk already outlined. Furthermore, the definition of ‘risk’ is context specific, and unfortunately as Ross and Hannan highlight in relation to money-laundering:

Risk is sometimes referred to as a property that is inherent in places, people or products, sometimes as an outcome of financial activity, and sometimes as a property of the regulatory regime itself. Rarely, if ever, does legislation attempt to provide a definition of risk, and regulatory agencies provide few explicit criteria that can be used to differentiate high risk from low risk.

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668 Interviewee C Regulator Ireland 6 February 2013.
669 Black ‘Paradoxes and Failures’ (n 442); Also see MacNeil, ‘Risk Control Strategies and the Credit Crisis’ (n 408).
670 See K Alexander ‘Banking Crisis’ (n 667).
671 See Black ‘Managing Regulatory Risks and Defining the Parameters of Blame’ (n 442), 2. Gray and Hamilton (n 408), 15 pre-GFC as quoted in Appendix K.
Regulation as an instrumental concept, locates problem-solving as central, and risk-based, goal-targeting as the major activity. However, this goal focus cannot stand alone, and must complement law enforcement capacity and drive. Thus, trends toward governance, instrumentality and successful enforcement, all backdrop regulatory reform at both policy prescription and research levels. These are impacted by the ever-present political dimension, replete with competing philosophies. The ‘better’ or ‘good’ regulation movements, for instance, disclose disparate values underpinning this competitive philosophical context, where the policy community is impacted by the plurality of business, community, regulatory and other forces. This pressure arises both domestically and internationally in the case of Irish financial regulation post-GFC. The real battleground for regulatory risk management however, lies where adequate enforcement meets these conflicting values.

On the one hand, regulatory standards around risk cannot be devised solely from the actions and intentions of the business community, where minimal public involvement is preferential, and thus light-touch governance ensues. For the general regulated population that is what has left us in the present fix. An unruly market domain sat outside the public control domain, and yet adversely impacted the public purse, where the taxpayer as payer of last resort has carried the cost, not just financially, but also socio-culturally. On the other hand, a heavy-handed, adversarial, command and control response equally cannot provide the necessary governance in all instances. The bulk of regulated entities accept regulation in general, but the deliberately evasive few dictate that coercive capacity must exist. Thus, the major remaining solution for the middle-ground is a consensus approach, where business and regulator collaborate to compliance for the best advantage of all stakeholders.

Real issues concern, what and where are the compromises to be made, how, by whom, and when; equally, the extent to which market competition influences governance strategy, community prevention and protection concerns define risk, or political expediency pressure policy response. The markets are a clear driver, because without them there is no need for ‘parasitic’ regulation; competition and innovation sit at the heart of markets; so too do moral hazard and individual/corporate conduct (including ethics)

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673 Haines *The Paradox of Regulation* (n 14).

674 This is discussed more fully in Part 2 Chapter 3 in relation to the fused binary.
which the community must risk-limit; while government, which must directly accept and respond to socio-cultural pressures, must accept that it cannot distribute resources (even if it has them) as rapidly and efficiently as the markets. This interweave demonstrates an inter-dependence among stakeholders where a commonality of interest lies in market continuity, which in my argument, is best guaranteed by collaborative market regulation, which is neither captured nor over-zealous.

The key sites of conflict resolution within this endeavour, concern the acceptable level of market competition and regulatory controls or standards, including sanctioning, as intrinsic components of financial regulation in contemporary society. The method enshrining the rules and principles of market governance must be collaboration, so as to both avoid over-regulation, or regulation simply for the sake of it, on the one hand, and, arbitrag ed compliance on the other, where those regulated creatively evade obligations seen as imposed. Where the standards are set in conjunction with industry, where such industry has both impacted their establishment and definition, and committed to their implementation; and, where participatory politics engages political will and community engagement, resulting in the likelihood of public acceptance; then, the regulatory outcome is more likely to yield success. As to regulators, market observation and adaptation are essential, as are engagement in reflective ‘double-loop’ self-critical learning, where modification improvements are rapidly effectuated. Clearly, accountable and transparent procedures are a foundational value. One dissertation interviewee expressed the view that post-GFC, a degree of dialogue, which in the past never existed between regulators and prudential supervision, is crucially important. He favours regulatory teams, which are subject to evolution and change and transitional change, having a direct relationship with the regulated entity. For him, the difficulty lies in maintaining a balance, where the regulator has enough sensitivity and understanding of the business imperatives, rather than simply constantly increasing the regulatory burden and imposing regulatory costs.

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675 Haines *The Paradox of Regulation* (n 14).
676 See Ayres and Braithwaite (n 90); Black ‘Paradoxes and Failures’ (n 442); Omarova (n 653), 416 as quoted in Appendix K
2.1.3. Criminal Law Risk Management

Modern risk challenges and their approaches are not confined to impacting financial regulation. Three distinct forms have been identified generally. These are actuarial risk, already seen as regulatory risk targeting; socio-cultural risk, which centres around social ordering of both community, and the individuals within it; and, political risk, exemplified in the rise of risk-based regulatory approaches already interrogated. Risk theory is based around state control of ‘normal’ crime, where economic considerations predominate. State risk management, as a legitimate goal of government, which entails framing and constraint by reference to the ideal of justice, requires that where state power is enhanced, there must be a correspondingly strengthened commitment to justice, in a rights-based approach, generated by individual cases. Twenty years ago, Beck warned of the emergence of a risk society, where the social production of wealth, was systematically accompanied by the social production of risk. This connection causes societal pressures around trust and credibility, both already described as market fundamentals. For Beck, risk is a systematic way of coping with hazards introduced by modernity itself. Market hazards to property and profit are numbered among these risks. Antagonism develops however between market consumers of risk, or those risk afflicted; and, those risk profiting. This outcome was clearly demonstrated in the socialisation of Irish bank debt post-crisis, where taxpayers were sacrificed to bondholders to maintain market reputation.

678 See HainesThe Paradox of Regulation (n 14); Black ‘Paradoxes and Failures’ (n 442).
679 See MM Feeley and J Simon, ‘The new penology: notes on the emerging strategy of corrections and its implications’ (1992) 30 Criminology 449; MM Feeley and J Simon, ‘Actuarial Justice: the Emerging New Criminal Law’ in D Nelken (ed), The Futures of Criminology (Sage 1994). Also see S Cohen, Visions of Social Control (Polity 1985) and S Cohen, Against Criminology (Transaction Books 1988). In Ireland the Criminal Assets Bureau, which seeks to be an integral player in every serious criminal investigation, openly advocate and implement asset targeting as opposed to nindividual targeting, but in spite of this, cases are not prioritised in terms of monetary value but by the degree of risk posed by individuals concerned; see C Gleeson, ‘Cab chief aims to ensure that nobody is untouchable in battle against crime’ The Irish Times (Dublin, 19 October 2013).
680 Here, a dual threat to political legitimacy lies: firstly in governmental resource management for economic maximisation, and secondly the capacity of government – or a collection of governments - to protect the citizenry.
At the new millennial dawn, emerging first in the US and then the UK, the already broached, new crime control culture arrived. It embodied three-fold attributes: a reworked conception of penal-welfarism, the new criminology of control, and an economic style of decision-making. As the obverse of deviance response, a trend toward treating crime as a normal societal activity (an ordinary activity in a crimogenic culture), or even an opportunity, and thus risk managing it, and minimising the costs associated with it, as opposed to suppressing it, was also observed. Crime control is therefore not a response, but instead, a planned risk endeavour, and an increasingly utilised feature of financial regulatory supervision and enforcement, especially post-GFC. The bulk of crime is seen as minor or petty with only the top one percent seen as serious. This criminal law worldview has been influenced by rational choice theory, derived from economics, and in effect is economic instrumentalism. Here, crime is viewed as continuous, enjoying normal social interaction, and motivated to utility maximisation. In this guise, it is very easy to regard the market domain for instance, as criminogenic. Here, lure and opportunity abound. Those in pursuit of crime – rational amoral offenders - do so until the costs of crime outweigh their self-interested pursuit of illicit gain. Crime is therefore, not a threat to social ordering, or a challenge to state control. It is an exercise of the cost calculus. This in turn, results in a move away from an ex-post facto or retrospective examination of the conduct, toward a prospective concern about future crime (and costs) and future behaviour change. Indeed, much of the rationalising around the administrative sanctioning focus upon future behaviour change, or responsive compliance, lies within this approach. Economic analysis of crime is very much an instrumentalist approach, where the multiplication of opportunity explains the rise in crime.

This economic analysis style may be located in the late 1960’s work of Becker, and his later Chicago economics school adherents, who forcefully advocated economic criteria...

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683 Garland The Culture of Control (n 25). See Appendix K for an extended footnote.
684 See Zedner (n 274); Ashworth and Zedner (n 407).
685 Interviewee X Regulator Ireland 12 November 2012 stated: ‘.... outright dishonesty, fraud by an individual or a corporate entity, clearly that should be treated very seriously, also threats perhaps to the solvency or liability of the entity and obviously on a wider basis even to other businesses in the same area’.
686 See Zedner (n 274). Interviewee X Regulator Ireland 12 November 2012 stated: ‘... the further up the pyramid you go the more intensive and expensive in terms of resources for the regulator ....it is simply not practical for regulators to treat everything seriously. There has to be a degree of selectivity in what they deal with and what they invest their resources in’.
687 See Zedner (n 274).
for criminalisation. Seeking to enlist help, they have asserted that Bentham’s punishment rationale is based in a cost calculus. Within economic literature, voluntary market dispute resolution is preferred. But there is recognition that civil suits cannot always internalise the costs of crime. Public enforcement is viewed paradoxically therefore, as more efficient. Reasons for this include culpability (intent or recklessness) proof, better public detection and enforcement, harm degree, the punitive capability of the criminal law, and enforcement costs. This theorising is principally pragmatic and directed toward practice, and particularly impacts the exercise of investigative, prosecutorial and arbitral discretion. While it cannot on its own satisfactorily justify criminalisation, for a school of thought steeped in cost consciousness, it paradoxically clearly demonstrates that both the administrative and criminal jurisdictions must be mobilised. At its most cost conscious, it advocates the preference for administrative regime over criminal trial, and warns that greater criminalisation threatens to create executives unwilling to take justifiable market risks.

Now a prominent feature of financial regulatory strategies, this approach is based in the significant influence of neo-liberal economics, where wrongdoers are characterised as rational actors motivated by the desire to maximize their own self-interest. A neo-regulatory state, in a shift from a welfare focus, and premised upon a combination of market competition, privatised institutions and decentred forms of regulation was described as its field. Crime within such is not regarded as a moral wrong, but instead as a cost to be calculated-in, and thus, efforts aimed at reducing such cost, including the payment of restitution, are deemed worthy of all acceptation. It has been described as a ‘managerialist tendency’, most prevalent at the lower end of the sanction tariff, where the cost argument is deemed more appropriate, and which results in the lower forms of infraction being hived off to administrative channels, resulting in administrative sanctions. However, this is not entirely accurate when considering the serious contraventions involved, and serious sanctions imposed, at the financial regulatory level.

690 Ashworth and Zedner (n 407).
At the regulatory level, this theory looks more like a private interest theory, which regards regulation as a commodity made available in the political market-place, supplied by politicians and bureaucrats upon application from those demanding intervention, and seeking to gain therefrom.\(^{691}\)

Recently, a ‘hard zone’ of simulated justice has been identified, a world of offender profiles on which risk-based policing is founded, of actuarial justice where lengthy prison sentences are matched to risk predictors, an area characterised by ‘risk targeting’ the prominent feature of new forms of financial regulatory practice.\(^{692}\) This ‘new penology’, is concerned with techniques for identifying, classifying and managing discrete groups. Effectively, it is an effort to regulate groups as a strategy of managing danger or risk, and is a new prudentialism of a dynamic, changeable and non-fixed form much like risk itself, geared to preventing loss and insuring against risk.\(^{693}\) These targeted groups include, paedophiles and suspected terrorists, to which in the changeable dynamic perhaps bankers and other subjects of financial regulation in the wake of the GFC may be added. This latter group have emerged as a result of ‘moral panic’ as ‘folk devils’, and are seen as a novel threat to the social order, with their labelling as ‘deviant’ by themselves, or at least some among them, as well as by the public, giving legitimation for a discrete and targeted punitive state response.\(^{694}\)

One result of this new penology, and the societal shift towards focusing upon risk, which brought with it the invention of its partner the risk reducing ‘protective’ factor,\(^{695}\) finds

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\(^{692}\) Feeley and Simon ‘The new penology’ (n 679); Feeley and Simon ‘Actuarial Justice’ (n 679); Also see Cohen Visions of Social Control (n 679) and Cohen Against Criminology (n 679); P O’Malley, ‘Simulated Justice: Risk, Money and Telemetric Policing’ (2010) 50 British Journal of Criminology 795. Hudson (n 681), 154-155 described the targeting strategy as quoted in Appendix K.


\(^{694}\) See N Lacey C Wells and O Quick, Reconstructing Criminal Law Text and Materials (3rd edn, LexisNexis Butterworths 2003); M Levi, ‘Suite Revenge? The Shaping of Folk Devils and Moral Panics about White-Collar Crimes’ (2009) 49 British Journal of Criminology 48; J O’Leary, ‘I should have been more pushy in opposing risk-taking at bank’ Irish Times (Dublin, 24 July 2010, p11) an extract of remarks by Mr O’Leary a former bank board member at the MacGill Summer School, Glenties, Co Donegal, as quoted in Appendix K.

\(^{695}\) See P O’Malley ‘Risk, crime and prudentialism revisited’ (n 693),99 where he describes, ‘risk factors ‘refer to the conditions that predict adverse outcomes’, protective factors ‘reduce the risk of harm’.
policing responding to wider ‘harms’. These contemporary risks are characterised by uncertainty, indeterminancy, contingency, and their global impact; and, because they require personal choice and navigation, they result in increased uncertainty, anxiety and reflexivity. Thus, there is increased emphasis upon prevention (as opposed to protection), and surveillance and security. The targeting of suspect segments of the population, or even a population itself, requires the actuarial assessment or risk rating of their likelihood to offend under particular circumstances, or in relation to specified categories of opportunity. Here, populations as aggregates, rather than as individuals are the focus and, unlike traditional approaches to justice, where individuals are judged after they have offended, judgements are anticipatory. Targeting around such risk rating is a specific tactic in both a reactive and proactive way, also the hallmark of the more modern risk-based approaches to financial regulation. It has been argued that the role of the police, and partner control agencies, has increasingly turned to that of producers and brokers of information about risk, where the prime goal is keeping the lid on problems by risk management techniques.

Within the financial market sphere, the security lens is financial stability framed against systemic risk, a macro-prudential activity which has international governance aspects, and gradually is demanding increased international criminal law response. Fledging as it may be, the European arrest warrant, surveillance policing, and transnational police teams and task forces are manifestations of this crime response. In the absence of international crime institutions or structures, financial regulators have post-GFC increasingly been seen to collaborate in dealing with international-style wrongdoing such as the LIBOR rate-rigging scandal, money laundering activities of UBS and Standard Chartered, the €6.2 billion estimated London ‘Whale’ loss, and the already mentioned cartel conspiracy.

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697 See Zedner (n 274). See Part 3 Chapter 1 regarding the new Irish PRISM targeting approach based around high risk activity and actors based in a score-card approach.
699 See CBI Enforcement Strategy (n 453), 4, 9. See Appendix K for detail.
701 See for instance, D O’Brien, ‘Big finance has failed and its rottenness has not yet been purged’ The Irish Times (Dublin, 10 August 2012); Reuters, ‘Standard Chartered agrees settlement’ The Irish Times (Dublin, 14 August 2012).
702 JPMorgan suffered an estimated $6.2 billion derivatives trading loss in 2012. See Appendix K for detail. See for instance, Reuters, ‘JPMorgan to pay $920m over ‘London Whale’ scandal’ The Irish Times (Dublin,
activity of AU Optronics. National regulators acting internationally, as an aggrieved commonwealth, have imposed huge monetary penalties by way of negotiated settlements which are publicised, while national criminal authorities are left to determine investigation and prosecutorial issues.

The utilitarian punishment ideation, perhaps here more recognisable as punishment disincentivisation or high opportunity costs, is applied by both those espousing economic analysis and actuarial justice techniques. They also both regard the criminal process as a system, and equally prefer quantitative over qualitative analysis. But while these two approaches are drawn from the same stable, they are not exactly the same horse. Differences centre on economic analysis viewing individual offenders as rational actors likely to respond to deterrent punishment pricing signals, while actuarial justice adherents target entire categories of high-risk people. Laudable and all as the goals of crime prevention and minimisation of risk may be, there are obvious concerns around curtailing the three hundred year-old liberal tradition of individual autonomy, and the unfortunate rising incarceration trend – penal warehousing – particularly demonstrated in common law countries where neo-liberal economic values collide with the freedom rhetoric. As already discussed, getting the balance right is a big concern, as also is the objective mediation technique to be employed.

Financial regulation at its core is concerned with two inter-connected levels of activity: supervision and enforcement. While the research questions are directed at the sanction aspect of the second of these, nonetheless the supervisory aspect heavily impacts the enforcement which follows. For instance, risk-based strategies target specific RFSPs, or specific activities based around an assessment of their risk level, and thus, the most likely

19 September 2013); K Scannell. ‘‘Whale’ loss charges for former traders at JPMorgan’ The Irish Times (Dublin, 15 August 2013).
703 See Zedner (n 274).
704 See Zedner (n 274).
706 Interviewee C Regulator Ireland 6 February 2013 stated: ‘......consultation needs to go on between governments, the regulators and the business market about what is the most effective use of limited resources. What’s the most effective use of the statute book in terms of the rules and laws etc. etc. I think government has to be responsive to the concerns of business if they think business has a valid argument. I think business has to be responsive to government if the government or the Regulator has a valid argument. And that maybe comes down to the trust between the key players in the market. It should be theoretically far easier to get certain laws passed through a more mature market that is open and ready to debate on these issues than it might be in a jurisdiction where the industry sort of says we run this country’.
cases filtering through to the enforcement stage will be from these targeted areas. The offences most seen as prevalent therefore, and the dependent sanctions most seen as operationalised, will have a direct relationship to such targeting. The choice of enforcement style therefore is significant.

2.1.4. Enforcement Style sub-set

Layered below the regulatory approach lies the enforcement style sub-set, also a discretionary fiefdom of the regulator. In Ireland post-crisis, the risk-based targeting approach as discussed, impacts the sit below enforcement style sub-set. Here, control over desirable market activity which entails risk across individual firms, individual transactions or in market aggregate is involved, and generally three somewhat overlapping high level strategies are employed: prohibition, limitation and remedy. It is principally in the limitation area, where standards are set, and which when breached trigger enforcement, that enforcement style becomes important. The style describes how regulators interact with those regulated in seeking to gain compliance. The style sub-set continuum is based on coercion and compulsion, and mainly focused on punishment for rule breaking and harm caused at one end; while contrastingly, at the other end, it is focused primarily on education, advice, persuasion, and negotiation techniques. In-between, both the literature and regulatory practice have identified various other continuum positions. Enforcement styles in practice, which traditionally identified two dimensions in industrialised countries, formalism (rule rigidity) and coercion, are underpinned by two major sanction strategies, confrontational deterrence and compliance co-operation, and for some regulators such styles are impacted by the concept of ‘responsiveness’ based on a mixed deterrent and cooperation approach. In Ireland,

707 MacNeil, ‘Risk Control Strategies and the Credit Crisis’ (n 408).
709 K Hawkins, Environment and Enforcement: Regulation and the Social Definition of Pollution (Clarendon Press 1984); K Hawkins, Environment and Enforcement (Oxford University Press 1987); Hawkins and Thomas Enforcing Regulation (n 708); Gunningham ‘Negotiated Non-Compliance’ (n 603); Hutter The Reasonable Arm (n 604); McAllister (n 708).
710 Ayres & Braithwaite (n 90); J Braithwaite, ‘Rewards and Regulation’ (2002) 29(1) Journal of Law and Society 12; Gunningham ‘Negotiated Non-Compliance’ (n 603); Macrory Review (n 122); P May and R Wood, ‘At the Regulatory Front lines: Inspectors’ Enforcement Styles and regulatory Compliance’
there is often overlap between the sectoral regulator and the Competition Authority, while each regulator has three broad enforcement powers, investigative, remedial and punitive\textsuperscript{711}.

The two traditionally identified dimensions, the degree of formalism and the degree of coercion, were expanded by McAllister in developing her model, to include regulatory capacity and autonomy\textsuperscript{712}. Her resulting conceptualisation, which draws upon these four dimensions, is a five-point typology spectrum of enforcement styles, ranging from retreatist to legalistic. These are represented below:

\begin{center}
Retreatist ~ Conciliatory ~ Flexible ~ Perfunctory ~ Legalistic
\end{center}

The legalistic style equates to the adversarialism of the criminal law, where juridification is located, and the regulatory control agency coercively goes by the book, and is sufficiently resourced to sanction consistently and pervasively\textsuperscript{713}. The retreatist represents for instance, the case of the captured Irish regulator pre-crisis, and is characterised by avoidance of hard choices, early backing-off from RFSP opposition, postponed decision-making, and the generation of meaningless paperwork to give the right impression\textsuperscript{714}. In-between, the perfunctory style entails inspection around the rule-book replete with back-logs, and although sanctions are steadily applied, it is only in a slap-on-the-wrist way in token enforcement\textsuperscript{715}. The mid-point flexible style, the one which allows the maximum of enforcement choice, emerges when the degrees of formalism and coercion vary by circumstances, may be customised, and may comprise

\footnotesize
\begin{itemize}
\item \textsuperscript{711} See Connery and Hodnett (n 6).
\item \textsuperscript{712} See McAllister (n 708). Also see Appendix J where the interactive regulatory use of the styles is depicted.
\item \textsuperscript{713} Kagan 'Regulatory Enforcement’ (n 598); P May and S Winter, ‘Reconsidering Styles of Regulatory Enforcement: Patterns in Danish Agro-Environmental Inspection’ (2000) 22 Law & Policy 143; McAllister (n 708); N Shover J Lynxwyler S Groce and D Clelland, ‘Regional Variation in Regulatory Law Enforcement: The Surface Mining Control and Reclamation Act of 1977’ in K Hawkins JM and Thomas (eds), Enforcing Regulation (Kluwer-Nijhoff 1984). Also see Weber The Theory of Social and Economic Organisation (n 66), 340 who wrote that the ‘spirit’ of rational bureaucracy embodied ‘formalism’, an antidote to arbitrariness, as a general characteristic. See Part 2 Chapter 2 for a more comprehensive discussion of adversarialism.
\item \textsuperscript{714} See Kagan ‘Regulatory Enforcement’ (n 598).
\item \textsuperscript{715} See J Braithwaite J Walker and P Grabosky, ‘An Enforcement Taxonomy of Regulatory Agencies’ (1987) 9 Law and Policy 322; and McAllister (n 708).
\end{itemize}
‘situational mixes’ across the four dimensions from autonomy to coercion\textsuperscript{716}. A conciliatory style reflects not being rule-bound or threatening, where results are paramount, and cajoling, and both trade-offs and gaming-tactics are utilised\textsuperscript{717}. As this survey indicates the style adopted by the regulator will impact procedural process as well as the applicable pole or enforcement pathway.

Control for the criminal side, always was and still is, \textit{command and control}. For public regulation, traditionally it was command and control, followed by a movement to \textit{comply or explain} after the Cadbury Report, a trend reversed at least by rhetoric post-crisis\textsuperscript{718}. Post-GFC, it is now apparent that an administrative regime on its own cannot maximise enforcement. Self-policing or self-regulation, is one acknowledged failed technique, which sits at one outer point of the entire regulatory continuum, while captured public regulation at the other end also failed. For completeness, it must be acknowledged that out and out anarchy is the opposite of control, but that is really something of a fey-event. Public control therefore, is obligatory, and the criminal law and the administrative regime are its joint components, where mid-point flexibility beckons greatest potential, and where the interplay issue requires both optimal application and transparent mobilisation\textsuperscript{719}.

\subsection*{2.1.5. The Harm Risk Kernel}

Within the enforcement style, discretionary decisions must be taken around what harms or risks should form the basis of coercive restraint. Packer’s argument that the use of criminal sanction should not inhibit socially desirable conduct, may cause reflection as to the general use of sanctions regarding market activity, but cannot however, be relied upon to justify non-criminalisation or non-regulation of morally reprehensible market

\textsuperscript{716} See Kagan \textit{‘Regulatory Enforcement’} (n 598); McAllister (n 708).

\textsuperscript{717} See Shover et al (n 713); and McAllister (n 708).

\textsuperscript{718} See the juxtaposed comparison in Appendix C and in Appendix E.

\textsuperscript{719} Within the regulatory literature the preponderance of opinion favours ‘flexibility’ see for instance, Ayres and Braithwaite (n 90); Baldwin and Black (n 593); Freiberg \textit{The Tools of Regulation} (n 119); Gunningham and Grabosky \textit{Smart Regulation} (n 16); Gunningham ‘Negotiated Non-Compliance’ (n 603); Gunningham ‘Enforcement and Compliance Strategies’ (n 603); Gunningham ‘Strategizing compliance and enforcement’ (n 603); Haines \textit{The Paradox of Regulation} (n 14); Hutter \textit{The Reasonable Arm} (n 604); Macrory Review (n 122); Macrory ‘Reforming Regulatory Sanctions’ (n 120); Rees \textit{Reforming the Workplace} (n 589). Concerning flexibility, even in a divergent binary context, the real issue is not which strategy pole to adopt, but when and to what degree; see Rees \textit{Reforming the Workplace} (n 589).
misconduct. The financial regulation, two-fold risk focus, of prudential (stability) risk, and more particularly after the GFC, macro-prudential risk with a global focus, is not penetrated by coercive regulatory sanction. However, business conduct, which clearly mobilises such risk management, and its control, are subject at national level to the binary coercive control mechanism with its interplay elements.

The issue then becomes, what harm risk to coercively sanction. Real crime justification lies in moral and political theory, an amalgam of the autonomy/restriction values which morphed into the morally loaded ‘harm principle’, buttressed by the minimalist approach to coercive prescription and sanction\(^{720}\). Principally grounded within Mill’s principle of liberty, the freedom-limiting role of the criminal law is purposed to minimise human suffering by preventing harm to others (crime) by the most efficient means available, and thus, defines justice in self-interest utilitarian terms\(^{721}\). The prime critique of this theory, which entails a discrete victim and perpetrator aspect, centres upon Mill’s self-imposed limitation upon state control, that coercive intervention only warrants preventing harm to others. If no ‘other’ victim can be identified, then the harm is not sanctioned, a premise heavily relied upon by those falsely advocating that economic crime is ‘victimless’.

Further, even if there is identification, the stipulated sanction suite options, are the only means available from which the discretionary power may draw out the most efficient sanction, unfortunately tailored not to the other as victim, but always to the offender’s characteristics. The tension between individual freedom and the prevention of harm therefore, comes down upon the side of offender freedom, within the Habermas normative key, even if the weak are sacrificed to the powerful. In a modern markets versus society context additionally, in some instances, such as the criminalisation of cartels or the regulatory authorisation of mergers, the legitimate restriction upon freedom is based in the market, not in society’s right to constrain it\(^{722}\).

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\(^{720}\) Ashworth *Principles of Criminal Law* (n 97); L Farmer, ‘The Obsession with Definition: The Nature of Crime and Critical Legal Theory’ (1996) 5 Social and Legal Studies 57; Husak *Overcriminalisation* (n 298); MacCormick (n 532). Also see McAuley and McCutcheon (n 274), 103 as discussed in Appendix K; and A Kenny, *Freewill and Responsibility* (London 1978), 76.


Mill’s theoretical argument confronts the two very distinct problems of coercive control within criminal/administrative sanctioning. First, the keeping of order and, second the simultaneous dramatization of the moral notions of the community. It thus, has a deeply concerning resonance for business crime, where all too frequently the argument that white-collar business crime is victimless crime seeks to special plead its location into more business-friendly administrative options. MacCormick identified ‘harm’ as a heavily contested, morally loaded concept when viewed through a ‘justice’ lens, specifically because individual interests in private property evoke one of three different responses: they are always, sometimes or never legitimate. When considering legitimacy, he advocated the need to focus upon the moral, cultural and political nature of the interests recognised in a particular society and culture. According to Sen however, concentrating upon the underlying freedoms, the Habermas normative key, rather than the claimed interests, will yield a more just result. Mill acknowledged that legitimate action toward benefit may legitimately provoke harm or loss to another. He particularly noted its possibility within a competitive environment such as financial markets as presently constructed. This legitimate action notion in a socially vital and valuable activity is a prominent argument against coercive sanctioning, or against lesser proofs forms around offence definitions based upon recklessness and/or negligence. But Mill equally accepted that when the means employed to obtain the benefit are not in the general interests of society, for instance where fraud, treachery or force are utilised, then it is legitimate for the state to alleviate the harm. Such harm relates to welfare interests, those related to survival as Locke pronounced, and includes economic assets and well-being, which both require precise definition, and an institutional structure such as a statutory regulator, or the judiciary, to protect them. Economic structures such as

369. Also see for instance, Competition Authority Decision No 6, Woodchester Bank Ltd/UDT Bank Ltd: 4 August 1992, Notification No. CA/10/92; where in relation to an acquisition agreement, the Authority decided inter alia, that for a merger to offend statute there must be at least a likely diminution of competition in the market concerned; this may occur where a merged undertaking raised prices upon diminished market competition; other effects may relate to the ease of new market entrance by competitors.
724 See MacCormick (n 532).
726 J Feinberg, Harm to Others (Oxford University Press 1984); J Feinberg, Offense to Others (Oxford University Press 1985); J Feinberg, Harm to Self (Oxford University Press 1986); J Feinberg, Harmless Wrongdoing (Oxford University Press 1988).
private markets, which have a public interest component, thus fall within the contractarian protection where harm legitimately provokes the coercive power of the state.\textsuperscript{727}

Unassailable ‘basic liberties’, or rights as trumps, were asserted by Dworkin, Fuller’s disciple.\textsuperscript{728} These he propounded as a better societal measure, where restriction of the lesser general liberties, in the sense of compromising to protect citizen equality, was clearly justifiable to forestall harm to others. It can hardly be argued however, that code standards which are, and are subject, to differential and shifting stricture norms amount to unassailable basic liberties. Thus, even in Dworkin’s definition there is no basis to exclude or marginalise the criminal law. Dworkin’s gradation of rights or distinction theory resonates from Locke, who propounded that natural rights cannot ever be given up, and if infringed, societal consent is lost with government losing its right to govern.\textsuperscript{729}

And further, Locke’s well set out view that restriction upon freedoms lies in the case of harm to another in his life, health, liberty or possessions. It is clear that breaches of an ethical code infringe or may infringe the property rights of others, and in severe cases such as the Enron accounting scandal, or the massive Madoff Ponzi scheme fraud, may impair the health and trust of ruined investors who may club together to seek redress.\textsuperscript{730} Regulation cannot function where no standards are in place, and equally as Fuller’s incongruence argument propounded, where those in place are disregarded, or where they are not enforced. Where the market seeks Locke in philosophical aid therefore to protect its liberty, it must also bear the burden of Locke’s philosophy in restriction.

The balancing of interests within the harm principle, led Feinberg to devise five factors based around risk gravity and probability, under circumstances however, where some but not all justify his conclusions when seen through the lens of highly competitive financial markets.\textsuperscript{731} For instance, the greater the risk, the less reasonable it is to accept it. This tends to support a case for criminalising recklessness as recently suggested by regulators,

\textsuperscript{727} In Ireland harm and culpability are seen as inextricably linked, while the preferred test is stated to be the harm that the offender intended to cause or risked causing where the harm is a reasonably foreseeable consequence. See LRC Report ‘Mandatory Sentences’ (n 469); T O’Malley, \textit{Sentencing Law and Practice} (2nd edn, Thompson Round Hall 2006); People (DPP) v O’Dwyer [2005] 3 IR 134 (CCA).
\textsuperscript{728} RA Dworkin \textit{Taking Rights Seriously} (n 61); Also see G Dworkin, ‘Moral Paternalism’ (2005) 24 Law and Philosophy 305.
\textsuperscript{729} See Locke \textit{Two Treatises of Government} (n 73); Brooks (n 229).
\textsuperscript{730} See van de Bunt (n 130). Also see the record settlement by JP Morgan Chase documented earlier concerning claims by the Madoff victims see ‘JPMorgan had Madoff concerns in 1998 Authorities informed decade later’ The Irish Times (Dublin, 08 January 2014).
\textsuperscript{731} See Feinberg \textit{Harm to Others} (n 726).
a live issue when considering the pre-GFC behaviour of Irish bankers. However, the suggestion that the greater the potential harm gravity, and the less probable its occurrence, should lessen prohibition, flies directly in the face of the disastrous fat-tail risks (outlier risks) coming home to roost within the GFC. Of central controversy, is the effective proposition that the most valuable, and yet risky conduct, should be self-insured and not prohibited, when considering that financial markets are made up of specialist knowledge experts, who are often speculators, and consumer innocents relying upon such expertise. It is in this conduct area particularly, that criminalisation and/or lesser coercive sanction must be seriously considered by policy-makers. It will not be easy because the criminal law involves conflicting principles and values and a compromise or balance must be struck. In terms of criminal law sanction practice in Ireland, on the hierarchy of protected rights of victims of crime, rights to private property rank after life, liberty and bodily integrity, while the seriousness of a property offence is not assessed solely by reference to the amount taken, but also by reference to the suffering or hardship which the offence caused. Financial regulatory practice in Ireland, demonstrated through the lens of the available negotiated settlement agreements, finds reference to remediation efforts as mitigating penalty. Accordingly, recognising that Feinberg’s more recent embellishment of Mill’s harm principle may be found wanting in the modern market context, the conclusion is that positive duties around expert risk management within market autonomy may best protect and prevent; that all identified harms whether proximate or not, and different categories of expert risk behaviour, must be prescribed; and, that once found present, they must be sanctioned even absent an identified victim.

The types of harm which financial market misconduct causes, impacts other corporations, individuals and society. This includes the obvious immediate financial loss of capital, the loss of potential profit, the loss of potential future opportunity, loss of individual and societal consumer confidence and reputation, potential damage to market stability/integrity or institutions of the market such as banks, and illegally re-distributing wealth. Hard core cartel activity for instance, has been characterised as leading to

732 Appleby Reflections on Weaknesses with respect to Accountability (n 455).
733 A Duff, ‘Introduction’ in A Duff (ed), Philosophy and the Criminal Law Principle and Critique (Cambridge University Press 1998); Also see Dworkin Taking Rights Seriously (n 61).
734 LRC Report ‘Mandatory Sentences’ (n 469).
735 See for instance, T O’Connor (ed), Competition Law Source Book Volumes 1 and 2 (Round Hall Sweet and Maxwell 1996); including Competition Authority decisions upon notification/application such as:
welfare losses in the form of appropriation (from consumer to producer) of consumer surplus (consumers over-pay), and the creation of three separate loss categories, deadweight loss to the economy where inflated cartelist prices exceed consumer price reservation, productive inefficiency (hindering innovation of both products and processes), and so-called X-inefficiency (managerial or productive slack) due to diminished competition. The following are two crime harm examples which show the national and international scale, and inter-relatedness of financial crime, and its dramatic economic and social effects.

Since 2000, thirty-three convictions have been secured for offences under the Competition Acts in Ireland. Described as 'some of the most damaging activity committed on a free market' and, 'a treacherous danger to an open economy', prosecution occurs on indictment in the highest first instance criminal court, the Central Criminal Court. Fines imposed by the EU Commission against cartels however, dramatically outstrip anything imposed in Ireland. The EU Commission operates a two-headed sanction policy: to impose a punitive sanction, although imprisonment is impossible at EU level; and to both prevent offence repetition, and to render the Treaty prohibition more effective. The case of AU Optronics Corporation and others is a fitting US anti-trust/cartel yet international comparator as to penalties, and makes a dramatically striking contrast to the EU and Irish practice. This Taiwanese corporation


739 EU Commission Cartel statistics available at [http://ec.europa.eu/competition](http://ec.europa.eu/competition); Between the years 2006 and 2010, relating to two hundred and forty-two decisions, fines totalling €12 million were imposed, a little over €3 million of which relates to 2010, with the highest fine being €1.4 million in the car glass case in 2008.


was sentenced to pay a $500 million criminal fine for its participation in its five-year conspiracy, matching the largest fine imposed against a company for violating U.S. antitrust laws. The prosecution sought a fine of $1 billion while the defence argued for $285 million\textsuperscript{742}. Paradoxically, the international print media reported that despite the fine that the company share price rose by 5%, because the fine was less than some investors had expected!

Money laundering (ML), although enjoying an EU origin, is a separate criminal offence in Ireland\textsuperscript{743}. In 2001, the IMF recognised ‘financial abuse’, which it widely defined as, encompassing potentially negative consequences for a country’s macroeconomic performance, imposing welfare losses, and negatively affecting cross-border externalities\textsuperscript{744}. Effectively, other crime categories are facilitated and legitimised by ML which is a predicate crime. ML involves considerable deliberation, including concealment of crime funds ownership, alteration of the form of crime proceeds, and, leaving no trail. The actual ‘washing’ or laundering involves placement in legitimate institutions, layering by disguising and splitting up, and integration meaning cleared funds re-enter the legitimate financial system\textsuperscript{745}. Sound reasons to control or criminalise ML harm, include the moral dimension, preventing bad exemplars, and difficulty in criminal detection\textsuperscript{746}. As to the incidence of ML harm, model numerical simulations demonstrate that it accounted for 19 percent of GDP in the EU-15 economy, and 13 percent in the US economy over the sample period January 2000 to April 2007\textsuperscript{747}.

Worldwide turnover in organized crime was valued at US $595 billion in 2001, and rose

\textsuperscript{742} See Appendix K for additional penalties imposed.

\textsuperscript{743} It is committed by statutorily defined ‘designated persons’ (ten categories) when engaging in one or more of three acts amounting to statutorily proscribed conduct (which may occur inside or outside the state) involving property which is the proceeds of criminal activity. See Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

\textsuperscript{744} See IMF Report, \textit{Financial System Abuse, Financial Crime, and Money Laundering–Background Paper} (2001). To encompass money laundering, financial fraud, tax evasion and avoidance, circumvention of exchange restrictions, connected-party lending, and stock manipulation. Tax fraud, welfare fraud, stock market abuse, pension, mortgage and insurance fraud, conspiracy, mail fraud, extortion through interstate commerce, access device fraud, wire fraud, embezzlement, cheque forgery and fraud, false entries and statements, and bank fraud have been identified by Taylor (n 87) and Brightman (n 193).

\textsuperscript{745} M Ashe and P Reid, \textit{Money Laundering: Risks, Liabilities and Compliance} (2nd edn, Round Hall Sweet & Maxwell 2007).

\textsuperscript{746} See Alexander \textit{Insider Dealing and Money Laundering in the EU} (n 135). These are more fully set out in Appendix K.

to US $790 billion in 2006\textsuperscript{748}. Equally chillingly, one IMF paper covering the period 2004-2011 argued that overall country compliance with ML international standards and risk analysis was low, which adversely impacted financial transparency\textsuperscript{749}. In 2009, it was estimated that the Irish economy was losing around €3 billion annually from white collar crime and corruption\textsuperscript{750}. This realisation clearly impacts the societal ordering of rights by policy-makers, and in particular the maximisation of interplay strategy.

Offences, grounded in harms as seen, are one side of the abrasive face of coercive control. The other is sanctions. Literature and practice alike often treat them separately. However, because they form a dependent axis and a vital connection between criminal and administrative enforcement, first I will deal with the procedural forms for their expression through the values context in Part 2 Chapter 2 before returning to deal with the dependent axis itself as an entirety in Part 2 Chapter 3.

\textbf{2.1.6. Summary}

In a nutshell, harm risk and its management are central to both offence/contravention and sanctions, and to market activity. It grounds the enforcement style. Harm risk definition in its traditional form has however, been found wanting and within the targeting approach increasingly favoured by both regulation and the criminal law, positive duty definitional formulations have been advocated. How to implement this and within what values context will be examined in the next two chapters. We start with the values complex for coercive control.

\textsuperscript{748} F Schneider, ‘Turnover of organized crime and money laundering: some preliminary empirical findings’ (2010) 144 Public Choice 473.


Chapter 2: Connective Tissue: Coercive Control Values Complex

2.2.1. **Introduction**

The selection for interrogation of pin-pointed practice values has already been identified and justified. They were chosen in keeping with the central autonomy/restriction theme, the accountability and transparency principles, and especially the Dicey/Packer values complex, which together ground the normative theoretical framework. Here reside regulatory and arbitral independence and constraint, strategic and tactical enforcement including adversarial justice, the non-arbitrary exercise of discretion, strategic and tactical mediation of justice within differential enforcement styles, and a values complex where an enforcement pathway and choices within it lead to sanction.

2.2.2. **Adversarial Justice**

Adversarialism is the centuries-old, preferred enforcement style of the criminal law, and its quasi-criminal relatives, and in a varied form is also mobilised in civil litigation. The control process, as exemplified by the top-end criminal process, is a continuum riddled with discretionary milestones. It begins with the legislative decision to criminalise certain forms of behaviour, follows with a report or discovery of an offence, and ends with a verdict or, in some cases, with the conclusion of appeal or review proceedings\(^{751}\). Packer argued that the process known as adversarial justice mediates the crime control model, and the due process ‘obstacle course’ model, where each competes for priority\(^{752}\).

Criminal procedure, the synthesis born of this system is the flagship, if not the fountain, exemplar for other control forms including administrative regimes. Its deficiencies have led to the establishment of more relaxed regulatory forms or styles as demonstrated, although its spinal definitional, procedural and proofs forms have been retained. A better regulation approach therefore, also ameliorates control with appropriate due process, and


\(^{752}\) See Packer (n 273) especially 163-164 as quoted in Appendix K and Habermas (n 276), 428 also as quoted in Appendix K.
thus requires the spectrum poles to narrow, and within a better balance reflexively test or
strain each other to beneficial effect around justice as truth. Designing a newer post-
crisis, fused, ‘justice’ framework for conflict resolution however, within the identified
need for market/regulator collaboration, will require re-examination of some well
entrenched ‘real’ crime’ procedural values or approaches.\footnote{See Langbein (n 491), 332 as quoted in Appendix K; also see F Haines and A Sutton, ‘The Engineers
Dilemma: a Sociological Perspective on the Juridification of Regulation’ (2003) 39(1) Law and Social
Change 1; and Part 2 Chapter 2 section 2.2.4.}

It was earlier demonstrated that the current, trending justice value emerging from ‘real crime’ veered toward Packer’s
crime control pole. Post-GFC in Ireland, this trend is continuing into regulatory market
governance, although correspondingly a business counterforce seeks a negotiated
accommodation.\footnote{See Elderfield Opening Remarks (n 417); Walsh Criminal Procedure (n 281); M Gallant ‘Alberta and
See Appendix K for an extended footnote.}
The chosen enforcement style, within the regulatory five point
continuum, provides the title and the attributes of the mediating justice. The top-lining
‘legalistic’ style is the equivalent of adversarialism, where lesser civil proofs and
procedures apply, although most advocates within the literature prefer the middle-point
‘flexible’ approach as already broached. Whatever point is chosen however, requires
suitable regulatory procedural protections, a matter taken up below.

The adversarial system of criminal trial is a lawyer dominated mode, which has become
one of the defining institutions of the Anglo-American legal tradition. Its origins lie in
English legal history (without plan or direction) across the century or so from the 1690’s,
as Langbein attributes.\footnote{See Langbein (n 491). According to Langbein, the adversarial system began as a limited special-purpose
procedure, effectively to serve the interests of wealthy grandees accused of treasonable intrigues. See
Appendix K for a more complete footnote.}
The Old Bailey in London was the most important criminal
court in the Anglo-American world during the 18th century, and it is from this court’s
jurisprudence that the tradition developed.\footnote{Langbein (n 491) explained that in the 1730’s as a result of changes in prosecutorial practice, and to
provide equality of arms, judges began to extend the right to defence counsel in ordinary felony cases. By
articulating and enforcing the prosecutorial burdens of production and proof, defence counsel managed to
silence the accused, and this development led to the privilege against self-incrimination and the
establishment of the prosecution-borne ‘beyond reasonable doubt’ standard of proof. See Appendix K for a
more complete footnote.}

It grew in response to gross legal
malpractice against relatively powerless individuals, via brave lawyers thwarting overly
harsh if not brutal sanctions and their practice, and vitally important, courageous and
corrective, judicial intervention\textsuperscript{757}. It is characterised by partisan lawyers for both prosecution and defence gathering and presenting evidence, and examining and cross-examining witnesses before a relatively passive judge. The trial court, conducts no investigation of its own, and instead, allows partisan lawyers to present (and sometimes suppress) and probe the chosen evidence (past fact) before a jury of peers, who determine innocence or guilt in the more serious cases\textsuperscript{758}. This approach, as stated, has inculcated regulatory forms even where less formal procedures apply.

Access to key, higher procedural protections as Yeung stipulated, despite the more recent diminution of Packer’s due process model, still lies within this system. Thus, in a separated, two-pole binary, classification of a regulatory matter as criminal could be crucial. In \textit{Melling}\textsuperscript{759} three significant features were identified as characterising criminal matters. This includes that the sanction is punitive, the obverse of the Dicey/Fuller legality principle, where significant financial penalty suggests criminal categorisation\textsuperscript{760}. This definition stressed the public, expressive and punitive nature of criminal law where culpability enjoys a significant aspect\textsuperscript{761}. Constitutionally, judges administer law and no-one can be tried on a criminal charge, laid by a separate and independent prosecutor, save in accordance with law deploying fair procedure\textsuperscript{762}. However, where EU legislation for instance, stipulates administrative sanction using a mandatory construction, it trumps this position, and significant administrative sanctioning is possible where the higher criminal procedure does not apply\textsuperscript{763}. As detailed more fully below, the quality of protection under the ECHR is also closely aligned with a finding of deterrent or punitive legislative purpose, again rendering the punitive/reparative divide a prominent influence.

\textsuperscript{757} See L Radzinowicz, \textit{Ideology and Crime: A Study of Crime in its Social and Historical Contexts} (Heinemann 1966), 127-128 as quoted in Appendix K.
\textsuperscript{758} Suspects enjoy a pre-trial right to silence which pertains right throughout the trial process. This right has devolved from the presumption of innocence, was judicially originated according to Langbein, and enjoys constitutional protection, but not as an absolute right. See for instance Charleton et al (n 281); Conway Daly and Schwepppe (n 448); Hogan and White (n 238); Horan (n 87); Langbein (n 491); and Walsh \textit{Criminal Procedure} (n 281).
\textsuperscript{759} See Melling v O’Mathghamhna [1962] IR 1 (SC), 24-25; McLoughlin v Tuite [1989] IR 82 (SC) and see ft 767 and 768 below; Also see Goodman International v Hamilton (No 1) [1992] 2 IR 542 (HC & SC). See Appendix K for an extended footnote.
\textsuperscript{760} See J McGrath ‘The Colonisation of Real Crime in the Name of All Crime’ (n 335) and see Appendix K for an extended footnote.
\textsuperscript{761} See J McGrath ‘The Colonisation of Real Crime in the Name of All Crime’ (n 335).
\textsuperscript{762} Article 34.1 provides inter alia that justice shall be administered in courts, while article 38.1 provides that no person shall be tried on any criminal charge save in due course of law.
\textsuperscript{763} See Connery and Hodnett (n 6), 141 as quoted in Appendix K; and see Art 29.4.10 as explained in Appendix K. Also see Van Gend en Loos 26/62 [1963] ECR 1; Costa v Enel 6/64 [1964] ECR 585.
Two major adversarial system defects were highlighted by Langbein: firstly, the ‘combat ethos’ effect, where truth-impairing incentives include: evidence and witness suppression, witness coaching, abusive cross-examination, and withholding or non-disclosure of information; secondly, the ‘wealth’ effect, the advantage accruing to those able to procure the services of the best lawyers and evidence gathering. The spread of what is termed ‘juridification’, or highly legalistic practice and procedure, into civil-style administrative regimes, is feared as an adverse development. Of significance for the binary, for instance, it has been observed of the ASIC approach to securities regulation, that it has been hampered by over-zealous adversarial activity on the part of the defence bar. Because the ancient and hallowed (bare) presumption of innocence, based in autonomy (liberty), underlies the two fundamental rules of proof burden in criminal and quasi-criminal administrative cases, namely the legal burden and the standard applicable, robust adversarialism may be anticipated. A prime challenge for binary interplay, concerns ensuring sufficient protection and fairness in enforcement style choice and practice, despite the contemporary history of lessening protection, justified to the risk of adjudicative error.

Within, for instance, Macrory’s view that all regulatory ‘prosecutions’ subscribe to the maximised criminal ‘beyond-reasonable-doubt’ proofs standard, this highly-defensive adversarial legalism may increase in the absence of ‘public good’ correctives. These correctives include: improved pre-trial investigation, and the wider use of inferences, rebuttable presumptions and reverse burdens of proof designed to disclosure of truthful evidence and/or forestalling the truth deficit. Within Packer’s due process values

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764 Kingsford Smith (n 455).
765 See D McGrath, Evidence (Thomson Round Hall 2005) and especially as quoted in Appendix K; also Part 2 Chapter 3 for a discussion about the standard of proof. And see The People (DPP) v D O’T [2003] 4IR 286 (CCA), 290-291; The Queen v Oakes [1986] 1 SCR 103, 121 Dickson CJC as quoted in Appendix K; Re Winship (1970) 397 US 358; McGowan v Carville [1960] IR 330 (HC), 345 Murnaghan J as quoted in Appendix K; and O’Leary v AG [1993] 1 IR 102 (HC),107 Costello J as quoted in Appendix K which statement was upheld by the Supreme Court on appeal O’Leary v AG [1995] 1 IR 254 (SC),
766 See D McGrath (n 765), 18 as quoted in Appendix K; Horan (n 87), 1058 as quoted and discussed in Appendix K
767 See Macrory Review (n 122); Macrory ‘Reforming Regulatory Sanctions’ (n 120).
768 See Langbein (n 491), 333-334 as quoted in Appendix K. Interviewee L Judiciary Ireland 7 January 2013 however reflected that first a failure should be demonstrated before such reform: ‘if after prosecutions have been attempted there is a demonstrated case for the reverse burden type provision, and I think you could probably justify it, but I think to go off and enact it without it being established that you need it, is something I would instinctively resist’.

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complex, there are two different burdens of proof which must be considered\textsuperscript{769}. These are the legal (persuasive) and the evidential, the former suffering potential constitutional implications upon shift\textsuperscript{770}. Additionally, there are three types of presumption used in statutory draughtsmanship where these burdens may pertain: permissive or mandatory rebuttable and irrebuttable presumptions of law\textsuperscript{771}; and permissive or mandatory rebuttable presumptions of fact, which raise an inference derived from proof of a fact\textsuperscript{772}. Significantly for reform, the ECtHR has determined that all such presumptions do not automatically infringe the ECHR, each being considered upon its own merits, while in general terms the use of presumptions is subject to a reasonable limits rule, meaning it must be reasonably proportionate to the legitimate aim to be achieved\textsuperscript{773}. Furthermore, it has been accepted in Ireland that constitutional protection against burden shift is not absolute\textsuperscript{774}.

As to the first burden, the legal burden is an issue-specific burden fixed in law, which allocates the risk of failure in proceedings, while the prosecution almost always bears it to the criminal standard\textsuperscript{775}. If it shifts to the defence the civil standard applies\textsuperscript{776}. Such a shift is rare at common law, but has become a feature of regulatory statutes, where the correct draughtsmanship therefore, is a crucial factor\textsuperscript{777}. The consequence is that in

\textsuperscript{769}See Horan (n 87); D McGrath (n 765).

\textsuperscript{770}See O’Leary v AG [1993] 1 IR 102 (HC); and see Redmond v Ireland [2009] 2 ILRM 419 (HC) McMahon J as quoted in Appendix K. Evidential burdens are also not incompatible with the ECHR article 6 (2) see Lingens and Leitgens v Austria 4 EHRR 373; also see R v Lambert [2002] 2 AC 545 (HL); The Queen v Oakes [1986] 1 SCR 103 as discussed more fully in Appendix K.

\textsuperscript{771}See Horan (n 87), 324 as quoted in Appendix K; and both Competition Act 2002 sec 12 (2) and D McGrath (n 765), 59-60 as discussed more fully in Appendix K.

\textsuperscript{772}See Horan (n 87), 325 and D McGrath (n 765), 16 and 57 as quoted and discussed more fully in Appendix K.


\textsuperscript{774}See O’Leary v AG [1993] 1 IR 102 (HC); and, D McGrath (n 765) especially 25-27 as quoted and discussed more fully in Appendix K.

\textsuperscript{775}See Horan (n 87), 322 as quoted in Appendix K; and D McGrath (n 765); DPP v Morgan [1976] AC 182 (HL); Hardy v Ireland [1994] 2IR 50 (HC & SC); Hutch v Dublin Corporation [1993] 3 IR 551 (SC) as discussed more fully in Appendix K. Contrastingly D McGrath (n 765), 50-51 explained the civil law position as quoted and discussed more fully in Appendix K; also see Gilligan v Criminal Assets Bureau (no 2) [1998] 3 IR 185 (HC).

\textsuperscript{776}See Hardy v Ireland [1994] 2 IR 550 (HC & SC) where in the High Court and mostly in the Supreme Court the judges regarded the statutory burden as an evidential one, although in separate minority views Egan J and Murphy J regarded it as a legal burden which was not constitutionally prohibited.

\textsuperscript{777}See Horan (n 87). Also see U Ni Raifeartaigh, ‘Reversing the Burden of proof in a Criminal Trial: Canadian and Irish Perspectives on the Presumption of Innocence’ (1995) 5(2) ICLJ 135. In R v Hunt [1987] AC 352 (HL), 374 Lord Griffiths commented that those cases of shift are cases where the burden can be easily discharged.

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limited statutory circumstances, the accused may lawfully be obliged to burden-bear. However, Irish constitutional pronouncements, in the absence to date of a definitive decision, may conflict with the ECtHR reasonable limits rule. The real issue relevant to interplay strategy however is: in what circumstances may the persuasive burden shift, and thus be of use to reform efforts. Two types of cases may particularly be noted, both arising where the accused engages in regulated activity, from which he intends to derive benefit, a category clearly referable to financial regulation.\textsuperscript{778} Firstly, where proof of formal qualifications to do acts regulated in the public interest is required, as by a fitness and probity code; and second, cases involving the voluntary acceptance of risk principle as by licence conditionality. Examples are few, but include a trade mark counterfeiting allegation, where the defendant was obliged to prove reasonable grounds of non-infringement;\textsuperscript{779} a bankruptcy non-disclosure of fraudulent disposal of property provision;\textsuperscript{780} cases of duty holders in health and safety prosecutions, very much material to financial regulatory actors charged with duties around financial control systems, where they engage in commercial activity with a view to gain, and are in charge of the work and attendant risks which they may have created;\textsuperscript{781} and, somewhat dated, Irish cases, of special or peculiar knowledge, very relevant to RFSP specialist knowledge experts who sometimes create market risk;\textsuperscript{782} concerning the sale of pork sausages above maximum price order;\textsuperscript{783} and conspiracy to export watches without a licence.\textsuperscript{784} In general terms, the case precedents determine that, if the statutory draughtsmanship would lead to conviction in the absence of exculpatory evidence, then the statute will be regarded as shifting the legal burden to the accused.\textsuperscript{785} Persuasive UK authority, if followed in

\textsuperscript{778} See Horan (n 87).
\textsuperscript{779} See R v Johnstone [2003] 1 WLR 1736 (HL) where Lord Nicholls of Birkenhead considered it fair and reasonable to require the trader to prove his belief that the goods were genuine and not counterfeit; And see (UK) Trade Marks Act 1994 sec 92 (5).
\textsuperscript{780} See R v Edwards; R v Denton; R v Hendley; R v Crowley [2004] 2 Cr App R 27 (CAC); also see (UK) Insolvency Act 1986 sec 353.
\textsuperscript{781} See R v Davies [2003] ICR 586 (CAC), 595 Tuckey LJ as quoted in Appendix K; and see R v Chargot Ltd (trading as Contract Services) [2009] 1 WLR 1 (HL).
\textsuperscript{782} D McGrath (n 765), 28 described the peculiar knowledge principle as long established citing its origin to R v Turner [1816] 5 M&S 206. See Appendix K for an extended footnote.
\textsuperscript{783} See Minister for Industry and Commerce v Steele [1952] IR 304 (SC); Emergency Powers (Pork Sausages and Sausage Meat) (Maximum Prices) Order 1943; DPP v Best [2000] 2 ILRM 1 (SC); and School Attendance Act 1926 as discussed in Appendix K. Also see R v Lambert [2002] 2 AC 545.
\textsuperscript{784} See The People (Attorney General) v Shribman and Samuels [1946] IR 431 (CCA); Maguire J; Emergency Powers (Control of Export) Order 1940; R v Edwards [1975] QB 27 (CCA), 39-40 Lawton LJ.; also R v Hunt [1987] AC 352 (HL) and Horan (n 87), 333 all as quoted and discussed more fully in Appendix K
\textsuperscript{785} See Horan (n 87).
Ireland, will mandate the relevant court to consider a number of factors, before deciding to allow the shift: the defence opportunity to rebut the shift; maintenance of defence rights; flexibility in presumption application; court retention of evidence assessment powers; and, prosecutorial difficulties absent the presumption. One UK practice which has developed, has been for courts to regard infringing persuasive shifts as permissible evidential shifts, although this course has been criticised. Paradoxes around the shift have been judicially highlighted, in relation to offence proofs, and a perceived protection differential. These include potential conviction, despite lack of proof beyond a reasonable doubt; and, the more serious the crime, and the public interest in conviction, the more important the defence protection.

As to the second burden, the evidential burden, which operates a filtering function, and where prima facie evidence sufficiency is at issue, the burden has been described as ‘not a heavy one’. Because the proving party need not convince the trier of fact of anything, he is only required to raise evidence suggestive of the existence of fact, producing a credible narrative of elements of a defence for instance. The two categories of cases, ‘formal qualifications’ and ‘voluntary acceptance’ equally apply, and since there are no constitutional or ECHR constraints as regards this particular burden, they may equally apply to RFSPs. Furthermore, the constitutionally upheld, recent Irish trend toward the use of adverse statutory inferences, drawn from pre-trial silence after prior warning, may enable juries or judges to infer unrevealed fact in a number of instances, including: fact deliberately not disclosed; alleged fact as a recent invention; irrelevancy of fact now relied upon; fact now relied upon is fabricated; and indeed, that the accused is guilty.

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786 See Sheldrake v DPP [2005] 1AC 264 (HL).
787 In a line of cases fully set out in PJ Richardson (n 230), 1691 persuasive burdens were recast as evidential, and some challenges were rejected in a significant number of others. In Sheldrake v DPP [2005] 1AC 264 (HL) the House of Lords made it clear that the task of the court was never to decide whether a reverse burden should be imposed on a defendant, but was always to assess whether a statutorily enacted burden unjustifiably infringed the presumption of innocence. Also see I Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ (2005) Crim LR 901; Horan (n 87), 326; and D McGrath (n 765).
789 See Horan (n 87), 332 as quoted in Appendix K.
790 See R v Schwartz [1988] 2 SCR 443; and see The People (DPP) v Davis [2001] 1 IR 146 (CCA), 156 where Hardiman J as quoted in Appendix K. And see McCauley and McCutcheon (n 274); D McGrath (n 765).
791 See Conway Daly and Schwegel (n 448); Criminal Justice Act 1984; Rock v Ireland [1997] 3 IR 484 (SC); The People (DPP) v Bowes [2004] 4 IR 223 (CCA); Murray v United Kingdom (1996) 22 EHRR 29; sec 72A Criminal Justice Act 2006 as inserted by sec 9 Criminal Justice (Amendment) Act 2009; The
Two recent Irish cases concerning the appropriate standard of proof after a burden shift has occurred warrant examination. In *Egan*, an underage sex case, the Irish Court of Criminal Appeal (Fennelly J) accepted that the legislature is entitled to frame statutes so as to explicitly cast a legal as opposed to evidential proof burden on the accused\(^792\). The court accepted that the accused is not required to give evidence and may discharge the burden (here “honest belief” as to age) by reference to some evidence in the case, whether by cross-examination or otherwise. However the court left open the issue as to the proof standard required of the accused, whether to the higher balance of probabilities or the lower establishment of a reasonable doubt. In *Smyth*, decided a mere two months later, a differently constituted Court of Criminal Appeal (Charleton J) dealt with the reverse burden imposed under the Misuse of Drugs legislation\(^793\). It was held that the burden of proof is borne by the prosecution in respect of every issue except on those issues on which the burden of proof is cast on the accused by statute. Here the trial judge was found in error in directing the jury that the proof burden never shifted to the accused. The court stipulated that the burden here was an evidential and not a legal burden. And, that it was discharged by raising a reasonable doubt. The court added that the correct charge to the jury in such cases should include a statement that the burden of proof shifts to the defence to prove the existence of a reasonable doubt.

In both of these cases the consideration of the reverse burden, one legal and one evidential, arose in the context of statutory defences, the explicit statement by the legislature of a defence and the proof burden connected therewith which lay upon the accused. Unfortunately, in neither case was the standard of proof stated in the legislation. This course – legislatively stating the standard- I argue should be adopted in all such cases so that there can be no doubt. Further, since financial market actors are experts, are voluntary participants in markets for profit, and they create and control the risks, I submit that the higher balance of probabilities proof standard should be applied. And further, for similar reasons, that each reverse burden should preferably be a legal as opposed to an evidential burden, and be explicitly statutorily stated as such to also avoid doubt.

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\(^792\) See *The People (DPP) v Egan* [2010] IECCA 28 (CCA).

\(^793\) See *The People (DPP) v Smyth and Smyth* [2010] IECCA 34 (CCA).
The conclusion for reform for the policy-maker therefore, is that statute may legitimately impose burden shift upon the accused within the law as it presently stands, that courts will so uphold subject to relevant legal principle, and that inferences against the RFSP accused are also permissible. Greater disclosure, accountability and transparency within the adversarial context, can therefore be legitimately demanded of market actors, particularly if the extra due process protection of the criminal law proofs standard is applied across the board.

One of the chief avenues of suppressing evidence mentioned by Langbein is the accused’s right to silence, and although it originates in criminal law practice and does not fully apply to the adversarial civil law, it does apply to the administrative sanction regime which is civil-based procedurally. Upholding the right is the basis of opposition to self-incrimination, which new procedural proofs forms are perceived to introduce. This right to silence grew from the common law prohibition that the accused was not competent to give evidence in her defence. Allowing that it has been recognised by the Supreme Court, as a corollary to the qualified article 40 constitutional right of freedom of expression, in Heaney however, it was held that the right could not prevail over a statute limiting it, which was held to be constitutionally valid. Thus, in the area of competing or conflicting rights, this right to silence is not absolute, and in striking a balance it has been determined to be secondary to the myriad explicit statutory abrogations of it. The Irish state has been found entitled to encroach upon the citizens’ right, where maintaining public peace and order require it, although such encroachment must be as little as possible. It must be recorded however, that the ECtHR subsequently impugned the statute requiring self-incrimination, in the form of an account of movements, which was the basis of Heaney; although such ruling appears limited to prohibiting the concept of a criminal charge consisting of refusal to answer questions.

794 In a civil trial a witness must be advised of the right to remain silent under questioning if an answer may incriminate them. Further, under the Companies legislation the statute-backed questioning of appointed inspectors must be answered in the investigative procedure but answers cannot be subsequently used in criminal proceedings.
795 See Heaney v Ireland [1996] 1 IR 580 (SC); R v Director of Serious Fraud Office, ex p Smith [1993] AC 1 (HL); R v Herbert [1990] 2SCR 151; and see The People (DPP) v Kenny [1990] 2 IR 110 (SC) as discussed more fully in Appendix K.
796 See Heaney v Ireland [1996] 1 IR 580 (SC); also see Gilligan v Criminal Assets Bureau (no 2) [1998] 3 IR 185 (HC); and The People (DPP) v Finnerty [1999] 4 IR 364(SC) as discussed more fully in Appendix K.
Thus, such a limited prohibition would not prevent questioning, or the jury (summary judge) from drawing conclusions around the answers or the lack of them, where a vital social or economic activity such as banking is concerned, once statutorily enacted\textsuperscript{798}. Nor would it prevent, incentivising specialist knowledge experts to voluntarily disclose, in return for sanction discount, or plea bargaining potential. In the financial world, the suspect is a specialist knowledge expert, with sole or discrete access to an information pool, and there lies the weight of legal change. The real crime, criminal suspect, pales before the might of the state apparatus, and requires equality of arms, and yet even there the right to silence is increasingly being curtailed. Therefore, since the bargaining or power position of the market expert changes the dynamic so significantly, consideration of amelioration of even long-standing legal standards or obstacles, such as the right to silence, requires serious consideration within any new, post-crisis regulatory contract\textsuperscript{799}.

The position of these financial experts, because they have specialist knowledge of the industry, often enjoy covert control of decision making, devise their own business plans and both create and manage risks around them, and furthermore, generate and hold ‘documentary’ or other evidential materials in the widest sense, must be tackled within a coordinated interplay strategy. It remains to be seen whether the Supreme Court or Court of Criminal Appeal post-GFC, will regard it proportionate that such experts may remain mute, and not disclose, or whether the right to silence/non-incrimination will be regarded as of a lesser order. Post-crisis, Irish courts in \textit{Dellway} and \textit{Murray} have exhibited a positivist trend to upholding the state interest above the individual, albeit protecting procedural rights\textsuperscript{800}. Where the financial stability of the state may be at stake, upon general principle the right to silence may arguably be found to be of such lesser order. In that event however, both the ECtHR and the Supreme Court have held that incriminating answers given under statutory compulsion, in the course of industry enquiry or company investigation, may not be used in subsequent proceedings unless proven voluntary\textsuperscript{801}.

\textsuperscript{798} In re National Irish Bank Ltd (no 1) [1999] 3 IR 145 (SC) where the Supreme Court inter alia held that if there were grounds for believing that there was malpractice or illegality in the operation of the banking system, it was essential, in the public interest, that the public authorities had the power to investigate the matter fully.

\textsuperscript{799} Conway Daly and Schweppe (n 448), 59 as quoted in Appendix K.

\textsuperscript{800} See Dellway Investments & ors v NAMA & ors [2011] IESC 14; and DPP v Paul Murray [2012] IECCA 60 as discussed more fully in Appendix K.

\textsuperscript{801} National Irish Bank, Re (No.1) [1999] 1 ILRM 321 (SC); Saunders v UK (1997) 23 EHRR 313 as quoted and discussed more fully in Appendix K; NH Andrews, ‘Civil liberties and the pin-striped accused: 178
One dissertation interviewee was especially disappointed in such a finding resulting in such evidence being excluded from subsequent disqualification and civil actions\textsuperscript{802}. Another stated of the right to silence: ‘\textit{[I]t can be interfered with but we should be slow to do so in my view}\textsuperscript{803}. Legal rulings to date however, concern evidence compiled on foot of statutory compulsion, without any form of caution known to criminal practice\textsuperscript{804}. There is nothing to prevent new statutory forms of caution, and evidence gathering including inviting submissions from suspects\textsuperscript{805}. For instance, ASIC already publicly assert, that all investigations which they commence include the possibility of criminal prosecution, and that the evidence gathering standards of the criminal law are always applied. Furthermore, increasingly, regulators charged with investigative responsibility, are employing former police as investigators so as to ensure an investigative culture and practice concomitant with criminal practice\textsuperscript{806}. Obviously this also aids subsequent trial proofs. This is an area which policy-makers must review, preceded by informed and participatory debate, and this debate, must include the resource issues relevant to both the regulatory investigators as experts, and the industry suspects as experts. Other adversarial challenges also await consideration, and exemplify the need for both an administrative pole within the binary, and in a fused binary for new statutory forms for evidence gathering and admissibility.

Five negative challenges surrounding the all-important criminal trial process, mainly congealing around evidential requirements, have been identified in the literature

\begin{itemize}
\item The privilege against self-incrimination and human rights’ (1997) 56 Cambridge Law Journal 243,245 as quoted in Appendix K.
\item Interviewee X Regulator Ireland 12 November 2012.
\item Interviewee L Judiciary Ireland 7 January 2013.
\item In Ireland cautions are administered under the nine Judges’ Rules, 1918 version; also see Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987 SI 119 of 1987, as amended by the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) (Amendment) Regulations 2006 SI 641 of 2006; and AG v McCabe [1927] IR 129 (CCA); People (AG) v Cummins [1972] IR 312 (SC); McCarreck v Leavy [1964] IR 225 (SC). Also see Charleton et al (n 281); Conway Daly and Schwepe (n 448); Horan (n 87); and Walsh \textit{Criminal Procedure} (n 281); and Balance in the Criminal Law Review Group, ‘The Right to Silence’ Final Report (2007), 88 all as discussed more fully in Appendix K.
\item Following US practice, ASIC operates a policy of selectively inviting ‘Wells Submissions’ from some suspects. As an incentive, the response may be used by the suspect upon later ‘conviction’ to ground a case for a lesser penalty due to cooperation. See ASIC, \textit{Enforcement action submissions} (Regulatory Guide RG52 originally issued on the 10 May 1993 as Practice Note PN52, 2007).
\item See for instance, Interviewee K Regulator Australia 24 May 2012 as discussed more fully in Appendix K; also see Kagan \textit{Regulatory Justice} (n 501); Barnard (n 527).
\end{itemize}
concerning the paradigmatic sequence of prosecution-trial-conviction-sentence\textsuperscript{807}. A recent post-GFC UK Consultation Paper highlighted numerous problems facing the prosecutor of economic crime, which equally impact Irish binary enforcement\textsuperscript{808}. These include the already broached, difficulties around identifying wrongdoing in hidden, specialist or technical fields, which often depends on corporate cooperation or whistleblowers, and little incentive for corporate wrongdoers to self-report. Seven specific target areas for Irish reform have been identified from Irish criminal practice, including the greater use of agreed pre-trial admissions, the provision of documentary evidence to juries, and the wider invocation of confiscation sanction powers; while, internationally four or more factors including case complexity and regulatory resourcing have been recognised as hampering fraud trials\textsuperscript{809}. There has not however, been advocacy for a transparent published policy or strategy governing the use of criminal law, as opposed to the administrative stream, nor the expansion of the criminal sanction suite to include enforceable undertakings or other cooperative resolution forms, for instance, where a form of co-regulation between state and the newly convicted would benefit non-custodial sanction policy, and potentially past and potential future victims.

Within the criminal law regulatory sector, where in Macrory’s view, traditional UK approaches left the criminal law with a great deal of work, he found that in nearly every regulatory field the core sanction was a criminal offence and usually one expressed in strict liability terms\textsuperscript{810}. While these strict liability offences do not feature in Irish financial regulatory enforcement due in part to judicial reading-in of a mens rea requirement, the Macrory Review recommendations for change/ improvement of the criminal system have clear resonance for Ireland\textsuperscript{811}. These include: improved training for court officials in regulatory offences, an issue even at the judicial level in Ireland\textsuperscript{812};
specialising criminal courts to specific areas; the provision of a richer range of sentencing options, including publicity orders, corporate rehabilitation orders, enforcement undertakings which allow the offender to propose their own sanction e.g staff re-training or compensation for victims; the application of proof beyond reasonable doubt in all regulatory enforcement as already highlighted; and the introduction of forms of restorative justice (victim involvement).

Most of these recommendations would improve criminal practice generally, let alone within a regulatory regime. However, within such regulatory regime, these proposals if implemented, would enhance system legitimacy, and provide the expert suspect with quality assurance around her defence. Of course, well resourced expert suspects, whose legal fees may be picked up by a corporate overlord, aided by the best of professional advisers and witnesses, utilising a juridified and more adversarial procedure, and shielded by a higher proofs standard, may gain too powerful a position without changes to the right to silence as already broached. There appears room for a trade-off. Better procedural protection in exchange for greater disclosure and explanation. In principle this does not offend, but the devil will be in the detail of any statutory reform. Such a reform however, would be preferable to the continuation of sole reliance on a civil-style regime, replete with a lesser proofs standard, possibly in breach of article 6 ECHR norms in the case of very large monetary penalties, and absent investigative evidential caution. Of course, the US parallel pathway, engaging both prosecution and civil regulatory suit, as well as private (class action) civil suit intervention, discussed more fully later, could be utilised, but business leaders find such grossly unfair. It has been recognised that business interests regard the rigours of the criminal process, as trial by ordeal, and as the actual punishment. Within these choices, I argue that greater protection for the innocent within a flexible, and none too hostile, and transparent enforcement style, and more committee but we have a very small budget. There isn’t an infrastructure of staff there. There is no budget for proper training’.  

Interviewee L Judiciary Ireland 7 January 2013 stated: ‘It’s an extraordinary situation when a person can find themselves in a criminal trial after appointment to the bench with absolutely zero induction training, zero mentoring and zero supervision but that is the system we have’.

Interviewee Z Business Leader England 29 November 2012 advised: ‘[A] n example I think is in the United States that the regulatory power indeed the criminal law power more generally in any corporate or individual crime becomes extreme because you are given the option at the end of the day of reaching an accommodation which often may be a very onerous one or alternatively having the book thrown at you’. See Appendix K for an extended footnote.

Levi ‘Serious Fraud in Britain’ (n 213), 189 as quoted in Appendix K.
disclosure requirements for the real infringer, is the better new regulatory contract rhythm.

Mobilising on the criminal side, clearly encounters the procedural issues already discussed, as well as constitutional considerations. The Irish constitution expressly stipulates certain due process rights, within the adversarial setting and the Dicey/Packer model, including liberty, fair trial, and jury trial for serious offences. Furthermore, the Supreme Court has both recognised, and given priority to, many unenumerated rights within the living, breathing document such as the presumption of innocence, right to silence (as discussed) and legal advice, prompt trial, bail, and proportionality in sentencing. International Human Rights conventions similarly provide, while the ECHR which establishes a floor of rights, is the main source for human rights law for the major EU court, the European Court of Justice. Of course, all of these rights relate to the accused, and yet impact, and in the conflict of rights allocation, restrict the individual victim and society (including regulator).

In comparing the Irish constitution, and the ECHR, it is clear that despite each containing similar concepts, nonetheless, outcomes of their application may result in divergent findings in the different interpretive courts. Three possible divergence areas have been identified: guaranteed rights may differ between instruments; even if the same, their range and scope may be interpreted differently; and, greater margins of appreciation may be allowed under one rather than the other. The judicial interpreters of the ECHR, do however include administrative style ‘offences’, tax and customs penalisations, contempt proceedings, and professional disciplinary proceedings in criminal classifications.

816 See Conway Daly and Schweppe (n 448); Hogan and Whyte (n 238); LRC Report ‘Mandatory Sentences’ (n 469); Walsh Criminal Procedure (n 281); also see D v DPP [1994] 2 IR 465 (SC), 473-474 Denham J as quoted in Appendix K; and In re Haughey [1971] IR 217 (SC), 264, O'Dálaigh CJ as quoted in Appendix K.

818 U Ui Raifeartaigh, ‘The Convention and Irish Criminal Law: Selected Topics’ in U Kilkelly (gen ed), ECHR and Irish Law 2nd ed (Jordans 2009); Heaney and McGuinness v Ireland (2001) 33 EHRR 12, argued that while the issue of victims’ rights has grown considerably in Ireland over the last decade or so, it has been observed that Irish courts have mainly indirectly noted the interests of victims of crime, whereas the convention places a stronger emphasis upon positive obligations to protect rights.

819 See Ui Raifeartagh ‘The Convention and Irish Criminal Law’ (n 818).
utilising similar reasoning as found in Irish courts\textsuperscript{821}. Thus, criminal law convention protections apply at the least to regulatory matters coming within these areas, and ECHR criminal law procedural norms must be adhered to. In the already introduced line of cases including \textit{Engel, Ozturk, Janosevic, and Jussila}\textsuperscript{822}, the ECtHR, whilst recognising the right of states to domestically categorise breaches as criminal or administrative, nonetheless, held that in either case the Article 6\textsuperscript{823} fundamental rights protections fully applied where the potential penalty deprives liberty in most cases (short durations excluded), and where monetary penalties are not inconsiderable, especially where imprisonment applies in lieu\textsuperscript{824}. In other words, the prime criterion is deterrent and punitive as twin objectives, with stigma secondary, although such is not ubiquitously applied\textsuperscript{825}. Further, beyond the criminal law it is clear that adverse decisions taken against an individual, by the executive or an administrative body, are covered by ECHR protection\textsuperscript{826}. This equally applies under UN ICCPR protection, as evidenced in \textit{Kavanagh}, where the failure of the Irish state to provide a jury trial for the accused, instead stipulating the use of the three-judge Special Criminal Court, was impugned as a treaty breach, because the prosecutor failed to demonstrate reasonable and objective grounds for his discretionary decision\textsuperscript{827}.

Analogous to the financial regulatory administrative sanction regime, resort has been made to more efficient and expedient ‘middle-ground’ civil procedures, in confiscation of

\textsuperscript{821} See King (n 448); Ui Raifeartaigh ‘The Convention and Irish Criminal Law’ (n 818). The Irish cases concerned are Goodman International v Hamilton (No 1) [1992] 2 IR 542 (HC & SC); McLoughlin v Tuite [1989] IR 82 (SC); Melling v O’Mathghamhna [1962] IR 1 (SC). The ECtHR cases involving minor offences of an administrative or regulatory order include: Garyfallou AEBE v Greece [1999] 28 EHRR 344; (violation of Art 6); Lauko v Slovakia [2001] 33 EHRR 40 (violation of Art 6); Lutz v Germany [1988] 10 EHR 182 (no violation of Art 6).


\textsuperscript{823} See Article 6 as discussed more fully in Appendix K; also see C Ovey and RCA White, \textit{Jacobs and White: The European Convention on Human Rights} (4\textsuperscript{th} ed, Oxford University Press 2006).

\textsuperscript{824} This entails a fair and timely public hearing, an impartial arbiter, the presumption of innocence, a statement of charge or accusation, adequate time and facility to defend, legal assistance where necessary, and, the attendance and examination of witnesses.

\textsuperscript{825} See Bendenoun v. France (1994) 18 EHRR 54 as quoted in Appendix K; McLoughlin v Tuite [1989] IR 82 (SC); and Case C-489/10 Lukasz Marcin Bonda 5 July 2012. See Appendix K for an extended footnote.

\textsuperscript{826} See E Brown, ‘Article 6 and Civil Cases’ in U Kilkelly (gen ed), \textit{ECHR and Irish Law} 2\textsuperscript{nd} ed (Jordans 2009); and Central Bank Act 1942 pt IIIC as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004 (CBA 1942 pt IIIC) as discussed more fully in Appendix K.

assets funded from crime, a move described as blurring the division between the civil and criminal. Enabled by legislation judicially upheld in both the UK and Ireland, civil forfeiture has mandated state targeting of financial assets as a law enforcement strategy, even in the absence of a criminal conviction. Its rationale lies in societal compensation for harm caused to the community by crime, redressing the unjust enrichment of those who profit at society’s expense in restoration of the status quo. The ECtHR has considered whether such in rem forfeiture, actually is merely reparative or involves punitive elements. In *M v Italy* the distinction between preventive and criminal proceedings, was drawn in favour of the former, although the court effectively excluded financial regulation from the former, non-protected preventive category, when stating:

> Preventive measures must, in principle, be regarded as distinct not only from criminal penalties but also from disciplinary penalties...administrative penalties...and other forms of penalty...since they are not designed to punish a specific offence.

Regarding due process, Ashworth and Zedner have argued that the need to comply with human rights provisions, has led to the state skirting the more onerous procedural requirements applicable to the criminal process, by stimulating the development of alternative channels of control. These alternatives include increased use of summary trial, hybrid civil-criminal processes as demonstrated, strict liability offences, and plea incentives. While newer forms of administrative enforcement of financial regulatory infringement fall within this category, strict liability offences have not as yet been utilised in Ireland. But, the less formal civil procedure, and lesser proof standard dominate. Civil sanctions, revamped to appear quasi-criminal, are called administrative when seeking to evade the human rights protections.

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829 For Ireland see Gilligan v Criminal Assets Bureau (no 2) [1998] 3 IR 185 (HC) McGuinness J as quoted in Appendix K; also Murphy v GM, PB, PC Ltd [1999] IEHC 5 and Murphy v GM (2001) 4 IR 113 (SC); King (n 448).

830 See King (n 448); D Lusty, ‘Civil forfeiture of proceeds of crime in Australia’ (2002) J Money Laund Control 345.

831 See M v Italy App. No. 12386/86, 15 April 1991, 97; King (n 448); Air Canada v UK [1995] 20 ECHR 150 all as discussed more fully in Appendix K.

832 See Ashworth and Zedner (n 407).
Here lies the conundrum. I argue that the financial regulator should not choose an enforcement style which circumvents the long-standing common law, constitutional and convention standards of the adversarial system. I also submit that the system must be improved, to provide better protection for the suspect, while also requiring such expert suspect to disclose and/or explain to a greater degree than at present. Licensing market entry, continuity, and exit, is an important part of collaboration, where the action is voluntary on the part of both the RFSP and the regulator for entry and continuity. Regulated fairly, in accordance with justice and approved due process values – the values complex - a mutuality or reciprocity around accountability and transparency values is also present. Since the markets and their licensing, are vitally important societal activity within Packer’s stipulation, taking part in the market, as licensed, entails reciprocal acceptance by both RFSP and regulator of the obligations of accountability and transparency. Therefore, values systems must reflect this contract within the fused binary, meaning that a trade-off of increased procedural protection from the regulator, for greater explain capability/ responsibility on the part of the RFSP, is apposite. Many benefits will follow from locating such within a flexible enforcement pathway system, where the regulator has a wider choice of prosecutorial options, mobilised via transparently taken decisions, against publicly available interplay launching factors^833.

2.2.3. Enforcement Pathway, Options and Issues
Sanction models have been classified by Kagan as either expert driven or legal driven^834. The expert judgement model is grounded in substantively rational Weberian decision making, which is adaptive, unrestrained by formal procedures and legal classifications, and oriented to the requirements and equities of each case. The legal model, which is grounded in administrative law, entails formal controls, specific legally enforceable protections against the risks of arbitrariness and corruption, emphasises accountability of regulatory officials to parliament and courts, promises predictability of decision and equality of treatment, delivers decision according to systematized fact-finding procedures, such as court-like hearings, and according to explicit, known rules. There is clear cross-

^833 The benefits of a flexible enforcement pathway and transparent launching factors around binary interplay are set out in Appendix K.
^834 See Kagan Regulatory Justice (n 501).
over between the two, and this is exemplified in the Irish experience. Binary exploration finds both sanction models across the sanction strategy continuum, although the ascendency of either depends upon the enforcement pathway choice.

Taking the Australian and US regulatory, and EU member state environmental regulatory, contexts as exemplars, legislation has empowered enforcement agencies to take exclusive, simultaneous or sequential, administrative, civil or criminal action in respect of the same conduct. Five main models or pathways of penalty enforcement may be identified, and not alone must a pathway be selected, but also the underlying options identified within, and their mobilisation governed by, a transparent mechanism:

1) Parallel criminal liability and civil penalties (including civil class actions) for the same conduct, the US approach where no prosecution or deferred prosecution agreements subject to extensive conditionality may apply;

2) Separate schemes of civil and criminal penalties, the divide generally based in double jeopardy, absent a single jurisdiction stipulation;

3) Administrative penalties that arise automatically by operation of legislation, also a feature of the newer form of ‘simulated justice’ found in the criminal law;

4) Parallel criminal liability and quasi-penalties (e.g. licence suspension or removal), which resonates with aspects of the RRT enforcement pyramid;

5) Intermixed criminal, quasi-criminal and administrative/civil sanctioning for the same conduct.

Irrespective of legal jurisdiction, generally the grounding legislation sets out the relevant and statute specific pathway, stipulates the priority of sanction models, provides for any stay on proceedings where an alternative procedure has become operative, or directs that...
one procedure cannot be maintained if another has been completed. The format often adopted, with national or regional variations, is that a civil pecuniary/monetary penalty cannot be imposed if a criminal conviction or acquittal upon substantially the same facts or charges has occurred; that civil proceedings are stayed, or may be stayed, where contemporaneous criminal proceedings are instituted; and, sometimes that if a civil monetary/pecuniary penalty is imposed that no criminal proceedings may lie. The relevant issues therefore, which impact interplay strategy, concern joint proceedings, double jeopardy including double penalty, and, elections and bars to proceedings. In Ireland, for instance, elections include the defence right to opt for jury trial, while procedural bars include stipulating time periods for commencement of summary proceedings.

The US, in a globally distinctive approach, opted to introduce parallel proceedings. In *Kordel* the US Supreme Court recognised that parallel civil and criminal proceedings are appropriate and constitutional; while in *Dresser*, it was held that effective enforcement of US securities laws requires that the SEC and the US Department of Justice (DoJ) must be able to investigate possible violations simultaneously. Moreover, US federal securities legislation expressly provides that the SEC can share information gathered in a civil investigation with other government agencies, and provide information to the DoJ to aid determination around instituting criminal proceedings. Accordingly,

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838 See Freiberg *The Tools of Regulation* (n 119).
839 Section 10(4) of the Petty Sessions (Ireland) Act 1851 stipulates that summary proceedings must commence within six months of complaint, unless statute intervenes as in the case for instance, of section 8(2) of the Competition Act 2002 which stipulates two years from the date of offence.
841 SEC v Dresser, 628 F.2d 1368, 1377 (D.C. Cir. 1980), a decision by the Court of Appeals for the Washington DC Circuit and a precedent followed by other courts.
corporate compliance programmes are now de rigeur with lawyers entering the fray at the earliest stage\textsuperscript{843}. Such programmes may provide a defence in some instances, with US DoJ guidelines putting a premium on such programmes. Because multiple penalties may be applied, and some may be very significant, negotiated settlement by the corporate world is common, often under circumstances where no-prosecution or deferred prosecution agreements, subject to extensive conditionality, are similarly negotiated. It has been argued that where agency costs of enforcement delegation, legal error or regulator/suspect collusion may occur, that it is optimal for both control agency and courts to impose sanction\textsuperscript{844}.

In US terms parallel proceedings are simultaneous or successive investigations, prosecutions, or other actions brought against a person, a corporation, or some other entity by federal and state governmental departments or agencies, or by a government entity and a private party\textsuperscript{845}. In one sense, they are not parallel, but instead concurrent and intersect in different ways. Fighting one may not terminate another. This makes strategising for an accused very difficult. Different strategies may be required for the different and simultaneous civil and criminal proceedings. Corporate business for the duration of the litigation blitz effectively changes from its product or service core to tackling costly multiple litigation threats. Documentary disclosure in one forum, whether civil or criminal, may rebound upon the producer in another. The raising of privilege or defence in one may result in adverse inference in another. A finding in a criminal case renders the conviction res judicata in a subsequent civil suit. Applications may be made to relevant courts to stay proceedings pending finalisation of others, although the traditional general rule is that criminal proceedings get priority\textsuperscript{846}. The US Supreme


\textsuperscript{844} See Garoupa and Gomez-Pomar (n 372).

\textsuperscript{845} See Lowell and Arnold (n 843); Brightman, (n 193); CH Loewenson, ‘Parallel Proceedings’ (2004) <http://www.mofo.com/files/Publication/b72e0c65-297f-455f-a9bb-6e0b3eb28c2/Presentation/PublicationAttachment/bd3bc6f0-6563-4f4b-a3f2-0c18189b5d98/04PLIDO.pdf> accessed 13 January 2014.

\textsuperscript{846} For instance, in SEC v Galleon Management LP 683 F. Supp. 316 (SDNY 2010), the record insider dealing case, the court ordered that wire taps be produced to the SEC, but the defendants Rajaratnam and Chiesi appealed and in SEC v Rajaratnam 622 F.3d 159 (2d Cir. 2010) the court decided that there should be no disclosure to the SEC prior to a ruling on their legality in the criminal case.
Court has laid down guidelines for such applications, the balancing test being around the criteria of benefit to stay applicant, and, utilising Mill’s principle, potential harm to others. US defence practitioners are however, aware that some advantages accrue their way also from civil discovery prior to prosecution.

An obvious dilemma also arises where the two poles are exercised but as exclusive jurisdictions. The first substantial UK case establishing principles for allowing civil actions to precede criminal trials was Bhetcha, where Megaw LJ framed the test around a real danger of causing injustice in the criminal proceedings, namely giving the suspect’s rights priority. This test has been refined by subsequent case law and in Mote, the Court of Appeal after reviewing the authorities, determined that a civil court enjoys a ‘real discretion’ to decide whether or not to adjourn the civil proceedings, while the power of the criminal courts to stay proceedings exists in two heads, for abuse of process or to limit evidence admitted at trial. Effectively, now a stay must be refused, moving the preference to the victim, unless there is a real risk of serious prejudice which may lead to injustice in one or both of the proceedings. Serious prejudice is particularly relevant to the privilege against self-incrimination, which however only applies to criminal matters, and in the US only to individuals, and further is dampened by the accepted wisdom that a prior defence in civil proceedings is likely to be exculpatory. Where newer forms of disclosure however, are introduced as suggested earlier, this will lessen the likelihood of prejudice occurring in any event. In the UK, where discrete statutory provisions apply, incriminating material found on foot of a civil search order, or a

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848 See SEC v Saad 229 F.R.D. 269, 273 (SDNY) 1998 where a US government attempt to prevent prosecution witness disclosure was not granted.
849 See Jefferson Ltd v Bhetcha [1979] 1 WLR 898, 905.
852 See V v C [2001] EWCA Civ 1509 (CA); for the US, where self-incrimination does not apply to the corporate form, see US v White 322 US 694, 698-99 (1944).
production order, has been admitted at a subsequent criminal trial. Furthermore, one major market actor gripe in the US parallel proceedings approach, concerns multiplicity of proceedings swamping a litigant/suspect. In the UK, the burden of conducting parallel litigation could lead to a stay but only in exceptional circumstances. One other obvious route to eliminate prejudice concerns within the regulatory setting, as discussed later, is to provide for discrete financial regulatory offences, to mobilise them within a fused binary, and within a single sanction suite to allow civil remedies such as injunctions and compensation orders to be made.

One new UK statutory, general regulatory, parallel strategy innovation has centred upon offender compliance. In general terms, a statutory double jeopardy prohibition prevents a subsequent criminal conviction, after imposition of administrative sanction, save where a fixed penalty notice was served and the penalty not paid, or an undertaking given and not complied with. The general principle was no double penalisation, but this protection has been curtailed in the discrete instance of non-compliance. This principle clearly may be expanded to the financial regulatory enforcement sphere where for instance, those accepting ‘liability’ or ‘infringement’, and who claim to come completely ‘clean’, in the absence of egregious wrong, may avoid additional criminal proceedings, unless shown to have withheld information or have failed to comply, for instance, with an enforcement undertaking or other conditionality.

Such an approach is directly in line with the US deferred prosecution agreement practice, pioneered by the US DoJ, and now also extensively operated by the SEC. These are formal written agreements within which the SEC Commission (as accepted by federal prosecutors) agrees to forego an enforcement action, where a cooperative individual or

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855 See Regulatory Enforcement and Sanctions Act 2008 (UK).

856 In 2010 the SEC introduced three new regulatory tools or prosecution agreements discussed in Appendix K; the UK for bribery and corruption cases recommended their use see MoJ Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (n 754). In the main they are based around US case law precedent. See for instance, SEC v Diamondback Capital Management LLC (January 2012); SEC v Tenaris S.A. (17th May 2011); SEC v Carter’s Inc (November 2010). For more complete information see Appendix K. Interviewee Q Academic Lawyer Australia 5 November 2011, from the Australian perspective stated that academics are horror-struck at the lack of procedural justice standards around deferred prosecution agreements; they are in his view a response to a perceived limitation of the legal system because fraud is too difficult to prove.
company agrees, among other things, to both co-operate fully and truthfully, and to comply with express prohibitions and undertakings during a period of deferred prosecution\(^{857}\). Default in the effective ‘probation’ terms or conditionality means that the prosecution ensues. Effectively, in both the UK and US approaches, the administrative side of the binary is used first, but the criminal side is also available when triggered by default on the part of the regulated entity or individual. Essentially, it is a tit-for-tat arrangement, in line with RRT, where default provokes ratcheting-up, and cooperative compliance is rewarded, by interim or probationary prosecution deferral de-escalation, leading on to time-defined closure. Current Irish precedent deploying similar conditionality in settlement agreements is readily extendable to the financial regulatory sphere. The latest Competition legislation provides for High Court approval of agreements applicable to both individuals and corporate forms\(^{858}\). The High Court must be satisfied that conditionality reflects: parties consent, the obtainment of legal advice, that the agreement is clear, unambiguous and compliant capable, and, that the parties are aware that compliance failure constitutes contempt of court and thus extra enforcement action\(^{859}\). Each agreement once approved comes into operation forty-five days after court approval\(^{860}\). Approval orders last for a time-limited 7 years\(^{861}\). The competent authority or the contracting party ‘undertaking’, may apply under certain circumstances to vary or annul the approval order\(^{862}\).

Within the EU, a parallel proceedings approach and a double jeopardy approach are found in market abuse enforcement. A recent ESMA Report identified four basic sanctioning approaches\(^{863}\). First, administrative sanctions only for one Member State (MS) for insider dealing and two MS for market manipulation; second, criminal sanctions only in two


\(^{858}\) Competition (Amendment) Act 2012, and, in particular section 5 which inserts a new section 14B into the Competition Act 2002.

\(^{859}\) Conditionality must reflect a number of factors as discussed in Appendix K.

\(^{860}\) Section 14B (4); Or in the alternative when a final order is made by the High Court on foot of a third party application seeking relief for alleged breach of contract. In relation to an application under section 14B(5) by any person other than the party undertaking or the Competent authority claiming such agreement would result in breach of contract between the undertaking and the applicant or would render such contract incapable of being performed.

\(^{861}\) Section 14B (8); but may be extended by up to 3 extra years under Section 14B (9).

\(^{862}\) Pursuant to Section 14B (7), these circumstances include: on consent; in the case of material error; where there has been a material change in circumstances since the making of the order that warrants the court varying or annulling the order; in the interests of justice.

\(^{863}\) ESMA Report (n 835) upon the EU-wide sanctioning powers under the abuse (MAD) directive.
MS; third, either administrative or criminal sanctions in fifteen MS; last, both administrative and criminal sanctions, cumulatively, in eleven MS for insider dealing and in ten MS for market manipulation. Criminal sanction proceedings halt administrative in fourteen MS; pecuniary sanctions are cumulatively available in nine MS on the same set of facts; in seven of these nine the second authority takes into account what was imposed by the first authority; and, five MS have no specific figure limiting the total cumulative administrative and criminal financial sanction which can be imposed. Imprisonment is only available on a limited basis, effectively in only four MS.

Accordingly, although currently there is no single EU market abuse model which Ireland may follow, there is ample precedent for a broader approach. Outside the scope of financial regulation, but a significant reference point for it, the EU environmental sector also deploys four general sanction pathway choices, along the lines of the MAD directive example, with underlying sub-sets. The same divergence is noted here also. For instance, whether criminal and administrative sanction regimes can apply simultaneously varies between MS. In nine MS both administrative and criminal sanctions may be applied simultaneously, while in five they cannot by operation of the EU double jeopardy rule known as “non bis in idem”.

The traditional common law, criminal law approach to double penalty, sometimes called double jeopardy, was grounded in ‘two pleas in bar of the indictment’. They apply to both summary and indictable matters, and originated as a judicial mechanism against a backdrop of accused oppression. These pleas are known as, autrefois acquit and autrefois convict, and effectively speak for themselves being based around prior acquittal or conviction of the offence as charged. The plea in bar may be made at any stage of the

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864 In Denmark and Sweden.
865 Including Ireland and Germany.
866 Including the UK (theoretically but not in practice) and France.
867 Including the UK and France ESMA Report (n 835), 9 Paragraph 24.
869 Including Italy ESMA Report (n 835), 14 Paragraph 46.
870 See Milieu Ltd Report Overview of provisions on penalties (n 835). The four types are: Administrative and criminal sanctions, criminal sanctions, quasi-criminal sanctions and administrative sanctions.
871 See EF Ryan and PP Magee, The Irish Criminal Process (Mercier Press 1983); G Coffey, ‘Raising the Pleas in Bar against a Retrial for the Same Criminal Offence’ (2005) 5 JSIJ 124; G Coffey, “Evaluating the Common Law Principle against Retrials” (2007) 29 DULJ 26; G Coffey, ‘The Constitutional Status of the Double Jeopardy Principle’ (2008) 30 DULJ 138; Horan (n 87); Langbein (n 491); T O’Malley Sentencing Law and Practice 2nd ed (n 727); Walsh Criminal Procedure (n 281). Also see Attorney General v Mallen [1957] IR 344 (SC); The People (DPP) v Quilligan (no 2) [1989] IR 46 (SC). All as discussed more fully in Appendix K.
second prosecution, although normally done at arraignment. The onus of proof, to the civil standard balance of probability, lies upon the accused, and if it cannot be met then the accused may ‘plead over’.

This common law approach was generally extended by statute to statutory offences, by proscribing punishment twice for the same offence. The classic common law rendition or governing principles of the rule, applicable in both Ireland and England, is found in the 1964 House of Lord’s dictum of Lord Morris of Borth-y-Gest. What has to be considered is whether the crime or offence charged in the later indictment, is the same, or is in effect or is substantially the same, as the crime charged in a former indictment. It is immaterial that the facts under examination, or the witnesses called in the later proceedings, are the same as those in earlier proceedings. Thus, it is clear that it is a narrow principle of limited effect, concerning itself with identical or similar charges not with identical evidence.

In the principal modern Irish authority, Re National Irish Bank, the High Court stated that the principle of double jeopardy is normally one associated with criminal law, although it may arguably extend to other tribunals which exercise disciplinary functions. In that case, the bank argued that it was doubly jeopardised, by the existence of both a fact-finding Inspectors’ investigation into DIRT tax compliance, and a reporting-function inspection by the Comptroller and Auditor General. However, Kelly J declined to extend

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872 See Interpretation Act 1937 sec 14; also see R v Miles [1890] 24 QBD 423 (QBD) and R v Thomas [1950] 1 KB 26 (CCA). Also see The People v Dermody [1956] IR 307 (CCA); Walsh Criminal Procedure (n 281); and T O’Malley Sentencing Law and Practice 2nd ed (n 727), 117 all as quoted and discussed more fully in Appendix K.

873 See R v Connelly [1964] AC 1254 (HL) at p 1306; approved by the Supreme Court in O’Leary v. Cunningham [1980] I.R. 367. And see Walsh Criminal Procedure (n 281), 785 and 787 as quoted in Appendix K; T O’Malley Sentencing Law and Practice 2nd ed (n 727), 116 as quoted in Appendix K; see State (Tynan) v DJ Keane and Anor [1968] IR 348 (SC); Klip (n 283), 231; the Convention implementing the Schengen Agreement articles 54-58, and relevant case law which includes Case C-187/01 and Case C-385/01 Criminal proceedings against Huseyin Gozutok and Klaus Brugge [2003] ECR 1-1345; Article 50 of the Charter of Fundamental rights of the European Union; Case C-489/10 Lukasz Marcin Bonda 5 July 2012. See Appendix K for an extended footnote.

874 See National Irish Bank, Re (No.2) [1999] IEHC 134 and by way of contrast, see the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 sec 15. See Horan (n 87); Registrar of Companies v Judge Anderson [2004] IESC 10. See Appendix K for an extended footnote.

875 See National Irish Bank, Re (No.2) [1999] IEHC 134, Kelly J; R v Hogan [1960] 2 QB 513 (CCA); R V Green [1993] CLR 46 (CAC); T O’Malley Sentencing Law and Practice 2nd ed (n 727),116; G Coffey, ‘Combating White Collar Crime in the E.U.’ (UCC North South Criminology/CCJHR Postgraduate Conference: Rights, Responsibilities, and Wrongdoings: Continuity and Change, University College Cork, 21 June 2013) as quoted and discussed more fully in Appendix K.
the principle. The learned judge remarked that although authorities were cited from all over the common law world, no single authority which sought to extend the principle to fact-finding investigations, of the type being conducted, had been advanced. He declined to extend the principle, because neither of these entities had other than a reporting function, being unable themselves to impose penalties, or make orders which are self-executing. Of relevance to interplay strategy, Irish financial regulatory penalties, unless voluntarily agreed, must be affirmed by the High Court, so it may be the case that the double jeopardy principle would not have applied at all, save for the express statutory stipulation of it as occurred.

There is Irish Supreme Court authority concerning criminal acquittal and subsequent disciplinary proceedings, and also the relationship between civil proceedings or claims and disciplinary proceedings. In McGrath\(^\text{876}\) a Garda, charged with embezzlement of money received in the course of employment, was acquitted by a jury in the Circuit Court, and, subsequently on judicial review, obtained an order of prohibition directed to the Garda Commissioner, to prevent him from holding a subsequent inquiry. As to civil proceedings, Hederman J in McGrath, drew a distinction between the consequences that flow from any purely civil action, and the disciplinary hearing procedure, highlighting that a disciplinary hearing was more serious in its consequences than a mere civil action. Commenting upon this decision, Kelly J in Re National Irish Bank opined that McGrath clarified that the doctrine applied to the bringing of similar charges, and not with the prosecution of different claims, which involve similar or identical evidence or witnesses. In a second Irish Supreme Court line of authority, Keane J in Mooney\(^\text{877}\) rejected the proposition that in every case where an employee is acquitted on criminal charges, his employer is thereafter precluded from dismissal based in the same circumstances which gave rise to the charges.

One subsequent High Court case, where the decision of Kelly J in Re National Irish Bank was relied upon, concerned the Law Society of Ireland which operates a type of professional regulatory parallel proceedings approach. Where a complaint is laid in writing, the Society is statutorily required to investigate and attempt resolution, and if failing, may commence a hearing. This in turn, may devolve into a disciplinary

\(^{876}\) See McGrath v The Commissioner for An Garda Síochána [1991] 1 IR 69 (SC).

proceeding for stated misconduct, under circumstances where a complainant may also pursue a civil claim in negligence. Any mutual issues dealt with in legal proceedings, including proceedings against the client for fees due, may cause regulatory adjournment, pending court ruling. In O’Duffy the applicant unsuccessfully sought to prevent an investigative hearing, which ensued in relation to two accountant’s reports, and also a separate subsequent disciplinary hearing. O’Neill J, on judicial review, held that these were two entirely different kinds of proceedings, with entirely separate and distinct results, and thus, that double jeopardy did not arise.

Without citing specific authority, Coffey has argued, as found in many other jurisdictions, that the common law double jeopardy principle has attained the status of an unenumerated constitutional right in Ireland, a position I adopt. He nonetheless, conceded that the Irish legislature may be permitted to enact legislation reforming the law, because even unspecified constitutional rights are not ‘entrenched against legislative encroachment’. Coffey argued that the law on double jeopardy was not designed as an absolute immunity from re-prosecution, but instead, to prohibit unreasonable retrials by the state. Of course, the principle of proportionality, as found in the case of Heaney, meaning not being arbitrary, unfair or irrational, must apply to any reforming legislation. Effectively therefore, the prohibition may be superceded by statutory reform, for instance, by instituting a separate parallel proceedings approach, or by incorporating a double jeopardy principle within a parallel approach. Furthermore, differing blends of double jeopardy may be legislated for, including no double charges, no double penalties, no double proceedings upon the same facts and so forth.

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881 See Considine v Shannon Regional Fisheries Board, [1997] 2 IR 404 (SC), 421 Hamilton J as quoted in Appendix K
882 See Coffey ‘The Constitutional Status of the Double Jeopardy Principle’ (n 871), 4; The People (DPP) v O’Shea [1982] IR 384 (SC); Section 11 of the Criminal Procedure Act 1993 as amended by section 44 of the Court and Court Officers Act 1995 as discussed more fully in Appendix K.
While as an external constraint, the ECHR, Article 4 of Protocol 7, prohibits double jeopardy (‘tried or punished again’) in two criminal trials, in the same state, following acquittal or conviction, it does not outlaw a criminal trial, followed by an administrative penalty and vice versa. Indeed, this double penalty practice, administrative sanction following criminal trial, is prevalent across continental Europe. The Protocol also allows for the re-opening of cases in light of ‘new or newly discovered facts’, or in the event of a fundamental defect in the impugned proceedings. This opens parallel enforcement possibilities of great relevance to compliance conditionality, and subsequent breach jurisdiction, around the US-style no prosecution or deferred prosecution agreements discussed above.

In 2007, the Irish Criminal Law Review Group Final Report, recommended, the desirability of appeals, where new or newly discovered facts provide compelling evidence of guilt, provided three safeguards were provided. The report highlighted that a similar UK statute, allowed re-trial following either a domestic or foreign acquittal, where the evidence is new and compelling, meaning highly probative. The Irish Group Report, opined that a provision along the lines of the UK statute would not breach the European Convention, and highlighted that a person may legitimately be doubly convicted, provided it is in different states. They also went on to recommend, a statutory mechanism to re-try acquittals in the event of interference with the trial process, whether in respect of the jury or otherwise. Three years later, changes in the law in Ireland, as exceptions to the rule against double jeopardy, statutorily established the exacting standard recommended by the earlier Group report. These changes provide that the Irish DPP may apply in two circumstances for a re-trial order: (a) an acquittal, and, (b) an acquittal where the trial process was tainted and the accused has been convicted of one of five separate categories of offence ‘against the administration of justice’ (including perjury and attempting to pervert the course of justice). In both circumstances, two

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884 See for instance, the ESMA Report (n 835).
885 These are: (i) an exacting threshold be met; (ii) advance judicial approval was obtained; and, (iii) any acquittal be set aside prior to the question of a retrial arising.
886 See Criminal Justice Act 2003 part 10 (UK); and Macpherson Inquiry, The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny (Cm 4262, 1999 as quoted in Appendix K.
887 See Criminal Procedure Act 2010 Part 3. This act came into force on the 1 September 2010 pursuant to the Criminal Procedure (Commencement) Order SI 414/2010.
888 See Sec 8(3) and sec 9(3).
conditions must be met: firstly, there is new and compelling evidence; and secondly, it is in the public interest to so apply\(^889\).

In a nutshell therefore, the principle of double jeopardy is of limited application in Ireland, and even where constitutional and convention protection applies, and as yet in Ireland this is definitively unclear, it is open to the legislature to stipulate/modify the terms of the application of the principle.

The rationale for multiple options, and penalties, within the pathway choice, is the flexibility it provides, both to regulator and RFSP\(^890\). For instance, enforcement may remain solely within the administrative regime, where there is cooperation, save where breach of conditionality occurs, whereupon an additional criminal proceeding may ensue; or, should the RFSP or the prosecutor opt for a criminal trial, then other remedies such as interim injunctions and reliefs may be sought in parallel civil or administrative proceedings; or, where a civil class action, seeking compensation, is joined to an administrative or criminal proceeding so that one court deals with all issues. Three downside risks concerning multiple punishment are: that it is potentially oppressive and unfair, cost injurious to the RFSP, and time-delays ‘finality’; as already broached, the use of evidence gathered in one proceeding, entailing discrete lesser safe-guards and procedures, is used in another where protections should be greater; and, penalty or sanction across the binary differing in speed of application, process, severity and purpose\(^891\). Whichever pathway choice is mobilised is at the outset determined by policy-makers, while it is clear that, a parallel approach which is culturally suited to Irish legal constraints, should allow maximal enforcement capability. No matter what choice is made however, in respect of enforcement options, whether minimal or maximal, discretionary decision-making and rules or norms around it are required.

In summary, clear divergences in pathway approach are manifest across the EU, where exclusive, double jeopardy and parallel approaches are selectively mobilised; Ireland, the

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\(^889\) New and compelling evidence has been defined to include evidence not previously adduced by the prosecution and which could not have been adduced, and is evidence which satisfies three criteria: (i) it is reliable; (ii) it is of significant probative value; and, (iii) is such that it might reasonably satisfy a jury of guilt beyond a reasonable doubt when added to the other case evidence.

\(^890\) ALRC Report on Principled Regulation (n 835).

\(^891\) ALRC Report on Principled Regulation (n 835); Beaton-Wells and Fisse (n 722).
UK and Australia operate a double jeopardy prohibition; while the US operates a parallel proceedings approach. The implications, from this pathway choice review, are that the greatest flexibility is available, where there is a sanctioning capability right across the binary continuum. Splitting the poles into an exclusive choice, or imposing an either/or choice such as double jeopardy, ties the hands of the prosecutor, and also may not assist the RFSP. Prosecutors may feel compelled to commence criminal proceedings, where a perceived lesser administrative sanction imposition is the only alternative. Or they may threaten to do so, causing an RFSP to accept a heavy administrative penalty, to avoid the possibility of a criminal record and a costly trial process. Similarly, if there is a divorced continuum, administrative sanction may be deemed either insufficient, or be deemed the best route because of considerations outside the evidence.

A full continuum capability, enables the admissible evidence pool to be the primary launching factor, and enables the pool to expand, to a better prosecution outcome potential, where hitherto cooperative RFSPs default. Such a full capability, may involve a full parallel proceedings approach, involving criminal and administrative/civil proceedings; or, a truncated one where for instance, administrative proceedings are followed by criminal default proceedings only. For the RFSP caught up in default, there is massive incentive to cooperate, where a deferred prosecution may ensue. This cooperation, in turn may remove antagonistic affects of prosecution, assist in discovery of the evidence pool, the benefit of which may extend beyond the case in hand, and lead to a more rapid conclusion to the benefit of ‘victims’ seeking compensatory orders. Stipulating that all such agreements must be court approved, and that RFSPs may apply to a specialist court for relief, where they perceive that unfair conditionality is being imposed by the regulator, can also be added. One clear obligatory requirement however, is to integrate sanction strategy, with the available offences and sanctions, and this will be explored later.

The problem for the regulatory policy-maker, as Kagan highlighted, is to locate the optimal pathway between legalism, incorporating reviewable discretionary decision-making, on the one hand, and uncontrolled discretion, Dicey’s outlawed arbitrary exercise, on the other.\(^{892}\) The optimal position is a place where fair decisions, compatible

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\(^{892}\) See Kagan *Regulatory Justice* (n 501).
with Packer’s due process values complex, are transparently made, both promptly and consistently, and rules are applied and adjusted, in light of their actual consequences. A tiered yet integrated system, as found across a reformed binary blend, may well solve the problem of balancing stringency and accommodation. Emphasis on rule-based decision, meets the legal ideal of certainty and formal equality. However, because a one-size-fits-all rules canon could result in harsh treatment, when applied to firms with special products or higher costs, or be too soft on firms that can afford to comply with more stringent requirements, then both binary poles must always be available. Inevitably, since each case must be dealt with on its own evidence-based merits, an unduly adversarial or legalistic-style approach, may not alone cause ‘litigation’ delay, but also may render an unfair advantage to well-resourced RFSPs. Hiring technical specialists in regulatory compliance, beside lawyers sophisticated in manipulating rules and formal procedures, are all features of the adversarial pageantry. Countering this problem, incentives around deferred prosecution, sanction discount, and speed of closure, may all be enabled within a flexible, yet across the board, binary capability893. For the cases perceived by prosecutors as seriously criminal, full criminal process choice must be retained. For the RFSP seeking to ‘put it up’ to the prosecutor, and who demands a criminal jury trial, such option should be available, but perhaps no sanction discount should apply.

2.2.4. Discretionary Delegation: Enforcement Launching Factors and Sanction Guidelines

As already highlighted, non-arbitrary discretionary decision making, replete with accountability and transparency, is an essential part of Dicey’s rule of law as it impacts the regulatory binary894. The rationale is at least two-fold: first, policy decisions may

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893 For instance, in January 2014 the new UK FCA gave State Street a 30 per cent discount on its fine for settling with the FCA at an early stage, see Reuters, ‘UK fines State Street £23m for overcharging NTMA and others’ The Irish Times (Dublin, 31 January 2014). Also see Central Bank of Ireland, Outline of the Administrative Sanctions Procedure (2013), which from the 6th November 2013 introduced a two stage sanction discount, the earliest stage 1 of thirty percent, and the lesser stage 2 of ten percent.

894 See Appendix K for an extended footnote and discussion around ‘autonomy’. Interviewee X Regulator Ireland November 2012 stated of RFSPs who are accountable to their licence: ‘I think it is important that people know what is required of them and for a Regulator at least I think it’s of value to have set down in writing what are the standards that are expected of corporates and directors and other actors in that space and ideally that those obligations should be expressed in an assessable way.....and the more assessable whatever guidance or document that’s produced I think the more likely it is that it will be read and understood by the supposed recipients of that message’.
yield inconsistent or variable results depending upon the personnel involved, whereupon a true and transparent exercise is necessary to avoid or lessen controversy or grievance; second, there must be space between policy-makers, and policy implementers, to ensure fairness, perspective and accountability. Discretion has been described as a relative concept which cannot exist outside the boundaries of Polanyi’s restriction. It is context based, and arises where a designated authority has a general power to make decisions subject to prescribed standards, and has power – the discretion - to not apply or circumvent those standards. In Ireland, judges, prosecutors and regulators have such a power. But, as Dworkin, the champion of equality has highlighted, discretion is not licence, is subject to checks, and is not immune to criticism. Furthermore, Packer theorised a general assumption of a degree of scrutiny, and control over enforcement actors and action, together with, a complex of assumptions around the accused’s adversarial rights and due process, where the accused may demand proof. Although expressed by Dicey, as a stark choice between the authoritative exercise of wide, arbitrary or discretionary state power, and the rule of law, in its current manifestation, discretion is fettered at both binary poles.

It arises at investigation, prosecution, trial and sentence stages. At each of these four stages, strains around strict rule of law norms, and also more general, yet equally important principles arise. In devising a new regulatory contract construct, strains around accountability and transparency for instance, will be readily apparent. While for some, legal rules and legal discretion are opposites, there is no reason in practice why they cannot aid each other. Within the regulatory contract back-dropped by risk, for Kelsen the mediating justice value is elusive of definition, in a relative sense, but, engages a protective social order where truth seeking may prosper; Reiman theorised it as, reasons

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895 See for instance, Weber The Theory of Social and Economic Organisation (n 66); Kagan Regulatory Justice (n 501); Packer (n 273), 287 concerning discretion as quoted in Appendix K. 896 See Dworkin Taking Rights Seriously (n 61). 897 As to judges, in the Attorney General for Australia -v- The Queen and the Boiler-makers’ Society of Australia & Ors [1957] AC 288 (PC) it was held that discretionary judgments are not beyond the pale, but there must be some standards applicable, to a set of facts not altogether undefined, before a Court can hear and determine a matter. 898 See Dworkin Taking Rights Seriously (n 61). 899 See Packer (n 273), 156 -157 as quoted in Appendix K. 900 See Dicey (n 25). Dicey (n 25), 110 explained the dilemma of discretionary exercise of authority thus: ‘discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects’. 901 See C Tata, ‘So what does ‘and Society’ Mean?’ in C Tata and N Hutton (eds) Sentencing and Society (Ashgate 2002).
answer to subjugation, rationality protecting voluntary acceptance of constraint. Hudson detailed two forms of justice in tension: formal (fairness), where rules are applied consistently; and substantive (alterity), involving making the right decisions, and providing case-specific right remedies. This dissertation inter-mixes and adopts, case merit examination, where consistent, fair, and accountable state control enhancement, is accompanied by a rights trade-off, in favour of those regulated, in further exploring Dicey’s non-arbitrary discretionary decision-making, and Packer’s justice continuum.

(a) Investigation Stage

It is widely known throughout common law legal systems, and possibly of comfort to business interests, that not all ‘criminal’ conduct is fully investigated, and even if so investigated, prosecuted. Most common-law jurisdictions subscribe to what is known as the Shawcross doctrine, rejecting as it does any notion of a formal obligation to prosecute every detected or reported offence, and this too is reflected in financial regulatory practice where infringement type or resources may be the issue. The Irish DPP determined, ‘no prosecution’, in a little over 36% of files between the years 2009 to 2011 as shown in Appendix H. For instance, only between 2% to 3% of cases classified as social welfare fraud in Ireland, are referred for prosecution.


See Hudson (n 681).

For instance see CDPP Prosecution Office Policy, Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process (2008); K Svatikova, Economic Criteria for Criminalization: Optimizing Enforcement in Case of Environmental Violations (Intersentia 2012); and Packer (n 273), 290-291 as quoted in Appendix K

T O’Malley, ‘Sentencing and the Prosecutor’ (9th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 24 May 2008), Reference ft 10: Sir Hartley Shawcross, then Attorney-General of England and Wales, speaking in the House of Commons on January 29, 1951 (H.C. Debates, Vol. 483, Col. 681). See also Hetherington, Prosecution and the Public Interest (London, 1989). Packer (n 273), 286 as quoted in Appendix K: ASIC’s approach to enforcement (Information Sheet 151 - 2012). As to Ireland, Interviewee C Regulator Ireland 6 February 2013 stated: ‘Just because there’s been a transgression of a rule or requirement doesn’t mean there’s going to be an enforcement activity’. Interviewee X Regulator Ireland 12 November 2012 stated: ‘...it is simply not practical for Regulators to treat everything seriously. There has to be a degree of selectivity in what they deal with and what they invest their resources in’.

Comptroller and Auditor General, Report on the Accounts of the Public Services 2011 (Presented to Dáil Éireann pursuant to Section 3 (11) of the Comptroller and Auditor General (Amendment), Act 1993, 2012)
action. In Ireland, the DPP’s Prosecution Guidelines establish that there is no legal obligation to lay the most serious charge, and further stipulate, that the prosecutor must not over-charge, a further comfort to business interests. The ideal solution is propounded as selecting a single charge which adequately reflects the nature and extent of the criminal conduct. In deciding on the appropriate charge, the DPP, or her officers, should consider the views of the Garda Síochána, the relevant state solicitor, and counsel if instructed.

Australian CDPP policy is to lay the most serious charge, unless the strength of the available evidence, probable lines of defence, and/or trial mode factors intervene. On the regulatory side, ASIC specifically provide in their regulatory guides and information sheets that: (a) they do not undertake a formal investigation of every matter that comes to their attention; and, (b) following the precedent set by the US SEC, that ‘Wells’ submissions may be invited from the alleged infringer as to enforcement action type and commencement. In line with previous commentary, Packer’s optimum prosecution criteria cater for differential offender categories, when deterring socially unacceptable conduct, in even-handed enforcement, while also not inhibiting socially desirable conduct like market activity. This latter point is the nub of over-criminalisation and over-regulation argumentation, and also a key factor in establishing a bright red dividing line, between prosecution and none, for the offender case categories.

(b) Prosecution Stage

Criminal offences in Ireland are constitutionally classified as a dyad. ‘Minor’ and triable summarily; or, as indictable and triable before a jury, who decide factual issues, when the more serious or aggravated offences are involved, and, attract a potentially higher sentence tariff. Prosecutorial decisions when made therefore, not alone relate to whether to prosecute, but also include the level of charge, whether summary or indictable.

907 Packer (n 273), 155-156.
908 See DPP Prosecution Guidelines Third Revision (2010).
910 ASIC’s approach to enforcement (n 905).
911 ASIC Enforcement action submissions (n 805); submissions will concern either or both of why ASIC should not commence any (or any particular) enforcement action, and what form of enforcement action may be appropriate.
912 See Packer (n 273), 296 as quoted in Appendix K.
913 See The Irish Constitution 1937 article 38.
the actual charges laid, and the court for instance, if indictable before a jury or judge sitting alone. Further, the accused may, in some offence types, elect for jury trial. Because criminal offence prosecutorial decisions in relation to financial regulation in Ireland are made at three sources, at the summary level by the Financial Regulator or Gardai in an overlap, and at the indictable level by the DPP, there is a binary disconnect. Contrastingly, for financial regulatory contraventions however, there is only one category, the serious and less so being handled in the same administrative sanction stream by the financial regulator. This reflects the two-pole mutually exclusive binary approach.

Hamilton, when Irish DPP, in April 2010, recognising a distinction between generic regulatory offences – which he did not define - and the core criminal law, made it known that he would be slow to recommend departure from his sole and exclusive agency for prosecuting all indictable crime. Emphasising that he worked very closely with the major regulators, who investigate crime and prosecute summarily, including the Revenue Commissioners, the Competition Authority (including jointly operated participation in the Cartel Immunity Programme), and the Director of Corporate Enforcement, he did not however, specify the financial regulator!

The statutorily grounded, DPP, was originally envisaged as a one-stop-shop for prosecuting offences, and as necessary both to meet the demands of EU accession, and independent decision-making. The origin of the rule that only the Irish DPP prosecutes indictable crime and offences in the name of ‘The People’ is contained in article 30.3 of the Constitution and in statute. The DPP’s authority does not need to be sought in every individual case however, as her power to control prosecutions may be delegated in

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914 For instance, DPP v Thomas Murphy (Slab) 5 June 2013 unreported (SC) see M Carolan, ‘Supreme Court rules ‘Slab’ Murphy may challenge non-jury trial’ IrishTimes.com (Dublin 5 June 2013). See Appendix K for an extended footnote.
915 See CBI Enforcement Strategy (n 453), 14.
917 Interviewee L Judiciary Ireland 7 January 2013; also see Walsh Criminal Procedure (n 281); Prosecution of Offences Act 1974; DPP Prosecution Guidelines Third Revision (2010); J Hamilton, ‘Opening Address’ (11th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 24 April 2010); P Appleby, ‘Compliance and Enforcement – The ODCE Perspective’ in S Kilcommins and U Kilkelly (eds), Regulatory Crime in Ireland (First Law 2010),178-179. See Appendix K for an extended footnote.
918 See Prosecution of Offences Act 1974. This act designated the DPP to replace the constitutionally enshrined Attorney General. And see DPP v Monaghan [2007] IEHC 92
respect of relatively minor matters, through a list or other arrangement of an administrative kind\textsuperscript{919}. Farrell has highlighted that any, ‘other person’ could also be designated to fulfil the same role, and control agencies are included \textsuperscript{920}. As for the DPP, Farrell also argued the negative proposition that, ‘.....the designation of the DPP as the exclusive prosecutor on indictment has ....the unforeseen consequence of dis-incentivising the use of prosecution as a regulatory tool by prosecutors’\textsuperscript{921}. He went on to draw, five structural and systemic issues or distinctions between the prosecutorial roles of the DPP and regulators, prior to concluding that, ‘.....the present system of prosecution of regulatory offences by the DPP necessarily restricts the degree of regulation that can be brought to bear by a given regulator’\textsuperscript{922}. This suggests a greater diffusion role for regulators as regards prosecution, but I argue that while this may stimulate more activity, it may lead to less consistency in discretionary decision-making. It may be preferable to maintain consistency, within a single yet specialist prosecutorial authority, dealing with offences across the entire dyad, and otherwise incentivise and resource, enhanced prosecution levels and frequency.

The fundamental criterion used in Ireland in relation to prosecuting suspected offenders by the DPP, involves a two-fold test which clearly resides in the ‘real’ crime paradigm. Firstly the sufficiency of evidence, which requires a reasonable prospect of conviction; secondly, considering the public interest in each discrete prosecution\textsuperscript{923}. A live issue arises when contemplating whether this approach is appropriate for the criminal law role in the financial regulatory setting. Limited stated criteria may add to simplicity, but also take away from transparency and accountability. They do not incentivise toward legal compliance, where underlying sub-criteria are not transparently revealed, and where considering the individual suspects or victims circumstances are not stipulated. They make the task of advising regulatory offenders as to their rights, and particularly prospects of mounting a good defence, more problematic. They also make it more

\textsuperscript{919} See DPP v Monaghan [2007] IEHC 92.
\textsuperscript{921} See Farrell (n 920), 4.
\textsuperscript{922} See Farrell (n 920), 2. These five distinctions are set out in Appendix K..
\textsuperscript{923} C Loftus, ‘Opening Remarks’ (13th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 19 May 2012); also see DPP Prosecution Guidelines Third Revision (2010); Appleby ‘Compliance and Enforcement’ (n 605), 190 as quoted in Appendix K.
difficult to judicially review discretionary decision-making, even if such is limited under the real crime focus.

Directing a prosecution is a matter solely for the DPP’s discretion, in which exercise she enjoys a partial immunity from judicial review. This stresses Weberian bureaucracy principles, the Irish Courts holding that a ‘special protection’ attaches to decisions to prosecute or not to prosecute\(^\text{924}\). In *Curran*\(^\text{925}\), Finlay CJ found that the exercise of the discretion did not relate exclusively to the probative value of the evidence laid before the DPP. He stated that there were many other factors appropriate and proper to consider, before expressing it unwise or unhelpful to list them exhaustively. Such a statement when applied to interplay decision-making, directly flies in the face of accountability, transparency, equity and legitimacy concerns. It also raises the obvious issue as to what these additional factors may be, when the DPP herself only discloses two factors.

While the accused has the right to reasonable expedition of any prosecution, the community has the balancing right to have criminal offences prosecuted\(^\text{926}\). In this light, the Irish DPP enjoys almost unfettered discretion in decision-making around prosecution files, although representations can lawfully be made. Plea bargaining, meaning charge bargaining, sentence bargaining and fact bargaining are all practised ‘unofficially’ in Ireland, where there is no statutory provision, although they have reached their official apothecosis in the US\(^\text{927}\). An official, statutory regulatory provision for plea bargaining, I argue, is long overdue, as is a provision for regulatory submissions as practised in both the US and Australia at the investigative stage.

Mainly on public policy grounds, the DPP is not obliged to give reasons for her decision, unless it can be demonstrated that it was made in bad faith, or under the influence of an improper motive or policy\(^\text{928}\). Although the DPP can change her mind once decisions are

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\(^{927}\) See T O’Malley, ‘Sentencing and the Prosecutor’ (n 905).

made, this alteration can be challenged where the decision changes from non-prosecution to prosecution without new evidence. The Director is not exempt from the general constitutional requirements of fairness and fair procedures however, and where a decision has been communicated and then withdrawn, the absence of fair procedures may make the decision reviewable, although this does not apply to internal communication of review. These developments reflect Dicey’s praise for the judge-made constitution grounded in the, ‘fruits of contests carried on in the Courts on behalf of the rights of individuals’. In a move supportive of a more collaborative exercise of discretion, as far as victims are concerned, effective October, 2008 the DPP introduced a scheme to pilot a policy change on the giving of reasons for decisions not to prosecute, or discontinue to prosecute, for five categories of cases, including murder, manslaughter, and workplace and road traffic fatalities. Reflecting human rights concerns, the written reasons are however, only supplied to persons connected with the deceased, in circumstances where it is possible to do so without creating an injustice. There is no reason why even such a limited pilot programme at least, should not be extended to the societally vital, financial regulatory area.

Of Irish prosecutorial practice at the real crime level, one dissertation interviewee observed:

*I'm not aware of a particular lobby or pressure group arguing for the expansion of the criteria here. Nobody as far as I am aware is suggesting there is a problem, but if there is a view that a wider group of criteria could be applied, I personally would favour it. I think the DPP is reasonably open minded to issues like that......I think in principle if there was a case for it, yes then it could, and should happen.*

I argue that the two-factor Irish criminal law practice, largely drawn from the ‘real’ crime paradigm, does require review for a financial regulatory binary. The Irish non-transparent and almost secretive approach, resting exclusively with a small set of state appointed officials, based around limited published criteria which umbrella the real rationales, where discretion is virtually absolute, and where no apparent distinction is drawn between

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930 DPP v Monaghan [2007] IEHC 92
931 See Dicey (n 25), 116.
932 See [http://www.dppireland.ie/victims_and_witnesses/reasons-for-decisions/](http://www.dppireland.ie/victims_and_witnesses/reasons-for-decisions/)
933 Interviewee L Judiciary Ireland 7 January 2013.
individuals and corporate entities, sits well within the Dicey arbitrary powers critique, and the Lacey et al observation that 934:

[C]riminal law doctrine contains a powerful set of assumptions – sometimes made explicit by judges and legal commentators, but sometimes left implicit – about not only the general structure of but also the rationale for criminal liability.

Although the Irish factors are in practice used for business crime, the binary launching factors must deal with a highly competitive milieu of great complexity, expert to expert, and where, unlike the criminal law, which takes an ex post facto backward view at fact, the regulatory decision-maker must look not alone backward at facts, but also forward at future behaviour change.

A revealing and expansory comparison, and one which cries out for immediate reform in Ireland, may be drawn from the practice of the Australian CDPP in the carrying out of his statutory functions. A publicly available written prosecution policy document has been available since 1986, and has been updated at intervals, the latest being dated 2008 935. This highly detailed and specific document, clearly designed for a pluralist society, is openly values-based upon, ‘the principles of fairness, openness, consistency, accountability and efficiency’. It eschews a ‘mathematical formula’ approach, and sets out ‘guidelines’ for the making of discretionary decisions regarding the prosecution process. Multiple factors, which are deliberately not prioritised, yet impact the decision include 936: the victim’s interests, extensive tailoring to offender case differentiation, evidence sufficiency, and prosecution success prospects.

This more broadly based approach, has also been applied in the US, on both the criminal and regulatory side, and has been recognised as incentivising cooperation, compliance and disclosure, as well as reducing incentives for business actors toward opaqueness and secrecy around business practice and organisation 937. On the criminal side, Principles of Federal Prosecution are set out in writing and publicly available. They separately cover

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934 See Lacey Wells and Quick (n 290), 39.
935 See CDPP Guidelines (n 909).
936 The fuller list is set out in Appendix K.
two categories, individuals, with multiple criteria including suspect conduct, evidence
sufficiency, degree of cooperation and enforcement alternatives; and business
organisations, with nine criteria including a corporation’s pre-indictment conduct,
conflating voluntary disclosure, cooperation, and remediation. The Principles also
provide a plea bargaining regime. The SEC as national securities regulator publicly
sets out its own multiple criteria in an Enforcement Manual which is available online, and
similarly splits across corporate entities and individuals.

The real issue is whether the two traditional Irish umbrella criteria, grounded in a real
crime paradigm, can meet the needs of transparency, equity, legitimacy and
accountability required of a world-class financial regulatory enforcement regime
involving expert mutuality. There is no priority ascribed, no disclosure of the real
underlying rationales, no publicised decision-making process, an apparent internal review
procedure although little external review possibility, no statutory or official plea
bargaining capacity, no policy to differentiate between different classes of offenders,
and no obvious incentive toward cooperation, compliance or disclosure. It is adrift real
crime prosecutorial methods in major common law jurisdictions, such as the US and
Australia as demonstrated. And, it is also adrift the financial regulatory tools, and
techniques, employed by the regulators in those same jurisdictions, even though the
criminal law is a factor or influence upon their regulatory decision-making, and where for
instance, corporate disclosure is viewed as a direct measure of corporate cooperation.

It is only in the last quarter century or so, that real crime prosecutorial guidelines have
become publicly available in the common law world, with Ireland a little adrift of the
development. On the financial regulatory side, the available guidelines are based around

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938 The Principles of Federal Prosecution provide when prosecutors should recommend or commence
federal prosecution and are set out more fully in Appendix K.
939 Nine factors are considered in conducting an investigation, determining whether to charge a corporation,
and negotiating plea or other agreements and these are set out in Appendix K.
940 Factors include the nature and seriousness of the offense and the person’s willingness to cooperate, as
well as the desirability of prompt and certain disposition of the case and the expense of trial and appeal.
941 In determining whether to open an investigation and, if so, whether an enforcement action is warranted,
SEC staff considers a number of factors, which are set out in Appendix K.
942 Conway Daly and Schewpepe (n 448) highlight that plea bargaining in Ireland may not be constitutionally
permissible and suggest without legislative guidelines that any ad hoc attempts at it should be abandoned.
Also see P Charleton and PA McDermott, ‘Constitutional Implications of Plea Bargaining’ (2000) 5(9) BR
476.
943 WS Laufer, ‘Corporate prosecution, cooperation, and the trading of favors’ (2002) 87 Iowa Law Review
123; and Laufer ‘Secrecy, silence, and corporate crime reforms’ (n 130).

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the real crime precedents, but are of a much younger vintage, all coming after the millennial turn. In many cases, scandals or case specific issues have precipitated a response. In the main, where there are guidelines, the control agency has itself drafted them, whether on the criminal or regulatory side. In most cases, the mobilisation technique for these factors, including any prescription of priority, is absent. US and Australian comparative examples, amply demonstrate the position from the financial regulatory perspective. Of particular relevance to Ireland, EU level comparison assists, although there is no present EU – as opposed to Member State - criminal law or financial regulatory enforcement capability beyond limited competition enforcement.

Example: Commencing in 2004, the EU Commission carried out examinations of various financial scandals, and recommended a criminal prosecution response, utilising dissuasive sanctions for both punitive and preventive effects. However, the EU reform road, to ‘speedy and effective’ financial regulation, can more recently be traced from 2007, when the financial crisis began to bite. In December, 2007 the EU Council invited the EU Commission to conduct a cross-sectoral stock-taking exercise of Member State sanctioning powers and regimes, which three years later in December, 2010 resulted in the publication of six identified EU-wide enforcement divergences, and the already highlighted call for better enforcement. Following these, and other findings, a typical EU consultation process was held in early 2011. The resulting EU formulation, arising from such consultation process, suggests an EU-wide common set of sanction criteria, comprising at least seven factors including: violation seriousness and duration including market effects, illegal benefits derived, repeated breach, and the suspect’s characteristics and cooperation during the investigation.

Example: In Australia, ASIC carries out all securities and investment sector investigations, and as a matter of policy allocates priority according to misconduct seriousness. At first instance, all decisions about enforcement action are taken at ASIC

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945 Commission ‘Feedback Statement’ (n 467), 4. The fuller list is set out in Appendix K.

946 See ASIC, Disclosure of convictions and proceedings (Regulatory Guide RG20 originally issued on the 18 May 1992 as Practice Note PN20, 2007). Investigations are conducted so as to maximise realisable remedies whether criminal, civil or administrative.
In a twin peaks approach, ASIC investigates all cases as though criminal, while the Australian CDPP, as an independent prosecutor, prosecutes only what is referred to it by ASIC. Within the stated priority of rendering assistance and protection, unlike Ireland, for ASIC criminal prosecution is the main signalling icon, and, deterrence the main enforcement tool. Until February 2012, no guideline document was available to public scrutiny, concerning ASIC’s choice of civil or criminal route or the criteria considered.

ASIC then issued an information sheet, not a regulatory guide. ASIC acknowledge that they do not undertake a formal investigation of every matter that comes to their attention, considering a ‘range of factors’ (specified in generalities) when deciding whether to investigate, and possibly take, enforcement action. To maintain flexibility, the specific factors considered by ASIC vary according to the circumstances of the case. ASIC specify that their priorities will necessarily evolve, and change over time, and that particular dynamic, influences enforcement focus. No statutory reference point is revealed however, nor the methodology of change or specific change agent. ASIC consider four resource-sensitive issues around misconduct, in deciding whether to undertake an investigation, or ultimately take enforcement action including: strategic significance of the harm, benefits of misconduct pursuit, case-specific issues including the admissible evidence pool, and, enforcement alternatives. They may invite the alleged infringer to make submissions on their own behalf, prior to engaging in discretionary decision-making, but are not obliged to do so. They may seek a criminal law, civil law or administrative penalty, across six broad action or sanction types: punitive, protective, preservative, corrective, compensatory, or negotiated resolution.

It is immediately noticeable to Irish policy-makers, inter alia, that wide discretion is retained; generalities abound; detailed definitions are avoided; non-technical language has been applied; that no enforcement pyramid or similar tool or heuristic is mentioned; no inter-factor prioritisation scale or weighting mechanism is revealed; that interplay issues between administrative and criminal law sanctioning are only peripherally tackled; that the regimen is non-statutory; that those regulated have no right to judicial review;

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948 Welsh ‘Civil Penalties and Responsive Regulation’ (n 587) has argued from her own empirical study that ASIC in practice relies heavily upon the use of the criminal law as its preferred technique.
949 ASIC ASIC’s approach to enforcement (n 905); also see LCEW Consultation Paper on Criminal Liability in Regulatory Contexts (n 570) both as discussed more fully in Appendix K.
950 These are set out in Appendix K.
951 See Appendix K for an extended footnote as to ASIC practice.
that the unfortunately unspecified and potentially shifting desires and aspirations of ASIC are identified features; that a tough criminal law top is envisaged, with a harm focus which may not include recidivism or settlement agreement breach; that no middle balance is provided for; that the upper limits of administrative sanctioning, and the lower limits of criminal law sanctioning, are not addressed; and, that no suggestions as to the modification or transformation of substantive criminal law or procedure are adverted to.

Example: US SEC practice clearly has exemplar effects for financial regulatory practice world-wide. Four key general factors have been identified: self-policing, self-reporting, remediation and cooperation. Concerning SEC cooperation practice, the relevant launching factors since 2001, as a matter of historical anachromism, have been differentially drafted and applied as between corporate entities and individuals, and been applied from different time points. In a nutshell, the above four broad measures, or key general factors, incorporate thirteen criteria when applied to corporate entities; and, four general cooperation considerations, incorporating thirty principles, in twelve sub-categories, and eighteen sub-divisions, when applied to individuals. While understandably, there are differences between individuals and corporate entities, nonetheless, the wide divergence in factors is confusing.

On the corporate side the thirteen factors have a case-specific origin. They reflect a misconduct focus; wide harm definition across corporate investors, the industry and the broader economy; degree of cooperation exhibited pre and post offence; remediation including future offence avoidance efforts; and, misconduct-caused changes in corporate existence or structure. Emphasising the need to fully interrogate the role of cooperation in any Irish reform, Laufer has highlighted, that both the value of privileged corporate information protected by the lawyer-client privilege, and what he described as


954 They are detailed in Appendix K.
‘work product protections’, required off-setting incentives or compromise around cooperation in favour of the RFSP, to ensure vitally important disclosure955.

The broader position adopted for individuals, came about as a result of pressure from the US defence bar956. The SEC, adopting a case by case approach, identified four general cooperation considerations, each with sub-categories, including the assistance provided by the cooperating individual, the importance of the underlying matter in which the individual cooperated, the societal interest in ensuring the individual is held accountable for his or her misconduct, and, the appropriateness of cooperation credit, based upon the discrete risk profile of the cooperating individual957. There are key regulatory learning messages for Ireland in this approach. It offers the RFSP the opportunity to fully engage with accountability and transparency, in the same way RFSPs require it of regulators, within the decision-making discretion. It provides a medium through which, enhanced ethical standards, particularly around disclosure, may blossom, through collaboration, into an improved regulatory system. A telling whistleblower capability with rewards, enabling insiders with vital information, to speak out without inordinate fear of reprisal, has enhanced the US picture, and must be considered for Ireland also958. Fair and open treatment by the regulator, whether at supervisory or enforcement level, should assist the RFSP for instance, to identify and eliminate, vulnerabilities in internal financial control systems, an area targeted and found wanting by post-crisis Irish regulation959. Board independence, and increased independence of auditors, directors and analysts, within a

955 Laufer ‘Secrecy, silence, and corporate crime reforms’ (n 130), 460; Also see PH Bucy, ‘Trends in corporate criminal prosecutions’ (2007) 44 American Criminal Law Review 1287. Laufer cites numerous examples that these incentives have been replicated from the Department of Justice criminal crime lead across multiple regulatory agencies in the US.

956 See Barnard (n 527).

957 SEC Enforcement Co-operation Initiative (n 899); SEC Release No. 34-61340 (n 899); SEC, Enforcement Manual (9 March 2012) <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf> accessed 17 July 2012, 119-123. These considerations are set out in Appendix K.

958 See van de Bunt (n 130) who discussed the statutory provision and protection of such in the US since 1989, extended in Sarbanes-Oxley in 2002 to the corporate world. Also see P Grabosky, ‘Regulation by reward: On the use of incentives as regulatory instruments’ (1995) 17 Law and Policy 256.


In summary, while the US parallel proceedings enforcement pathway is the downside scenario for infringers, there are incentives for those who cooperate, including deferred or no prosecution procedure as outlined earlier. Co-operation is an established launching factor in the US, on both the administrative and criminal sides. Conditionality may be tailored to both individual infringers, and individual contraventions/offences. Within their four broad measures, the SEC take into account and recognise, both the self-interest of the individual, and the societal context, the value of the assistance, the importance of the matter under investigation, and the appropriateness of giving cooperation credit to the specific individual. They have the already explained, gradated and differentiated new tools options such as cooperation, no-prosecution, and deferred prosecution agreements assigned to them. However, they have lagged behind the example of the US DoJ in operationalizing the cooperation concept to the financial sector. Their newly mobilized, three different types, of formal written agreements are mainly based around prior US case law, and US DoJ criminal-side practice. The SEC have been slow to fully publicize the operationality of its criteria and case precedents; now have two discrete frameworks, one for individuals and another for corporates; utilized a methodology which by-passed their most-often used notice and comment approach; declared openly that no legal rights are created, and that the principles stipulated have no rank order, and are not exhaustive; issued the policy purposed to gain an insider’s view of misconduct and fraud, and thus aid earlier enforcement action; aimed the analytical framework to maximize the SEC Commission’s own law enforcement interests; established that the paramount interest to be protected was that of investors; stressed the need for flexibility in the application of co-operation criteria or principles; made clear that the presence or absence of an SEC licence is not material to penalty application; made clear that even in the absence of
substantive charges, or even where the underlying conduct does not warrant it, civil penalties for lack of co-operation may be imposed; and, as regards witnesses, have operationalized proffer (of help/evidence) agreements, and have streamlined the procedure for witness immunity requests.

Based around this data, a best practice standard with potential for universal application requires: a political will towards convergence in a system like the EU; a clearly established pathway and launching factors, which also sets out the operationalisation of such criteria; collaborative input from industry and other stakeholders; a need for regulatory flexibility around interplay decision-making and deployment; regulatory accountability and transparency on both the part of regulator and RFSP; formal principles, set out in an appropriate and accessible regulatory document, which is purposed both in aid of the regulator, and market actors and their advisers; a capability toward sector-universal sanction application; an acknowledgement that principles may differ between individuals and corporate entities; and, the need for formal agreements with infringers around sanction credit, prosecution deferrals, non-prosecution decisions and applicable conditions, including breach re-activation, and prohibited conduct and undertaking performance during probation.

Although such a list cannot be definitive, the fourteen launching factors which have emerged from these separate criminal law and administrative surveys, and I argue arranged in their optimum descending order, include:

Deliberation (degree of culpability); Harm ; Previous Misconduct; Detection method; Stigma Requirement; Enforcement Costs; Enforcement remedies available; Case Differentiation (e.g. case specific admissible evidence); Submissions from RFSP; Other Enforcement options; degree of Self-reporting; degree of Self-policing; Remediation efforts; Cooperation.

Implications for such a set of launching factors include their arrangement in a descending or ascending scale. Clearly, the individual launching factors have a ‘hard’ top and a ‘soft’ bottom, as does the collective, and thus may be presented as a mirror image, with individual case differentiation sitting at the balanced fulcrum as demonstrated in
Appendix J. Thus, favourable factors must be weighed against those less so, in discretionary decision-making, for instance, high culpability, high cooperation, and low previous misconduct. As set out here, the degree of culpability or intent is the most serious. Cooperation is a key escalation and de-escalation factor, as in the mirror image it sits both sides of the fulcrum, and it relates both to pre and post contravention/offence conduct and misconduct. A mathematical mechanism for evaluating the factors is eschewed, as prescribed by court ordained sentence principle in Ireland, but some form of prioritisation or misconduct scale is required.

Enforcement style, in any specific case, will be determined by case circumstances and/or by alleged infringer attitude or motivation. The preferred style will impact procedural requirements, where for instance, criminal matters will attract the adversarial panoply. One launching factor is the available sanction suite, and a transversal sanction suite, flexibly drawn across the six ASIC identified categories, optimises rather than limits the enforcement pathway choice. The tough top or dynamic concentration, locates the ‘benign’ big gun, well recognised in the literature, which must be designed not to shoot blanks. It will influence relevant actors and their conduct, or indeed operate as a weapon of strength against the recalcitrant. Since offences and sanctions are a dependent axis, then optimisation mandates consideration of both new offences and penalties, as well as the mirroring of criminal offences and regulatory contraventions. The major launching factor of cooperation of the alleged infringer, determines the engagement of negotiated resolution techniques, the use of deferred or no prosecution agreements, any relevant conditionality, and any independent approval mechanism.

Policy makers must determine which cases lie where, and where the starting point or presumptive preference, if any, will be. The most serious obviously will lie at top, the
minor at the bottom and perhaps be subject to prosecutorial protocol arrangements. Protocols and memoranda of understanding are not unknown to public enforcement and exist for instance, in the competition sphere where the Irish DPP has an arrangement with the Competition Authority. The real test however, is balancing the middle. The regulator or specialist prosecutor will exercise the discretionary prosecutorial decision-making power, by mobilising the launching factors subject to Dicey’s well recognised rule of law constraints.

Amply making the case for a published best practice standard, along the lines argued in this dissertation, as a guide to both regulator and those regulated, Yeung observed and warned965:

A common feature of regulatory regimes is the extent to which the regulator, as public enforcement authority, is typically invested with extraordinarily broad discretionary powers of enforcement yet is provided with very little statutory guidance concerning how that power should be exercised.

One issue, in the event of additional criteria being operationalised, is the degree to which they should be publicised. One judicial interviewee, reflecting the coyness of some regulatory practice operated internationally, highlighted one downside to publication, ‘you don’t want to be advising the proofs of somebody who might be the subject of a criminal prosecution as to how they might avoid being prosecuted’966. In the alternative, even beyond the legitimacy and due process arguments for publication, at a practical level, without such advance guidelines how may market experts and their advisers consider their level of cooperation, self-policing and beneficial behaviour change? Clearly, guess work, gaining the ear of the regulator, and mythical industry gossip are possibilities, but unenviable ones for an accountable and transparent approach.

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965 See Yeung Securing Compliance (n 437), 247. Also see LCEW Consultation Paper on Criminal Liability in Regulatory Contexts (n 570) which recommended guideline principles for the use of the criminal law in serious wrongdoing in regulatory matters.

966 Interviewee L Judiciary Ireland 7 January 2013.
(c) Sentence Stage

At the criminal law level in Ireland, the independent judiciary, pursuant to article 34 of the Irish Constitution must be involved in sanction imposition\(^{967}\). Therefore, issue arises as to the necessity for judicial involvement in approving prior financial regulatory arrangements. As practised in Ireland, where a monetary penalty or other sanction is concerned, and there is dispute or no consent on the part of the infringer, approval is required. However, in relation to agreed and negotiated settlements, often in the form of written agreements, world-wide practice differs depending upon national legal culture. In the US for instance, settlements negotiated by the regulator must be court approved, and post-GFC, the judiciary have exhibited that they will not be treated as a rubber stamp for the negotiated terms including penalty and conditionality\(^{968}\). In the UK and Ireland however, there is no judicial approval procedure where the settlement is agreed, a practice unjustified by Weber’s and Packer’s standards\(^{969}\).

In the case of the criminal law in Ireland, a departure from the practise in other common law jurisdictions, even where governed by written constitution, there is no statutory sentencing guideline, whereas regulators generally, draft their own sanction guidelines\(^{970}\). The fairness and legitimacy of the financial regulator devising his own sentence guidelines, and then administering them, clearly also a breach of legal, as well as Weberian and Packer’s principles, must be questioned\(^{971}\). One clear solution is to provide for a specialist independent authority, to consider and devise them, on foot of statutory authority. This would enable part of the collaborative input from the financial industry already promulgated, in the event that the industry was afforded a representative interest, or allowed to make submissions. Similarly, in the event that such a body was established, it would seem prudent to have it also draft the relevant criminal law guidelines, at least

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\(^{967}\) Article 34.1 inter alia provides that, ‘Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution....’

\(^{968}\) See for instance media reports concerning Citi group including Reuters, ‘Judge questions fairness of $590 million Citigroup settlement’ The Irish Times (Dublin, 2 April 2013).

\(^{969}\) See ft 971 below.

\(^{970}\) In Ireland, either the Court of Criminal Appeal or the Supreme Court have set the guidelines on a case by case basis. However, see The People (DPP) v Kelly [2005] 1 ILRM 19 (CCA), 29 Hardiman J as quoted in Appendix K; also see The People (DPP) v Tiernan [1988] IR 251 (SC); and The People (DPP) v WC [1994] 1ILRM 321 (CCC), 325 Flood J as quoted in Appendix K.

\(^{971}\) See Deaton v Attorney General [1963] IR 170 (SC); also see Weber The Theory of Social and Economic Organisation (n 66), 331, and Packer (n 273), 155 as quoted and discussed more fully in Appendix K. And see N Morris and M Tonry, Between Prison and Probation (Oxford University Press 1990), 83.
insofar as they affect the binary role. This would avoid differences across the binary, and potential additional allegations of a two-tier system, already broached regarding elites and others, thus weakening binary legitimacy. Nonetheless, the predilection of the Irish courts to favour case individualisation, and only limited sentence range guidance, based around facts not offences per se, and to disfavour setting out general tariffs or advance tariff policy, must also be interrogated within the reform mix, not least because they may on an extreme view, require a constitutional amendment to overcome them. As one dissertation interviewee remarked of the criminal law side, the Constitutional separation of powers otherwise called judicial independence, a further feature of the autonomy principle already interrogated, and the judicial capacity to oppose ‘interference’:

[T]here is a huge range of options there but you are dealing with strong willed individuals and its part of the job spec that you be fiercely independent, and so imposition of guidelines is a tricky thing. If they are genuine guidance i.e. they are suggested best practice, that’s fair enough. If it is suggested that failure to adhere to them could in some respect lead to some consequence, well there would be an outcry that this [is] an encroachment on judicial independence which is guaranteed under the constitution.

Other jurisdictions do not project the same entrenched viewpoint, and for decades operate inter alia numerical, principled or information systems based in sentence tradition and politics. Taking Dicey’s trenchant rule of law statement and definition as a reference point, it seems difficult to conclude that the Irish constitution would outlaw any simple form of guideline, although a heavy prescription may well be found offensive. Nonetheless, the critical issue is the degree and method of constraint to which court (or

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972 Media reports in Ireland reported that the Irish judiciary had established a six person research team at the Judicial Researchers Office. See R Mac Cormaic, ‘Using complex data to answer a simple query: how do judges decide on sentences?’ IrishTimes.com (Dublin, 4 June 2013). See Appendix K for an extended footnote.

973 See The People (DPP) v WD [2008] 1 IR 308 (CCC) in which the Central Criminal Court considered cases of rape over a three-year period in which lenient, ordinary, severe and condign punishments had been imposed. Also see The People (DPP) v Pakur Pakurian [2010] IECCA 48 where robbery ranges were considered.

974 See The People (DPP) v Tiernan [1988] IR 251 (SC); also The People (DPP) v Kelly [2005] 1 ILRM 18 (CCA); Deaton v Attorney General [1963] 170 (SC) as quoted and discussed more fully in Appendix K.

975 Interviewee L Judiciary Ireland 7 January 2013. Also see Article 35.2 Irish Constitution 1937; Tonry ‘Punishment Policies and Patterns in Western Countries’ (n 475), 5 as quoted in Appendix K; and A Ashworth, ‘The Decline of English Sentencing and Other Stories’ in M Tonry and RS Frase (eds) Sentencing and Sanctions in Western Countries (Oxford University Press 2001) as quoted and discussed more fully in Appendix K.

976 See Tonry (n 475), 3 as quoted and discussed more fully in Appendix K.
regulator) autonomy are subject. Tata lucidly expressed the discretion/constraint problem as follows\footnote{See Tata (n 901), 7.}:

\textit{Legal rules are seen to ensure predictability, consistency, order, equality but tend to be inflexible and insensitive. Discretion is seen as having the opposite properties: flexible, but easily allows inconsistency, inequality, disorder.}

The comparative UK perspective for instance, pronounces sentencing guideline benefits to include: greater transparency, especially if simply and succinctly stated, and self-consistent; consistency improvement in both sentencing policy and sanctioning itself; and, involvement and input from a broader range of professionals in framing punishment guidance\footnote{A Ashworth, \textit{Sentencing and Criminal Justice} (4\textsuperscript{th} edn, Cambridge University Press 2005); J Cooper, ‘The Sentencing Guidelines Council: A Practical Perspective’ (2008) 4 Criminal Law Review 277; JV Roberts, ‘sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales’ (2011) 51 British Journal of Criminology 997; M Tonry, ‘Sentencing Guidelines and their Effects’ in A von Hirsch K Knapp and M Tonry, (eds), \textit{The Sentencing Commission and Its Guidelines} (Northeastern University Press 1987); M Tonry, \textit{Sentencing Matters} (Oxford University Press 1996); A von Hirsch, A Ashworth and JV Roberts (eds) \textit{Principled Sentencing: Readings on Theory and Policy} (3rd edn Hart Publishing 2009); M Wasik, ‘Sentencing Guidelines in England and Wales: State of the Art?’ (2008) 4 Criminal Law Review 253.} Unlike the UK, where a Sentencing Advisory Panel was established in 1998, the procedures of which have subsequently been updated on a number of occasions\footnote{N Padfield, \textit{Text and Materials on the Criminal Justice Process} (3\textsuperscript{rd} ed, LexisNexis Butterworths 2003); Roberts ‘sentencing Guidelines and Judicial Discretion’ (n 978).}, and a second higher administrative tier, the Sentencing Guidelines Council, being added\footnote{See Ashworth \textit{Sentencing and Criminal Justice} (n 978).}, Ireland currently only deploys criminal sentencing guidelines established piece-meal by judicially developed case law, where ‘just deserts’ is the primary philosophy, and where Irish courts still place considerable value on rehabilitation\footnote{T O’Malley \textit{Sentencing Law and Practice} 2\textsuperscript{nd} ed (n 727).}. Irish reforms recently recommended, inter alia: improving clarity on sentencing rationales; involving the judiciary in deliberations about penal reductionism; echoing the economic arguments already broached, ensuring the resource implications of sentences are taken into account by judges; and, enhancing the use of remission and parole\footnote{I O’Donnell, ‘What to do with an overpriced field and an ill-conceived jail plan?’ \textit{Irish Times.com} (Dublin, 27 June 2011).}.

One issue requiring consideration emerged from US practice, where the separation of powers is equally constitutionally enshrined and jealously guarded. It concerned sentencing ‘balance’, an approach initiated in US statutory reform in the mid-1980’s,
when US Sentencing Commission guidelines required reflection of proportionality, deterrence, public protection and offenders’ treatment needs, but as also found in the Irish financial regulatory sector guidelines, failed to prioritise or resolve conflicts between aims\(^{983}\). This type of ‘list-them’ approach, leading to a pick-and-mix discretion with inconsistency potential, was also enacted by amendment in the UK\(^{984}\), when the unranked sentence purposes were stated to be: punishment; crime reduction including by deterrence; reform and rehabilitation; public protection and reparation to ‘victims’\(^{985}\). Courts were originally under a flexible duty ‘to have regard’ to the guidelines. More recently, in both the UK and the US, sentencing guidelines have become more directive, if not presumptively binding\(^{986}\). In a nutshell, reformed sentencing guideline schemes, require courts to sentence within the guideline ranges, or to give justificational reasons as to why a different sentence is appropriate. Most US schemes require courts to find ‘substantial and compelling’ grounds for departing from the guidelines. In England and Wales, the duty of courts has become more robust, mandating they ‘must follow’ definitive guidelines, rather than merely ‘have regard to’ them. When devising a system, it must be realised that the need to declare sentencing rationales, to prioritise them, and to declare a primary rationale for classes of offences, were all recommended by the Council of Europe twenty years ago\(^{987}\). Rendering sound advice to any Irish reform efforts, Roberts has stated\(^{988}\):

*The statutory language used to encourage or compel courts to sentence in accordance with the guidelines is critical to the success of the system. The challenge to legislatures is to achieve a balance by means of a system that is often followed but from which courts depart when confronted with an exceptional case.*

It has been recognised, that the current, judicially-stipulated, Irish criminal law sentencing system, does not always adhere to a consistent approach, in terms of the application of

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\(^{983}\) See Ashworth *Sentencing and Criminal Justice* (n 978).

\(^{984}\) UK Criminal Justice Act 2003 section 142.

\(^{985}\) See Ashworth *Sentencing and Criminal Justice* (n 978).


\(^{987}\) See Council of Europe, ‘Consistency in Sentencing’ (Strasbourg, Council of Europe 1993), Recommendation R (92) 17.

\(^{988}\) See Roberts ‘Sentencing Guidelines and Judicial Discretion’ (n 978), 1000.
key sentencing aims and principles. This emphasises the need for statutory guidelines, although recent proposals for the awaited judicial council composed of judges, to fulfill the role of draughtsman, raises legitimacy and transparency issues. Sentencing courts in Ireland enjoy a wide discretion, and sentences imposed are crime and offender specific. In Duffy, a recent cartel conspiracy case, McKechnie J illuminated the approach of the Irish judiciary to criminal law sentencing:

*In Irish law it has been established for many years that any sentence imposed must reflect the crime and the criminal. It must be rational in its connection to both. It must be proportionate. Therefore, factors such as the seriousness of the offence (culpability, harm, behaviour, etc.), the circumstances in which it is committed and the prescribed punishment must be looked at. As of course must any aggravating circumstances as well as any mitigating one. The latter would include, if the evidence so established, matters such as guilty plea, cooperation, remorse, absence of previous convictions, good character, unlikely to reoffend, etc. This list must be added to by any other individual factor which is legally capable of attracting credit. Having done this exercise the appropriate sentence to fit the crime and the offender is then arrived at.*

Even at the regulatory level guidelines often bear no direct reference to restitution for ‘victims’, although there may be powers available to the sanctioning authority to disgorge, compensate or repair. Three suggested sanction objectives incorporating denial of benefit and penalty sufficiency, and five sanctioning steps starting with disgorgement, fixing penalty quantum, and then running through adjustments, were all recommended in the UK post-crisis. The results of the already mentioned, post-crisis, EU-wide consultation process, elicited no really new criteria categories, merely confirming offence seriousness, benefits derived, impact, repeated breach, co-operation, and offender size and survival, as preferred options, but they were more expansive than some current regulatory stipulations. It has not been universally mooted, to ensure that resource implications of sentences are taken into account, although commentators such as Braithwaite, have highlighted the negative cost-benefit implications for the state, of

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990 LRC Report ‘Mandatory Sentences’ (n 469).
991 DPP v Duffy & Anor [2009] IEHC 208, paragraph 35. He did this based around the sentencing principles established by decisions of the Court of Criminal Appeal and the Supreme Court.
993 Commission ‘Feedback Statement’ (n 467); Held between December, 2010 and February, 2011.
imprisonment for the regulatory offender. Nor, apart from Macrory, is the ‘education’ of the sanctioning authority an issue that has received much prominence to date.

The implications for financial regulation directly impact reforming interplay strategy. Both the criminal law and administrative regimes find the arbitral authority, as both formulator and mobiliser, of the sentence norms or principles. This strains accountability and transparency values at the regulatory level. The criminal law gains its principles in a piecemeal way, case by case across a diverse set of offence and offender types, on an ex post basis, and must wait for citizen or state proactively mobilised litigation; the administrative regime however, enjoys an advance statement of principles, which often lacks a statutory basis. In neither instance, are the principles prioritised, and while flexibility is not prominent it is increasingly advocated. The arbitral authority is the sole determinant of priority, if any. Often, as in Ireland, there is also no differentiation between individuals and corporate entities. The source of the principles being two-fold, invites inconsistency across the binary irrespective of the make-up of the principle suite itself. Because there is an effective wedge driven between the criminal/administrative poles, a deliberate choice of pole is rendered a necessity. If there was one independent guideline source, one guideline suite, and one rank order, where the independence of the arbitral discretion was mandated, then RFSPs may feel more assured as to the normative underpinning of any new financial regulatory contract.

2.2.5. Summary

Re-balancing the values complex has been contexted expert to expert, where social justice values are collaboratively negotiated. Newer values have been emphasised for fulfilment by both expert streams, including accountability and transparency. Ethical duties may be

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994 Braithwaite ‘Diagnostics of white-collar crime prevention’ (n 138). Also see M Cavadino and J Dignan, *The Penal System: An Introduction* (3rd edn, Sage 2002); LRC Report ‘Mandatory Sentences’ (n 469). Tonry (n 475), 5 highlighted that in some US jurisdictions, ‘correctional resources and capacities ...influence sentencing policies’.

995 Macrory Review (n 122). Interviewee L Judiciary Ireland 7 January 2013 stated concerning sentence inconsistencies: ‘I would be more inclined to attribute that to the complete lack of any judicial training or education and this is not the judiciary’s fault. The government just does not provide the money for it. We have a judicial studies committee but we have a very small budget. There isn’t an infrastructure of staff there. There is no budget for proper training’.

996 See Tonry (n 475), 6; and Macrory, ‘Reforming Regulatory Sanctions’ (n 120), 241 as quoted in Appendix K.
extended to both market actors, and their advisors as fiduciaries, and this may impact
offence definition, prosecutorial decision-making, and offence proofs. Packer’s control
and due process balance, within the adversarial criminal trial, confronts the ‘truth-deficit’
and may shift as needs demand. Well-entrenched rights such as the presumption of
innocence, and its ward the right to silence, were found not to be absolute, enabling
statutory provision for reverse burdens, presumptions and inferences as a potential trade-
off. This trade-off involves the broadening of the criminal law standard of proof
protection to all regulatory cases within the binary; and, discretionary decision-making on
the part of regulator, prosecutor and arbiter, governed by published guideline aid, to
evade Dicey’s arbitrariness prohibition, and to uphold the rule of law. The enforcement
pathway may be broadened to parallel forms, with or without a double jeopardy presence,
or remain as a double jeopardy choice where such is rationally reformed. A common
suite of sanctions, broadened to flexible regulatory enforcement, and new offences,
complement new structures, instruments and mechanisms. Constitutional changes are a
policy option, inter alia, concerning administrative authority and ‘limited powers of a
judicial nature’; the definition and demarcation of ‘minor’ penalties; the ECHR article 6
application to ‘punitive’ cases which requires clarification of the definitional criteria; the
boundaries of the right to silence, and non-incrimination; and, statutory criminal law
sentence guidelines.

The rule or supremacy of the law, according to Dicey, is the equivalent of the
constitutional security given to the rights of individuals. This is no more evident than
in the exercise of discretion in relation to prosecution. Within the rule of law, aimed to
produce universal equality, formality, neutrality and objectivity, partisan commitments
are constrained by formality of procedures, and by the independence of a constraining
judiciary, promising delivery of equal rights-based justice. Throughout this exemplar
review, where the operations of the regulator were the primary lens, the essential roles of
the already highlighted accountability and transparency values, in relation to pathway
choice, launching factor mobilisation, and sentence guideline draughtsmanship, and use
within discretionary decision-making, have been readily apparent. Ultimately, their
manifestation will be located in the sanction imposed, which when publicised, will be a

997 See Dicey (n 25).
998 See Dicey (n 25); N Hutton, ‘Sentencing, Inequality and Justice’ in C Tata and N Hutton (eds.)
Sentencing and Society (Ashgate 2002); and Tata (n 901).
forever reminder within ‘justice as fairness’ to all stakeholders. Not alone to the RFSP sanctioned, but also to civil society whose confidence and support are essential to the maintenance of the administration of justice, and the politicians who openly declare the need to reflect or incorporate public views in both prosecutorial decision-making, and the evolution of sentencing policy.\footnote{M Hough and JV Roberts, ‘Public Knowledge and Public Opinion of Sentencing’ in C Tata and N Hutton (eds) Sentencing and Society (Ashgate 2002).}

In a nutshell, Part 1 Chapter 2 interrogated the mediating adversarial justice through its various phases and exercises of discretion. The need for a new expert to expert values complex trade-off or reciprocity emerged. This is of particular relevance to the definition of harm risk as discussed earlier where positive duty formulations were advocated. Thus, against this backdrop we now turn to interrogate the sanction paradigm and commence with the offence/contravention and sanction dependency.
To accord with Dicey’s legality principle, offences must be pre-defined. They are a statement of the wrong, where the misconduct is expressed as a prescribed offence or contravention, based in the perceived harm risk. They are accompanied by a sanction tariff maximum, which is usually legislatively provided, and applied, after the ‘bridging’ conviction. Sanction is the equally prescribed in advance penalty, tailored specifically to the harm risk expressed as offence or contravention, and imposed upon each individual according to case and personal merits and circumstances. Offence cannot exist without sanction and vice versa, and thus they form a dependent axis. All offences must be proved by the prosecutor. For the criminal law, the standard for centuries has been proof beyond reasonable doubt; for the administrative sanction regime, it is the equally longstanding and separate, civil standard of proof on the balance of probabilities. Since probability governs the differential, such differential is both quantitative and qualitative. It is a straight choice between these two proofs options and no hybrid or alternative is permissible save where statutorily provided.

A crime, otherwise called an offence, is the active ingredient of the criminal law, the distinctive canon, encompassing the doctrine and the adversarial procedure, played out in the so-called criminal justice system. Only ‘bad’ criminals want it. The ‘good’ citizen...
with rights eschews it, and seeks prevention or protection from it\(^{1006}\). A massively
diverse range of offences lies within the canon, those detailed as mala in se where moral
culpability must be proven, and those mala prohibita, the no intent form\(^{1007}\). Offences
inculpate and are static and certain, being framed mainly as ‘negative’ or ‘do not’ duties,
while grounds relied upon to excuse enjoy much more flexibility, enabling context
relevant defence pleading\(^{1008}\). In their definition offences are rule-based, and take a
similar legislative form, in order to comply with rule of law requirements toward certainty
and consistency\(^{1009}\). Regulation mobilises similarly, calling the infringement a
contravention, although using more flexible techniques beyond the more narrow rule-
based approach of the criminal law in the definitional task\(^{1010}\). The types of
offence/contravention harm relevant to financial services principally manifest in the form
of market abuse, money-laundering, company law breaches and myriad offences against
the fraud concept\(^{1011}\). These latter offences include bribery and corruption and the
already highlighted cartel conspiracies. All have been heavily influenced by EU directive,
in the case of money-laundering repeat directives, transposed into domestic law, while
fraud is a common law concept, which too has been impacted by EU inspiration\(^{1012}\).

The classic use of regulation, as restriction, was based in a statutory system – general and
abstract statutes as Habermas described them – which delineated typical ‘fact situations’
and offences in specific legal terms linked to specifically defined legal consequences
(sanctions)\(^{1013}\). Two interwoven strands were positioned by McGrath within the criminal

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\(^{1006}\) Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310), 90 as quoted in Appendix K.
\(^{1007}\) See Scott ‘Regulatory Crime’ (n 25), 15; J Rowan-Robinson PC Watchman and CR Barker, ‘Crime and
Regulation’ (1988) Criminal Law Review 211; and Coffee jnr ‘Paradigms Lost’ (n 252) as discussed more
fully in Appendix K.
\(^{1008}\) See W Wilson, Central Issues in Criminal Theory (Hart 2002).
\(^{1009}\) Duff ‘Introduction’ (n 733); Also see McLeod (n 334).
\(^{1010}\) See for instance C Scott, ‘Criminalising the Trader to protect the Consumer: The Fragmentation and
Consolidation of Trading Standards Regulation’ in I Loveland (ed) Frontiers of Criminality (Sweet &
Maxwell 1995), 150 where he described a ‘regulatory crime paradigm’ as discussed more fully in
Appendix K. Also see Lacey Wells and Quick (n 290); G Richardson, ‘Strict Liability for Regulatory
in Appendix K.
\(^{1011}\) See Gobert and Punch (n 130); Levi ‘Serious Fraud in Britain’ (n 213); Horan (n 87); M Levi and J
British Journal of Criminology 293, 299; WK Black ‘Echo epidemics control frauds generate ‘white-collar
street crime’ waves’ (n 87); M Levi, ‘Serious tax fraud and noncompliance’ (2010) 9(3) Criminology &
Public Policy 493; all as discussed more fully in Appendix K.
\(^{1012}\) See A Arlidge et al, Arlidge and Parry on Fraud (3rd edn, Thompson Sweet and Maxwell 2007); Ashe
and Reid (n 745); C McGreal (n 254). Because for the EU the protection of its own interests was a major
focus also see Kuhl (n 436).
\(^{1013}\) Habermas (n 276), 430-431.
law side of the binary\footnote{J McGrath ‘The Colonisation of Real Crime in the Name of All Crime’ (n 335), 48-49.}. One, which is recognised by Irish courts, is an ‘expressive, symbolic, moral judgement’, reflecting community values and inflicting just deserts punishment. The second is effectively the regulatory (criminal law) offences which Habermas was describing, which later bifurcated into no intent liability as one means to correct proofs difficulties. This second strand, according to McGrath, is neglected by Irish courts. He described them as, ‘regulatory, instrumental and utilitarian’, often compliance-oriented, aimed at deterring future behaviour, and placing reliance on fines in a civil-style approach. Wells amplified this understanding and divergence, also through the lens of sanctions, pinpointing a regulation penalty partition, but instead within the two-sided binary:

\begin{quote}
Regulation can involve civil or criminal penalties. It is distinguished from criminal law – which applies across the board – in two ways: it targets those engaged in specialised activities and its underlying purpose is said to be different in that regulation seeks to mould or encourage behaviour rather than condemn it.
\end{quote}

The classical, strict or narrow statutory methodology, could not meet the demands of what Habermas described as the ‘service administration’, namely the welfare state based around risk prevention, which acts in a future-oriented worldview. Thus, the classical norms broke down, and newer forms were needed, resulting in the wider-based contravention concept, housed within an administrative sanction regime of lesser formality and proofs standard. Nonetheless, the traditional definitional form of harm/consequences, offence/sanction, dependent axis, was retained for financial regulation. In the round, this jurisprudential development based in pragmatism, has not alone widened the ‘offence’ base in practice, it has also brought along with it a criminal law and administrative sanction differential, replete with different sanction suites, as well as legitimacy, and especially the values, concerns already explored. Habermas explained\footnote{See Habermas (n 276), 431.}:
The spectrum of legal forms has expanded to include special legislation, experimental temporary laws, and broad regulatory directives involving uncertain prognoses; the influx of blanket clauses, general clauses, and indefinite statutory language into the vocabulary of the legislator has sparked... discussion over the “indeterminacy of law”.

Although elements of administrative sanctioning mimic civil forms, it is a distance however, from Coffee’s civil pricing versus criminal sanction (prohibiting) distinction. Both binary poles utilise sanctions as necessary, albeit for a different purpose, as demonstrated. Recognising the two-sided binary, Farrell recently identified five divergences between the Irish DPP’s prosecutorial role and that of regulators. In his opinion these divergences render financial regulatory prosecutions difficult, and disincentivise the taking of such prosecutions by regulators. Scott’s argument, that regulation is a ‘bifurcation’ in the criminal law, confirms the Habermas analysis, and reflects McGrath’s one-sided binary view. Scott, like others, highlighted divergences between ‘real’ and ‘regulatory’ crime, not alone in the absence of mens rea in strict liability offences, a concept however little used in financial regulation to date where the judiciary favour mens rea being read in, but also in investigation, prosecution, function, defences available, sentencing and enforcement style. Somewhat in response to Scott, Kilcommins and Vaughan have expressed concern that a ‘dispersal of justice’ to control agencies raises serious accountability and transparency issues, matters pursued earlier. Ogus has highlighted procedural divergences including the standard of proof and trial method, and also institutional differences including investigative and penalty imposition, although these are correctable within a common framework, where

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1017 For instance, the civil standard of proof and less formal procedures; they also mimic some criminal forms for instance, fines or monetary penalties, and consequential disqualifications. And see Coffee jnr ‘Paradigms Lost’ (n 252).

1018 See Farrell (n 920).


1020 Scott ‘Regulatory Crime’ (n 25), 8-9; also Kilcommins and Vaughan Terrorism, Rights and the Rule of Law (n 450), 138-143 outlined five distinctions which have traditionally been drawn between regulatory crimes and ordinary crimes as set out in Appendix K.

1021 See Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310).
not already compatible\textsuperscript{1022}. For McGrath, the Irish compliance-oriented approach has created a two-tier legal system privileging corporate elites in the financial sector, and Gadinis has found that US regulators favour those in larger firms with lesser sanction\textsuperscript{1023}. However crucially, Kilcommins and Vaughan argue that compliance strategies alone cannot guarantee societal financial security, a key dissertation focus and argument\textsuperscript{1024}.

Traditionally, the criminal law was broken into three categories, offences against the person, offences against property, and offences against the government, with newer classifications emerging like road traffic offences. White collar ‘crime’ was a world apart and more associated with civil wrongdoing. But with the growth of financial sophistication and its effects, gradually regulation and the imposition of penalties emerged in Ireland, often sourced from the EU. Connery and Hodnett explained: ‘...the Financial Regulator is unique in Ireland in that he may impose administrative sanctions under civil law, unlike other regulators where constitutional grounds are often cited as a reason why Regulators may not [so] impose.......'\textsuperscript{1025}. In effect, this means that the traditional ‘real crime’ offence definition, now uneasily sits under the regulation umbrella, where it may be cast as a morally-loaded or a strict liability offence, beside its civil-style regulation off-spring, and more informal, contravention, which now is its sibling in sanction enforcement. Indeed, the sibling is now often cast as big brother, amid proposals that alternatives to criminal prosecution be actively sought\textsuperscript{1026}.

For centuries, law has known an essential divide, measurable across both substance and method, between the civil law of private arrangements, which is overshadowed by state correction, and the state dominated coercive criminal law control\textsuperscript{1027}. Legislators and prosecutors/regulators clearly face policy and political trade-offs when operationalizing

\begin{flushleft}
\textsuperscript{1022} A Ogus, ‘Regulation and its relationship with the criminal justice process’ in H Quirk T Seddon and G Smith (eds), Regulation and Criminal Justice: Innovations in Policy and Research (Cambridge University Press 2010).
\textsuperscript{1024} See Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310) and especially, 90 as quoted in Appendix K.
\textsuperscript{1025} See Connery and Hodnett (n 6),140.
\textsuperscript{1026} Criminal stigma has been recently recommended only for seriously reprehensible conduct, and not as a primary means of ensuring regulatory objectives; see LCEW Consultation Paper on Criminal Liability in Regulatory Contexts (n 570); and Horan (n 87), 21 as quoted in Appendix K.
\textsuperscript{1027} See including Ashworth Principles of Criminal Law (n 97); D Garland The Culture of Control (n 25); McAuley and McCutcheon (n 2274); Norrie Crime, Reason and History (n 211); Radzinowicz History (n 25); Wells and Quick (n 180).
\end{flushleft}
either criminal or civil enforcement as presently constituted\textsuperscript{1028}. Procedurally, the differing rules of evidence, standard of proof, and the missing ultimate jail-time sanction, are key disparities. Different regimes apply in different jurisdictions with national social, legal and cultural traditions key influences\textsuperscript{1029}. For some, an independent regulator enforces civilly and perhaps criminally on the summary side, but instead refers the more serious indictable matters to the criminal prosecution authority. For others, there is only a civil or administrative jurisdiction. For yet others, there are multiple regulators, in some cases competitive, covering discrete markets within the multiplicity (markets and actors) as found in the financial markets sector. The third way approach portends elimination of these traditional trade-offs, although it will of course establish new ones. But of these new trade-offs, while they can be negotiated collaboratively toward a hopeful better conclusion, the state prosecutor post-GFC enjoys a more powerful bargaining position with a more readily deployable criminal law.

While the criminal law enjoys the discrete paradigm explored in Part 1 Chapter 3 section 1.3.5, it overlappingly incorporates general features of law which the civil law also enjoys. Theses include judicial personnel which inter-changeably move between codes\textsuperscript{1030}, constitutional values, legislative underpinning, and forms of sanction tailored to harm risk including injunctive relief and damages. While recognisably the criminal proof standard differs from the civil, criminal procedure differs from civil procedure, and, the rules of evidence may be differentiated; both systems however, are adversarial, where cross-examination is still jealously regarded as the great engine, both have proofs, procedures and evidential rules, and, deploy jury trials although they are now uncommon on the civil side. In addition to policy disincentives, legislatures and regulators/prosecutors must deal with public concerns around the introduction or continuation of an easier proved civil jurisdiction, the greater deployment of criminal

\textsuperscript{1028} M Welsh, ‘The politics of civil and criminal enforcement regimes’ in Levi-Faur D (ed), Handbook on the Politics of Regulation (Edward Elgar 2011). One of these trade-offs concerns whether white collar crime is real crime or a sub-species of offending. See Croall White Collar Crime (n 87), 167 as quoted in Appendix K.

\textsuperscript{1029} See for example the Milieu Ltd Report Overview of provisions on penalties (n 835) as set out more fully in Appendix K.

\textsuperscript{1030} Interviewee L Judiciary Ireland 7 January 2013 stated: ‘De facto there is a specialist judiciary in this sense that while theoretically any judge of the …..High Court, can be assigned to the criminal cases in reality out of the 30 judges of the High Court only about 10 are assigned to do so because they are people who from practise have experience of crime and who are comfortable doing it. That’s simply a convention. There’s nothing to stop somebody who has done nothing else all their life other than patents or whatever doing a criminal case. But that’s the way it works in practice’.
enforcement amid over-criminalisation jibes, and the provision of increased penalties. Regulators often also find themselves squeezed between both political and public, concerns, aspirations and machinations. They are confronted with a choice between overlapping criminal and administrative jurisdictions, albeit mainly rooted in an exclusive, or preferential sequential, as opposed to a simultaneous parallel proceedings approach. The ‘hard choices’ point up the need to consider the correct pathway to enforcement, and the need to provide a transparent policy statement around it, which is subject both to public scrutiny and consultation. Most regulatory commentators now accept that infringers should be dealt with by a flexible enforcement system, tailored to their discrete circumstances, and that being so the regulator must also be empowered to deploy his sanction arsenal in similar flexible fashion. For those regulated, best practice or due process requires that as much advance information as possible is available for professional advisers, their clients, consumers and the public generally as to how, when, why and by whom such hard choices are made.

Almost sixty years ago the definition of crime was asserted to be a ‘thorny intellectual problem’. More recently an obsession with grinding technical discussion and arcane attempts at its impossibility, have been noted. No definitive statement or definition of it, or of the criminal law, or of regulatory offences or contraventions, has yet emerged. And yet, the criminal law and regulation, through these ‘offences’ known as crimes and contraventions, with their attendant sanctions, are regularly deployed by the state, as the dominant social force, to coercively regulate the conduct of market and general citizenry. As already highlighted, the focus is, in fact risk, termed misconduct or wrongdoing, where culpability is a traditional requisite, although it is generally now described as ‘harm’ where intent is not mandatory. While the compliant citizenry voluntarily consent to be subject to such regulation, underpinned by sanctions, it is in return for a

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1031 See Fullenkamp and Sharma (n 420).
1032 Welsh ‘The politics of civil and criminal enforcement regimes’ (n 1028).
1033 See for instance, LCEW Consultation Paper on Criminal Liability in Regulatory Contexts (n 570) as discussed more fully in Appendix K. Also see Horan (n 87); and see Part 2 Chapter 2 sections 2.2.3 and 2.2.4 for a more complete discussion.
1034 See for instance, Ayres and Braithwaite (n 90); Baldwin and Black (n 593); Freiberg The Tools of Regulation (n 119); Macrory Review (n 122).
1036 See Farmer (n 720).
1037 See Zedner (n 274).
guarantee of societal or state protection against the disobedient\textsuperscript{1038}. One dissertation interviewee stated the parameters:

*Outright dishonesty, fraud by an individual or a corporate entity, clearly that should be treated very seriously, also threats perhaps to the solvency or liability of the entity and obviously on a wider basis even to other businesses in the same area*\textsuperscript{1039}.

For over seven hundred years individual responsibility has been the subject of the public, coercive, social control system known as the criminal law, and regulation has followed suit\textsuperscript{1040}. It is prescriptive. It is mobilised proactively\textsuperscript{1041}. In Ireland, the common approach was to impose a regulatory code and criminalise the breach, creating vast numbers of new ‘crimes’, although more recently, and mainly in response to EU legislation, enforcement sanctioning has found newer forms of expression within administrative regimes\textsuperscript{1042}. Coercive control, operating as demonstrated, through the inter-dependent offences/contraventions and sanctions dependent axis, requires clarity as the key, for the state which prosecutes bears the full burden of proof to the highest standard\textsuperscript{1043}. Croall has described the definition and proof issue thus:

*[R]educing the extremely complex activities involved to criminal offences may be very difficult and difficulties also arise in defining with sufficient precision the borderline between legal and illegal activities*\textsuperscript{1044}.

The prosecutor however, must stand upon his indictment, the offence itself as defined and the accompanying statement of offence, once the ‘individual’ accused has been arraigned and pleaded. Of course, this individual may be the individual person or a corporate entity.

\textsuperscript{1038} Hart \textit{The Concept of Law} (n 123); Garland \textit{The Culture of Control} (n 25); Hobbes (n 281); Locke \textit{Two Treatises of Government} (n 73).

\textsuperscript{1039} Interviewee X Regulator Ireland 12 November 2012. Levi ‘Serious Fraud in Britain’ (n 213), 181-182; Horan (n 87); LCEW \textit{Consultation Paper on Criminal Liability in Regulatory Contexts} (n 570) as quoted and discussed more fully in Appendix K.

\textsuperscript{1040} See McAuley and McCutcheon (n 274). Based in the libertarian viewpoint that coercive powers should only respond to positive actions, the common law approach is that criminal responsibility is individualistic, according to Lacey Wells and Quick (n 290), 47.

\textsuperscript{1041} See DJ Black, ‘The Mobilization of Law’ (1973) 2 J. Legal Studies 125.

\textsuperscript{1042} Hamilton ‘Do we need a system of administrative sanctions in Ireland?’ (n 451).

\textsuperscript{1043} See Woolmington v DPP [1935] AC 462, 481 Viscount Sankey LC; Horan (n 87), 320-344; Hardy v Ireland [1994] 2 IR 550 (HC & SC); O’Leary v AG [1995] 1 IR 254 (SC); R v Hunt [1987] AC 352 (HL); X v Germany (1962) 5 Y.B. 192 and X v Netherlands 16 D.R. 184. All as quoted and discussed more fully in Appendix K.

\textsuperscript{1044} Croall \textit{White Collar Crime} (n 87), 135; Also see MacNeil and O’Brien ‘Introduction’ (n 2).
Financial service providers are essentially business vehicles, such as corporate entities and firms/partnerships, populated by individual decision-makers\footnote{See sec 18 Interpretation Act 2005 (Ireland); Horan (n 87), Preface as quoted and discussed more fully in Appendix K.}. These populating individuals may include independent agents servicing corporate needs such as lawyers, accountants, bankers and credit ratings agencies; or, the more regular shareholders, ordinary employees, corporate executives as agents of the board, and corporate officers including the board itself. For liability accountability purposes, differential responsibility applies. For instance, the fitness and probity regime stipulates that, corporate officers conducting controlled functions, require due diligence vetting, and adherence to code standards\footnote{For more detailed explanation see Part 3 Chapter 1 section 3.1.9.}. As already explained, individual persons and corporate entities are differentially treated within the law and its forms. Corporations have only been subject to criminal liability since the mid-nineteenth century, while mens rea (intent) was only imputed to the corporate form in the mid-twentieth\footnote{See Horan (n 87), and Slapper and Tombs (n 87), 27-28; R v Birmingham and Gloucester Railway Co. [1842] 3QB 223 (QBD), Patterson J, 232; DPP v Kent and Sussex Contractors[1944] 1 KB 810 (KBD); R v ICR Road Haulage Ltd [1944] 1 KB 551 CCA); Moore v Bresler [1944] 2 AER 515 (KBD); Lacey Wells and Quick (n 290), 665-666 as quoted and discussed more fully in Appendix K.}. Thereafter, issues around identifying the corporate ‘controlling mind’, and its involvement, bedevilled liability proofs\footnote{See R Keane, Company Law (4th edn, Tottel 2007), 165; Tesco Supermarkets Ltd v Natrass [1972] AC 153 (HL); Purcell Meats (Scotland) Ltd v McLeod 198 SCCR 672; R v P&O European Ferries (Dover) Ltd [1991] 93 CAR 72 (CAC); Attorney General’s Reference No 2 of 1999 [2000] 3AER 182 (CAC) as discussed more fully in Appendix K.}. Unless a statute specifically imposes liability on the company for the acts of an employee, then the traditional identification rule must be applied\footnote{See R Keane Company Law (n 1048),166.}. This rule was succinctly put almost a century ago by Lord Haldane LC\footnote{Lennard’s Carrying Co v Asiatic Petroleum Co Ltd [1915] AC 705 (HL),713. This passage has been approved by the Irish Supreme Court see Taylor v Smyth [1991] IR 142 (SC), McCarthy J and Superwood Holdings plc v Sun Alliance and London Assurance plc [1995] 3 IR 303 (SC) Denham J.}: ‘\textit{A corporation is an abstraction. It has no mind of its own.....its active and directing will.....is an agent.....who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation’}.

Parliamentary draughtsmen however, have formulated at least two ways to impose corporate liability: a standard solution formula, whereby, if the offence is proved committed with the consent or connivance of named officers, or those acting as such, then both individual and corporate will be liable; a secondary formula, basing liability upon...
the quality of corporate management and organisation of its activities, where for instance, gross breach of a duty of care by senior management entails liability. Exculpatory general defences such as mistake, reliance on information supplied, accident or other cause beyond control of the accused, and particular statutory defences including due diligence and taking all reasonable precautions, are often provided, and enable the establishment of corporate training and oversight programmes. Corporate entities have been described as the white-collar criminals’ gun or knife equivalent and as the perpetrator of a significant amount of economic crime, and thus internal controls are significant additions to coercive control. In Ireland, company legislation over the last two decades, motivated mainly by EU legislative drivers, has widened corporate criminal liability, aimed at preventing illegal strategising towards gaining unfair competitive advantage, for instance, by fraudulent and reckless trading and insider trading.

Mostly, the traditional common law imposes liability for acts and not for omissions. This contrasts with the civil law approach of many continental countries, which largely underpins EU law, which provides for many omission offences. The common law however, recognised a number of forms of participatory liability, one of which is participating by inaction. Charleton et al recited the 1930’s Australian case of a man who watched his wife drown herself and two infants, where silence was found to amount to acquiescence and gave consent. They state that the traditional common law analysis imposed a duty to act where ties of marriage, blood, contractual responsibility or other special factors, disentitle the innocent spectator defence. Such a view has interesting

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1051 See McLeod (n 334). Also see for example the UK Corporate Manslaughter and Corporate Homicide Act 2007. All of the terms such as ‘gross breach’, ‘duty of care’ and ‘senior management’ are specifically, statutorily defined.

1052 See Scott ‘Regulatory Crime’ (n 25), 18 as quoted in Appendix K; and section 78 of the Consumer Protection Act 2007.

1053 S Wheeler and M Rothman, ‘The organisation as weapon in white-collar crime’ (1982) 80 Michigan Law Review1403; Also see Connery and Hodnett (n 6); Gobert and Punch (n 130); Horan (n 87). In Ireland aggravating factors concerning corporate entities may include failure to heed warnings, and risks run specifically to save money; mitigating factors may include prompt admission of responsibility and a timely plea of guilty, steps to remedy the deficiencies, and a good industry risk record. See The People (DPP) v Rosebery Construction Ltd and McIntyre [2003] 4 IR (CCA);and R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249 (CAC).

1054 See R Keane Company Law (n 1048); also see N Cahill, Company Law Compliance and Enforcement (Tottel 2008). Also by establishing regulatory authorities like the Financial Regulator, and the Office of the Director of Corporate Enforcement (ODCE).

1055 Lacey Wells and Quick (n 290), 47; also see A Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) LQR 424.

1056 See Lacey Wells and Quick (n 290), 47.

1057 See Charleton et al (n 281), 216.
ramifications for corporate crime, and especially financial regulation, for instance, the
finance house supervisors who allow their subordinates, contrary to in-house guidelines,
to gamble vast amounts of client money on the stock market, or on hedging instruments,
or corporate executives who fail to adequately implement or monitor control systems and
standards. As Charleton et al state\textsuperscript{1058}: ‘Where the accused has an express role pursuant
to contract or position in society to prevent the occurrence of the crime by the principal
offender, mere inaction on his part can amount to assent’. Beyond this, in regulatory
matters there are many statutory omission offences, especially regulating corporate
conduct\textsuperscript{1059}. Corporate examples arise in Ireland also\textsuperscript{1060}.

In addition to substantive offences, and the two or more player inchoate offences such as
incitement and conspiracy, lies the old common law originated participatory liability
categories of accomplice, where secondary liability applies\textsuperscript{1061}. Since 1861 the
prohibition against aiding, abetting, counselling or procuring, has been codified on a
procedural statutory basis, and complicity amounts to joint offending\textsuperscript{1062}. Furthermore,
long-standing derivative liability laws concerning persuasion or encouragement to
commit, escape assistance, and assistance or aid at the scene, still apply\textsuperscript{1063}. Taking this
offence arsenal into account, it is difficult to accept that the Irish crisis has resulted in so
few prosecutions to date. It exhibits a clear gap between statute book and practice
implementation, Fuller’s incongruence, where a culture of impunity has been asserted\textsuperscript{1064}.
Post-crisis, some have expressed the opinion, if not moral outrage, that new offences are
needed, and reckless financial behaviour similar to reckless trading known to company
law has been mooted as one prototype\textsuperscript{1065}. However, offences drawn from intent and no-
intent strands, have been described as being incapable of definition under one over-
arching rubric, with no discernible collective moral standards, many lacking direct

\textsuperscript{1058} See Charleton et al (n 281), 217.
\textsuperscript{1059} See Lacey Wells and Quick (n 290), 47.
\textsuperscript{1060} For instance, see section 242 of the Companies Act 1990; MacCann and Courtney Companies Acts
1963-2009 (n 463); section 33AK of the Central Bank Act 1942 as inserted by section 26 of the Central
Bank and Financial Services Authority of Ireland Act 2003; Connery and Hodnett (n 6). All as discussed
more fully in Appendix K.
\textsuperscript{1061} See Lacey Wells and Quick (n 290).
\textsuperscript{1062} See Criminal Law Act 1997 discussed more fully in Appendix K.
\textsuperscript{1063} See Charleton et al (n 281), 207-208.
\textsuperscript{1064} F O’Tóole, ‘An inquiry is needed into why a regime of impunity still exists in this state’ The Irish Times
(Dublin, 23 July 2013) as quoted and discussed more fully in Appendix K.
\textsuperscript{1065} Appleby Reflections on Weaknesses with respect to Accountability (n 455); also Packer (n 273), 359;
The Economic Voice, ‘Kinetic Partners Global Regulatory Outlook Report’ (29 January 2014), as quoted
and discussed more fully in Appendix K.
reflections of underlying moral norms. On the other hand, Packer speculated whether enforcement resources required to sustain a credible deterrent threat may best be applied to ‘noncriminal modes’.

Perhaps these new offence rhythms may at long last see a workable definition of the ‘financial regulatory offence’, a hybrid move away from the real crime offence as sometime bifurcated into regulation, and the administrative contravention divide. Such a move would evade double jeopardy issues; procedural wrangles; if uniform, culpability concerns; and where rendering condign punishment, two-tier justice jibes. It would also aid a binary fusion, by providing one definition across both poles for a prosecutor to draw upon, and encourage a single sanction suite of the broadest dimension. It would aid discretionary decision-making around, the enforcement pathway, and the launching criteria, although some options would remain around tough top, balanced middle and rehabilitative base strategies. To date, differing views as to what a ‘regulatory offence’ entails have been promulgated, albeit with some commonality of characteristics. These draw across the ‘regulatory’ sphere as a unit, which it clearly is not, and result in severe difficulties when contemplating discrete application to financial regulation. Within the general press of generic regulatory offences, Richardson distinguished the majority of regulatory offences from real crime, extensively examined no-fault or strict liability regulatory offences, and argued that conviction for regulatory offences carries none of the stigma attaching to ‘real’ crime conviction. For Scott, paradigmatic crime involves serious offences involving intent and imprisonment possibility, while regulatory offences have been overlaid on the system, with no fault regulatory offences a bifurcation in the criminal law. Non-Irish judicial reasoning described as ‘double thinking’, has argued that regulation and ‘true crime’ embody different concepts of fault, with regulatory fault, based in a reasonable care standard, enjoying a significantly lesser degree of culpability,

1066 See Wilson Central Issues in Criminal Theory (n 1008).
1067 See Packer (n 273), 357.
1069 See G Richardson (n 1110). As yet, there is no clear ‘regulatory offence’ category. Also see Connery and Hodnett (n 6); McAuley and McCutcheon (n 274); and J McGrath ‘The Colonisation of Real Crime in the Name of All Crime’ (n 335). Interviewee Q Academic Lawyer Australia 5 November 2011 stated that there is no general definition of a regulatory offence in Australia either.
1070 See Scott ‘Regulatory Crime’ (n 25).
because regulatory offences are directed at consequences of conduct and not the conduct itself. Viewing regulatory offences through the workplace health and safety prism, Lacey et al identified three main characteristics of the regulatory model around offence definition, liability and enforcement. In his survey of regulatory enforcement, Macrory found that most regulatory misconduct was subject to criminal sanction. In current Irish parliamentary drafting practice, a regulatory offence is a lesser type of offence, involving no intent proof, is not odious such as a moral offence, and while it does not attract a term of imprisonment, fines are in order, as are add-on sanctions such as reprimands, cautions and disqualifications which are not regarded as penalties.

The above survey however, aids little in formulating a more comprehensive and vital definition of a ‘financial regulatory offence’. To this point, regulatory offences have been characterised as minor, mainly involving no fault, with some statutory defences, and involving minor penalties. Clearly serious, less so and minor misconduct must all be covered. The harm focus must widen, beyond harm to immediate others, to include civil society effects. Increased disclosure obligations on the part of market actors will be reflected in new inferences, reverse burdens and presumptions. Recognition of the individual/corporate differential, including intent elements, and statutory defences, will be required, as will procedures toward joint individual/corporate charging and trial. Definitions where the harm risk confronted are clearly stated and visible; where moral blameworthiness, as opposed to no-fault strict liability, is retained for all but the most minor technical matters; where ‘stigma’ is related to offence seriousness; where appropriate sanctions are applicable, and publicly prosecuted, within a specialised enforcement regime based in accountable and transparent norms, while grounded in Dicey’s rule of law, and abiding the newer and reformed form of Packer’s due process; would lie at the heart of an enforcement enterprise for financial regulatory reform. They would for instance, overcome Scott’s critique that specific group targeted and instrumental enforcement runs the risk of infringing universalistic and principles-based reasoning; and, relegate as secondary, his fear that utilitarian concepts of regime

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1071 See R v Wholesale Travel Group (1991) 3SCR; David Janway Davies v Health and Safety Executive [2003] IRLR 170 (CAC);and Lacey Wells and Quick (n 290), 650.
1072 See Lacey Wells and Quick (n 290), 645 as discussed in Appendix K.
1073 Macrory Review (n 122).
1074 Interviewee H Parliamentary Draughtsman Ireland 20 December 2012.
efficiency and effectiveness, override the normative complexity of legal concepts such as intent\textsuperscript{1075}. 

The literature and practice as explored, mandate decisions about whether offences will be defined around rules or principles or both. Principles undoubtedly allow more flexibility such as for licensing-style prescriptions, but may not sustain prosecutions directed toward criminal proofs standards, which traditionally rules-based drafting has provided. As to proofs, I adopt Macrory’s view that the criminal standard and procedure be applied. This will negate article 6 ECHR difficulties and allow for all sanctions to be regarded as punitive if necessary. The additional protection afforded to suspects, will be off-set by greater disclosure obligations, thus maintaining the Packer obstacle course, although re-jigged. Consequently, this means that discretionary decision-making, as to investigation, prosecution/charge and sentence, will be governed by criminal law values. Statutory establishment, with collaborative involvement, of an independent specialist means, separate from the control agency which enjoys an ongoing relationship with suspects, is warranted for drafting discretionary operational guidelines, a single sanction suite, and sentence factors and guidelines. This would best be accompanied by establishing/designating a separate specialist prosecutorial and arbitral authority with full inherent jurisdiction. Accountability and transparency within the rule of law, as well as equity and legitimacy will be enhanced by such, and thus promise the likelihood of increased compliance.

Serious misconduct, which the regulator refers to the prosecutor for indictable criminal prosecution, or matters which an accused wishes to have treated as such, may then both be dealt with by a criminal trial where the single and common sanction suite will apply in the event of a conviction. Breach cases will also be similarly dealt with. Specific tailoring of sanctions to specific harm risks would reflect calls in the regulatory literature. To afford maximum flexibility, in a type of parallel proceedings approach, where the prosecutor decides to partly prosecute, and partly resolve by negotiated resolution, then simultaneous civil-style interim or interlocutory relief may be obtained such as injunctions. This may occur despite the criminal trial still pending, where serious prejudice, as discussed earlier, may be the protective shield. Orders may be achieved in

\textsuperscript{1075} See Scott ‘Regulatory Crime’ (n 25).
the same criminal proceedings, subject to civil proofs and procedure, or in separate yet mirrored civil proceedings, as policy-makers determine, and as statutorily stipulated. Mostly, world-wide international practice has seen separate proceedings in separate courts being utilised. I argue this as best practice, although article 38 of the Irish constitution does not require separation of civil and criminal courts. Once the court however, for instance, the Irish High Court, has full inherent jurisdiction, all matters could be dealt with in the same forum, providing the likelihood of practice (including same judge), procedure and sentence consistency. There is ample comfort from the Supreme Court in Goodman International that even allegations of illegal activities, fraud and malpractice may be investigated in a parallel proceeding\textsuperscript{1076}. And, the upholding of the civil forfeiture jurisdiction in Murphy v GM similarly supports, once civil due process is followed\textsuperscript{1077}. In the hybrid, part prosecution proceedings proposed, all admissions contained in a previously concluded and approved settlement agreement will be admissible in the subsequent criminal trial.

However, where the suspect and regulator consent to negotiated resolution and its conditionality, where court approval is stipulated, then different civil-style proofs and procedure standards may apply. Here, the enabling statute will set out conditionality principles allowing for flexibility and a catch-all ‘other additions’ discretionary category. Such will enable both RFSP and regulator to innovate regulatory outcomes, tailored to innovative regulatory circumstances or products. The agreed conditionality will govern the enforcement outcome, while in the event of disagreement over conditionality, the ‘suspect’ will be allowed to apply to the specialist court for a ruling upon grounds of reasonableness\textsuperscript{1078}. All agreements, which may include no prosecution and deferred prosecution stipulations, and must include a clear statement of all admissions by the suspect, must be court approved and be time-defined. Effectively, there will be no prosecution, save where it emerges that full disclosure and cooperation conditionality has not transpired, or in the event of breach of other conditionality. In that event matters may be fully or partly re-opened, all admissions will be admissible, all penalties will stand, and the additional proceedings will be prosecuted with criminal proofs and procedure,

\textsuperscript{1076} See Goodman International v Hamilton (No 1) [1992] 2 IR 542 (HC & SC).
\textsuperscript{1077} See Murphy v GM [2001] 4 IR 113 (SC).
\textsuperscript{1078} Business leaders complain of feeling obliged to accept administrative penalty to avoid financial cost, time cost and/or reputational effects implications, is discussed more fully in Appendix K.
with the full range of sanctions available. In all cases the sentencing basis will be that prior sanction compliance will be included in the ‘total price’. Furthermore, sanction discount incentives will only apply to negotiated resolution, and may potentially be withdrawn or clawed-back for proven breach.

In the absence of a discrete financial regulatory offence form however, the necessity of providing a normatively clear and compliant enforcement pathway, launching factors, and interplay strategy within current binary constraints is obvious. In the event of a new form as demonstrated, similarly, prosecutorial discretion will be aided as to accountability and transparency, by publicly scrutinised advance publication of such.

2.3.3. Sanction Suites, Penalties and Options: The Practice

Sentencing has significant executive or management elements, is directly policy-oriented replete with competing goals and visions, and being discretionary, encompasses the sentencer’s own social attitudes. UK studies indicate, that at summary level, that local sentencing culture, and not the law, training or precedent, is the principal influence, and that the more experienced school new recruits. Criminal sanctioning has five potential adverse effects: a primary penalty (e.g. imprisonment/fine); a secondary penalty (e.g. disqualification); an ancillary order (e.g. sex offender register entry); and ‘collateral consequences’ firstly, by operation of law and secondly, as a matter of fact. These ‘collateral consequences’ include criminal record, reputational damage, social ostracisation, employment black-listing, and, unwanted publicity. For corporate entities, they include adverse share price movements, impacting both the entity and innocent investors, and exclusion from EU and US public procurement tendering. Sometimes these consequences are disproportionate to the contravention/offence. As to primary punishment, the apex imprisonment – incapacitation – is internationally regarded

1079 See Lacey Wells and Quick (n 290).
1080 See Cavadino and Dignan (n 994).
1082 See T O’Malley Comments (n 1081).
as a last resort\textsuperscript{1083}. For RFSPs however, incapacitation may mean extremely serious disqualification or licence revocation, and especially for corporate entities, transfers of equity, or the imposition of public-interest directors, or other autonomy impediments. There are in fact thousands of sanctions, including sanction variations, potentially available for financial regulatory wrongdoing as shown in Appendix I. One significant, post-GFC, trend, is based in the realisation that globalised business enterprise requires multi-national regulatory response. It engages regulators from different jurisdictions collaborating in investigations and administrative or civil-style sanctioning, while leaving criminal aspects to relevant national fora. A prime example is the LIBOR rate-rigging scandal, where the two competitive US regulators, the SEC and the CFTC joined forces with the FSA in the UK\textsuperscript{1084}. Three well-known international banks have suffered large monetary penalties from these multiple regulators, with other banks waiting to take their turn\textsuperscript{1085}. Criminal prosecutions are still pending.

The EU Commission views financial regulatory enforcement, based on \textit{effective, proportionate and dissuasive} sanctions, as a priority principle grounding post-GFC reforms\textsuperscript{1086}. Noting divergent member state practice, the EU Commission opined that criminal sanctions, when appropriately applied, in particular imprisonment, send a strong message of disapproval that could increase the dissuasiveness of sanctions, and further recommended introducing criminal sanctions for the most serious violations\textsuperscript{1087}. In addition, the Commission, reflecting separate sanction suites, recommended a core administrative sanction suite tailored flexibly to discrete violations. They added that criminal sanction may not be appropriate in all cases, and, advocated an assessment of minimum rules on the definition of criminal offences and sanctions. Of such a mixed system, one Irish regulator interviewed for this dissertation, highlighted in its

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\textsuperscript{1083} Ashworth \textit{Sentencing and Criminal Justice} (n 978); A Duff, ‘Guidance and Guidelines’ (2005) 105 Columbia Law Review 1162; T O’Malley \textit{Sentencing Law and Practice} 2\textsuperscript{nd} ed (n 727).
\textsuperscript{1084} UK Treasury Select Committee Report (n 13); Wheatley Review (n 13).
\textsuperscript{1085} See Barclays (US $425 mn), UBS (US $1.5bn) and RBS (US $615 mn).
\textsuperscript{1086} See Case C 68/88 Commission v Greece [1989] ECR 2965 (Greek Maize). This is the standard adopted by the Irish Financial Regulator. Also see COM (2010) 301 (n 12), 4 where such enforcement is seen as one of four linked priority principles for reform.
operationalisation the importance of signalling, national culture, workable instrumentalism and equitable decision-making, issues already explored\textsuperscript{1088}.

Within regulatory literature, sanctions are a fundamental, legally grounded State control mechanism, or enforcement tool, normally specifically and legislatively provided as maxima. They are imposed as a result of a breach of rule, either by a lawfully appointed judge or administrative authority exercising lawful discretion, directed to infringers motivated to apply rules to themselves, by dint of those sanctions attaching to such rules\textsuperscript{1089}. They are secondary rules, which provide the centralised official ‘sanctions’ of the legal system.

Within the binary however, there is no single transversal sanction suite. Coercive in nature, sanctions take many forms whether punitive, privatory or preventive. The vast array of criminal sanctions includes imprisonment, fines and obligatory criminal registration\textsuperscript{1090}. The discrete administrative/civil sanction suite deploys monetary penalties, levies, cautions/reprimands and disqualifications. While the sanction suites differ, at the apex incapacitation is the aim, whether imprisonment on the criminal side, or disqualification and its similar on the administrative. New and specific civil sanction tools, were highlighted as essential, even for pre-crisis Irish financial regulatory control, a demand continued post-crisis in Ireland and beyond, where for instance, specific tailoring of administrative sanctions to specific harm risks has been EU recommended\textsuperscript{1091}. All sanctions at the levels statutorily prescribed, may constitutionally be exercised by

\textsuperscript{1088} Interviewee C Regulator Ireland 6 February 2013 stated: ‘....... criminal powers should be considered during the course of what is a serious offence. I think that is a well-established principle in common law countries...... the criminal system of the country has to fit the demands and needs of society and also what is best in the interests of the country and what is actually workable....... if a given matter is at the top end of the scale, and a criminal action is the best way of sending a message, if you’re a criminal authority or a Regulator then it has to be taken in to account......[but]...... you don’t need to make everybody a criminal to insure that message that this is a criminal offence gets out there. But at the same time you don’t want to be seen to be making unfair judgements and treating one group of people different from another group’.

\textsuperscript{1089} See The State (C) -v- The Minister for Justice [1967] IR 106 (SC) 122 Walsh J; Buckley v AG and another [1950] IR 67 (SC), 84 both as quoted in Appendix K.

\textsuperscript{1090} Freiberg The Tools of Regulation (n 119) has described the Australian criminal sanction regime with over 1,500 sanctions; see Appendix I. Also see ALRC Report on Principled Regulation (n 835).

\textsuperscript{1091} McDowell Report (n 26); Butler et al (n 451); COM (2010) 716 final (n 23); Hamilton ‘Do we need a system of administrative sanctions in Ireland?’ (n 451); Horan (n 87); McDowell (n 451); COM (2010) 716 final (n 23) all as discussed more fully in Appendix K. Interviewee K Regulator Australia 24 May 2012 stated that in his area of expertise that, much like road traffic criminal law in various countries including Ireland and the UK, regulated entities can suffer demerit points attaching to their licence as a result of proven breach, and that once a certain level is reached then the licence can be suspended or even revoked.
criminal courts in Ireland. But, the issue arises as to what level of seriousness of sanction may lawfully be imposed at administrative level.

The Irish Constitution allows for the exercise of ‘limited’ functions and powers of a ‘judicial nature’, by legally authorised persons or bodies within the administrative sphere, which includes the financial regulator. Supreme Court interpretation regards powers and functions which affect citizens’ rights and reputation, in a far reaching way, as not being ‘limited’. The ‘judicial nature’ element, as interpreted in McDonald, arises inter alia where rights are determined, liabilities imposed, or penalty inflicted, as at the financial regulatory sanction stage. The result of the appellate decision in McDonald, according to Hogan and Whyte, was to establish a third category of acceptable body, administrative bodies bound to act judicially. Former Irish DPP Hamilton, has highlighted that Irish courts, upheld the constitutionality of legislatively imposed administrative penalties, in a number of cases, including the Revenue Commissioners imposition of fines for late payment of taxes, and the Companies Registrar’s imposition of increased fees for late filing of returns. However, he also highlighted reluctance to legislate wider, due to constitutional constraints, and argued that an expansory constitutional referendum was likely to fail because voters may not grasp the complexity of the issue. Commenting upon the Supreme Court’s viewpoint in Anderson, McGrath argued that the court drew a sharp two-fold distinction between civil or criminal sanctions, holding that administrative sanctions: (a) do not involve criminal procedures, and (b) are aimed at legitimate administrative goals through ‘deterrence’ and not punishment. Upon examining more recent Supreme Court authority, Hogan and Whyte regard the devising of an interpretation test for article 37 as unlikely, leaving courts to a pragmatic case by case determination, referenced against pre-defined legal principles. Where court appeals,

1092 See Article 37 as quoted in Appendix K; also see Part 2 Chapter 2 section 2.2.2 ff 759; In re Solicitors Act 1954 [1960] IR 239 Kingsmill Moore J all as quoted and discussed more fully in Appendix K.
1093 See McDonald v Bord na gCon [1965] IR 217 (HC) at p 231, Kenny J; Hogan and Whyte (n 238), 154; as quoted and discussed more fully in Appendix K.
1094 See Hogan and Whyte (n 238).
1095 Hamilton ‘Do we need a system of administrative sanctions in Ireland?’ (n 451).
1098 See J McGrath ‘The Colonisation of Real Crime in the Name of All Crime’ (n 335).
1099 See Hogan and Whyte (n 238).
and approvals in a new strategy, as I have argued above, are applicable, then article 37 objections would likely fall away.

The greatest practical, sanction implication, concerns the imposition of fines. One academic interviewed for this dissertation, critiqued that settlement events are meaningless, in practical terms, because fines are made part of the business cost by RFSPs, and this in turn adversely affects the façade of enforcement\textsuperscript{1100}. Being insurable or recoverable from third parties, or even if large not overly affecting monopolies’ or oligarchies’ market share, within the literature they are seen to be a crude instrument in behaviour change, as corporate entities negotiate fines away from stigma into diminished effectiveness and price mechanisms\textsuperscript{1101}. Worryingly for these conclusions, Lacey et al highlighted the statistical preponderance over 150 years for non-custodial and financial penalties\textsuperscript{1102}; Macrory depicted monetary penalties as the most common administrative remedy for businesses\textsuperscript{1103}; while O’Malley concluded the fine is increasingly the most oft-used weapon, the sanction for those ‘in and of’ the market\textsuperscript{1104}. Although the language of ‘discipline’ is used to justify imprisonment, it has little resonance to fines, which Zedner argued have little, ‘reparative, curative or reformation value’\textsuperscript{1105}. Despite this, fines are easily calibrated, they enable the sentencing court to reflect differing degrees of gravity and culpability, they are non-intrusive, not requiring supervision or the loss of the offender’s time, and according to Zedner are straightforwardly punitive, mainly uncontaminated by other values\textsuperscript{1106}. Official UK reports have recommended their use, both in isolation, and in combination with other non-custodial penalties, for all levels of offence seriousness\textsuperscript{1107}; and, to replace community sentences for low-risk offenders\textsuperscript{1108}. Ashworth however, has highlighted, ‘fears that disparities in fining occur to a

\textsuperscript{1100} Interviewee E Academic Australia 22 March 2012.
\textsuperscript{1101} Freiberg \textit{The Tools of Regulation} (n 119); Wells ‘Corporate crime: opening the eyes of the sentry’ (n 18), 377 as quoted and discussed more fully in Appendix K; and see Appendix I.
\textsuperscript{1102} See Lacey Wells & Quick (n 290), 103. Also see Croall \textit{White Collar Crime} (n 87), 111 who stated: ‘The most common sentence used in ....regulatory offences is the fine’.
\textsuperscript{1103} Macrory ‘Reforming Regulatory Sanctions’ (n 120), 233 concluded: ‘At present some 92 per cent of sentencing outcomes against businesses take the form of fines.
\textsuperscript{1104} See P O’Malley, ‘Theorizing fines’ (2009) 11 Punishment and Society 67. Also see Appendix I concerning fine use, and Freiberg’s statement of advantages and disadvantages.
\textsuperscript{1105} See Zedner (n 274), 205-6.
\textsuperscript{1106} See Ashworth \textit{Sentencing and Criminal Justice} (n 978), 303.
considerable degree’. One potential remedy, bar disparities, is to widen the corporate sanction base, such as by deploying the ‘equity fine’, which has been adopted in Australia, whereby a public corporation may be required to transfer shares into a state fund for sale, and later distribution, to crime victims.

Corporate entities and individuals are primarily treated similarly within criminal fining approaches, with statutes increasingly providing offence liability for both, although at regulatory level penalty mxima are often differentiated. But at actual sanctioning there are differences, while at the incapacitation level especially, the same ‘fix’ can’t do. An individual may be imprisoned, a corporate entity cannot. Thus, more imagination and flexibility is needed in the sanctioning enterprise, where corporate probation, community service or monitoring, product banning orders, financial reward restrictions, the appointment of public interest directors, forced shareholder sales or re-arrangements, the use of negotiated enforceable undertakings with conditionality, and the curtailing of board autonomy have all been mooted or tried. The key realisation is that individuals and corporate entities must in some respects be treated differently, to be imaginative in the approach applied, and to exercise flexibility in regulatory enforcement. Hence, differential treatment when considering launching factors earlier. In a move

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1109 Ashworth Sentencing and Criminal Justice (n 978), 307; section 164(4) Criminal Justice Act 2003 (UK); Ashworth Sentencing and Criminal Justice (n 978), 309 all as discussed more fully in Appendix K.
1110 ALRC Report on Principled Regulation (n 835), para 26.119; Freiberg The Tools of Regulation (n 119); and Croall White Collar Crime (n 87), 158 as quoted and discussed more fully in Appendix K.
1111 See Part 2 Chapter 3 section 2.3.3; Ashworth, Sentencing and Criminal Justice (n 978), 310-311; Central Bank (Supervision and Enforcement) Dail Bill (2011) 43 enacted July 2013 as discussed more fully in Appendix K.
1112 As to the imaginative use of sanctions in the EU environmental sector see Part 2 Chapter 3 section 2.3.3 and Milieu Ltd Report Overview of provisions on penalties (n 835).
1113 Interviewee C Regulator Ireland 6 February 2013 stated of enforceable undertakings: ‘An enforceable undertaking is at its essence negotiated outcome. And in our settlement meetings ...with firms we can agree things that necessarily aren’t in the legislation. So we can agree that they will appoint an independent person to validate so the enforceable undertaking... conditionality... is all about future looking and you will do this and it will be done on a monthly basis and your expert will report to us every two months and will have final say at [regulator] and you have agreed all this so it’s all documented and if you wish to breach this we will go to court and we will enforce the provisions of this contract. But it’s just a contract which happens to be created by a statute with a regulatory wrapper around it’.
1114 See for instance ASIC, Enforceable Undertakings (Regulatory Guide RG100 – 2012);Bergman (n 424); Croall and Ross (n 422); Coffee jnr ‘No Soul to Damn, No Body to Kick’ (n 424); Fisse (n 606);C Ford and D Hess, ‘Corporate Monitorships and New Governance Regulation: In Theory, in Practice, and in Context (2011) 33(4) Law and Policy 509; Macrory Review (n 122); Packer (n 273); Wells ‘Corporate crime: opening the eyes of the sentry’ (n 18). Post-GFC civil servants or public service directors/chairmen became officially in charge of failed (nationalised) banks; examples of this include the British government being the majority owner of the Royal Bank of Scotland (RBS) and Lloyds Banking Group in Britain, the Irish government’s ownership of Anglo Irish Bank, and the German government control of Hypo Real Estate.
seemingly broadening the criminal ‘proportionality’ sentence practice, within a flexible regulatory approach, Freiberg argued that the regulator:

[S]hould consider the effects on the regulatee in terms of markets and.... the administrative burdens imposed, as well as the resources required to employ the option and the consequences if no action is taken.  

Packer speculated, whether extensive criminal prosecution of economic crime, diverted attention and resources from the task of ensuring a competitive market. Implicitly he also recognised markets as special enforcement locations when suggesting, ‘the problem may well be to devise sanctions that are not overly severe’.  

McDowell explored the extension of remedies, beyond traditional criminal sanctioning, into a new model for penalisation via civil law procedure, such as administrative fines imposed by the EU Commission in competition matters, and adverted off-script, to advice he tendered as Irish Attorney General, to the effect that making ordinary citizens so subject, may offend many principles of law.  

In his view additionally, Irish Supreme Court obiter dicta in Murphy v GM implied that the civil standard of proof could be applied to proceedings with no separate criminal law dimension, because Article 38 ‘trial of offences’ stipulations don’t apply.

The tension dilemma, that prosecution is public whereas administrative penalties are sometimes confidential or difficult to discern, thus encouraging the payment of heavy penalties to avoid publicity, a criminal record and imprisonment, has been highlighted by Levi.  

Civil sanction may be cheaper, quicker and more predictable, but it creates a sense of unfairness and social privilege – a dangerous downside affecting sanction efficacy - while stigma and criminal process are a big deterrent to ‘the respectable’.

On the other hand, Lacey emphasised imprisonment’s, ‘uniquely intrusive, stigmatizing,

\[1115\] Freiberg The Tools of Regulation (n 119), 98 as discussed more fully in Appendix K.
\[1116\] See Packer (n 273), 362.
\[1117\] See McDowell (n 451). Also see D McFadden, ‘Two tiers Equals Full Suite: Civil Fines Complement Criminal Enforcement’ in Kilcommins S and Kilkely U (eds), Regulatory Crime in Ireland (First Law 2010) who advocated for civil fines in the Competition legislation which presently contains both criminal and civil sanctions for breaches of competition rules.
\[1118\] Murphy v GM [2001] 4 IR 113 (SC) in which the Proceeds of Crime Act 1996 was held not to contravene the constitutional private property protections of Article 43 of the Constitution.
\[1119\] See Levi ‘Serious tax fraud and noncompliance’ (n 1011).
\[1120\] See Hart The Concept of Law (n 123); Levi ‘Serious tax fraud and noncompliance’ (n 1011).
psychologically painful, and expensive nature'\textsuperscript{1121}; while Braithwaite, even post-crisis, perhaps unsurprisingly, argued that the public is overly pre-occupied with the imprisonment of the guilty, as a crime remedy, despite prison not being the most cost-effective way to reduce crime\textsuperscript{1122}. Concerning the control of white-collar crime by stigma (shaming) and subsequent reintegration into the stigmatising society, Levi has concluded that business elites, absent adverse economic effects, appear invulnerable to shaming processes at national level, and even more so at global level\textsuperscript{1123}. Thus, he propounded that sanctions which damage business prospects, were a more powerful penalty, a view equally endorsed by one dissertation interviewee\textsuperscript{1124}. This demonstrates clearly, that correctly constituting the sanction strategy, allied to the sanction suite, and effective deployment, are vital objectives. Nonetheless, Luban has forcefully argued the real power of the criminal law\textsuperscript{1125}:

\begin{quote}
[C]riminal penalties aid in regulatory enforcement. Would-be corporate offenders know that they might be facing not only an over-burdened regulatory agency, but also tough and capable professional prosecutors – prosecutors who have a powerful investigative tool in their hands, namely the threat of jail time.
\end{quote}

Criminal sanction is not alone a powerful weapon in its own sphere, but within the binary its presence may beneficially impact the administrative regime\textsuperscript{1126}. Between criminal law

\textsuperscript{1121} N Lacey, ‘Principles, Politics, and Criminal Justice’ in A Ashworth and L Zedner (eds), The Criminological Foundations of Penal Policy essays in Honour of Roger Hood (Oxford University Press 2003), 97.

\textsuperscript{1122} Braithwaite ‘Diagnostics of white-collar crime prevention’ (n 138).


\textsuperscript{1124}This accords with the view of Interviewee X Regulator Ireland 12 November 2012 who stated: ‘....we have wondered at times whether issues like disqualification or restriction are actually treated much more seriously by the potential directors in question and they are much more prepared to fight those sorts of issues or those sorts of potential sanctions simply because of the serious damage to reputation’.

\textsuperscript{1125} See D Luban, ‘The Publicity of Law and the Regulatory State’ (2002) 10(3) Journal of Political Philosophy 296, 312; Interviewee Z Business Leader England 29 November 2012 stated: ‘....insider trading is a classic example. When you get somebody like Raj Gupta put away for a number of years it teaches a lesson’. Also see Butler et al (n 451), 21; J Walsh, ‘Persuasion and dissuasion – Seeking Effective Enforcement of Competition Law’ in S Kilcommins and U Kilkelly (eds), Regulatory Crime in Ireland (First Law 2010); DJ Walsh (n 1125), 174 as quoted and discussed more fully in Appendix K.. Interviewee Q Academic Lawyer Australia 5 November 2011stated that in Australia executives rush to seek immunity, because if they reveal first they evade the penalty completely; if the corporation reveals first then there is immunity for itself and for current employees (not past employees); while, if a manager gets in first then only he gets immunity. This provision or tool causes a great deal of information to come to light.

\textsuperscript{1126} See Interviewee C Regulator Ireland 6 February 2013 who stated: ‘I think that stands to reason but I don’t think it’s just the criminal. I think it’s a fact that you say you are going to do something, you take the enforcement action and you’re seen to be taking the enforcement action and that is what gives you the traction in the marketplace. Ireland is a very small place and it gets out there quite quickly’.
as punishment, and contrastingly, just another state regulatory tool which involves fines and imprisonment (rather than injunctions and damages), for Simester and von Hirsch punishment engages censure as an integral aspect, with the level of sentence one measure of opprobrium. They concluded that the crime-preventive aspect of the criminal law, and of its sanctions, is significant evidence of deterrent effect. They also argued, that criminal law is a special regulatory tool for influencing behaviour, having a social significance beyond civil law. Here, conviction and sanction send clearly understood messages, with the criminal law embodying a qualitatively unique, and more significant, moral communicative voice, lacking in the civil arena. Within the interplay between administrative and criminal dimensions, Macrory espoused compliance sophistication in focused reform:

[C]hanges taking place should lead to a system where the criminal law is more focused on the truly criminal, where sanctions better reflect the range of circumstances involved in regulatory breaches, and where they encourage restoration and improved compliance in a more sophisticated way.

Of course, irrespective of the optimal interplay policy, what the ‘truly criminal’ consists of, who determines its parameters, and what ‘sophistication’ entails, are all individually and collectively completely another matter. It is my argument that sophistication is best demonstrated in a fused binary, rather than one composed of two competing poles. At the wider level, the legislative structure of the Irish criminal justice system is geared almost exclusively towards the prosecution of non-regulatory crime. This means that all prosecutors are bound by the considerations which bind public, rather than regulatory prosecutors, resulting in a history of regulatory criminal prosecution being modest in scope and effect. The sanction rationale for the Irish financial regulator’s administrative regime can be located to the McDowell Report, where easier proved civil sanctions were the preferred remedy, all based around civil law practice. Regulators however, require armament with a range of sanctions both to deal with a diversity of infringers, and to carry sufficient enforcement threat. Single option sanction suites run the risk of credibility and lack of flexibility constraints. Segregated binary sanction

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1127 See Simester and von Hirsch (n 125).
1128 See Macrory, ‘Reforming Regulatory Sanctions’ (n 120), 242.
1129 See Farrell (n 920).
1130 See McDowell Report 1999 (n 26).
1131 Welsh ‘The politics of civil and criminal enforcement regimes’ (n 1028).
capability, on the other hand, quite apart from its internal paradoxes, drives regulators into an unenviable choice between civil or criminal options, the position which third way proposals particularly seek to avoid. Thus, the optimum sanction suite, finds an interchangeable commonality on either side of the binary continuum, and running across it, with transparent operational guidelines so as to avoid regulatory capture issues. The universal application of a single standard of proof, the criminal ‘proof beyond reasonable doubt’ standard, especially relevant where severe monetary penalties may be imposed on the civil/administrative side, I argue as one Macrory sophistication, which may be legally obligatory in any event.

Illuminating the ongoing interplay discourse, Macrory stated of his UK Review:

‘Where the Review and ..... the Government broke new ground was to set [statutory reforms] within a clear set of principles concerning the rationale for sanctions that combined and integrated both criminal and civil approaches’. Possibilities include conceiving penalties as ‘sanctions’ per se, devising a common coordinated strategy and a transversal sanction suite, and, ditching the criminal/civil divide. Assisting innovative sophistication, a new interplay strategy may copy the recent ASIC deployment of six ‘Broad Sanction Action Types’, across a hard to soft spectrum, as set out in Part 2 Chapter 2 section 2.2.4 (b): Punitive including imprisonment and fines; Protective such as disqualifications; Preservative such as asset or evidential document protection injunctions; Corrective including orders to correct misleading financial advertising; Compensatory including reparation and disgorgement; and, Negotiated Resolution where

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1132 See Morris and Tonry (n 971), 38 as discussed in Appendix K.
1133 See Macrory Review (n 122); Welsh ‘The politics of civil and criminal enforcement regimes’ (n 1028). It is my submission that due to article 6 ECHR and to article 37 of the Irish Constitution that the Irish administrative sanction regime is punitive and not minor or limited and thus is captured within the criminal law forms.
1134 See Macrory ‘Reforming Regulatory Sanctions’ (n 120), 241.
1135 See the Regulatory Enforcement and Sanctions Act 2008 (UK).
1136 Interviewee C Regulator Ireland 6 February 2013 stated of sanction options: ‘One of the greatest powers that Regulators have..... is the power to impose a direction or a condition of a licence....Calling itself enforcement doesn’t probably do .... justice to the power it is......if you have the power to issue a direction on a regulated firm to tell it to cease writing business and if it’s an insurance company you have just messed around with that company’s very reason it’s essence for being’. Interviewee Q Academic Lawyer Australia 5 November 2011 referred to the use of the punitive injunction on both the civil and the criminal side which as contemplated would be the most severe sanction when mobilised as both mandatory and interventionist. Also see R Rawlings, ‘Introduction: Testing Times’ in Oliver D Prosser T and Rawlings R (eds), The Regulatory State (Oxford University Press 2010) as discussed more fully in Appendix K.
settlement agreements would locate\textsuperscript{1137}. In general terms, I argue that this categorisation may successfully form the basis for a single, transversal sanction suite for a fused binary.

Thirty years ago, Braithwaite advocated a “\textit{disparate arsenal}” of corporate and individual sanctions, for three reasons\textsuperscript{1138}: 1) to accommodate the situational variations where punishment is required; 2) to make punishment a special event as opposed to a routine event; 3) to help refine the pyramid or hierarchy of enforcement. Post-crisis an examination of Irish sanctions reveals some lacunae and a broadened suite is apposite. One very intriguing proposition emerged simultaneously from the criminal law sector, in the form of the Council of Europe proposition that sentenced prisoners be encouraged to participate in drawing up their individual sentence plans\textsuperscript{1139}; and, was mirrored in the UK Macrory Review regulation reforms, which allow offenders to propose their own sanction e.g. staff retraining or compensation for victims\textsuperscript{1140}. This would tailor nicely into enforcement undertaking conditionality, although mobilisation may require refinement from current practice\textsuperscript{1141}. It may be difficult to work however, absent maximum cooperation and disclosure, at any stage above minor enforcement.

New sanctions, and sanction tools, include those gleanable from international comparators, both reflecting public outrage, and demonstrating cultural influences relevant to Irish reform\textsuperscript{1142}. For example, from US SEC practice, demonstrated above, cooperation is an essential sanction focus, and it forms the base for negotiated resolution even beyond immediate penalty imposition. Their often deployed deferred and no prosecution agreements, with commercial contract-style negotiated conditionality, have

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\item[1137] See Appendix K for a more complete discussion of theses sanction categories. At a practice level, recently the EU Commission in its preliminary examination of relevant interplay considerations has \textit{inter alia} opined that: a core set of administrative sanctions is required; administrative sanctions should be tailored to specific infringement; criminal sanctions, and in particular imprisonment, generally send a strong message of disapproval; and, that criminal sanctions may not be appropriate for all types of financial regulatory violations and in all cases. See COM (2010) 716 final (n 23).
\item[1138] Braithwaite \textit{Punish or Persuade} (n 535), 168.
\item[1140] See Macrory Review (n 122); Macrory, ‘Reforming Regulatory Sanctions’ (n 120).
\item[1141] Interviewee E Academic Australia 22 March 2012 warned that enforceable undertakings as practised in Australia are too weak (‘pathetic’), and argued that because enforceable undertakings are negotiated, they depend on the capacity of the contract, that is the terms that are made/set, and If such terms go too far there is a legitimacy problem.
\item[1142] See Commission, ‘Towards an EU criminal policy – Ensuring the effective implementation of EU policies through criminal law’ (Communication) COM (2011) 573 final, where cultural differences across the EU were highlighted in relation to formulating a common crime policy.
\end{enumerate}
\end{footnotesize}
been mooted for Ireland and for the UK. These agreements allow a great deal of flexibility around sanctioning. Conditionality may include newer forms of enforceable undertakings, perhaps even where the infringer suggests all or part of a penalty, or where corporate monitoring or re-training is stipulated. They allow a sanction statute to provide for all agreed conditionality as legitimate, allow regulators to move as ‘real-time’ as possible to market innovation, and furthermore, significantly allow for the re-instatement of criminal prosecution in the event of breach, under circumstances where admissions previously made may become admissible in evidence. Even where a double jeopardy pathway is chosen, this type of parallel approach may be in-built, via conditionality specifically providing for breach re-activation. Clearly, the ESMA Report already cited, also demonstrates that civil law grounded EU member states, find no difficulty in applying a parallel sanction approach. Some give no credit in the second proceedings for penalties imposed in the first. It is my argument, that the optimum position for the regulator is a parallel sanction approach, while the infringer is entitled to the protection of credit for prior penalties imposed, but only where discharged, and conditionally remains unbreached.

Two EU areas of comparative interest, affect the sanction suite. First, some sanctions and sanction techniques, available in the EU environmental area, appear transferrable to financial regulation in Ireland. This includes: a wider and more imaginative sanction array or arsenal; the anomaly of heavier criminal law maxima than currently apply to financial regulation; and, broader culpability capability, where for instance, negligence is utilised. Sanction varieties include restriction, suspension or prohibition/ban of the activity; cancellation or restriction of licence; seizure of tools, machinery and equipment; imposition of rectification or corrective measures; closure; loss of tax credit, credit financing and other benefits; business and product exclusions; and, making public the

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1143 Appleby Reflections on Weaknesses with respect to Accountability (n 455); Elderfield Opening Remarks (n 417); Ministry of Justice Consultation Paper, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (CP9/2012 Cm8364 17 May 2012).

1144 Milieu Ltd Report Overview of provisions on penalties (n 835). The sanctions mobilised throughout different EU member states include three categories: (i) criminal law sanctions; (ii) quasi-criminal sanctions known as “administrative criminal”; and, (iii) administrative sanctions. See Appendix K for more detail.

1145 See Appendix K for an extended footnote about EU criminal law strict liability and culpability generally. As to Ireland Mr Justice Frank Clarke of the Supreme Court was quoted post-GFC in the print media as quoted in Appendix K see R Mac Cormaic, ‘Ireland ‘does not treat negligence in major institutions as criminal’ The Irish Times (Dublin, 19 October 2013).
sentence. In commenting upon the EU environmental sector generally, but of wider application to the financial regulatory sector, Svatikova has recently argued that the criminal law is particularly appropriate for serious infringement. She identified four normative economic criteria for criminalization: (1) harm is large and/or diffuse and/or immaterial and/or remote; (2) stigma is desired; (3) detection probability is low; (4) criminal enforcement costs are sufficiently low. As regards harm, it is my argument that, perhaps frequency, duration, timing, and impact should be added; publicity is best viewed an essential sanction as opposed to a discretion; and, the nature of secretiveness or low detection probability begs the need for whistleblower protection and reward, and impacts offence and thus sanction seriousness. The degree of stigma clearly is harm referable, and highlights the need for discretionary guidelines which operate fairly, so as to ensure accountability, transparency and thus legitimacy. The cost argument is now an essential feature of regulatory risk management.

Second, broadening regulatory tools, and exemplifying a greater command and control attitude post-GFC, the EU Commission, based in G 20 reform proposals, outlined their own proposals for the reform of the regulation of market abuse. Under the current 2003 Market Abuse Directive, only administrative measures or sanctions are EU stipulated, but Member States are not precluded from adding a criminal dimension. The outstanding majority of Member States, in principle, provide for both administrative and criminal sanctions, although diverge regarding the launching factors. The new proposal mandates EU-wide criminal enforcement, and extends it to criminalising inciting, aiding and abetting, as well as attempts at market abuse, thereby ratcheting-up the potential stigma level, all geared to market integrity protection. Relevant to the sanction interplay issue are the, common law compatible, policy statements, contained in

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1146 See Svatikova (n 904). As to ‘serious’ cases, policy-makers must decide the boundaries, for instance, by stipulating the common Irish norm that every case involving a potential penalty of five years imprisonment is a serious matter.
1147 See Europa Press Release “Proposals for a Regulation on Market Abuse and for a Directive on Criminal Sanctions for Market Abuse”, Brussels 20th October 2011 memo/11/715 paragraphs 4 and 5; and see Council document 5908 (n 670) as quoted and discussed more fully in Appendix K.
1149 See ESMA Report (n 835), paragraph 13 and 23; Europa Press Release, ‘Proposals for a Regulation on Market Abuse and for a Directive on Criminal Sanctions for Market Abuse’ (Brussels memo/11/715, 20 October 2011), paragraphs 12-14, as quoted and discussed more fully in Appendix K.
the highly influential criminal law Manifesto of the fourteen wise lawyers, which advocate inter alia restrictive criminalisation and proportionate sanctioning\footnote{A Manifesto on European Criminal Policy, (2009), published by 14 EU academic criminal law professors as discussed more fully in Appendix K; Also see EU Commission Press Release “Towards a reasonable use of criminal law to better enforce EU rules and help protect taxpayers’ money”, 20th September, 2011, IP/11/1049.}.

Distinction in enforcement generally, and thus sanction imposition, within a flexibility approach, may be drawn for instance, when considering ‘hard-core collusive behaviour’, the size or scale of a business organisation, and the geographical impact or operability of such business\footnote{See ALRC Report on Principled Regulation (n 835); Macrory Review (n 122); Macrory ‘Reforming Regulatory Sanctions’ (n 120).}. In my argument, three categories of cases merit criminal law involvement. The catastrophic and recidivist infringement cases which equally impact interplay policy, but in doing so pull in different directions; the serious cases make decision-making easier, but including recidivists maintains the regulator’s credible threat. The small but repetitive cases may go unnoticed, or insufficiently noticed, if the over-riding policy is geared toward the serious end only. The third category for criminalisation, already broached, is that of agreement breach by the infringer. Admixture of perceived ‘bi-polar’ civil and criminal approaches (polarised compensation and punishment paradigms) will result as some claim, in no or no worthwhile regulation of the middle-ground, unless a fused binary is adopted, and the field of action is explicitly stipulated\footnote{See ALRC Report on Principled Regulation (n 835).}. This is a primary dissertation issue, which must be broadened to sanction purpose. Concerning the position of ‘victims’ in the financial regulatory space, an issue highlighted when the harm principle was interrogated, Findlay and Henham, criticised mere ‘symbolic and rhetorical’ repositioning of penalty\footnote{See Findlay and Henham (n 124).}. They called for an ideological realignment, synthesised from an engagement between the morality informing the ideology of justice, and the morally legitimate expectations of such crime victims, and the crime context. The issue then becomes what constitutes this synthesised re-alignment.

Drawing upon the legal mobilisation, two-some technique, of reactive citizenry or proactive state, Sparrow examined the shift where a traditional reactive agency recognised a deficiency in its strategy\footnote{See DJ Black (n 1041) who pioneered the distinction between proactive and reactive mobilisation, although Reiss is anecdotally credited by Grabosky with coining the word ‘proactive’; also see M Sparrow, The Regulatory Craft (Brookings Institution Press 2000).}. He concluded, that eventually the agency
realises that the preferred goal is to improve compliance, and that all tools, and a broader and more comprehensive range of tactics, contribute to success. This entails finding a balance between a credible deterrent, and the public relations benefits and resource efficiencies of more co-operative methods, and then moving to an integrated compliance strategy. Thus, the use of all tools and the widest range of tactics promises binary optimisation based in integrated compliance. This example is apposite to Ireland particularly, since the Irish financial regulator pre-GFC was captured, and operated a retreatist enforcement style, thus rendering him reactive as opposed to proactive. Furthermore, post-crisis, the targeted Irish supervision and the connected enforcement style is both proactive and reactive. Accordingly, an all tools and tactics approach is required, namely, aligning the overall incentives facing decision-makers in RFSPs, more closely with public policy.

Integrated strategy is associated with the development of co-ordinated, multifunctional response, the invention of new tools, techniques and solutions, and dynamic resource allocation. Concerning the utility of Macrory’s statutory marriage of strategy and sanction, and the potential synergy of such interplay, Rawlings stated that it was: ‘the statutory grounding of an innovative suite of sanctions within a set of principles of regulatory governance emphasizing transparency and accountability’. For Rawlings therefore, and in my argument, the marriage is between policy – represented by the regulatory principles, including its values complex, pathway and launching factors – and the statutorily grounded and innovative sanction suite. The preferred sanction strategy within the sanction suite and its hierarchy, is primarily tailored towards compliance, unafraid to engage criminal justice, may be punitive but not destructively so, and while correcting for unjust enrichment, must avoid stigmatising the innocent. It is clear that a sanction suite, complementing such a strategy, must have in-built discretion for the enforcer to meet such aims, and preferably entail sanction guidelines. The ability to regularly review both guidelines and penalties, and change them rapidly where necessary, is also mandatory. Risks to both individual and corporate liberty, and livelihood, require a transparent and accountable mechanism, to arrest unfettered exercise of discretion, as part of the institutional enforcement framework. Dicey’s rule of law still rules.

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1155 See Sparrow (n 1154).
1156 Rawlings (n 1136), 12-13.
1157 See for instance, Yeung Securing Compliance (n 437); Yeung ‘Better regulation’ (n 437).
Packer’s theoretical due process values may therefore be re-constituted, but will still temper coercive control, within adversarial justice, and beyond, such as negotiated resolution, where it influences. Macrory’s accountability and transparency norms are integral.

While for some strategy is the key rather than the components\(^\text{1158}\), I argue however, that strategy plus the components (offences and sanctions) are the key, and the two are interconnected. The strategy may not be implementable without the components, and the components are useless without an overall game-plan or policy, which strategy provides. The task is to explicitly framework within the rule of law, in a collaborative way, the inter-relationship between political liberty, private property, and, the reach of control, which includes administrative and criminal sanctions\(^\text{1159}\). Regulation, within this strategic interplay, works best when enforcers can call upon a mix of enforcement strategies and sanctions\(^\text{1160}\). Both civil and criminal sanctions, and separate administrative and criminal jurisdictions, must be possible, as Braithwaite originally envisaged\(^\text{1161}\). Nothing of course, prevents the transversality of penalties, or their simultaneous or subsequent use across the jurisdictions, based upon the same facts. Once a total price guarantee is stipulated, it does not matter from which binary side a sanction is imposed. Giving enforcers the power to both punish and deter, in a ‘carrot and stick’ approach, gives legitimacy to those wishing to persuade, and we now interrogate these strategies\(^\text{1162}\).

2.3.4. The Modern Sanction Paradigm

The modern regulatory sanction paradigm, draws from, and/or is influenced by, normative assumptions from both binary poles. The downstream sanction paradigm mimics the upstream criminal justice/regulation paradigm, in that sanction is legally grounded, institutionalised and institutionally administered around normative principles. Lacey has described sanctioning as a social practice, grounded in a plurality of community

\(^{1158}\) See for instance, Fisse (n 606).
\(^{1160}\) Braithwaite *Punish or Persuade* (n 535).
\(^{1161}\) Braithwaite *Punish or Persuade* (n 535).
\(^{1162}\) Appleby ‘Compliance and Enforcement’ (n 605), 189 as quoted in Appendix K.
values which sometimes conflict. It has already been depicted normatively by Coffey/Mann/Yeung as a punitive/reparative divide; Ayers and Braithwaite punish or persuade; Prosser/Cadbury the regulatory command and control versus comply or explain. In strategic terms, the criminal pole engages confrontational deterrence, and the regulatory/administrative responsive compliance with a future behaviour change perspective. Sanction is the coercive face of control, the upholder of the regulatory contract, the dependent end result of a proven offence or contravention, and thus, the tool which enforces financial regulation and makes it a reality. As the motivation to RFSP compliance, and future behaviour change, sanction is the avoidable, and to be avoided, event. As deterrent, it is the signal to RFSPs, illegal operators inhabiting black and grey latitudes, and others including the populace, that, action follows misconduct and therefore, protection and prevention work. Sanctioning, such as the punishment or persuade paradigms, are the opposite ends of a single continuum. It is the underlying principles or norms within such continuum, rather than a strict rules-based approach, which are being increasingly seen as the way to provide a modern, just and transparent punishment regime.

(a) Components

As demonstrated, in Part 1 Chapter 3 section 1.3.5 (c) ‘deterrence‘ a sibling of the prescription concept, occupies a central place in the modern criminal law norm structure, and derives from the punishment theory originated in Benthamite utilitarianism. The original sanction objective was graded punishment according to the crime, while the overall goal was envisioned to establish different degrees of aggravation of offences,

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1163 N Lacey, State Punishment: Political principles and community values (Routledge 1988).
1164 See for instance, Gunningham ‘Negotiated Non-Compliance’ (n 603); Hawkins Environment and Enforcement (n 709); Hawkins and Thomas Enforcing Regulation (n 708); AJ Reiss jnr , ‘Selecting Strategies of Social Control over Organisational Life’ in K Hawkins and JM Thomas (eds), Enforcing Regulation (Kluwer-Nijhoff 1984). Also note Hobbes (n 281), 717-718 as quoted in Appendix K.
1165 Ashworth ‘The Decline of English Sentencing and Other Stories’ (n 975) described UK trends pre-GFC as producing, ‘a twin-track approach to criminal justice, suggesting that nonpunitive responses at one end of the sentencing scale are acceptable only in tandem with heavily punitive measures at the other end’. See LRC Report ‘Mandatory Sentences’ (n 469); I O’Donnell, ‘Information vital to sentencing and punishment’ The Irish Times (Dublin, 17 June 2013); T O’Malley Sentencing Law and Practice 2nd ed (n 727). It is also the view of Interviewee E Academic Australia 22 March 2012; and, Interviewee W Academic Australia19 October 2011.
1166 T O’Malley Sentencing Law and Practice 1st ed (n 535) as discussed more fully in Appendix K.
executing appropriate punishment, after allowing the sentencing court a limited discretion\textsuperscript{1168}.

More recent change, in the sanction paradigm, has been traced to a change in the relationship between the citizen and the state, and indeed in the state itself, attributed to jostling among the different manifestations of the authoritarian state, the preventive state and the regulatory state\textsuperscript{1169}. One of these changes is the delegation of social tasks in punishment, to specialised regulatory or control agencies, found either on the margins of social life, or occupying an esoteric bubble, resulting in them becoming hidden\textsuperscript{1170}. This is an apt reference to forms of sanctioning in the financial regulatory sector, where much is conducted in private, with non-universal publication of outcomes, and where publication if effected, is generally by electronic means, requiring those interested in actively seeking out the information. The traditionally operated open, ritualised sanction dialogue between community and offender, Garland argued, has become a much more oblique communication\textsuperscript{1171}. One recent Irish critique, highlights the emergence of a ‘regulatory society’, where the increasing and extensive use of regulatory strategies in areas such as competition law, environmental protection, health and safety law, and consumer and corporate affairs, entail criminalisation as the strategy of ‘last resort’, when compliance through negotiation and monitoring – effectively persuasion - has failed\textsuperscript{1172}. If this is so, then there must be room, for both punishment and persuade, in a sanction strategy.

Penality has been described by Garland, as a cultural text, even a cultural performance, which sends an extended range of signals, and communicates with a variety of social audiences, including market offender, other market actor, victim, professional criminal justice actor, and the public\textsuperscript{1173}. As such the criminal law is concerned with power, authority, normality and social relations, and possesses an important symbolic function in


\textsuperscript{1169} See Ashworth and Zedner (n 407).


\textsuperscript{1171} Garland Punishment and Modern Society (n 1170).

\textsuperscript{1172} S Kilcommins and U Kilkelly, ‘Introduction: Regulatory Wrongdoing in Ireland’ in S Kilcommins and U Kilkely (eds), Regulatory Crime in Ireland (First Law 2010); and Butler et al (n 451), 21 as quoted in Appendix K.

\textsuperscript{1173} Garland Punishment and Modern Society (n 1170).
constructing social values, or in upholding the prevailing structure of power relations. In paradigm terms, it is about ordering and control as seen. Operationalisation entails a rationale, and implementing norms. The sit-above sanction rationale in Irish practice has been drawn from the two broad traditional theories of punishment which mask the myriad underlying strands. These are the deontological (consequentialists) and the teleological (retributivists), described as two competing normative conceptions of criminal law, where consequentialists justify punishment as a contingently efficient technique for achieving some benefit, and retributivists justify punishment as an intrinsically appropriate-just deserts- response to crime. Garland, updating the classical deontological benefit analysis or utilitarian deterrence, prevention and rehabilitation viewpoint, explained that penal signs are a repetitive set of instructions about good and bad, and ordered and disordered behaviour, and teach about what to accept or condemn, and how to classify conduct, all the time providing an interpretive language. He emphasised, the positive capacity to produce meaning and create normality, and not only the negative side to suppress and silence deviance. This positive capacity is an important consideration in relation to financial regulation, where currently, targeted, interventionist superintendence is a major feature of the paradigm.

The competing teleological/moral retributive or crime response – perhaps negative - view of punishment may be set in moralistic terms, so that when laws are broken, the offender is culpable and deserves to be punished, while criminal conviction expresses an adverse social judgement of blameworthiness. In such a view, punishment is denunciatory, retributive and proportionate - commensurate with the seriousness of the offence. Within this milieu, crime control requires the repression of criminal conduct as its priority. And it is here that a great tension emerges. Because when financial regulation is considered, for the most part, whatever sanction set is available, is imposed at an administrative level, and excludes incarceration as a sanction option. If punishment severity is to be related to offence gravity, then it follows, that all options must be available within the sanction set. Since the late 1970’s O’Malley explains, most US

\[1174\] See Garland, *Punishment and Modern Society* (n 1170); and, Lacey Wells and Quick (n 290).

\[1175\] T O’Malley *Sentencing Law and Practice* 2nd ed (n 727).

\[1176\] A Duff, ‘Penal Communications: Recent Work in the Philosophy of Punishment’ in M Tonry (ed), *Crime and Justice: A Review of Research* (Chicago University Press 1996); Lacey Wells and Quick (n 290).

\[1177\] Garland *Punishment and Modern Society* (n 1170).

\[1178\] See Lacey Wells and Quick (n 290).

\[1179\] See Packer (n 273).
jurisdictions have adopted the retributive ‘just deserts’ approach, and Canada and the UK followed suit by adopting proportionality as their guiding principle of sentencing; while in Ireland, a similar step was taken via judicially developed case law, although courts still place considerable value on rehabilitation. The sit-below, judicially pronounced, implementing sanction values require that sanctions in Ireland may not be impermissibly wide, and indiscriminate, in respect of right to livelihood and property rights. Further, to conform with the paradigm as explained they must be both proportionate, and may not by disproportionate means, seek to obtain a legitimate objective. Proportionality entails a three-step process, of first locating the sentence range; second placing the sentence within the sentence range, based upon offence gravity, where offender culpability and behaviour, and harm caused, are the factors; before finally considering the aggravating and mitigating factors. Sanction must also be applied consistently, meaning be approached consistently.

In terms of the imposition of multiple penalties, as in a parallel approach, significantly in Redmond it was held that there must be a proportionate and cumulative ‘total price’, where all permissible previous impositions, are later taken into account. This amounts to a maximal cap or limiter, proportionate to the individual case. In US practice, the total price formula allows for second case reparative effects to be added on, even where set out

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1180 See T O’Malley Sentencing Law and Practice 2nd ed (n 727); The People (DPP) v McCormack [2000] 4 IR 356 (CCA), 359 Barron J; The People (DPP) v Kelly [2005] 1 ILRM 19 (CCA), 30 Hardiman J; Horan (n 87), 405; and also see for instance, The People (DPP) v Oran Pre-Cast Ltd (16 December 2003, unreported) CCA, and DPP v O’Flynn Construction Company Ltd [2007] 4 IR 500 (CCA); Kilcommins O’Donnell O’Sullivan and Vaughan (n 299), 11 all as quoted and discussed more fully in Appendix K.


1182 See State (Healy) v O’Donoghue [1976] IR 325 (SC); The People (DPP) v WC [1994] 1 ILRM 321; The People (DPP) v Sheedy [2000] 2 IR 184; The People (DPP) v Kelly [2005] 1 ILRM 19 (CCA); The People (DPP) v O’Dwyer [2005] 3 IR 134; Pudlizewski v Judge Coughlan [2006] IEHC 304; The People (DPP) v H [2007] IEHC 335 (HC); The People (DPP) v GK [2008] IECCA 110; The People (DPP) v Keane (n 87), 18; T O’Malley Sentencing Law and Practice 2nd ed (n 727); and Hardiman J in The People (DPP) v Kelly [2005] 1 ILRM 19 (CCA),29 as quoted and discussed more fully in Appendix K.

1183 Consistently means principled approach (not outcome) to offenders in a like manner. Sentence disparity (outcome) is permissible. See Law Reform Commission, Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court (LRC CP 33-2004); LRC Report ‘Mandatory Sentences’ (n 469), 14; Halliday Report Making Punishments Work (n 1107).

1184 In People (DPP) v Redmond [2001] 3 IR 390 (CCA) Hardiman J reviewed the divers sanction types available as crime response including disqualification, administrative (including Revenue) penalties, and civil damages, and advocated a proportionate and cumulative approach to sanctioning under which a court has regard to the ‘total price’ paid by the offender for his infraction. Also see T O’Malley Sentencing Law and Practice 1st ed (n 535), 128 regarding the ‘total price’ concept and argument; and T O’Malley Sentencing Law and Practice 2nd ed (n 727), 95 onwards regarding ‘cumulative proportionality’.
as monetary penalties, and seemingly punitive, where they amount to making the state whole, or in other words recouping to the state the costs of enforcement\textsuperscript{1185}. The mobilisation of an available single sanction suite, drawing across both binary poles, would negate double penalty jeopardy, and promise maximal tariff capping, as stipulated in any statutory sentence provision.

Because rehabilitation has been declared an essential ingredient in Irish sentencing, as stated, a lesser penalty may be attracted where a rehabilitative programme is involved\textsuperscript{1186}. Contemporary welfare-based rehabilitation theories have largely been immersed in the increasing provision of community penalties such as probation, community service, and community treatment including restrictive structured programmes. The individualised discretionary character of correctionalist arrangements has afforded greater latitude to both policy and sentence decision-makers\textsuperscript{1187}. Yet among the options, and especially when prevailing political winds are factored in, a disparity and changeability in penalties and reformative potential is apparent. More recent offender ‘management’ trends toward imposing greater offender restrictions, more demanding accomplishments, and the targeting of outcomes, according to Zedner, have placed a strain upon the original intent to render assistance, guide and befriend\textsuperscript{1188}. Within the financial regulatory sector too, court imposed – managerial - enforceable undertakings, and the imposition of conditionality including monitoring, re-training programmes and modified internal control systems, portend a rehabilitative behaviour change.

Yet another community approach, and clearly inter-linked with rehabilitative purposes, has seen restorative justice become an increasingly pervasive economy. Here apology, explanation and reparation are the rationale. Making amends and paying compensation are both involved and are seen as restorative for victims, offenders and communities in a

\textsuperscript{1185} See US v Halper, 490 US 435 (1989), where at 488 the US Supreme Court stated: ‘A civil, as well as a criminal sanction, can constitute punishment when the sanction, as applied to the individual case, serves the goal of punishment’. Also see E Neafsey and ER Bonanno, ‘Parallel Proceedings and the Fifth Amendment’s Double Jeopardy Clause’ (2011) 7 (3) Fordham Environmental Law Review 719.

\textsuperscript{1186} See The People (DPP) v M [1994] 3 IR 306 (SC); LRC Report ‘Mandatory Sentences’ (n 469), 12; and, DL MacKenzie, ‘What Works. What doesn’t Work. What’s Promising’ in P Priestley and M Vanstone (eds) Offenders or Citizens? Readings in Rehabilitation (Willan 2010); and The People (Attorney General) v O’Driscoll (1972) 1 Frewen 351(CCA) as discussed more fully in Appendix K.

\textsuperscript{1187} Garland The Culture of Control (n 25); Radzinowicz History (n 25) Vol 5, 727 adverted to a, ‘Common Law tradition that room should always be left to accommodate the peculiarities of individual cases’.

\textsuperscript{1188} See Zedner (n 274).
Community penalties seen in this guise have been described as carrying a secular penance, where the genuinely repentant may show such to their own community, or where the reluctant may even be forced to do so. Within the financial sector this is achieved by disgorgement of ill-gotten gain and/or the imposition of monetary penalty, clearly residing within Locke’s restriction upon autonomy, which may sometimes amount to exemplary damages as seen in the international regulatory response to the already mentioned LIBOR rate-rigging scandal. Voluntary remediation efforts, which the cynical describe as attempts to evade higher penalty, are also increasingly prevalent at the corporate level. Restoration, as opposed to just deserts punishment, at the regulatory level has been credited by Braithwaite as motivation building, resource mobilising, crime cognition reinforcing, plural deliberation fostering, and follow-through improving.

A major competitor to the more rehabilitative approaches however, comes in the form of offender risk management already discussed, which may otherwise be termed incapacitation in its widest sense. Within liberal democracy, institutions of justice originally corrected the space between individual protection and the state, and citizens seeing common risks being state corralled were content with affording greater protection to offenders. However, as individuals became more conscious of the dangers/risks posed by their fellow individual citizens, rather than government or fate, coupled with the rise in the culture of blame, the movement to re-balance victim protection, and thus, suppress or target offender risk developed. This has resulted in more prison time, increased prisoner populations throughout the common law world and, more restrictive or incapacitating community punishment. Risk management licenses more intensive and intrusive community penalties, increased resort to technologies of control, and the use of prudential assessment in offender management, as already broached in Part 2 Chapter 1.

The old criminal law notion of creating boundaries between insiders and outsiders,

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1189 See Braithwaite *Restorative Justice* (n 300); Zedner (n 274). Also see People (DPP) v Lyons [2014] IECCA 27.
1191 See Braithwaite *Restorative Justice* (n 300).
1192 See Hudson (n 681).
1193 See Zedner (n 274).
and defining enemies or creating scapegoats by responding to real or constructed threats, has re-emerged according to Nelken.  

Of central concern to interplay strategy is the notion that the criminal law is a special kind of regulatory tool for influencing behaviour throughout its three phases of operation, enjoying the already broached unique social significance and distinctive moral voice which the civil law lacks. Within Dicey’s rule of law and legality there is advance declaration of prescribed conduct, a labelling disapprobation post conviction, and sanction is publicly and deliberately imposed as censure and shaming. The context shaping sentencing, the distinguishing feature of which is judicial public pronouncement, mostly after public proceedings, moves across the process panoply. The community is told that the offender has been found guilty of wrongdoing. Media images enhance the printed and spoken word of condemnation. Social and economic consequences flow from this, such as loss of liberty, job restriction, monetary penalty, and social ostracisation. Deterrence is a major intended objective, although, as Packer argued, it is diminished where less than full enforcement is the prevailing policy. Sentencing performs a heavily symbolic function which embodies an authoritative expression by the legal system of its response to the discrete offence, performed by placing the sentence on a conventional register of censure or disapproval, all accompanied by the utterance of key words. Administrative sanctioning cannot make the same rich claims, since negotiation may blur advance prescription, lack of trial minimises publicity and signalling, and the lack of a register of misconduct denies historical memory.

Of particular relevance to financial regulation, due to the interconnected supervisory and enforcement jurisdictions, are the somewhat connected issues of deterrence and denunciation, which are seen by some as symbolically communicating state punishment for taking unfair advantage and a societal safety-valve. Deterrence may be tailored

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1195 See Simester and von Hirsch (n 125).
1196 See Ashworth Sentencing and Criminal Justice (n 978). This extends across decisions to investigate and to prosecute, through trial mode, remand and plea, to pre-sentence reports, speeches in mitigation, and even to fine default, temporary release, and parole.
1197 See Packer (n 273) and Appendix K.
1198 See Ashworth Sentencing and Criminal Justice (n 978).
1199 T O’Malley Sentencing Law and Practice 2nd ed (n 727). The denunciatory aspect of punishment as distinguished from retribution has been described as a “safety-valve” for victims who might otherwise be
generally to society as a warning of serious consequences of certain wrongdoing, or be aimed at a particular offender, where offenders are presumed able to perform a crime cost/benefit analysis, and where the objective is dissuasion. Here proportionality may be inapplicable in that a dissuasive penalty may be disproportionate to the relevant wrongdoing. The objective is crime reduction, and the method is instilling fear of a future punishment. This Benthamite utilitarian tradition stipulates the creation of more ‘punishment’ unhappiness than the value of crime happiness/reward. However, only two oppositional variables – crime happiness versus punishment unhappiness - are considered in this approach. Modern sanctioning however, supplies statutory penalty maxima related to the discrete offence harm, and the collateral consequences already highlighted, as further variables, plus the need to consider sentence principles such as last resort imprisonment as yet another variable. There is room to re-consider the narrow Benthamite construct therefore. Furthermore, denunciation is closely associated with the just deserts theory of censure, is aimed at condemning the conduct constituting the offence, with the objective of deterring others who are amenable to dissuasion. Its application may sometimes, for instance, in much publicised cases of a high degree of planning and pre-meditation, result in exemplary sentences far divorced from proportionality, and may sometimes thus incur the wrath of appellate courts.

In a nutshell, the result is two different sanction strategies, running across one continuum, both of which must be mobilised in an integrated way with the law which precedes, the prescribed offences (harm wrongs), and the penalty which follows, for they are a dependent axis. Offences are defined in advance, a statement of the wrong, the crime expressed as prescribed offence or contravention, based in the perceived harm risk, with a legislatively provided sanction tariff maximum. Sanction is the prescribed in advance penalty, tailored specifically to the harm risk expressed as offence or contravention. Law prescribes, lawful institution and procedure administers, and a lawfully appointed arbitral authority hears, and exercising discretion sentences from a lawfully established sanction suite. These are the essence of the modern rule of law for sanction, the legitimation, of

\(^{1200}\) See DPP v Paul Begley [2013] IECCA 32 the recent garlic importer fraud case whose maximum sentence for a first offender at first instance, was reduced from six to two years imprisonment on appeal.
punishment or persuade, a normative (principled) sanction system. Punishment as sanction involves a range of competing if not incompatible values or rationales including retribution, incapacitation, deterrence, reparation and rehabilitation (including education), as already demonstrated; is implemented by legal norms such as proportionality, consistency, fairness and parsimony; and, must meet competing expectations, for instance, offenders demanding of right that exercised discretion not be arbitrary and that due process applies, victims wanting their voices heard, and the public who want a consistent and proportionate response.

(b) Sanction Strategies: Confrontational Deterrence and Responsive Compliance

Because sentencing is not an exact science, and there are understandable variations in sanction consistency of approach and outcomes, the establishment and use of sanction principles is in keeping with justice requirements. These principles themselves form the core of sanction strategies. The two major Irish real crime criminal law sentencing principles as judicially pronounced, and as already discussed, are consistency (equality) and proportionality to both crime and individualised offender, and they raise real issues for sentencing business crime where there is potential for individual, public confidence and market integrity harms. Nonetheless, they are equally relevant to civil-sided regulatory sanction practice. Four core general regulatory sanctioning principles recently highlighted, and highly pertinent to proportionality in business conduct sentencing, entail: ensuring that no financial gain or benefit is obtained from non-compliance; aiming to change the behaviour of the offenders and move them back to compliance; being flexibly responsive in the sense of being appropriate for the particular offender and offence; and, as in the criminal law space, being proportionate to the nature of the offence and the harm caused. Twenty years ago, when contemplating a corporate accountability

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1203 See for instance LRC Report ‘Mandatory Sentences’ (n 469); I O’Donnell, ‘Information vital to sentencing and punishment’ The Irish Times (Dublin, 17 June 2013); T O’Malley Sentencing Law and Practice 2nd ed (n 727); Tonyr (n 475); Ashworth ‘The Decline of English Sentencing and Other Stories’ (n 975), 86; A von Hirsch, ‘The Project of Sentencing Reform’ in M Tonry and RS Frase (eds) Sentencing and Sanctions in Western Countries (Oxford University Press 2001) as discussed more fully in Appendix K.

1204 See DPP v Duffy & Anor [2009] IEHC 208; The People (DPP) v M [1994] 3IR 306(SC); The People (Attorney General) v O’Driscoll (1972) 1 Frewen 351 (CCA);The People (Attorney General) v Poyning [1972] IR 402 (CCA); and The People (DPP) v Tiernan [1988] IR 251 (SC). Interviewee L Judiciary Ireland stated: ‘One of the important requirements for trust and confidence in the law is that the law should be seen to be consistent in its approach. So sentencing guidelines are important or may be important in ensuring consistency’. Also see the CBI Enforcement Strategy (n 453), 18-19; M Levi, ‘Fraudulent justice? Sentencing the business criminal’ in P Carlen and D Cook (eds) Paying for Crime (Open University Press 1989), 101 as quoted and discussed more fully in Appendix K.

1205 See Macrory Review (n 122); Macrory, ‘Reforming Regulatory Sanctions’ (n 120), 231.
model within the business regulatory sector, Fisse and Braithwaite outlined what they called twenty desiderata in business sentencing\textsuperscript{1206}. These included maximization of responsibility across all regulatory actors both cost-efficiently, and in a way that does not impose unrealistic burdens upon the corporate or public purse; preventing scapegoating of identified individuals; avoiding sanction spill-over onto innocent actors; avoiding the deterrence trap, i.e. setting penalties so high that actors cannot bear them resulting in economic jeopardy; and, avoiding myopia about the aims of the criminal justice system which must include ‘just deserts’ as well as prohibitory elements reflected in the denunciatory capability of the criminal process\textsuperscript{1207}. The three-pronged EU-wide stipulation by the ECJ in the \textit{Greek Maize} EU anti-fraud case, that sanctions must be proportionate, effective and dissuasive, governs regulatory sanction practice throughout the EU\textsuperscript{1208}.

Utilising these and other sanction principles, or indeed not utilising some at all, two main regulatory enforcement strategies are used in financial regulation. They are two polar extremes on a single continuum: confrontational deterrence, the traditional criminal law punitive method; and co-operative compliance, otherwise called ‘advise and persuade’\textsuperscript{1209}. The regulator’s real dilemma is finding the correct ‘judicious mix’ between these two strategies, a task impacted by national and socio-economic setting, the challenge being punishment for the worst offenders and encouragement for the voluntarily compliant\textsuperscript{1210}. It requires a credible tough top for the serious criminal matters, and an educational base for the lesser administrative style harms. The real challenge lies in balancing the middle where culpability, more in the form of recklessness lies at the upper end, and negligence in all its degrees lies at the lower\textsuperscript{1211}. One regulator interviewed for this dissertation stated\textsuperscript{1212}: ‘.....the area of enforcement is about the area of deterrent. It’s all about the messaging and the signalling and the education of the

\textsuperscript{1206} See Fisse (n 606).
\textsuperscript{1207} Sullivan (n 307) has described ideal neo-liberal correction as entailing a commercial relationship where customers (criminals) get what they deserve, a contractual relationship between the prospective criminal and the state.
\textsuperscript{1208} See Case C 68/88 Commission v Greece [1989] ECR 2965 (Greek Maize).
\textsuperscript{1209} Gunningham ‘Negotiated Non-Compliance’ (n 603); Hutter \textit{The Reasonable Arm} (n 604).
\textsuperscript{1210} See Gunningham ‘Enforcement and Compliance Strategies’ (n 603).
\textsuperscript{1211} Intention is regarded as most significant, then recklessness and then negligence. See T O’Malley \textit{Sentencing Law and Practice} 2nd ed (n 727), 92 as quoted in Appendix K.
\textsuperscript{1212} Interviewee C Regulator Ireland 6 February 2013.
market place’. For one member of the judiciary interviewed, the prime reform issue was about finding balance within a tightening up process:

[T]he widely held view is that our financial regulatory system needs to be tightened up.....it needs to be required practise, required by legislation, so that they have a certain minimal level, and it needs to be enforced, and whether the enforcement involves persuasion or coercion or a mixture of both is a matter obviously for the regulator to find a balance.

Concerning balancing these two sanction strategies and, their marriage with enforcement ‘justice’, as the two poles merge then deterrence becomes compliance, and compliance entails a deterrent threat. Here lies the better likelihood of behaviour change. At the margins, deterrence can be brutal, compliance action retreatist and lax. Furthermore, the elements of enforcement style are consistent with the legalistic or adversarial at the upper deterrence margin. The flexible style is located at the centre where the better likelihood of behaviour change has been identified. Within a fused sanction binary therefore, the flexible style and what it entails is in my submission the desired goal.

(i) Confrontational Deterrence

Deterrence in its characteristics assumes RFSPs are incentive-sensitive rational actors; is confrontational; sanctions rule-breaking behaviour; is adversarial and accusatory; with a focus upon detection, guilt establishment, and penalising prior offending; where sanctioning all breaches is espoused. The assumption is that if offenders are detected with sufficient frequency, and punished with sufficient severity, that all potential future violators, including the recidivists, will be deterred. As already discussed, deterrence, as the common law penal tradition and practice, is underpinned by the notion of privation and suffering as consequences of transgression, all grounded in Benthamite Utilitarianism.

According to the economic theorists traceable from the late 1960’s, those seeking historical weight and connection by claiming that Bentham affirmed their stance, both individuals and firms engaged in business are utility maximisers, compliant only where, likely swift detection and penalty combine, to outweigh the benefits of their

1213 Interviewee L Judiciary Ireland 7 January 2013.
1214 See Gunningham ‘Negotiated Non-Compliance’ (n 603); Gunningham ‘Strategizing compliance and enforcement’ (n 603); Black Rules and Regulators (n 403).
1215 See Gunningham ‘Strategizing compliance and enforcement’ (n 603).
infringement. This view of business solely as self-interested ‘amoral calculators’ however, is at variance with empirical studies. Gunningham and Kagan reviewed the authorities and concluded that corporate legal compliance exceeds initial expectation. While there is considerable variation in corporate response many firms are not closely attentive to sanction risk, and some institute compliance measures that go beyond legal rules. Nonetheless, they concluded that research supports the view of most scholars that the threat of legal sanctions is essential to regulatory compliance. Punishment and deterrence are inseparably linked, although it has been asserted that among a multiplicity of influencing factors, that it is the certainty of punishment, rather than the severity of punishment, that gives rise to the deterrent effect.

General (industry) deterrence and specific (sole infringer) deterrence, have been distinguished by O’Malley, from and within the traditional criminal law punitive form where as seen, just deserts retribution applies. Informed from the Irish criminal law perspective, and as approved by the Irish courts, O’Malley explained that a penalty motivated by a general deterrence policy aims to demonstrate both to potential offenders, and to society at large, the painful consequences of the wrongdoing. In mature, heavily regulated industries, according to Gunningham, although such deterrence becomes less important as a direct motivator of compliance, it reminds organisations to review their own compliance when competitors are sanctioned, and reassures them that if they invest in compliance efforts their competitors will be less likely to cheat.

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1216 See Becker (n 688); I Ehrlich, ‘The deterrent effect of criminal law enforcement’ (1972) 1 Journal of Legal Studies 259; Parker and Nielsen (n 263); Posner (n 688); and Stigler ‘The theory of economic regulation’ (n 688); Interviewee N Academic Australia 27 April 2012 stated that Becker, who was looking at the rational choice offender, followed the Bentham view that the state can’t change people by criminal procedure as discussed more fully in Appendix K.


1218 On the criminal law side a compelling link between punishment and deterrence has been made, and deterrence is not one of several competing aims it has been asserted see LRC Report ‘Mandatory Sentences’ (n 469),11; McAuley and McCutcheon (n 274), 104.

1219 See Law Reform Commission, Consultation Paper on Sentencing (LRC CP 2-1993); and McAuley and McCutcheon (n 274), 104; Gabor and Crutcher “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures” rr2002-1e (Research and Statistics Division, Canadian Department of Justice, 2002) at paragraph 4.3.1. as cited by LRC Report ‘Mandatory Sentences’ (n 469),11ft 24. See Appendix K for an extended footnote.

1220 T O’Malley Sentencing Law and Practice 2nd ed (n 727). Also see DJELR White Paper on Crime, Organised and White Collar Crime (n 450); LRC Report ‘Mandatory Sentences’ (n 469); McAuley and McCutcheon (n 274). Also see for instance, in a cartel conspiracy case of market relevance, McKechnie J in DPP v Duffy & Anor [2009] IEHC 208 at paragraph 36.

1221 See Gunningham ‘Enforcement and Compliance Strategies’ (n 603).
Specific deterrence, on the other hand, is more concerned with impressing upon the particular offender the punishment he will suffer personally. Here, past legal penalty influences future compliance. Both forms of deterrence are grounded in offender rationality and cost benefit capability. Whether the pre-GFC market behaviour as explored however, was entirely rational is debateable, but for the most part it appears that it was either rational or misguided, or negligent, or at the extremes reckless or downright fraudulent. Operating through fear, these deterrence options are not concerned with proportionality, according to O’Malley, instead enjoying the objective to dissuade rather than punish commensurately, and thus have a clear affinity with harder forms of regulatory compliance. Here, crime prevention is grounded in threatened future punishment however, rather than more positive incentives to become law abiding. Nonetheless, it generally has the effect of demonstrating to the ‘good apples’ that free-riders will be punished, reminding them to check their own continuing compliance so as to evade the costs associated with violation. Perhaps a more apt nomenclature for such would be deterrence/compliance as it seems to occupy a middle-ground between traditional, harder, punitive forms of deterrence deployed by criminal courts, and harder compliance forms where sanction is geared to future behaviour change but punishment is not the objective.

Reflecting upon the strategic interplay reveals the limitations of deterrence across the two binary poles. At the serious criminal law end where both prosecutor and defence demand adversarial procedures, it has its place. At the other end of the continuum, cooperative business, which may fall foul of financial regulatory law and practice, may be alienated by its abrasive character. For responsive regulation advocates such as Braithwaite, the role of deterrence is to achieve compliance which is non-punitive and grounded in education and persuasion. For those truly committed to responsive compliance, all deterrence is geared towards gaining compliance, which is regarded as a changing of behaviour for future benefit. This concept is in harmony with Hart’s earlier discussed ‘cost and countervailing benefits’ notion where thwarted future wrongs never committed

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1222 T O’Malley Sentencing Law and Practice 2nd ed (n 727); Gunningham ‘Enforcement and Compliance Strategies’ (n 603).
1223 T O’Malley Sentencing Law and Practice 2nd ed (n 727).
constituted such benefit, but it is not consistent with retributive aims\(^\text{1225}\). It has thus been argued that, modern compliance scholarship, of which there is a great wealth, extends and pluralises beyond the fear of detection and punishment, into a range of factors motivating to compliance\(^\text{1226}\). Policy makers must factor this extensive scholarship into their deliberations.

Deterrence was extensively summarised from a regulatory perspective by Freiberg who argued that it is not an objective quality, but instead subjectively depends upon how offenders know, or understand, the law or law-enforcement practices\(^\text{1227}\). He concluded\(^\text{1228}\): "Deterrence is paradoxical: those who are most likely to be deterred are the least likely to need it and those who need it most are least likely to be deterred". This summation does not resonate with the punitive criminal law tradition where serious offenders, and especially mitigation-challenged recidivists, obtain just deserts proportionality and are felt to need it. Clearly for such offenders, including the white collar variety, the punitive form capability is necessary.

(ii) Cooperative Compliance

Compliance theory is a significant remove from Bentham’s deterrence-based compliance. It is a relative newcomer which arrived via two sources. First, finding its feet in the separate work of Reiss and springing into regulation from a criminal law source, another fountain example, where un-coerced responsiveness is the most valuable resource; and thereafter Hawkins who sourced from environmental regulation\(^\text{1229}\). Clearly sitting at the regulatory or ‘softer’ end of binary enforcement, as predicted by Reiss, more and more systems of social control are based around it\(^\text{1230}\). Conceptually, compliance is as much a process as a single event, and may result in instant conformity, or be an open-ended long-term affair\(^\text{1231}\).

\(^{1225}\) See Hart *Punishment and Responsibility* (n 230) and John Gardner as quoted and discussed more fully in Appendix K.
\(^{1226}\) See Parker and Nielsen (n 263) and all of their contributors; also see Part 1 Chapter 2 section 1.2.4 above.
\(^{1227}\) Freiberg *The Tools of Regulation* (n 119).
\(^{1228}\) Freiberg *The Tools of Regulation* (n 119), 214.
\(^{1229}\) See Hawkins *Environment and Enforcement* (n 709); Reiss (n 1164); Reiss and Bordua (n 117).
\(^{1230}\) See Reiss (n 1164).
\(^{1231}\) Hutter *Compliance: Regulation and Environment* (n 373).
Responsive compliance, otherwise called ‘advise and persuade’, with the relatively new pedigree, favours prevention, repair and results, emphasises co-operation and conciliation over coercion, focuses upon attaining broad legislative aims, rarely seeks legal recourse, and is characterised by bargaining and negotiation. A compliance enforcement strategy occurs where regulators inform the RFSP how to comply in the future instead of imposing sanctions for past indiscretions, and allow for discretionary waivers and exemptions. The enforcement threat sits in the background as a tactic or bluff to be invoked where the regulated entity is uncooperative and intransigent. Administrative sanctioning regimes favour compliance models but not always the softer form detailed here, since in some jurisdictions such as the Australian ASIC criminal proceedings are a high priority, and in the US SEC for instance, court approvals are required for negotiated settlement practice.

The real danger is that a pure form of compliance strategy can easily degenerate into intolerable laxity and fail to deter those with no voluntary interest in complying. Gunningham has argued that regulators must recognise that a compliance strategy impacts differently motivated organisations differently, and being ineffective against the recalcitrant, is only effective for the incompetent if accompanied by education and advice. There are categories of offender therefore, for whom compliance is not well geared, including the incompetent or irrational actor requiring incapacitation, and the rational actor requiring deterrence. Five categories of market actor were depicted by Braithwaite, each having a different compliance attitude: seriously disengaged (prosecution response needed); able but not willing (enforcement order needed); willing but not always able (compliance control needed) at the behavioural mid-point; willing and able (warning and counselling needed); and, at the base fully compliant (education and maintaining awareness needed). Citing Mc Barnett, Freiberg identified four models and

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1232 See Hawkins Environment and Enforcement (n 709); Gunningham ‘Negotiated Non-Compliance’ (n 603); and Gunningham ‘Strategizing compliance and enforcement’ (n 603).
1233 See Black Rules and Regulators (n 403).
1234 See Gunningham ‘Strategizing compliance and enforcement’ (n 603).
1235 See Rees Reforming the Workplace (n 589); Gunningham ‘Enforcement and Compliance Strategies’ (n 603).
1236 See Gunningham ‘Enforcement and Compliance Strategies’ (n 603).
1237 See Braithwaite ‘The Essence of Responsive Regulation’ (n 603). Interviewee L Judiciary Ireland 7 January 2013, similarly stated: ‘you get people who are incompetent, you get people who are careless, you get people who are reckless and then you get people who are simply bad minded and criminal. And you have to cater for that entire spectrum’.

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forms of compliance centred upon compliance attitude or disposition, and it is evident that even for some of the seemingly compliant, a deterrence strategy may be more appropriate\textsuperscript{1238}. The conclusion is that both strategic poles are needed for the judicious mix, with an interplay strategy necessary to govern deployment.

(c) Summary

From the above analysis, the modern binary sanction paradigm, mimics and draws upon the spinal characteristics of the binary poles, their institutional nature, principled approach, legal grounding and contract underpinning. It is coercive yet runs the punishment or persuade continuum, where two strategies – confrontational deterrence and cooperative compliance - vie for ascendency. One commonality in Ireland is that the higher courts determine the over-arching sanction principles; a second is that the autonomous arbitral function enjoys discretion in sanction imposition. On the criminal side there must be proportionality, consistency, scale-positioning, and total price, where judicially-imposed imprisonment is a last resort, and ‘just deserts’ retribution trumps rehabilitation. For regulation, the ECJ determined from a criminal perspective that effective, dissuasive and proportionate sanctioning is required, all directed toward future behaviour change. Effectively on both sides the declarer of the norms administers them. On the criminal side outside Ireland legislatures now pronounce over-arching principles for courts to interpret and deploy, in Ireland the courts themselves do so, and the regulator fixes his own advance-published sanction guidelines. A clear differential exists in practice between individuals and corporate forms. Irrespective of the use of an enforcement pyramid or its likeness, regulators recognise there must be flexibility, with a tough top, a balanced middle and an educational base. Specialist control autonomies at the devising, investigative and arbitral levels portend greater legitimacy, an enhanced version of legality, and improved equality. Expert market actors and expert regulators within this system, both demand more accountability and transparency from their opposition.

\textsuperscript{1238} Freiberg \textit{The Tools of Regulation} (n 119); D McBarnet, ‘When Compliance is Not the Solution But the problem: From Changes in Law to Changes in Attitude’ (Canberra Centre for Tax System Integrity, Australian National University Working Paper No 18/2001). The four categories are set out in Appendix K..
2.3.5. **Sanction Mobilisation: The Enforcement Pyramid**

As a regulatory purpose, business regulatory compliance, contemporaneously benefiting both business and business-users, while simultaneously advocating business success, regulatory excellence, and the engagement of the law, cannot be faulted for anything other than high ambition. The objective of the fused binary is ongoing collaborative balancing of the new regulatory contract where social justice mediates. This is balancing re-ordered to: market standard setting tailored to harm (risk) management; regulatory control thereof and especially market conduct purposed to increased compliance; amid regulatory process values and protections. Pre-control and control collaborative balancing of Fullenkamp and Sharma’s tensions occurs among autonomous market experts (RFSPs) and their ethical-duty-bound advisers, restrictive state and expert control regulators, and civil society (mainly taxpayers); all as reflected in the autonomy/restriction balance where social justice resides. Sanction strategy mix or balance for misconduct moves between punishment or persuade and its nomenclature variants, may engage both as policy-makers determine, and in all cases reflect a proportionate and cumulative ‘total price’ as sanction. And the values complex balance, involves Dicey’s rule of law balancing non-arbitrary, discretionary decision-making and appropriate, advance guideline aid; and, Packer’s control/due process balance, expert to expert, within justice mediation. I adopt the Ayres and Braithwaite mix of punishment and persuasion strategies, more recently incorporating Braithwaite’s restorative justice, and Macrory’s built-upon flexibility incorporating the wider ‘proportionality’ approach, as already interrogated. Accordingly I also support their objective to optimise effective business regulation at a practical level, by relying upon flexibly responsive policing, where the preferred outcome is maximised compliance, and future behaviour change, by those regulated.

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1239 See Ayres and Braithwaite (n 90); and Gunningham ‘Strategizing compliance and enforcement’ (n 603); C Parker and V Nielsen, ‘Introduction’ in C Parker and V Nielsen (eds), *Exploring Compliance Business Responses to Regulation* (Edward Elgar 2011); Feldman and Lobel (n 260). See Appendix K for an extended footnote.

1240 See P Grabosky ‘Discussion Paper: Inside the Pyramid’ (n 603); Grabosky ‘On the interface of criminal justice and regulation’ (n 455); Fullenkamp and Sharma (n 420) as discussed more fully in Appendix K.

1241 Ayres & Braithwaite (n 90); Braithwaite *Punish or Persuade* (n 535).

1242 See Braithwaite *Restorative Justice* (n 300).
In Part 1 Chapter 3 section 1.3.7 it was concluded that in practice the original Ayres and Braithwaite RRT ‘third-way’ version of flexible ‘responsiveness’, an attitude grounded in the values complex, is the most sustained and influential account of how and why to combine deterrent and cooperative regulatory enforcement strategies\footnote{See Ayres & Braithwaite (n 90); Nielsen and Parker ‘Testing responsive regulation in regulatory enforcement’ (n 597); Kingsford-Smith (n 455); Braithwaite ‘The Essence of Responsive Regulation’ (n 603) as discussed more fully in Appendix K.}. Here, updated from the literature as interrogated, a strategy mix is the objective, and the enforcement pyramid is utilised as a heuristic to demonstrate the hierarchical ordering of the sanctions. The RRT pyramid shape or concept, where credible case dependent, different levels of responsive regulatory engagement are available, is arranged at the expert regulator’s discretion\footnote{Ayres and Braithwaite (n 90) and see Appendix L for the original Ayres and Braithwaite Enforcement Pyramid; Braithwaite ‘The Essence of Responsive Regulation’ (n 603), 492-493 as quoted in Appendix K; Grabosky ‘Discussion Paper: Inside the Pyramid’ (n 603); Appleby ‘Compliance and Enforcement’ (n 605), 187 cited a six-segment pyramid; Interviewee E Academic Australia 22 March 2012 on the other hand, suggested a Star of David shape (six-pointed star) not a pyramid; Ashworth Sentencing and Criminal Justice (n 978), 269 discussed a penal ‘ladder’ as quoted and discussed in Appendix K.}. There is the tough top, most important balanced middle, and educational base, as already broached, all deployed by normatively justified responsiveness.

As argued earlier, a presumptive preference as to enforcement commencement is not necessary, but if deployed, possesses signalling properties. I argue that if deployed, the starting point should be the flexible middle where the balance lies, and which provides the greatest room for escalation and de-escalation, the key pyramid problem identified in the literature. Presumptive preference may be regarded as taking the place of a traditional criminal law, direction-pointing, sanction rationale. Braithwaite’s argument is that the state mobilises the coercive power, and thus, reassurance to business is located in a minimalist presumptive base. For critics like Scott, in practise regulators locate supervision at base, but infraction therapy higher up, meaning different points of entry are applied to different activity\footnote{Scott ‘Regulation in the age of governance’ (n 16).}. Critics suggesting that commencement at base encounters escalation problems, at least at regulatory commitment level, may perhaps be assuaged by commencement higher up\footnote{See Baldwin and Black (n 593); Gunningham ‘Enforcement and Compliance Strategies’ (n 603); Gunningham and Grabosky Smart Regulation (n 16); Scott ‘Regulation in the age of governance’ (n 16).}. Since criminal law operates upon the minimisation principle and, regulation similarly, it is no surprise however, to find the educational base as Braithwaite’s presumptive preference for pyramid positional commencement. But soft regulation failed pre-crisis. Furthermore, based in previous discussion, I argue that the
flexible enforcement style is most likely to optimise, particularly where there is a single transversal sanction suite, so a starting point above the middle is counter-productive, if not contradictory. Such a flexible approach begs a presumptive preference, if any therefore, at the middle fulcrum occupied by case differentiation, where the flexible enforcement style is located, regulatory incentives such as sanction discount are deployed, and, RFSP (high and low) cooperative and remediation factors span it above and below. This aids escalation and de-escalation, where flexibility and total price are key values. It also warns infringers that sanction is a serious business, and yet reassures that immediate moves to the more adversarial top are not de rigueur. Nonetheless, one-off serious cases will require top treatment, as too I argue the breach cases, and recidivism. As to the educational base, a published protocol between DPP and regulator can readily deal with all minor matters, under which the regulator automatically assumes jurisdiction. Presumptive preference and protocol are both, of course, the domain of the policy-maker, who will decide the required preferences and responses, and the most important dividing lines.

Collaboration has also been heavily advocated throughout this dissertation. A collaboratively reformed values complex is required within the operational rule of law, and advance, written guidelines governing discretionary decision-making are necessary. These guidelines will deploy pyramid functionality. Moving beyond the Ayres and Braithwaite, 'provokable but forgiving' or tit-for-tat strategy, I argue that the regulator must view each ongoing matter (and not just each ongoing RFSP) on a case by case basis, as Macrory and others contemplated, with cooperation as only one, though an obvious and significant, mitigating factor. Simultaneously, the RFSP must be allowed to disagree with the regulator's approach, and perhaps enjoy a right to apply to a court to review settlement agreement conditionality, for instance. Since the regulatory relationship will be ongoing, the wise RFSP must seriously contemplate compliance over breach. But, if there is infringement, to cooperatively ensure the matter remains within lesser pyramid strategy levels, where lesser sanction capability and greater sanction

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1247 See Appendix J for a working representation. As to case differentiation, there has been a clear differential identified between the criminal law stipulation that each sanction event must confront the particular accused and the particular crime, whereas the more modern, flexible, regulatory approach recommends broadening these two criteria to include the particular accused to include its geographical location and size, its market and effects thereon, and the salient harm.

1248 The tit-for-tat strategy is discussed more fully in Appendix K.
discount rest, when aided by adept and equally expert advisers, the prudent RFSP will seek an optimal negotiated outcome. This will entail conditionality which must be fully enforced.

Once corporate self-punishment fails however, where RFSPs dash the hope that they will recognise, understand, internalise and operationalise the values of the regulatory regime in the operation of their business, or jettison agreed conditionality, then regulatory action higher up the pyramid follows automatically. This, as policy-makers direct, may involve administrative proceedings or criminal prosecution at a higher level, in a new double jeopardy alignment where the dissertation-proven anomalies are expunged; or, if policy-makers prefer, the proactive operationalisation of a parallel approach, where full ‘total price’ credit is given inter-proceedings for penalties or orders imposed, thus avoiding arguments that subsequent sanctioning is compromised by earlier penalties. In either case, to meet ECHR standards, the criminal law proofs standard will apply, and all prosecutorial decisions will be taken outside regulatory control by the independent specialist DPP; while, all arbitral decisions, including negotiated resolution agreement approval, to safely conform to constitutional requirements, will be by specialist judge enjoying full inherent jurisdiction.

Evidential procedures beyond proofs standards, the trade-off for RFSPs, in terms of their own accountability and transparency, require the provision of suitable reverse burdens, presumptions and inferences at trial stage, but a negation of any strict liability imposition. Recognition that the ‘guardian’ presumption of innocence, and its right to silence and other ‘wards’, may work somewhat differently expert to expert, within a consensual and socially valuable market space, enables the regulator to request Wells-type submissions (transparency) from suspects at the investigation stage, and to use them across all functionality. The expansion of negotiated resolution vehicles, with statutorily provided, limitless conditionality capability, buttresses collaboration, and also, aids almost, real-time regulatory enterprise. Thus, rational RFSPs may find it cheaper to self-punish (remediate or install better internal controls), and regulators may avoid values concerns, and a crisis of resources and capacity, enabling delivery of punishment where it is really needed. Optimally, it is my argument that an integrated strategy and offence/sanction

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1249 See Kingsford Smith (n 455); Braithwaite ‘The Essence of Responsive Regulation’ (n 603).
combination set the policy background. Here, prosecutorial decision-making requires a publicly available, transparent interplay strategy, which sets out the statutorily-based, enforcement pathway, interplay launching factors (with weighting methodology), and single sanction suite deployed within sentence guidelines. Such sentence guidelines, drafted by a body independent from the regulator or imposing court, and yet, incorporating their own and business collaborative in-put, will provide the necessary norms or principles, and an appropriate weighting methodology. As demonstrated earlier, the ‘proportionality’ and consistency principles differentially govern ultimate sanction for both corporate and individual offenders, while there may also be a difference in approach between the narrower criminal law practice and the broader regulatory aspiration. I argue that the broader view is not incompatible with criminal law principles and should be adopted across the binary for financial regulatory matters, and be subject to criminal law proofs.

The heuristic does not have to be a pyramid, and the design clearly has limitations, but the regulatory literature recommends it as best. Although variable in design, it may not be suitable for the one-off offender, particularly if a serious offence is involved, perhaps eliciting a dramatic move to apex, and an exemplary punitive sanction. It also requires responsive RFSP involvement for optimal result. At the top end particularly, this raises issues around constitutional values, such as the innocence presumption and the right not to self-incriminate, as already discussed, and as highlighted in the literature. I have argued that Packer’s negative due process obstacle course be retained but tweaked. Considering the middle, the examined authorities suggest a balance must be created and operated. Allowing that there must be a tough top, there is still some controversy as to the downward boundary line. Is it catastrophic risk cases? Is recidivism included? Also, agreement breach cases? What lies beyond if anything? In my submission all three categories must be included, with flexible prosecutorial discretion around other suitable circumstances. Similarly, even if the presumptive preference, if any, is for an educational

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1250 Nonetheless, I accept Braithwaite’s view that even for serious matters, where the RFSP attitude is cooperative, the presumption of dialogue and any sanction presumptive preference is the recommended starting point; see J Braithwaite ‘Rewards and Regulation’ (n 710).
1251 See particularly, Baldwin and Black (n 593); Scott ‘Regulation in the age of governance’ (n 16); C Scott, ‘Regulatory Governance and the Challenge of Constitutionalism’ in D Oliver T Prosser and R Rawlings (eds), The Regulatory State (Oxford University Press 2010); Yeung Securing Compliance (n 437); O’Sullivan v The Law Society of Ireland & others [2012] IESC 21 McKechnie J; all discussed more fully in Appendix K.
base or somewhere not too far above, which includes warnings, reprimand, caution as well as training, it’s upward boundary is fluid. So the real question for the policy-maker is: how low does the tough top or the ‘hard’ criminal law seep, and how high does the educational base, ‘soft’ compliance, creep? This is the real sanction interplay issue.

Taking the two parts of the binary as separate and unconnected, means the real decision lies right at the boundary between the two, without any middle-ground. There is a bright red line where all parts south of hard criminal behaviour is administrative, and all parts north of the administrative sanctions regime result in criminal charges, when a ‘double jeopardy’ pathway applies. Automatically, one regime is excluded, and the pyramid is truncated either at top or bottom. Because there is an exclusive pathway, it fixes the boundary itself by definition. Thus, the pathway choice is itself a factor in determining any boundary line. If sequential or simultaneous proceedings are permissible, then there is either a fluid line or no line at all. But in that case, a means to ensure balance is required across the middle-ground, where soft and hard law meet. Thus, straddling the balance, the flexible style and the middle point case differentiation fulcrum along with it, are the most appropriate presumptive preference. Within the chosen pathway, weighted launching factors assist the decision-maker in assuming the best pyramid step for each individual case, and thereafter escalating or de-escalating. The launching factors are the operational tools of the interplay framework, and where arranged in priority and mirrored as shown in Appendix J, they enable the regulator to weight and pinpoint the actual entry point in a perspicuous way. It is the policy-makers’ task to delineate these factors, and the independent prosecutorial decision-makers job to apply them, so as to create and mobilise a balanced middle, and thereafter determine the entry point. It is my argument that a balanced middle is essential, and that policy-makers must reconsider the current double jeopardy rule to facilitate it. Greater parallel flexibility at least along the lines I have argued will be required.

There are minimal, if any, adverse implications for Dicey’s legality principle. All breaches, whether crimes or contraventions must still be advance prescribed, as too the relevant sanction even if drawn from a common suite. Total price sanction protection, even in cumulative or parallel instances, always applies. Sanction cannot be imposed save where Packer’s revised due process obstacle protection is applied: full criminal proofs and procedure protection apply. Since sanctioning at both poles involves 277
proportionality, and this entails just deserts, I argue that all sanctioning be regarded as punitive, whether generated by criminal process or by regulatory process even if involving minimal monetary penalties; and thus, all sanction events (including prior investigation and trial) be automatically accorded full constitutional and ECHR protection. There is nothing however, to prevent an RFSP seeking a consensual, negotiated outcome which involves sanction, from making breach admissions which form the basis for an expert to expert agreement, which is then specialist court approved. Although equality before the law is not the primary focus of this dissertation, there is ample authority within the literature and caselaw, for the propositions that universal application of norms and protections across the relevant sector satisfies universality as equality; and, that sentence flexibility is permissible. I accept Tonry’s statement that: ‘Sentencing standards must try to reconcile both parts of the equality principle. That is, they must be concerned to treat like cases alike and to treat different cases differently’. Within the propounded expert to expert contract construct the above two propositions find even greater support, while the pyramid provides a valid, and advance-published, testing tool.

In summary, the key conclusions to be drawn from exploring the Enforcement Pyramid as a mixed theoretical and practice sanction heuristic, include the need to involve criminal law sanctioning as a tough top, the preference for a wider educational base whenever a sanction minimisation policy prevails, and the absolute necessity to devise a balanced middle where much discretionary decision-making will lie. The deployment of a predetermined interplay strategy, which incorporates a pathway choice, with sub-options, and a set of launching factors and sentencing guidelines, is an obvious accompaniment to such a heuristic, mobilised within a reformed values complex. Although this heuristic need not necessarily be a pyramid, or if a pyramid the enforcement pyramid as located within RRT, it is clear that it is wise to employ some form of sanction guide. Further, the balancing of autonomy/welfare, and the need for a business friendly approach in the very open and globally small Irish economy, where the crisis impact upon society has been devastating, must be factored-in. It is my argument however, that a sanction pyramid best depicts and works the binary blend. A flexible, reflexive, iterational approach to pyramid/heuristic building, where regulators respond to current demands, is the preferred

1252 See Tonry (n 475), 6.
establishment methodology in my submission. The fused interplay strategy may then be encapsulated as follows.

### 2.3.6. The New Regulatory Contract: Coordinated Interplay Strategy

The new regulatory contract which over-arches the new coordinated interplay strategy amounts to targeted constraint or regulation of a unique market space, as the theatre for market actor behaviour, in a unique way. This unique way, is a principled, institutionalised, responsive expert to expert reciprocity, collaboratively arrived at, and grounded in law. It is manifest in a collaboratively devised enforcement pyramid with stated values, which flexibly engages both the criminal law and regulation in fusion. It incorporates a judicious mix of their enforcement strategies, amid a broadened definition of harm risk manifested in new financial regulatory offences. A broad tools and tactics range contributes, where expert RFSP and expert regulator relate; and, where at sanction stage proportionately, and within equality principles, the individual circumstances of each RFSP within the widest industry and regulatory context are considered. This is reflected in an appropriate individual and corporate persona differential. It is proactively mobilised, within the twin-track regulatory context of independent, specialist prosecutorial and arbitral functions. It deploys collaboratively formulated, new disclosure norms and forms, including inferences, presumptions and reverse proof burdens; maximised due process values protections; and, new and discrete financial regulation offence definitions and forms. As the underlying sanction interplay strategy it unpacks from a written, pre-published, enforcement pathway with sub-options, enforcement launching factors with stated operationalisation detail, sentence guidelines, and a single transversal sanction suite. This is deployed as depicted in Appendix J across an enforcement pyramid incorporating a tough criminal law top, balanced criminal/regulatory middle and regulatory educational base. Here, interactively mobilising the five-point enforcement style, fourteen mirrored launching factors pivoting around case differentiation where RSFP cooperation is central, and the high-low misconduct scale, effectuates the interplay strategy.
PART 3

3.0.1. Rounding Up Review

To this point within the reform context, Part 1 generally reviewed coercive control and its two agents, the criminal law and regulation, as autonomies and restriction for the discrete market milieu and its identified issues and features such as its criminogenic tendencies. The issue was whether the two agents were a mutually exclusive binary pairing or whether a third dimension or fusion was viable, and if so, under what conditions. And later, the normative theoretical framework was developed to wash through the three coercive control connections in Part 2, to reveal the first shoots of a new sanction fusion theory. Here lie the fusion mobilisers, the over-arching new regulatory contract, and, the sit-below coordinated interplay strategy, both replete with component parts.

Harm risk and its management, the kernel of offences and sanctions and central to market activity, was demonstrated to be legally defined by engaging rules, principles or code standards. Harm risk, resources and reputation were colliding variables within coercive control where risk definition is context-specific and subject to targeting. The values complex for such coercive control – the implementation context – when examined across the procedurally rights-based mediator known as adversarial justice was found to be in need of recalibration. A values trade-off or expert to expert reciprocity was suggested for a fused interplay strategy.

The offence/sanction dependency was optimally found to require both criminal and compliance sanction engagement. To facilitate for instance, a new definition of a financial regulatory offence was proffered. When engaged to provide the optimal ‘judicious mix’ within the coordinated interplay strategy, the enforcement pyramid deployed the criminal law as the tough top and qualitatively significant moral signalling voice; the combined criminal and administrative balanced middle as the flexible enforcement style; and the regulatory protocol-mobilised educational base. A disparate sanction arsenal across six categories was promulgated as a single transversal sanction suite subject to guidelines. As enforcement, the sanction paradigm was found to be: institutionalised and legally grounded with a harm risk focus; principled when both targeting misconduct for offence definition within the immensely dynamic, innovative
and competitive market milieu, and sanctioning as a proportionate and cumulative ‘total price’; and, as contract underpinned coercive control incorporating identified discrete features.

This research accumulation, effectively the answer to the first research question, will now be interrogated across the Irish financial regulatory practice and policy in Part 3 Chapter 1 which immediately follows, geared to answering the supplementary research question. A final rounding up and further findings and conclusions will thereafter be set out in Part 3 Chapter 2.
Chapter 1: Irish Financial Regulation: Practise and Policy

3.1.1. Introduction

Ireland’s history of financial regulation is much like the international multi-influence pattern broached in Part 2. It has been inextricably wedded to both foreign and political influences, and the banking industry with its endemic scandals and failures, right from the statutory establishment of the Bank of Ireland in 1783 by Grattan’s Parliament. At times over the next century and a half the Bank of Ireland resembled a central bank without being one. By the time of Irish independence therefore, and in the wake of the economically depressing Great War, Ireland still had no legally established central bank. In 1942 the Irish Central Bank – not a full central bank – was statutorily established, and over the following decades was added upon. The legal basis for Irish economic regulation was provided by the 1937 Irish Constitution. Drawn from the liberal political view of communitarian economic welfarism, where power is centred in the state, it protects private property rights, empowers the Oireachtas to secure the common good and the operation of free competition, and charges the state to supplement private initiative with the goal of protecting the public from unjust exploitation.

Since the new millennium, the most significant change to formal institutions of Irish financial regulatory governance was the establishment of statutorily independent regulatory agencies. These control agencies were delegated specific regulatory powers, including sanction powers, for which traditional hierarchical institutions of government

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1253 See M Moynihan, Currency and Central Banking in Ireland 1922-60 (Gill and Macmillan 1975); TK Whitaker, ‘Origins and Consolidation, 1783-1826’ in FSL Lyons ed, Bicentenary Essays Bank of Ireland 1783-1893 (Gill and Macmillan 1983); Braithwaite and Drahos (n 346); FSL Lyons, ‘Reflections on a Bicentenary’ in FSL Lyons ed Bicentenary Essays Bank of Ireland 1783-1893 (Gill and Macmillan 1983); D Wessel, In Fed We Trust (Crown Business 2009). As discussed more fully in Appendix K.

1254 For establishing a bank by the name of the Governors and Company of the Bank of Ireland Act 1782 (21 and 22 George III c.16); which was completed in a nationalist ferment.

1255 After a classic Irish political fudge and amid much delay heavily contributed to by political and civil service tension. It was based upon the British model which traditionally operated a clubbish, close-knit, exclusive community relying upon understandings, convention, trust and tradition see Braithwaite and Drahos (n 346). For a history of Irish banking see Re Shields estate 1901 1IR172 (CA CHD). Also see Moynihan (n 1254); Lyons (n 1254); Foy (n 77); Leddin and Walsh (n 313).

1256 See Article 43 as discussed more fully in Appendix K.
were deemed inappropriate, prompted largely by EU legislative demands\textsuperscript{1257}. The already mentioned EU Single European Act, following the successful \textit{Crotty}\textsuperscript{1258} constitutional legal challenge, a subsequent public referendum, and the legislative ‘juggernaut’ it inspired, gave rise to the already mentioned EU regulatory state, and a sustained expansion of regulation\textsuperscript{1259}. Control agencies operate under powers delegated from the relevant Irish government Minister, some acting as agents within the EU context\textsuperscript{1260}. Financial services regulation, which is led by the Department of Finance, is one of these regulated sectors, where licensing or authorisation systems have been put in place to enable market entrants to compete, sometimes with former state monopolies, with a view to growing and expanding the market\textsuperscript{1261}. Competition law rules are applied to ensure no abuse of a dominant position. The judiciary may be asked to intervene, by way of appeal or judicial review, where a regulator’s decision is impugned. The Governor of the Central Bank and his delegates sit as Ireland’s representatives at the European Central Bank (ECB), and within the various and significantly important EU regulatory networks.

The catalyst for pre-GFC Irish financial services regulatory reform, unsurprisingly, was a series of financial failures and scandals\textsuperscript{1262}. This backdrop suggested that the Central Bank was struggling to cope with the burgeoning consumer-focused issues of regulation,

\begin{itemize}
\item \textsuperscript{1257} See Westrup ‘Regulatory Governance’ (n 429); Connery and Hodnett (n 6); Prosser \textit{Law and the Regulators} (n 21); Levi-Faur ‘Regulatory Networks & Regulatory Agencification’ (n 108) and Appendix K for more.
\item \textsuperscript{1258} \textit{Crotty v An Taoiseach & Others [1987] ILRM 400 (SC)} which held inter alia that the Single European Act (SEA) was properly within the constitutional licence of article 29.4.3 which authorised the state’s accession to a living, dynamic Community but also held that since part of the SEA would bind the state to concede part of its sovereignty that a constitutional referendum was required.
\item \textsuperscript{1260} See Westrup ‘Regulatory Governance’ (n 429); Connery and Hodnett (n 6); Hogan and Morgan (n 276). According to Scott ‘Regulatory Crime’ (n 25), there are over seventy regulatory bodies in Ireland with criminal responsibilities, not including local authorities, an over 350% increase since 1958.
\item \textsuperscript{1261} See generally Connery and Hodnett (n 6). Also see H Smith ‘Legal and compliance risk in financial institutions’ (n 641), 484 as quoted in Appendix K; and Barth Caprio jnr and Levine (n 216) as discussed more fully in Appendix K.
\end{itemize}
and an advisory group was established. Their terms of reference included the establishment of a single financial regulator. Replacing the old Central Bank regime was recommended by the resultant Report. It outlined inter alia, that Ireland needed a dedicated first class regulatory authority operating to high standards, and with significant regulatory roles, attributes and mandates. However, the report set off a clamour from the banks, and other financial services firms, arguing for the retention of the Central Bank as regulator. The government, after deliberating for nearly two years, decided in 2001 upon a curious hybrid – the new regulator was established as part of a newly constituted Central Bank. Under these influences and circumstances, Ireland statutorily established both a standalone financial regulator in 2003, which failed as seen, and, an as yet still novice, administrative sanction regime in 2004. New statutory objectives were established. The objective stated by the regulator himself to be most relevant post-GFC being: ‘...the proper and effective regulation of financial service providers and markets, while ensuring that the best interests of consumers of financial services are protected.

Ireland’s current financial regulatory architecture therefore, is part of the broader Central Bank apparatus. Apart from the Irish financial regulator, who has since October 2010 been re-subsumed into the Central Bank, there is the Financial Services Ombudsman, a separate consumer agency, the Stock Exchange (ISE) with its combined code, and the Director of Corporate Enforcement (ODCE). The EU Commission action plan in the financial services sector, utilises the principles of mutual recognition and the ‘single passport’, thus relieving entities once established in one member state from requiring

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1263 It had nine members under the chairmanship of Michael McDowell, and was appointed by the Fianna Fail/Progressive Democrat coalition government in October 1998, reporting in 1999. See McDowell Report (26); Westrup, ‘Regulatory Governance’ (n 429).
1264 See McDowell Report (n 26), ch 1. The terms of reference are discussed more fully in Appendix K.
1265 See McDowell Report (n 26), ch 6 while the roles and attributes are discussed more fully in Appendix K.
1266 See Westrup, ‘Regulatory Governance’ (n 429); Conner and Hodnett (n 6); Regling and Watson Report (n 8).
1268 A newly inserted section 6A of the Central Bank Act 1942 set out the statutory objectives for the Central Bank as the new financial regulator. Following the normal regulatory pattern goals were also established to sit under these objectives.
1269 See Section 6A (2) (b) CBA 1942.
1270 See CBI Enforcement Strategy (n 453), 3, 8.
1271 Central Bank of Ireland, Annual Report 2012 (5 April 2013); Central Bank Act 1942 and the Central Bank Reform Act 2010 (CBRA 2010) as discussed more fully in Appendix K.
authorisation elsewhere. Similarly, due to the global aspects of capital movement and financial services, there are impacting international regulatory fora with established requirements, including the ECB, the Basel Accords, the IMF and the newly created EU supervisory watchdogs inspired by the de Larosiere Report. Further, financial market commentators, and especially the credit ratings agencies, have played a pivotal role in Irish financial affairs throughout the crisis. In this dissertation however, the focus is the Financial Regulator, designated a deputy governor of the Central Bank, and more particularly the Regulator’s enforcement and sanctioning regime. Within its control domain, the Irish Central Bank as financial regulator oversees fourteen separate categories of financial service provider, which require licence authorisation or approval. Of the regulated entities, the bulk are located within the Dublin IFSC, which hosts more than five hundred operations, including half of the world’s top fifty banks and top twenty insurance companies.

3.1.2. Enforcement Powers and Functions: Practice and Policy

Operationally, the Part IIIC enforcement powers and functions of the Irish financial regulator, are mainly administrative, and are imposed under the administrative sanctions regime where offences are termed contraventions. These powers are coupled with powers vested in the regulator to summarily prosecute offences, although as yet unexercised, and also for the regulator to refer serious crime to the DPP, which although exercised has not yet borne fruit. It is a hybrid twin-track approach which is subject to a double jeopardy restriction based around the imposition of monetary penalty. Within the policing binary, criminal law engagement draws primarily from the ‘real crime’ paradigm when engaged. But, felt insufficient from the outset and not flexible enough, uniquely an administrative regime was added, based around newer offence forms and

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1272 See Connery and Hodnett (n 6). This is tailored to achieving the Treaty objective of an integrated market for banks and financial conglomerates, as a core component of the free movement of services and freedom of establishment.
1273 See De Larosiere Report 2009 (n 1) as quoted and discussed more fully in Appendix K.
1274 See Appendix K for an extended footnote.
1275 These entities cover banking, asset financing, fund management, corporate treasury management, investment management, custody and administration and specialised insurance operations.
1276 CBA 1942 as inserted, by CBFSAI 2003.
1277 Interviewee C Regulator Ireland 6 February 2013 so confirmed. Also see Appendix F.
espousing civil law attributes. Therefore, the criminal law within post-crisis reform, not alone requires mobilisation, but also pre-mobilisation tailoring for its binary role. The salient enforcement tools and techniques post-GFC are mainly still based in the establishing 2004 statute, although somewhat updated by the 2010 reform statute. More is necessary.

The driver of the Irish administrative sanction regime, as elsewhere, is the ‘prescribed contravention’. Unlike criminal offences which are rules-based in definitional terms, their definition is much wider around both rules and broader principles, where failure to comply includes breaches of codes, conditionality and regulatory directions. Like criminal offences however, contravening also includes attempts, aiding and abetting, ‘knowing involvement’ and conspiracy. Despite the requirements of culpability (intent) being specified however, the criminal standard of proof does not apply. The enforcement procedure set out on the statute books, presages commencement with the Financial Regulator’s concern that a ‘prescribed contravention’ may be or may have been committed, and a potential examination and enquiry. To date however, no enquiry has actually been held, and all investigations have been concluded between regulatory staff and RFSPs via negotiated settlement agreement. This means that no valuable information is available at the practice level, as to the definitional and evidential proofs around contraventions, or as to difficulties, if any, in the admixture of criminal law norms

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1278 See McDowell Report (n 26); also Interviewee C Regulator Ireland 6 February 2013 observed of contraventions: ‘Is it possible for a Regulator to announce a code the breach of which would lead to a criminal sanction, would that actually stand up in a court of law? You’re actually then delegating to an administrative body the power in a nutshell to determine what is criminal and what is not. How would that sit in Ireland and Commonwealth countries I don’t know but I think the benefit of having the proscribed contravention avenue is that those areas which are episodes of the breach of the corporate governance code for example can be shown to be a proscribed contravention and yes it may only be a civil penalty in that regard’.

1279 See CBFSIA 2004; CBRA 2010.

1280 See Appendix K for an extended footnote; see McLeod (n 334).

1281 See Section 33AN CBA 1942. Prescribed contraventions are statutorily defined as contravention in one of four categories, as detailed in Appendix K.

1282 See Appendix K for more about section 33AN of the CBA 1942.

1283 The requirements of proofs and the relevant proofs standards, key elements in offence and contravention draughtsmanship are discussed more fully in Part 2 Chapter 3 section 2.3.3.

1284 An examination into the issue may be commenced to establish whether there are reasonable grounds for such suspicion see Financial Regulator Ireland, Outline of Administrative Sanctions Procedure (2005). See Appendix K for more detail.

1285 Revealed in interview with Interviewee C Regulator Ireland 6 February 2013; also see Appendix F.
and the civil law proofs standard. Nor can an assessment be made as to the relative strengths of criminal offences compared to contraventions, for instance, in terms of their definitions, different definition sources, or evidential proofs. There is no discrete financial regulatory ‘offence’ as explored in Part 2 Chapter 3 section 2.3.2.

The broader statutory financial regulatory regime is operationalised via five separate statutory routes as detailed in Appendix D. Apart from the ‘regular’ administrative sanctions powers enjoyed by the Central Bank, it also has separate sanctioning powers under securities markets legislation. Contraventions of three EU Directives are not subject to the legislative mechanism established under the 1942 Act however. Instead, each of the individual domestic regulations governing these areas contains a distinct legislative device for imposing sanctions. Mystifyingly, while under regular Central Bank administrative sanctions powers, penalties may only be imposed on RSFPs, and those concerned in their management, sanctions under the securities markets regulations may also be imposed on firms or persons who are not engaged in providing financial services.

The dependent correlation between criminal offences, and criminal sanctions, is mirrored in the relationship between prescribed contravention and penalty on the administrative side. There is little if any correlation however, between monetary and other sanction suite capability between the criminal law and the administrative sanction sides of the binary. Sampling from the offences created within the broader statutory financial regulatory regime (five separate statutory routes), together with the appropriate penalties, reveals that infringements in the main are prescribed contraventions. The bulk of the penalties apply on the administrative sanction side, where a broad sanction suite applies, while on the criminal law side the main sanctions are imprisonment and/or fine. There is no common sanction suite. There is no specified commonality between the prescribed contraventions of the statutory administrative regime, and the general offences found

1286 Interviewee C Regulator Ireland 6 February 2013 when referring to negotiated settlement agreements stated: ‘...in our settlement meetings that we have with firms we can agree things that necessarily aren’t in the legislation’. See Appendix K for an extended footnote.
1287 Under Part IIIC of the CBA 1942.
1288 See CBI Enforcement Strategy (n 453), 7.
1290 Dealt with by the administrative sanction regime whether under the CBA1942 Part IIIC or the EU inspired Regulations.

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within the criminal law canon. For instance, under the 2010 reform statute, the enforcement of suspension and prohibition orders is the civil remedy application for a mandatory injunction (followed by committal enforcement), rather than either the engagement of the administrative sanction regime, or the provision of an offence for breach.\textsuperscript{1291} The penalty regime also differs as between the Part IIIC regime, and the three EU-driven Regulations, in some respects: for instance, monetary penalties are not consistent, and, civil remedies are specifically provided for under the Transparency Regulation regime. Among the three regulations themselves, not all, notably market abuse, specifically provide for indictable offences and penalties. In terms of the broader types of administrative sanctions available, beyond monetary penalties however, the sanction suite for the EU regulations is common.

Prior to the financial crisis, there was no dedicated enforcement capability, which was a clear break with international best practise\textsuperscript{1292}. The new dedicated Irish Enforcement Directorate recommended by a specially commissioned report, and consequently established in late 2010, now works in close cooperation with, and receives references from, the supervisory directorate, which is the primary interface with those who provide information on the activities, including suspicions of regulatory breaches, by RFSPs\textsuperscript{1293}. While the Central Bank has operationalised a handover mechanism containing clear guidelines for the referral and acceptance of enforcement cases, to and by, the Enforcement Directorate, this mechanism has deliberately not been made publicly available\textsuperscript{1294}. Nonetheless, a multi-disciplinary case team is assigned to consider the matter, confirming one practical conjunction between business and regulator. One business leader interviewed for this dissertation expressed, ‘I am very much in favour of teams, regulatory teams which are subject to evolution and change and transitional change, having a direct relationship with the [RFSP]’\textsuperscript{1295}. If not satisfactorily resolved at team level, enforcement may result in measures being taken including the holding of an

\textsuperscript{1291}See Sections 30 and 44 of the CBRA 2010.

\textsuperscript{1292}See Mazars Report,\textit{Towards a ’Best Practice Organisation Final Report – For Presentation to the Authority} (Commissioned by the Irish Financial Regulator in March 2008 and dated February 2009).

\textsuperscript{1293}See CBI\textit{ Enforcement Strategy} (n 453), 17; and Mazars Report 2009 (n 1292).

\textsuperscript{1294}In May 2012 Oakes (Oakes \textit{The role of enforcement} (n 453) revealed to the industry some of the grounding operational considerations as discussed more fully in Appendix K.

\textsuperscript{1295}Interviewee Z Business Leader England 29 November 2012. Only a little short of twenty years ago an effective control agency was characterised as politically independent, well-staffed and well-resourced, with the will to grapple with big business, and organised into multidisciplinary teams to deal with the ubiquitous complexity see Punch (n 87).
Inquiry, although as stated none such have yet been held. Breach of a regulation alone is not the sole determining factor as to whether or not an enforcement file is opened\textsuperscript{1296}. The significance or weight of the matter as determined against the Central Bank’s statutory objectives, strategies, policies, regulatory Programme and Enforcement Priorities are also considered before making a determination. Each RFSP referred to Enforcement, thus, enjoys two corridors of communication with the Bank, the usual day-to-day channel with its supervisory team, and a new corridor with the Enforcement Directorate.

To achieve Irish Central Bank objectives and goals, Oakes has indicated that the enforcement directorate elects to use supervisory or enforcement measures and tools, or a combination of both, when dealing with senior management of RFSPs\textsuperscript{1297}. The requisite prosecutorial tools currently available, according to Oakes span both binary poles\textsuperscript{1298}:

\textit{Administrative Sanctions Procedures for prescribed contraventions; fitness & probity cases; enforcement of markets regulations (i.e. market abuse, prospectus and transparency regulations); investigations of unauthorised business activity; criminal prosecutions; and specialist monitoring and inspections of Anti-Money Laundering/Counter-Terrorist Financing (AML/CTF) laws and Financial Sanctions.}

Although undercover police work including surveillance, rooted in an appropriate domestic legal framework, may avoid fundamental rights infringement as presently understood, and therefore, there is nothing to prevent greater use and admissibility of evidence obtained under such conditions in subsequent criminal trials, there is no evidence that such capability is currently in place\textsuperscript{1299}. Consideration of the extension of such to regulatory matters involving supervision is not unreasonable. In conjunction with its obligation to cooperate with other law enforcement agencies, save where the regulated entity itself has so disclosed, the Irish Central Bank is under a duty to disclose information which gives rise to a suspicion that a criminal offence may have been committed\textsuperscript{1300}, save where the Central Bank is prohibited, in limited circumstances, from

\begin{itemize}
\item \textsuperscript{1296} See Oakes \textit{The role of enforcement} (n 453).
\item \textsuperscript{1297} See Oakes \textit{The role of enforcement} (n 453).
\item \textsuperscript{1298} See Oakes \textit{The role of enforcement} (n 453).
\item \textsuperscript{1299} PA McDermott, ‘Undercover Investigations & Human Rights’ (9\textsuperscript{th} Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 24 May 2008).
\item \textsuperscript{1300} Or contravention of the Companies Acts 1963-2009 or Competition Acts 2002-2010.
\end{itemize}
making that disclosure pursuant to European Law. In 2012, for instance, eighty-four matters were referred to an Garda Siochana, but no investigative details are available, and no prosecution ensued. Furthermore, while in 2012 the Central Bank held two separate enforcement regulator fora in-house, to facilitate the sharing of experience and learning between enforcement regulators on matters of common interest, no details have emerged. In short, as far as the use of the criminal law is concerned Irish financial regulation is long on rhetoric but very short on action, including disclosure.

Much like the DPP’s criminal law practice, not every case referred to Enforcement will conclude with the Central Bank seeking to impose a sanction or other order, although each case and outcome has been stated to depend upon the law and evidence involved. As one dissertation interviewee explained, ‘.....it is simply not practical for regulators to treat everything seriously....There has to be a degree of selectivity in what they deal with and what they invest their resources in.’ However, no published guidelines are publicly available despite Macrory’s accountability and transparency norms requiring some degree of openness, and international best practice. Oakes has claimed the Bank will not shy away from cases which are complex, difficult, challenging, factually intricate or novel. He stressed that the Bank is both prepared to be challenged before the IFSAT, the specialist Appeals tribunal, and anticipate court challenges from time to time. In carrying out its functions accountably, the Enforcement Directorate accepts that it must adopt fair procedures, and has stressed transparency. It has asserted that its actions will be, ‘timely in nature, transparent in method, consistent in application and effectively utilised’, and that it will act in line with its stated objectives in a manner that is,

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1301 See CBI Enforcement Strategy (n 453), 14. See Central Bank of Ireland, Annual Report 2012 (5 April 2013) which recites that disclosure of information cases to other Enforcement Authorities in 2011 was 111, and in 2012 decreased slightly to 105.

1302 Under section 33AK CBA 1942 as amended; see CBI Annual Report 2012 (n 1301), 57.

1303 See CBI Annual Report 2012 (n 1301), 56. On 7 June and 21 November 2012, the Bank held a forum for enforcement regulators. Among the 20 regulatory agencies represented were attendees from the Garda Bureau of Fraud Investigation, the ODCE and the Competition Authority.

1304 See Oakes The role of enforcement (n 453).

1305 Interviewee X Regulator Ireland 12 November 2012.

1306 This international best practice was fully discussed in Part 2 Chapter 2 section 2.2.4 (b) Prosecution Stage. Outside the scope of this dissertation, as and from 6th November, 2013 it has been determined that the Irish DPPs two criteria discussed above will apply; see CBI Outline of the Administrative Sanctions Procedure (2013) (n 493).

1307 See Oakes The role of enforcement (n 453).
‘proportionate, consistent, targeted and transparent’\textsuperscript{1308}. A publicly available, advance prosecutorial policy statement would best meet this rhetoric.

One Irish financial regulator interviewed for this dissertation explained the current Irish approach to fraud cases, the roles of both the Gardai and the DPP, and the financial regulator’s interaction with them as follows\textsuperscript{1309}:

\begin{quote}
[W]e file a report and produce the necessary evidence to the Garda Bureau of Fraud....as ....the current sort of thinking is it’s the authority to take the fraud cases. It means we liaise with them and help support them in any way we can in relation to the criminal cases that they then pursue through the DPP on an indictable offense...... We haven’t made a reference for an indictable offence as far as I am aware to the Garda. But we have assisted the Garda where ......It may have come about through their own intelligence.
\end{quote}

The Irish DPP’s declared preference for exclusive control of all indictable matters, without wanting to deal with the minor cases, leaves an obvious lacuna, because the Irish regulator has shown a reluctance to deal with summary criminal matters in practise. Farrell’s critique that exclusive DPP control has curtailed regulatory engagement does not apply here. The argument for a specialist prosecutor dealing with all cases is mainly grounded in efficiency and consistency concerns. Beyond the willingness concerns demonstrated above, resources are also an issue. It seems ridiculous for a small country to provide two (or even three) separate prosecutorial capabilities, especially when in practice none of them operates at summary level.

Perhaps the solution best lies in the ASIC twin-track approach, where the regulator investigates and decides what cases to pursue, and, then refers all criminal cases to the specialist, independent and adequately resourced DPP. For the fusion jurisdiction recommended by this dissertation all case action decision-making and court appearances could be referred to the DPP as specialist since all such will involve culpable wrongdoing where criminal procedure protections apply. This includes both administrative and criminal poles within suitably devised published operationalising mandates across the tough top and balanced middle, while the protocol already broached will leave the regulator to deal with the supervisory and educational base cases.

\textsuperscript{1308} See CBI Enforcement Strategy (n 453), 18-19 as discussed more fully in Appendix K.
\textsuperscript{1309} Interviewee C Regulator Ireland 6 February 2013.
Central Bank Governor Patrick Honohan explained post-crisis, that Irish financial regulatory reform faced three major challenges, under the headings of facts, philosophy and resources\textsuperscript{1310}. These are: the difficult objective circumstances and condition of the financial system; the pre-GFC failed policy approach to regulation; and, that resources applied to supervision were manifestly inadequate. Reform was inevitable, and a greater criminal law input was demanded. Whatever its form, enforcement was lauded as standing full square at the frontline response of the Irish Central Bank, and at many other regulators, not just within the EU, but also the US, Asia and Australia\textsuperscript{1311}.

Sign-posting the way to the future, and signalling the need for a new and more restrictive financial regulatory relationship, Governor Honohan\textsuperscript{1312} described the new post-GFC Irish financial regulatory philosophy as being:

\textit{Obtrusive and intrusive as opposed to light-touch. The previous tendency – not confined to Ireland – to regard business leaders in financial services with awe and deference has had to be abandoned...... the days when the raised eyebrow of the Governor could be relied upon to ensure compliance are long gone.... Financial firms know that they operate in a rules-driven environment and that compliance is expected. Failure to enforce could, I am afraid, be taken as an implicit waiver of rules. Such lack of clarity is not consistent with the new philosophy.}

Under the new reform structure the Irish Head of Financial regulation is a Deputy – Director of the Central Bank\textsuperscript{1313}. He oversees five standalone directorates. Two of these are the Supervisory Directorate which operates the new, post-crisis, targeted and assertive risk-based PRISM supervision model, and the Enforcement Directorate which supports it. In line with current best international practice they are organisationally separate, although the former refers matters to the latter\textsuperscript{1314}. Each Directorate has a Director\textsuperscript{1315}. Credible

\begin{thebibliography}{9}
\bibitem{1311} See Oakes in CBI Enforcement Strategy (n 453).
\bibitem{1312} See Honohan Speech \textit{Closing Remarks} (n 1310). Also see Punch (n 87) who argued that much depends upon the enforcement strategy of the control agency.
\bibitem{1313} On 9\textsuperscript{th} April 2013 Matthew Elderfield announced his resignation effective October 2013, and later announced that he would join Lloyd’s Banking Group of London, as its director for conduct and compliance. His replacement effective 1\textsuperscript{st} October 2013 was Cyril Roux the former First Deputy Secretary General of the Autorité de Contrôle Prudentiel et de Résolution (“ACPR”), the French prudential supervisory authority for banks and insurance companies, which is an offshoot of the Banque de France.
\bibitem{1314} Oakes \textit{Delivering a credible threat} (n 431).
\end{thebibliography}
enforcement has been asserted to be a strategic deliverable, and thus an Enforcement Strategy has been published, enforcement priorities have been set, enforcement expertise is being built by a multi-disciplinary skills and teams approach, and, announced as shown that enforcement powers will be exercised in a proportionate, consistent, targeted and transparent manner\(^{1316}\). What this means in terms of enforcement pathway and discretionary decision-making will now be interrogated.

### 3.1.3. Enforcement Pathway and Enforcement Style

In Ireland, the preferred enforcement pathway choice is statutory, and is that of double jeopardy. It is deployed under five statutes and is non-uniform. Eschewing a single strategic philosophy, it confusingly draws across many and begs reform. There is nothing as already explained in Part 2 furthermore, to prevent this statute-led approach, however diverse it may be, from itself being superseded by statute, for instance, by a parallel proceedings approach. Nor is it impossible for a double jeopardy principle to operate within a parallel approach, for instance, where credit is given in the second proceeding for sanction, especially monetary penalty, imposed in the first. While there is nothing to prevent a statutory reform, one key reform difficulty, which had necessitated the unusual statutory formula in the first place, was that offences and contraventions are not mirrored, and thus, the traditional Constitutional protection against double charge could not have been applied.

The relevant statutory double jeopardy provisions – the Part IIIC regime and the EU-driven Regulations – establish a very restrictive either/or choice for the regulator\(^{1317}\). Currently as seen earlier, the general Irish statutory approach extends the common law case law principles and practice, where crime or offence charged grounds the prohibition\(^{1318}\). The financial regulatory strategic trigger however, is not the traditional charge approach of Lord Morris in \textit{Connelly}\(^{1319}\), but is instead, a monetary penalty award, which is a clear departure from normal Irish practice. Under the regulatory regime

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\(^{1315}\) The first person appointed to Enforcement was Peter Oakes in December 2010; In January, 2013 he resigned effective April, 2013, and was replaced by Derville Rowland.

\(^{1316}\) Oakes \textit{Delivering a credible threat} (n 431).

\(^{1317}\) See Section 33AT CBA 1942 as inserted by section 10 of the CBFSAI 2004.

\(^{1318}\) See Ryan and PP Magee (n 871); Walsh \textit{Criminal Procedure} (n 281).

\(^{1319}\) See \textit{R v Connolly} [1964] AC 1254 (HL).
breaches of a regulatory requirement can constitute both a prescribed contravention and a
criminal offence, thus raising issues as to whether a true traditional double jeopardy
situation arises, and whether a constitutional prohibition based around double charging is
relevant. No criminal prosecution may be brought if the Administrative Sanctions
Procedure has been followed and has led to the imposition of a monetary penalty,
whereas if a criminal prosecution has been brought, and the RFSP is found either guilty or
not guilty, then no monetary penalty may be imposed pursuant to the Administrative
Sanctions Procedure\textsuperscript{1320}. One dissertation interviewee has queried whether this is a true
double jeopardy formulation at all\textsuperscript{1321}. Although a stark choice is presented to the
regulator, alarmingly, there is no double jeopardy prohibition in relation to the subsequent
administrative imposition of non-monetary penalties, some of which, such as licence
disqualification or revocation, may carry heavy punishment of themselves. It is legally
permissible therefore, for the regulator to reprimand an RFSP and damage reputation for
instance, following a criminal acquittal. However, as yet there is no known or recorded
instance of the regulator seeking to invoke such a jurisdiction. As regards the monetary
penalty criterion generally, if the objective was to prevent double penalty, then suely a
total price stipulation would have better covered the situation. When comparing
European practice, where frequently in regulatory matters administrative sanction may
follow criminal imposition, Ireland clearly is adrift that practice, but allows it on the
statute book to a truncated non-monetary penalty extent.

The origins of the Irish double jeopardy clause stem from even more restrictive and
complicated proposals, suggestive of heavy industry lobbying, set out in the Central Bank
and Financial Services Authority of Ireland Bill 2003\textsuperscript{1322}. The Bill’s explanatory
memorandum (without stipulating an exact source) stated:

\textit{Section 33BC: Regulated financial service provider or person not to be liable
twice for same contravention. This provides that a financial service provider or a

\textsuperscript{1320}See CBI Enforcement Strategy (n 453), 20; Section 33AT CBA 1942 Part IIIC as discussed more fully
in Appendix K; see F Haines and D Gurney, ‘The Shadows of the Law: Contemporary Approaches to
an extended footnote.

\textsuperscript{1321}Interviewee L Judiciary Ireland 7 January 2013 stated: ‘I’m not sure that I agree with the idea that the
imposition of a substantial civil penalty should prevent one from bringing a criminal prosecution. It doesn’t
seem to me to be a true case of double jeopardy’.

\textsuperscript{1322}No 55 of 2003 eventually enacted as the CBFSIAIA2004.
However, disappointingly, and somewhat shockingly, the section 33AT provision inserted by the 2004 act provision, which in the Bill outlawed double contravention charges, and double penalty between administrative and criminal poles of all shades and not just fines, was ameliorated in favour of the regulator, with very little if any scrutiny or explanation, as the amended bill wended its way through both Dail and Seanad 1324.

In relation to the three EU-driven Regulations concerning market abuse, transparency, and prospectuses, a common double jeopardy model is also utilised. Not alone equally not along the traditional criminal law lines, it differs from the Part IIIC approach, and is internally contradictory. Here, the logic is that a ‘person’ is not liable to be penalised twice for the same ‘acts’ which underlie a contravention. Taking the market abuse regulation as the exemplar, in regulation 46 where a sanction is to be imposed under the administrative sanction regime, and, “the acts which constitute the prescribed contravention to which the sanction relates also constitute an offence under a law of the State”, then the person, known as the assessee, is not “liable to be prosecuted or punished for that offence under that law”.

The criterion therefore is not the common law ‘charges’ rationale, nor indeed the sometimes ‘same facts’ usage, but instead is the ‘acts which constitute’, with the prescribed contravention as the starting point. Bewilderingly, the cross prohibition, where a criminal prosecution (for an offence under the regulations or the statute itself only) comes first and the person (assessee) is found guilty or acquitted, stipulates that a sanction in respect of a prescribed contravention shall not be imposed where “all or some of the acts constituting that offence also constitute the prescribed contravention”. Here ‘all or some of the acts’ is the criterion not ‘the acts’. Further, there is no prohibition in finding guilty at a criminal trial and also making a finding of a prescribed contravention, the prohibition is against double penalty not double finding. Unlike under the Part IIIC regime the monetary penalty criterion was not utilised as stated above. Similarly, the

1323 See the draft section 8, Central Bank and Financial Services Authority of Ireland Bill 2003, inserting a new part IIIC into the CBA 1942, concerning enforcement provided in the proposed section 33BC. See Appendix K for an extended footnote.

1324 See the section 33AT provision inserted by the CBFSIA 2004.
entire criminal law canon prohibition was not engaged. So the same regulator, enjoying sanction powers across five statutes, and across both poles, employs several different double jeopardy criteria. And the criteria do not include, in the case of the three EU-driven regulations, offences found in the general legal canon.

The Irish regulator has not disclosed the use of an enforcement heuristic such as an enforcement pyramid. Within the double jeopardy pathway choice however, since the Irish financial regulator in practise, has exclusively applied the administrative sanction regime in the form of settlement agreements, any strategy pyramid effectively, absent the tough top criminal law, takes the shape of a flat-topped Aztec pyramid, with administrative/civil remedies at top and a wider educational base. Strategically, there is no use of confrontational deterrence, and all eggs are placed in the cooperative compliance basket. The use of double jeopardy as an option cuts the top off the triangular pyramid. If and when the criminal law option is used, the lower administrative rungs may be cut off (non-monetary) or will be cut off (monetary penalty). The sanction hierarchy as administered in practise, running from top to bottom, is revocation, disqualification, monetary penalty, reprimand and warning. This means that the actual enforcement style can only be described as ‘flexible’ in so far as there is an either/or choice, but also inflexible in that the choice is stark and either/or. As rendered, the choice is fixated upon the administrative regime and thus, perfunctory or at worst ‘inflexible’. Because all sanctioning has resulted in negotiated settlements, none of which have been court approved, the style veers to the conciliatory if not the retreatist. Reform is apposite.

3.1.4. Prosecutorial Discretion: Launching Factors

Pre-crisis, an IMF assessment report recommended that the Financial Regulator should build capacity on investigations/enforcement, and establish clear authority and decision-making processes under the administrative sanctions regime, particularly on deciding between the administrative route or criminal prosecution. Nonetheless, no interplay capacity building has yet been publicly revealed, while the hand-over of matters from the supervisory directorate to the enforcement directorate, as shown above, is deliberately not

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1325 See Part 2 Chapter 3 section 2.3.4 (b) regarding sanction strategy options.
being made publicly available\textsuperscript{1327}. Despite adopting the statutory double jeopardy pathway choice, there is no published Irish guideline as to the preferred use of the administrative sanction route or the criminal law route, or how to deal with interplay issues. Guidelines, whether as to pathway, launching factors or sentence, have a way of building public trust and confidence, I argue, because they suggest consistency of approach, emphasise transparency, and allow for review potential\textsuperscript{1328}. Additionally, unlike ASIC, which introduced the use of Wells-submissions which it borrowed from US practice, no such evidence-gathering procedure is available to the Irish regulator. The obsolete and limited real crime disclosure tradition is still employed and, expert to expert needs reinvigorating with increased disclosure capability at the investigative stage, and increased inference, presumption and reverse burden jurisdiction at trial.

Absent publication, full Macrory accountability and transparency are in issue, as is Dicey’s non- arbitrary discretion prohibition. Absent a policy at all then regulatory legitimacy is in issue. So exploring for the existence of a policy is apposite. In a survey of the financial regulatory sector conducted before the 2010 reforms, Connery and Hodnett highlighted the unique position of the Irish Financial Regulator, as opposed to others, where constitutional grounds are often cited as impediments to the dual role\textsuperscript{1329}. They commented that in light of the limited penalties available pursuant to summary criminal prosecutions, as a matter of general policy, the Financial Regulator decided only in exceptional circumstances to pursue a prescribed contravention via the criminal process. Indeed, the Central Bank’s own Strategy Document issued in December, 2010, post reforms, clearly re-stated a preference for Administrative Sanctioning over summary criminal prosecution\textsuperscript{1330}, which will be pursued in exceptional cases but where necessary will be pursued in all cases\textsuperscript{1331}. Although there is no publicly available document setting out the launching factors, still decisions in practice are made therefore, based around

\textsuperscript{1327} See Oakes \textit{The role of enforcement} (n 453).
\textsuperscript{1328} Interviewee L Judiciary Ireland 7 January 2013 stated: ‘One of the important requirements for trust and confidence in the law is that the law should be seen to be consistent in its approach. So sentencing guidelines are important or may be important in ensuring consistency’. Interviewee N Academic Australia 27 April 2012 took the view that the presence and exercise of discretion was a problem regarding a mixed sanction philosophy, and added that there would clearly have to be a transparent strategy.
\textsuperscript{1329} See Connery and Hodnett (n 6).
\textsuperscript{1330} There cannot be both due to double jeopardy restriction.
\textsuperscript{1331} See CBI \textit{Enforcement Strategy} (n 453), 20.
undisclosed rules of thumb. One regulator interviewed for this dissertation revealed some of the factors and impinging limitations considered, when stating:\footnote{1332 Interviewee C Regulator Ireland 6 February 2013.}: 

[W]e’ll look at the facts of the case, we’ll look at the evidence. We will look at the time frames we have with summary prosecution and we’ll make an assessment on that. At the moment it’s being preferred to go down the civil route, but it doesn’t mean if the right case comes up that we won’t go down the criminal route....... you want to make sure you’re going to target something that’s going to give you a return on the use of a summary criminal prosecution power, because you’re not going to get big sentencing are you at the end of the day.

Thus time frame, presumptive preference for the civil route, difficulty in identifying the ‘right’ commencement case, and sanction outcome govern the call. Of course at the indictable level the sanction capability is so much stronger but this official only mentions the summary form of prosecution. However, it is evident that the view has been formed that summary prosecution powers with limited fine capacity, do not measure up to the monetary penalty arsenal of the administrative regime. The same interviewed regulator, clearly only contemplating a criminal/civil pathway choice, revealed that criteria from multiple DPP, ‘messaging’, ‘evidential and proofs’ concerns and especially, and somewhat worryingly, ‘desired outcome’ again, are all-important considerations. This worldview raises considerable legitimacy, universality of approach, clarity, coherence and other concerns, as is evident from his remark:

_We are looking at DPP’s guidelines for initiating a prosecution whether it is in Ireland or a DPP around the world. And we’ll look at it and [ask] what is the message which we are trying to send with this particular case? And that is when you decide what tool you are going to use, is it going to be civil or is it going to be criminal? And then you need to weigh up. Is there going to be difficulty in proving a criminal case here or is a civil case better? And what is the impact and can you get the coverage on a civil case and make it sound meaningful, or will people simply say oh it’s irrelevant because nobody went to jail? So there is a place definitely for the criminal cases in the Central Bank, and in relation to the range of factors that we take on it will come down to what is the desired outcome._

This remark about the DPP’s guidelines is worrying, in that as already demonstrated, there is wide divergence in available launching factors between the US and Ireland, Australia and Ireland, and the EU and Ireland, even from the limited survey set out above in Part 2 Chapter 2 section 2.2.4. Contrary to international best practice as set out in
section 2.2.4 furthermore, no satisfactory attempt to date has been made at the financial
regulatory level in Ireland to establish or publish a definitive set of discretionary
launching factors governing sanction interplay. There are advantages in doing so.
Not alone is such advance publication needed to meet values such as legitimacy, equity,
due process, accountability and transparency as already highlighted, but also a statement
of how such factors or criteria will be operationalised is equally necessary. From a
market actor perspective, such developments if they occur, will offer incentives to design
out opaque business behaviour, practices, and models which encourage nondisclosure and
organizational secrecy. In addition, professional advisers will be enabled to accurately
advise their clients, in a timely manner, as to their obligations. This applies both pre-
offence, ensuring greater compliance, and post-offence, ensuring speedier and condign
sanction geared to future behaviour change, all within a Packer acceptable due process
environment acknowledged as both efficient and fair.

Reflecting the views of the European Court of Justice, in the landmark Greek Maize case, and adopting the policy grounding the EU Commission’s recent proposals regarding
criminal sanctioning in the financial regulatory area, the Central Bank, drawing from the
criminal law fountain into regulatory enforcement, have stated: ‘....where we detect non
compliance with laws or regulatory requirements, our objective will be to ensure that
proportionate, effective and dissuasive action is taken to protect the interests of
stakeholders.’ The Central Bank has warned that a key component of their new post-
crisis enforcement approach is a proportionate and robust sanction under their
administrative sanction powers, both as a deterrent to others, and to educate stakeholders
regarding the behaviour expected of them. Thus, a policy of both specific and general
deterrence has been espoused, the hybrid middle strategy discussed earlier which veers
more to compliance than to retribution. By way of general statement, Oakes stridently
declared the Bank’s post crisis criminal law enforcement policy thus:

*Exercising our criminal powers will place us before the courts to prove our case
beyond reasonable doubt and this too is a challenge we accept. Like other*

1333 Outside dissertation scope and effective 6th November 2013 see CBI *Outline of the Administrative
Sanctions Procedure* (2013) (n 493), 9 as discussed more fully in Appendix K.
1335 See CBI *Enforcement Strategy* (n 453), 9.
1336 See CBI *Enforcement Strategy* (n 453), 3.
1337 See Oakes *The role of enforcement* (n 453).
regulators we may not win each case but we will take cases where we believe we have strong points to argue and solid evidence in support, including being prepared to appeal where appropriate.

Regarding reform criteria for Ireland then in making these prosecutorial decisions, and with a view to fully reflecting the regulator’s tougher enforcement stance, it has already been demonstrated that on the criminal law side that Australian, US, and EU criminal and regulatory prosecutors consider a broader range of factors. The relevant launching factors in discretionary prosecutorial decision-making however, are discrete to each country and culture. They can only be exercised within the national constitutional values cocoon. For Ireland, there is nothing to prevent the use of the launching factors outlined in Part 2 Chapter 2 section 2.2.4, or the mobilisation discussed in Part 2 Chapter 3 section 2.3.5 and as shown in Appendix J, which include intent, harm, the case specific weight of the evidence, cooperation and remediation efforts. Indeed, the regulator interviewee quoted above suggests that drawing upon international comparators is already an operational feature in Ireland.

Conscious that the criminal law has been marginalised from non-use, recent revelations by the Enforcement Directorate that to be considered a credible enforcer they accept the challenge of future criminal prosecutions, promise to act decisively, and yet not act recklessly or wantonly in exercising their powers, is helpful to building binary capacity\textsuperscript{1338}. One currently missing element is a protocol between regulator and the DPP, designed for instance, to assist early intervention, early consultation, investigative aid and information passing between regulator and DPP, as an optimal binary suggests. One dissertation interviewee acknowledged\textsuperscript{1339}: ‘I think that that certainly is likely to be of value’. Such a protocol may also govern all lesser matters, including all minor supervisory and educational issues, which may safely be left to discretionary decision-making by the regulator, and thus lessen the work for any potential specialist and independent prosecutor.

As regards enforcement interplay, at present the Irish financial regulator acts upon complaints or upon its own initiative, has a large administrative penalty arsenal, or as

\textsuperscript{1338} Oakes Delivering a credible threat (n 431).
\textsuperscript{1339} Interviewee X Regulator Ireland 12 November 2012.
shown may mobilise on the criminal side by prosecuting minor or summary offences itself, or may refer serious offences to the Garda Siochana equally bereft a separate set of launching factors, or the DPP who will presumably apply the two real crime criteria already explored and presumably also expect the Gardai to do likewise. With a clear choice between a criminal prosecution and administrative sanctioning, there are two separate sanction suites one including imprisonment and the other not, no availability of enforcement undertakings, or the no prosecution or deferred prosecution options and conditionality already explored, and thus no single transversal sanction suite. On the administrative side there is penalty differentiation between corporate entity and individual in statute, and incongruously there have been few enforcement cases brought against individuals in practise.

The recent revelation by the regulator, that there has never been a summary criminal prosecution, and as to indictments only a few referrals to the DPP, none of which have yet borne fruit, is troubling. Although the administrative sanction regime commenced in 2004, apart from a warning in 2005, the first real sanctions were not imposed until July, 2006. The first monetary penalty was imposed in 2007. All sanction events to date have resulted in negotiated settlement agreements as shown in Appendix F. Irish financial regulation of RFSPs and markets, clearly a novice regime, is now described by the regulator as based, ‘in a model of assertive risk-based supervision underpinned by a credible threat of enforcement’. Practice objectives revealed in December, 2012 included protecting regulatory stakeholders (including consumers, investors and the public); holding specific wrongdoers accountable; a general deterrence goal; improving

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1340 See Connery and Hodnett (n 6), ch 4; and CBRA 2010, Part 3.
1341 Monetary penalties of up to €5 million on a firm or €500,000 on a person; these penalties were increased by the Central Bank (Supervision and Enforcement) Act 2013.
1342 See Elderfield Opening Remarks (n 417); Oakes Delivering a credible threat (n 431). Also Interviewee C Regulator Ireland 6 February 2013 who confirmed this information and yet added that ‘the criminal space is where we want to move in to’. Also see S Carswell, ‘Anglo executive given immunity deal by the DPP’ The IrishTimes.com (Dublin, 10 September 2013) as discussed more fully in Appendix K.
1344 Concerning sanctioning RFSPs do not care about monetary penalties; they are concerned with Brand (image and reputation); F Muldoon, ‘Economic and Social Reform’ (Public Seminar ‘Reform in the Aftermath of the Crisis: Exploring Agenda for Health, Political and Financial Reform’ University of Limerick 19 September 2013).
1345 Interviewee C Regulator Ireland 6 February 2013 so confirmed.
1346 See CBI Annual Report 2012 (n 1301), 57.
regulatory compliance levels; compensating harmed investors; the changing of future
behaviour; improving supervisory efficiency; and, educating and signalling regulator
intentions. While ninety percent of enforcement events have been directed at
corporate entities, increased scrutiny of the behaviour of individuals within such
corporate structures has been promised.

3.1.5. A Credible Threat of Enforcement

It is open to debate as to whether a credible threat of enforcement means all sanction
outcomes to date being located within ‘discounted’ settlement agreements, none of which
have been court approved. Large monetary penalties have been imposed, it is true.
None of these can be described as ‘minor’, and yet despite legitimacy and legality
concerns, no RFSP has yet attempted a constitutional legal challenge, although both the
Irish judiciary and the regulator are aware of its potential. As time has progressed,
more detailed sanction publicity statements have been published on the regulator’s
website, and absent a revealed methodology of computing monetary penalties, and the
proofs and bargaining workings, these now systematically reveal the salient facts and
penalties, the case specific sanction factors applied, including self-reporting and
cooperation efforts, and a market commentary directed to general industry behaviour
change. The conclusion of one Irish regulatory official interviewed for this dissertation
suggests that the financial services industry, and its advisers, at any rate, regard the threat
as ‘credible’:

1347 Oakes Delivering a credible threat (n 431).
1348 Oakes Delivering a credible threat (n 431). Also Interviewee C Regulator Ireland 6 February 2013
stated: ‘I think what needs to be seen is a real drive by the Irish regulatory authorities to take action and
where does action actually hurt the most? It doesn’t hurt against an institution. If you want to change
behaviour in individuals you need to focus on the behaviours of individuals and then take any action
against the individuals’.
1349 Thus far there has been a noticeable gap between supervision and enforcement, and in enforcement
itself, as far as sanctioning, and particularly conditionality associated with settlement agreements, is
concerned. The position may however, change somewhat under the new powers for the Central Bank under
Central Bank (Supervision and Enforcement) Act 2013. See Appendix K for more detail.
1350 Interviewee L Judiciary Ireland 7 January 2013 stated: ‘Well there is a risk of constitutional
challenge......I don’t wish to express a view or not as to whether it would be successful, and it wouldn’t be
appropriate, but I agree with you that theoretically there is a risk of challenge’. This dissertation has
primarily argued from within existing legal principles for a fused binary, but has also recognised the
possibility of Constitutional amendment; however, in that event it must be noted that ECHR and EU
fundamental Rights Charter provisions cannot be over-turned by Irish Constitutional amendment.
1351 Interviewee C Regulator Ireland 6 February 2013.
What we do now in enforcement is being debated by the insolvency firms and law firms. They are repeating and redistributing what happens in our cases. We are getting coverage in the newspapers on areas to do with enforcement which didn’t really happen in the past. It actually is getting out there. Is it working? I have people I know in the industry who tell me that enforcement and the powers of the bank are discussed at board meetings.

This suggests that enhanced compliance capability and mobilisation, especially within a collaborative setting, which is recognised by the business elite as equitable and workable, may well have the desired effect of changing culture and ‘working’. The current tardy nature of the Irish financial regulatory enforcement culture however, is not helpful. It is amply demonstrated by the way in which events at Anglo-Irish Bank have been dealt with. Chairman of the Board of the Financial Regulator, Jim Farrell revealed in the 2008 Annual Report, contemporaneous to the publication of the EU de Larosiere Report, that four issues had arisen which resulted in formal investigations. As of July, 2012 prosecutions had eventually been commenced against Willie McAteer, Pat Whelan and Sean Fitzpatrick (former chairman), all formerly of Anglo Irish Bank; the ODCE had indicated that its investigative role with Anglo had been finalised; and Sean Quinn had lost his business empire, been declared a bankrupt, and was the subject of High Court contempt proceedings for asset interference. Three months before these prosecutions ensued, one dissertation interviewee observed from his discussions with bankers that they felt as though they had ‘got away with it’, and expressed themselves as surprised at this. Disappointingly, Irish media reports early in 2014 recorded that the High Court was informed that Anglo Irish Bank prosecutions could take several years to finalise.

On the other hand, there has been business resistance to stiffening administrative enforcement post-crisis. Elderfield revealed that sanctioning and publication of those sanctions had, ‘made some in the industry uncomfortable and [led] to pleas to ease up on

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1352 De Larosiere Report (n 1) which Jim Farrell lauded had advocated clear rules and enforcement powers to encourage overall compliance and to act as a deterrent to poor controls and risk management.
1354 See Appendix K for an extended footnote.
1355 Subsequently re-named IBRC, and later to be liquidated by statute in 2013, see Irish Bank Resolution Corporation Act 2013 (no 2 of 2013).
1356 He was subsequently jailed for contempt in December, 2012.
1357 Interviewee E Academic Australia 22 March 2012.
1358 M Carolan, ‘Anglo Irish Bank criminal cases could run for several years, High Court told’ Irish Times (Dublin, 14 January 2014).
the use of the enforcement tool'. This lobbying fell on deaf ears, and it was made clear that enforcement is, ‘a necessary and best practice element in the regulatory toolkit’. It is pass-remarkable that business appears a slow learner in relation to its lobbying practices, when contemplating the problems caused by it, and by the previously captured regulator! The business view may have some weight concerning criminal law mobilisation however, as reflected by one dissertation interviewee:

I think it has to be used carefully and cautiously because otherwise you can bring out a big bazooka which actually can work unfairly in terms of business decisions that are just negligent rather than culpable in criminal law. I’m sure it is necessary in certain circumstances for prosecutions. We’ll see that in Ireland we’ll see whether they are justified in time.

Arguments that Irish corporate competitiveness was being impaired by post-crisis administrative enforcement were equally rejected, by Elderfield, and it was emphasised that enforcement was prominently operationalised across the EU and elsewhere. Further, lobbying to ring fence international firms from the scope of potential enforcement action, provoked the revelation that weaknesses in governance, systems and controls, and other breaches, have been found amongst international RFSPs, just as for domestic RFSPs. Tackling another hackneyed lobbying tactic, and eschewing exemption claims, Elderfield also emphasised that the deterrent effect applies both to inadvertent breaches, and to those self-reported, although due credit is given when sanctioning. The simple catch-phrase is that sanction and publication, incentivise improved behaviour change for all, and while impacting the reputation of ‘bad’ business, it may enhance Ireland’s business reputation generally. Sanction effectiveness was measured by the same business interviewee quoted above as follows: ‘I suppose you are afraid of criminal law from every point of view whether reputational damage or the actual sanction, reputational damage is the primary one’. A second interviewee expressed the weight of criminal prosecution also in reputational terms, stating that it harms confidence and trust

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1359 See Appendix F from which it is clear that post-crisis enforcement has stiffened; Elderfield Opening Remarks (n 417) of December 2012; C Barr, ‘John Bruton calls for ‘rein’ on financial regulation’ IrishTimes.com (Dublin 11 May 2013), and ‘Elderfield warns against diluting regulation’ IrishTimes.com (Dublin 9 May 2013); C Hancock, ‘Elderfield gives Roux a head start’ The Irish Times (Dublin, 22 August 2013). For the US backlash see for instance, The Economist, ‘Criminalising the American Company A mammoth guilt trip’ (London, 30 August 2014). See Appendix K for an extended footnote.


1361 Elderfield mentioned the UK and US, and also across the EU including France, Germany, Sweden, Malta and Luxembourg.

in the RFSP, and once publicised it informs individuals, and may lead on to licence
disqualification or revocation. Recognising the imperative of correctly measured incentives, re-enforcing Elderfield’s examples concerning the globalised nature of the
reform agenda, and explaining the role of public policy, and reflecting informed business opinion, Honohan has contextualised the current Irish financial regulatory position thus:

> Getting the overall incentives facing decision makers in financial firms right – ultimately more closely aligned with public policy – is an elusive goal which is also being pursued at international level....For the most part, Irish regulations are defined by those adopted by the EU which in turn is coloured by the wider decisions at the level of the (international) FSB.

3.1.6. **Enforcement Strategy**

Irish financial regulatory practice in so far as the actual sentence is concerned, is both compliant with, and grounded in, the three-pronged EU-wide practice that sanctions must be proportionate, effective and dissuasive. Effectively, the criminal law fountain has provided the standard for the regulatory sibling. The goal is to protect ‘stakeholders’ but this term is not officially defined. A statement that victims, wider taxpayers of last resort, and the markets and/or civil society generally are included, if not their prime focus, may favourably influence market actors contemplating compliance or remediation after misconduct.

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1363 Interviewee E Academic Australia 22 March 2012 expressed the view that criminal prosecution is disliked by RFSPs because it harms confidence and trust in them, and once publicised it informs individuals, and may lead to licence revocation also, which is the nexus or connection for corporate actors, because they are afraid to lose their licence. Also see ft467 above where the anti-criminal law views of market actors in the EU and Australia are apparent. Interviewee Z Business Leader England 29 November 2012 stated of the GFC: “It’s not in my opinion the absence of the criminal law that created the problem.... There seemed to be a lack of comprehension of macro-economic aspects of this and the effects that it would have rather than I mean perhaps criminality can be established in some particular cases but I don’t think that that is the fundamental problem”.

1364 See Honohan Speech Closing Remarks (n 1310). Of relevance to policy makers Interviewee Z Business Leader England 29 November 2012 stated: ‘....the key issue is for the Financial Services Authority to insure and to look at the cultural development of the companies in question in terms of their remuneration strategy, in terms of the obligations, in terms of the power of the compliance function to veto transactions where necessary, I think that that’s the key to it’.

1365 See Case C 68/88 Commission v Greece [1989] ECR 2965 (Greek Maize); also see CBI Enforcement Strategy (n 453), 9 as quoted in Appendix K.
Upon release of the Central Bank’s 2012 enforcement priorities Oakes stated:\textsuperscript{1366}:

\textit{Enforcement action combined with the resultant publicity has a powerful impact, promoting compliance and deterring other industry participants from similar non-compliance whilst educating stakeholders on the standards and behaviours expected of them.}

Absent summary criminal prosecution by any of the three designated ‘specialist’ prosecutors, and despite referrals, the laying of any indictable charge by the supremely specialist DPP, the Irish enforcement style cannot be described as flexible, which was the preference to emerge from the earlier discussion. Further, the actual strategy mobilised to date as opposed to the rhetoric, engaging as it does the exclusive use of a form of negotiated resolution, veers heavily toward responsive compliance and not the judicious mix which also emerged from the research as preferable. Oakes’ aspirational reference to promoting compliance and deterrence, by enforcement coupled with publicity, does not find solace in the real crime enforcement experience where crime continues unabated.

Stakeholder education via the same double combination of enforcement and publicity is another matter. While of course, such education is a valuable and positive regulatory tool for the many market actors identified, for instance, in the earlier highlighted Parker et al studies as being motivated to responsible social behaviour, sometimes stakeholders may also negatively be educated in how to ‘beat the system’.

In Part 2 Chapter 2 section 2.3.2, McGrath’s general regulatory ‘two strands’ formulation, was stated to neglect the unique position of the Irish financial regulator, when statutorily enjoying the dual administrative and criminal enforcement powers. Nonetheless, the critique expressed by a number of commentators, that in Ireland (as elsewhere), no worthwhile attempt has been made to define regulatory offences, must be counted a missed opportunity. The Irish practice reflects discrete offence and contravention categories, and discrete criminal and civil proofs standards and procedures, with the growth coming in the more principles-based contraventions. When offences and contraventions are kept discrete, then two enforcement poles are needed, and decision-making must reflect the two discrete processes. It also encourages discrete sanction suites, for which the only real rationale is imprisonment which may constitutionally only

\textsuperscript{1366} See Central Bank of Ireland, Central Bank Publishes \textit{Enforcement Priorities for 2012} (Information release 13 February 2012).
be imposed by a judge. Separation also has implications for double jeopardy and double penalty prohibitions, especially if the discrete contraventions, and the sanctions attaching to them, are not regarded as punitive by constitutional or international convention norms. One advantage of a fused binary for Ireland, should only one type of offence/contravention be applicable, with a single procedure and proofs standard, and where a single sanction suite applied, would be that universal justice would be mobilised across a discrete and uniform set of norms, which would also govern a single discretionary decision-making regime. All exercises of discretion would be simplified to the benefit of policy-makers, decision-makers, and clients of such a system and their advisers. All sanctions would be imposed within a single fused binary, even if drawn from a legalistic criminal law top down style, to a retreatist administrative bottom. A total price stipulation would remove double penalty concerns, a single form of offence some double jeopardy issues, and the stipulation of the single criminal law proofs standard many others.

3.1.7. Sanction Guidelines

Advance notice of sentence factors within the administrative regime, on the other hand, is deemed essential. Four general sanctions factors with sub-categories, as devised by the regulator himself in 2005 pre-crisis, must be considered before ‘sentence’ may be imposed\textsuperscript{1367}. These non-statutory guidelines, which have clearly been influenced by regulatory practice abroad, include the nature and seriousness of the contravention; post-contravention conduct; an infringer’s previous record and general considerations\textsuperscript{1368}. They clearly mirror issues pertinent to the development of interplay launching factors, a realisation which begs the question as to why such factors were not devised or published. In some instances, there is limited reference to these guidelines in settlement agreement publicity notices, while the priority of same is not revealed. The fairness and legitimacy of the financial regulator exclusively devising his own sentence – and other - guidelines, and indeed increasingly self-drafting statutory instruments, and legislative amendments,

\textsuperscript{1367} Financial Regulator Ireland, \textit{Administrative Sanctions Guidelines} (2005) (FRI Sanctions Guidelines), para 14 as discussed more fully in Appendix K.

\textsuperscript{1368} From US SEC and UK FSA practice.
and then administering them, may clearly be criticised as a breach of Dicey’s rule of law, as well as Weberian, and Packer’s due process, principles.

Within the Irish guidelines as published, no overall values, rationale or set of objectives have been set out, for instance, around norms such as proportionality of sanction, offence/perpetrator considerations, or total price guarantees; or, around preferred sanction strategy, protection/prevention priorities, punishment including the use of imprisonment, rehabilitation or future behaviour change. Therefore, none of the balancing discussed in Part 2 Chapters 2 or 3 can be achieved. Similarly, there has been no attempt to prioritise the criteria, or provide for the resolution of guideline conflicts, as recommended in criminal guidelines internationally, although it must be acknowledged that regulators worldwide appear to prefer maximum flexibility, rather than prioritisation as a governing principle. No guideline ranges have been provided for sanction level, nor has a misconduct scale or a methodology of imposing monetary penalties, for instance, been outlined.

Absent also is the three stage proportionality process propounded by Irish criminal courts of locating sentence range, placement within it based upon offence gravity, including harm and offender culpability, before aggravation and mitigation kick-in. No differentiation between individuals and corporate entities has been set out, and nor has any guidance as to the relative prosecution or sanction of either or both been given. Apart from these internal deficiencies, the current Irish financial regulatory guidelines, minus statutory grounding, ranking and in-built conflict resolution, clearly do not conform with the Council of Europe model which advocates sanction rationales as explored earlier, and they bear no direct reference to restitution for ‘victims’ although there are powers available to the sanctioning authority in that regard\textsuperscript{1369}. Further, they fall a good way short of the three suggested sanction objectives recently proposed in the UK, inter alia around sanction steps, and are out of step with the EU-wide consultation process recommendations. No reference is contained to resources implications, and nor has education of the regulator as sanction deviser and/or mobiliser been broached. There is a

\textsuperscript{1369} See both Council of Europe, \textit{Convention on Compensation for the Victims of Violent Crime} (Strasbourg, Council of Europe 1984); and Council of Europe, ‘Consistency in Sentencing’ (n 987), Recommendation R (92) 17.
clear need for a public consultation process around all of these issues, and for reforms where deemed beneficial to the responsive working of the regulatory sanction regime.

3.1.8. Sanction Options and Practice

By way of overview, administrative sanction action has been taken against firms operating in the international financial services sector, banks, insurers, re-insurers, retail intermediaries, stockbrokers, specialist MiFID firms, a listed entity not otherwise regulated by the Bank, a fund administrator and investment managers. The original philosophy governing the use of sanctions was guided by the 2004 consultation process and the Irish Government’s six principles of ‘Better Regulation’, and in particular necessity, proportionality and effectiveness. The major four sanction factors as discussed above are seriously limited, and outdated, when set against the international comparators explored in Part 2 Chapter 2. The lack of an Enforcement Directorate until late 2010 was a major enforcement obstacle. While RFSP cooperation in sanction events is a vital international norm, discrepancies with best international enforcement practice may also now be found in the 2006 voluntary reporting guidelines.

The discrete Irish administrative/civil sanction suite, as established in 2004, includes a wide range of sanctions such as monetary penalties, levies, cautions/reprimands and disqualifications. Until mid-2013, when some minor additions were made, this suite continued post-crisis. New civil-specific sanction tools to add to the mix were recommended even pre-crisis, but not added, while the EU call for specific tailoring of

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1370 Oakes Delivering a credible threat (n 431).
1372 These were FRI Strategic Plan 2007-2009 (n 1315), 12: (1) The availability of other regulatory actions; (2) the nature and seriousness of the contravention; (3) the conduct of the financial service provider after it came to light; and, (4) the previous compliance record of such provider.
1373 See the pivotal Mazars Report (n 1292) as discussed more fully in Appendix K.
1374 See The Voluntary Reporting Guidance Note (Financial Regulator Ireland, Guidance Note for Regulated Financial Service Providers in Reporting Compliance Concerns to the Financial Regulator (2006)), which set out twelve indicators to assist in voluntarily reporting compliance concerns, detailed more fully in Appendix K. Also see Part 2 Chapter 2 section 2.2.4 because these guidelines lag behind the more extensive current international comparators, and do not differentiate between companies and individuals.
1375 See Appendix K for an extended footnote. Also see Connery and Hodnett (n 6), ch 4; Central Bank Reform Act 2010, Part 3; and Appendix F.
1376 See Central Bank (Supervision and Enforcement) Act 2013.
administrative sanctions to specific harm risks has not been heeded\textsuperscript{1377}. In Part 2 Chapter 1 the significance of penalty severity, as an indicator of criminal classification, was highlighted both for Ireland and the ECHR. My original research for this dissertation as seen in Appendix F, reveals that under the Irish administrative sanction regime, monetary penalties are differentiated between individuals and corporate entities\textsuperscript{1378}, and are top-lined or subject to ceilings maxima. They were critiqued as requiring upgrade tailored to proportionate reflection of offence harm, and in mid 2013 reform arrived after a lengthy delay\textsuperscript{1379}. In practice fifty-nine settlement agreements were concluded up to the end of 2012\textsuperscript{1380}. The sanction hierarchy revocation to reprimand, as already highlighted is clearly evident, despite no specific enforcement pyramid being deployed\textsuperscript{1381}. Despite Irish regulators being aware of the pyramid concept, neither it, nor any other heuristic is currently deployed, nor are any sanction values such as normally accompany a pyramid, expressed or openly relied upon\textsuperscript{1382}.

The reprimand is the most frequent accompaniment to a monetary penalty. It is clear that monetary penalties have stiffened since the onset of the financial crisis. In fact, almost 65% of all monetary penalties have been imposed during 2011-2012, in twenty-six cases. No figures are available however, for collection rates for the monetary penalties imposed. Most infringers are corporate RFSPs and individuals have largely not been ‘prosecuted’. During the period 2004-2012 the largest six fines, none of which could be described as

\textsuperscript{1377} McDowell Report (n 26) and especially paragraph 7.6 for instance; also see Butler et al (n 451); COM (2010) 716 final (n 23); Hamilton ‘Do we need a system of administrative sanctions in Ireland?’ (n 451); Horan (n 87); McDowell (n 451); COM (2010) 716 final (n 23). See Appendix K for an extended footnote.

\textsuperscript{1378} Part IIIC CBA 1942 as amended: individuals (maximum €500,000) and corporate entities (maximum €5 million), and increased by Central Bank (Supervision and Enforcement) Act 2013 Part 11 effective 1 August 2013.

\textsuperscript{1379} Interviewee X Regulator Ireland 12 November 2012 advocated a strong case for substantially increasing the financial penalties that may be imposed on corporate entities vis a vis the individual entity. The Central Bank (Supervision and Enforcement) Dail Bill (2011) 43 contained extensive reform proposals as recommended by the Financial Regulator. On 11 July 2013, after a two-year wait, the Central Bank (Supervision and Enforcement) Act 2013 was finally enacted, effective 1\textsuperscript{st} August 2013. See Appendix K for more detail.

\textsuperscript{1380} See Appendix F. In sharp contrast, Appleby ‘Compliance and Enforcement’ (n 605), 185 revealed that in the first ten years of operation of the ODCE that about 280 convictions had been secured against more than 100 companies, company directors and others for various company law offences; furthermore, some 70 disqualifications of company directors and others had occurred, and the ODCE supervised the restriction of over 8000 persons by liquidators.

\textsuperscript{1381} See https://www.centralbank.ie/regulation/processes/enforcement/Pages/settlement-agreements.aspx.

\textsuperscript{1382} See ft 605 and ft 606 above; and, Appleby Reflections on Weaknesses with respect to Accountability (n 455). Interviewee X Regulator Ireland November 2012 advocated a pyramid with values. Interviewee C Regulator Ireland 6 February 2013 when asked about the use of an enforcement pyramid approach stated: ‘I wouldn’t necessarily describe it like that’.
minor per se, although they may not greatly impact corporate resources, have been in the two million euro or above bracket with the largest Quinn Insurance Ltd at €3.45 million\(^{1383}\). Total fines were just short of €21 million (excluding remediation) and the case average was almost €356,000\(^{1384}\). These are significant monetary penalties, are clearly punitive, and cannot be described as the exercise of limited powers by a non-judicial body, potently suggesting a breach of the legality principle, and a case for Constitutional and/or ECHR challenge. The regulatory authorities are aware the exercise may constitute unwarranted interference with the judicial function, and noting industry reluctance to rock the boat, clearly use it to their advantage\(^{1385}\). A view has been taken that save for criminal prosecutions for serious matters, of which there have been none to date, since all sanctioning is effectively consensual, then Irish domestic and international standards are not applicable or will not be insisted upon by suspects/accused. This in my view is not good regulatory practice. Legitimacy requires compliance with Dicey’s rule of law, irrespective of consent, as does Macrory’s accountability, most especially since such consent may not be genuine and be forced upon the accused by enforcement costs, a real and stated discontent of business leaders.

Extolling what the Irish financial regulator claims as sound legal practice, and in order to achieve the most cost effective resolution, he promoted the option of early settlement pre-crisis and still persists post-crisis. In these cases, the terms of settlement may reflect a policy proclaimed discount on the ultimate penalties, given the resultant saving in time, resources and money\(^{1386}\). However, the discount level and any temporal considerations

\(^{1383}\) See Croall and Ross (n 422) as quoted in Appendix K.

\(^{1384}\) During the period 2004-2012 the largest six fines have been Quinn Insurance Ltd and another €3.45 million (2008), Combined Insurance Company of Europe Limited €3.35m plus remediation of €2.151 million (2011), Alico Life €3.2 million (2012), Merrill Lynch International Bank Ltd €2.75 million (2009), Allied Irish Banks plc €2 million (2010), Ulster Bank Ireland Limited €1.96 million (2012). The range of fines has run from as low as €800 to €3.45 million, with total fines just short of €21 million (excluding remediation) the case average being almost €356,000. See Appendix F for more detail.

\(^{1385}\) Interviewee L Judiciary Ireland 7 January 2013 concerning potential constitutional challenge to the size of penalty imposition stated: ‘You could make that argument. I don’t wish to express any view on it’. And later the same Interviewee L added: ‘....theoretically there is a risk of challenge. ....It’s a matter for the Attorney General really. Presumably this has been looked at’. Interviewee C Regulator Ireland 6 February 2013 stated as to the top-lining or ceiling of monetary penalties: ‘We do [limit] in Ireland now I’m not a constitutional expert but I am informed that that’s because of a particular constitutional reason’. Also see DJELR White Paper on Crime, Organised and White Collar Crime (n 450) which commented upon constitutional limits to the scope to extend the use of administrative penalties; also see Connery and Hodnett (n 6).

\(^{1386}\) See CBI Enforcement Strategy (n 453). 21; and see Oakes The role of enforcement (n 453).
have not been pre-published. Despite this promotion being actively targeted, once a sanctions case has commenced, there is no independent approval authority. The benefits of a rapid sanction event were extolled post-crisis to include, quicker resolution and closure, the immediacy of a strong message of deterrence, good resource management, and the perceived likelihood of reduction of future breach, thus providing greater protection for consumers. As the crisis unfolded however, the government-commissioned Honohan Report, effectively criticising contingent regulation based in expediency as lacking legitimacy, bemoaned that the preferred approach to enforcement was to seek voluntary compliance, and that enforcement therefore was largely seen as a private problem-solving exercise, between regulator and those regulated. Honohan located the compliance approach in two reasons. Firstly, the credibility danger that court cases might be lost, and secondly, feared business perception of over-regulation, because attaching conditions to licenses, and similar measures, might both attract unseemly adverse publicity, and discourage promotion of the Irish financial sector. Presaging the future however, Honohan argued that post-crisis, regulatory agencies must quickly establish both credibility and reputation as an enforcer, thus creating expectations as to how the rules, codes, regulations and principles will be enforced, in turn, influencing future RFSP behaviour. I argue this must involve an updated and fused binary, where sanction beyond settlement agreement is actively operated. Seven plus years into operations, Oakes has described settlement agreements as ‘voluntary’. Bank policy is not to engage in protracted settlement negotiations, normally facilitating only one settlement meeting in each case, and to seek in the public interest an agreement of the facts, a reprimand, and if the case warrants it an agreement of a financial penalty.

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1387 As of 6th November 2013 they have been as stage 1 30% and stage 2 10%; see CBI Outline of the Administrative Sanctions Procedure (2013) (n 493).
1388 See section 33 AV of the Central Bank Act, 1942 as amended; FRI Sanctions Guidelines (n 1312), para 13; FRI Outline of Administrative Sanctions (n 1284), 6-7 as discussed more fully in Appendix K.
1389 Oakes Delivering a credible threat (n 431).
1390 See Honohan Report (n 6), 44; Habermas (n 276), 125 as quoted in Appendix K.
1391 See Honohan Report (n 6), 56.
1392 Interviewee C Regulator Ireland 6 February 2013 described the sanction binary thus: ‘I do think you need to keep your civil and criminal tools in the toolkit and I don’t think one should usurp the other on every occasion’.
1393 See Oakes The role of enforcement (n 453).
1394 Interviewee C Regulator Ireland 6 February 2013 described the actual settlement procedure model, with some future, yet minimal, planned innovations, as follows: ‘.....where we are comfortable that we can demonstrate that there has been a contravention...... we’ll offer a settlement if the firm wants to take settlement. That meeting is held on a without prejudice basis. We will not walk out of the room [if] we get
This suggests that policy overrides the case specific treatment of individual RFSPs when sanctioning is involved, and that a limited perspective on sanction suite options prevails.

Recognisable themes from the Irish settlement agreement pool included\textsuperscript{1395}: the almost ubiquitous co-operation of offenders, where cooperation of varying degrees, and especially during investigation, and in early settlement, was reported in all cases thereby effectuating sanction discount options; that often breaches were not deliberate; that in many cases no client complained; that in a sizeable number of cases offenders voluntarily self-reported breaches, giving credence to detractors of the argument that Irish corporate entities are merely profit-maximisers; that since 2009 most breaches were found in targeted themed inspections or other inspections reflecting the use of newer sanction strategies; more recently, inadequate internal control systems have been found (e.g. five in 2012) although all have been stated to be rectified; sometimes breaches have extended over lengthy periods, for instance, in 2012 in the case of two insurance companies, the breaches extended over three and a half years in one case and for nineteen months in the other; and, there has only been two repeat offenders\textsuperscript{1396}. Notices to date however, fail to reveal any methodology of calculation of monetary penalties imposed, and there is no hint, as is found in criminal law sentence statements at higher court level at least, of reference to a high, mid or low case location upon a misconduct scale.

It has been evident from earlier discussion that the weight of the evidence is a significant consideration in the discretionary operation of launching factors, and it also impacts sanction tool decision-making\textsuperscript{1397}. The Irish practice policy, absent a publicly available set of launching guidelines, has favoured settlement over enquiry or prosecution. It is difficult to gauge the evidential strength enjoyed by the financial regulator from published settlements in assessing this policy. Presumably the civil law balance of probabilities standard is used to appraise the admissible evidence pool. It is clear however, that post-infringement cooperation is a major factor in sanction tool choice, sanction discount, and actual penalty imposed. The regulator has revealed that he only invites to settlement, an agreement of the facts, we get an agreement of a reprimand, and if the case warrants it an agreement of a financial penalty......'. See Appendix K for an extended quote.

\textsuperscript{1395} See https://www.centralbank.ie/regulation/processes/enforcement/Pages/settlement-agreements.aspx. Also see Appendix F.

\textsuperscript{1396} The now nationalised Allied Irish Banks plc and Aviva Insurance through three different corporate entities. In 2013 Quinn Direct Insurance became a third.

\textsuperscript{1397} See Part 2 Chapter 2 section 2.2.4. See Appendix K for an extended discussion.
after assessing sufficient demonstrable evidence of infringement\textsuperscript{1398}. This suggests that in all fifty-nine cases to date there has been a weight of admissible evidence against suspects, both causing settlement and monetary penalty levels, and explaining why no constitutional challenge has yet materialised. However, the stated emphasis upon cooperation, equally suggests some insufficiency of information/evidence, and sizeable sanction discount in exchange for fact admission. The size of such discount has not been disclosed. While aggravating and mitigating factors are disclosed, it occurs in so bland and general a way as not to allow proper analysis. One observation however, is the rare pursuit of individuals, and non-existent pursuit of the management team ‘collectivity’\textsuperscript{1399}. Most sanction outcomes concern corporate entities per se, where imprisonment is not an option, but the size of monetary penalties definitely is\textsuperscript{1400}. In this respect, the linkage of fines to financial gain or harm caused, rendering them open-ended penalties, and allowing them to act both as disgorgement mechanisms and as deterrents, has great appeal\textsuperscript{1401}. In Ireland however, maximal capping is applied.

A necessity for judicial involvement in approving prior financial regulatory arrangements was broached in Part 2 Chapter 2 section 2.2.4 (c). There is currently no such procedure, despite large monetary penalties being imposed by the financial regulator. The view has been taken that because settlement agreements are voluntary contracts, that unless there is dispute, or no consent, on the part of the infringer, such a course is not applicable. Irish settlements to date have involved few if any conditions, and where present, relate to victim compensation or reparation, or time-limited licence disqualification or non-application restriction. In the event of a jurisdiction, which I highly recommend, enabling substantial conditionality in connection with no prosecution or deferred prosecution

\textsuperscript{1398} Interviewee C Regulator Ireland 6 February 2013 stated: ‘...where we are comfortable that we can demonstrate that there has been a contravention, a proscribed contravention under the Act and ......we can put to the firm that we hold this belief [then] if they wish we would be prepared to sit down and see whether we could reach a settlement’.

\textsuperscript{1399} Interviewee C Regulator Ireland 6 February 2013 stated: ‘I think what we need to see is that the management team are held accountable, and they’re not being personally accountable for the actual breach but collectively to have some form of responsibility. It would be very nice to see regulated institutions in this space having the maturity to say right no bonuses this year claw back of bonuses from previous years’.

\textsuperscript{1400} Interviewee C Regulator Ireland 6 February 2013 stated: ‘[I]f your only powers are summary criminal convictions .....you want to make sure you’re going to target something that’s going to give you a return on the use of a summary criminal prosecution power because you’re not going to get big sentencing’. Also see ft 1375 above.

\textsuperscript{1401} See Freiberg\textit{The Tools of Regulation} (n 119), 221. Also see Appendix F. Freiberg set out five ways of linking fines to financial gain or harm caused, including percentage of turnover.
agreements as earlier explained and discussed, then an appeal, review and approval mechanism will be required for legal, due process and equity reasons. There is already precedent for a specialised arbitral function in the form of IFSAT the dedicated appeals tribunal. The stipulation of the High Court as the specialised court, perhaps in a separate division, where all prosecutions are processed, would result in full inherent jurisdiction being deployed; the distinction between summary/minor and serious offences procedurally would be eliminated; it would encourage consistency of approach to settlement approval, conditionality dispute resolution and sanction tariff; and, flag for all to see, that financial markets and their coercive control are uniquely and vitally important to society.

3.1.9. Ireland: Post-Crisis Reforms

Beyond the statutory structural, and special resolution vehicle reforms, and establishing the dedicated Enforcement Directorate in late 2010, to bring the Irish enforcement system up to international standard, and both the enhancement of monetary penalties, and the introduction of updated administrative sanction and enquiry guides\textsuperscript{1402}, which are outside this dissertations cut off date, two prominent reform examples arise. Both impact the values complex interrogated within this dissertation. They also both provide a barometer for the effectiveness of reforms to date. The first is the new Prism risk-based targeted approach, which accords with the risk management, targeting approaches of both the criminal law and regulation discussed in Part 2 Chapter 1.

Post-GFC, there has been a general shift towards a different type of risk-based approach which is regulator-led\textsuperscript{1403}. In Ireland, a new ‘proportionate’ approach to corporate governance standards was advocated, eschewing a ‘one-size-fits-all’ model. This is in line with the regulatory flexibility which regulatory literature propounds, flexibly applying different criteria to the different risk profiles as between banking/insurance and funds\textsuperscript{1404}. In the case of funds, for instance, the industry itself was invited to propose its

\textsuperscript{1402} Effective 6\textsuperscript{th} November 2013, see Central Bank of Ireland, Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942 (2013) and CBI Outline of the Administrative Sanctions Procedure (2013) (n 493)

\textsuperscript{1403} See Appendix K for an extended discussion.

\textsuperscript{1404} M Elderfield, Untitled (The European Insurance Forum in Dublin, 29 March 2010); M Elderfield, The Future of Financial Regulation and how it will impact the investment funds industry (IFIA/NICISA global
own corporate governance code. The Irish Central Bank has placed great reliance upon, and heavily publicised, its targeted supervision system. Published simultaneous to the establishment of the stand-alone Enforcement Directorate, the Enforcement Strategy indicated that 40% of enforcement effort would be targeted at reactive enforcement, and 60% at proactive enforcement\textsuperscript{1405}. The new enforcement regime was thus closely aligned with the new targeted and themed risk-based regulatory approach of the Central Bank announced in June 2010, and later introduced as PRISM (Probability Risk and Impact SysteM) almost eighteen months later in November 2011, under which regulated entities, pre-classified as higher risk, or of systemic importance, are prioritised by using a score-card system\textsuperscript{1406}. Prioritised targeted themes were established and publicised in advance\textsuperscript{1407}. One prominent example arises in an area targeted and found wanting by post-crisis Irish regulation, where at supervisory or enforcement level, both identifying and eliminating vulnerabilities in internal financial control systems has been unearthed among domestic and international market actors\textsuperscript{1408}.

Upon the launch of the strategy, Head of Financial Regulation Matthew Elderfield emphasised that the regulator was determined to use enforcement action to improve standards of compliance, and was reported in the print media to have warned:

\begin{quote}
The boards of directors and senior management of financial services companies operating in Ireland need to satisfy themselves that they are operating in
\end{quote}

\textsuperscript{1405}See CBI \textit{Enforcement Strategy} (n 453), 4 and 9-10. See Appendix K for an extended discussion.

\textsuperscript{1406}See CBI \textit{Enforcement Strategy} (n 453), 6; Central Bank of Ireland, \textit{PRISM Explained} (2011). Staffed by multi-disciplinary teams, the Enforcement Directorate has seven responsibilities including administrative sanctions procedure; criminal prosecutions; anti-money laundering/counter terrorist financing; EU financial sanctions; and, liaison with other law enforcement agencies see CBI \textit{Enforcement Strategy} (n 453), 11-12. Also see Elderfield Untitled (n 1404), M Elderfield, \textit{The Future of Financial Regulation and how it will impact the investment funds industry} (IFIA/NICISA global funds conference 2010 Dublin, 9 June 2010), M Elderfield, Untitled (The European Insurance Forum in Dublin, 09 May 2013) <http://www.centralbank.ie/press-area/speeches/Pages/MatthewElderfieldEuropeanInsuranceForum2013.aspx> accessed 22 May 2013; P Brady, \textit{Banking supervision: our new approach} (Central Bank of Ireland speech delivered 21 June 2010) and J McMahon, \textit{Banking supervision: our new approach} (Central Bank of Ireland Dublin, 21 June 2010).

\textsuperscript{1407}See CBI \textit{Enforcement Strategy} (n 453). See Appendix K for an extended footnote.

\textsuperscript{1408}A random search of the settlement agreements published by the Financial Regulator on website concerning this issue is more fully set out in Appendix K.
accordance with regulatory standards in order to avoid the reputational and financial costs of possible enforcement action.\footnote{C O’Brien, ‘Central Bank plans increased scrutiny and enforcement to restore credibility’ The Irish Times (Dublin, 22 December 2010).}

In the view of an academic dissertation interviewee\footnote{Interviewee E Academic Australia 22 March 2012. Framed towards the future, when introducing its ten new performance priorities for 2012 the Central Bank, stressing credibility and effectiveness and openly relying upon the new PRISM approach, stated, ‘Enforcement plays a fundamentally important role within the Central Bank’s new risk-based regulatory framework [PRISM], helping to achieve a regulatory regime that is credible and effective’; see CBI Enforcement Priorities for 2012 Information Release (n 1366).}, the Irish PRISM strategy goes directly into corporate governance now. There is a built-in Macrory-style accountability mechanism, and therefore, it is not regulatory overreach. A risk panel can evaluate what the regulator says. The corporate or the regulated entity can question the regulator’s implementation. This approach coincides with the views of one business leader interviewed who stated, ‘Regulators must also be held to account in terms of the way that they play, and there has to be a structure which allows for an appellate justification of their position to be tested’.\footnote{Interviewee Z Business Leader England 29 November 2012.} For another regulator interviewee, the corresponding RFSP obligations also involve accountability around responsive engagement with compliance:\footnote{Interviewee X Regulator Ireland 12 November 2012.}

\[T\]here is a case for differentiating and determining, in particular circumstances, what is the appropriate burden of proof..... requiring explanation in a criminal investigation context [may be too much] to impose.... in an Irish system where self-incrimination comes into play. But I think as a general principle comply or explain, for matters other than formal criminal investigation, is something that I would certainly support. And at times, I think there is need for that to be perhaps introduced in legislation more than it has been to date.

Despite the targeting however, no attempt has been made in Ireland as yet to make the expert to expert relationship more accountable or transparent by altering or introducing reformed, reverse burdens of proof, presumptions or inferences, as has been demonstrated legally allowable in Part 2 Chapter 1 section 2.2.2.

The second selected example, concerns the fifth ethical model discussed earlier in Part 1 Chapter 2 section 1.2.4, which was introduced post-crisis in Ireland, and is called the new...
flagship (Section 50) fitness and probity code\textsuperscript{1413}. It is a minimum standard reaching all financial service sectors, is far more detailed than its forebears, and like all codes is directed to future behaviour change\textsuperscript{1414}. The format adopted reflects corporate bureaucracies, where ethical responsibility is hierarchically related to responsibility, and experience level within the organisational command chain\textsuperscript{1415}. Statutorily grounded\textsuperscript{1416}, Minister Lenihan when introducing it, stated the reforming legislation, ‘set the tone of the new regulatory arrangements’, and gave the Central Bank new powers, ‘...... to ensure the fitness and probity of nominees to key positions within financial service providers and of key office-holders within those providers\textsuperscript{1417}'. Strangely, and in some contradiction of this claim, they were drafted by the Central Bank itself as regulator, raising legitimacy and due process concerns, since the Bank also administers and enforces it\textsuperscript{1418}. Regretably, if the refom sets the new enforcement tone, then the criminal law has again been marginalised from non-use as regards substantive offences, and where mobilised for procedural compliance, its use has been limited.

Under the code, the Central Bank as regulator requires individuals proposed to carry out controlled functions (CFs)\textsuperscript{1419} within regulated financial service providers (RFSPs), to be honest, diligent, independent-minded and to act ethically and with integrity\textsuperscript{1420}. Pre-approval vetting arrangements are premised upon, individuals’ compliance and RFSP due

\textsuperscript{1413} The Central Bank, following industry consultation, issued two separate but inter-linked codes under Section 50 of the CBRA 2010 as set out more fully in Appendix K.

\textsuperscript{1414} P Montagnon, ‘UK: Stewardship in a changing market’ (4th Cambridge International Regulation and Governance Conference More Regulation or Better Stewardship? Optimising the Means and Ends of Good Governance, Queens College University of Cambridge, 6 September 2012). These F&P Standards are minimum standards found in a thirteen page document entitled “Fitness and Probit Standards”; see Central Bank of Ireland, Fitness and Probit Standards (Code issued under Section 50 of the Central Bank Reform Act 2010) (2011) (CBI F&P Standards) and also see Central Bank of Ireland, Guidance on Fitness and Probit Standards (2011) (CBI Guidance), and furthermore Central Bank of Ireland, Minimum Competency Code 2011 (2011) (CBI MCC). They have an origin in old stock exchange rules, and UK, FSA ‘FIT’ standards, see UK FSA FIT standards (2004). In turn they appear to have influenced recent UK standards updating.

\textsuperscript{1415} See Yeager (n 222); Schedule 2 of CBRA 2010 (Sections 20 and 22) (Amendment) Regulations 2011, Statutory Instrument S.I. 615 of 2011, Prn. A11/2216, as set out in Appendix K..

\textsuperscript{1416} On the 20th April, 2010 in a dark hour for the Republic of Ireland, then Minister for Finance the late Brian Lenihan TD introduced the Second stage of the Central Bank Reform Bill 2010. Lenihan (n 1413 extended footnote), 442-443.

\textsuperscript{1417} One of the unsuccessful 2010 Bill amendments proposed by the then opposition was to the effect that the code would not come into force until submitted to the Minister for Finance who in turn would submit it for consideration and approval by either the Oireachtas or an Oireachtas Committee see R Bruton, 17 June 2010 Dail Committee Amendments, <http://www.oireachtas.ie/documents/bills28/bills/2010/1210/b1210d-dscp.pdf> accessed 9 November 2010.

\textsuperscript{1418} See Appendix K for an extended footnote.

\textsuperscript{1419} See CBI FAQ (n 1413), 25 as discussed more fully in Appendix K..
diligence of such compliance, concerning four basic principles, mainly based around compliance, competence, capability, honesty, financial soundness, information sharing and regulatory guidance.\textsuperscript{1421} Casting the onus where it primarily belongs, every individual performing a CF must notify the RFSP without delay, if for any reason they no longer comply with the code standards, while the regulator recommends that RFSPs contractually require individuals to so declare.\textsuperscript{1422} In addition to requesting a record of the due diligence undertaken by each RFSP, as part of the pre-approval process, the Central Bank itself undertakes its own due diligence in respect of proposed approved persons.\textsuperscript{1423} However, it has been recognised for decades that codes per se are insufficient, that they require routine inquiry processes of those responsible for meeting the standards, and also require buttressing by law designed to reinforce crucial social values, and thereby support good corporate management.\textsuperscript{1424} Five separate code enforcement offences are set out in the procedural area in connection with failure to comply, give information and/or give evidence or answer questions when directed by regulatory authority.\textsuperscript{1425} The penalties available include on summary conviction a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both; and on indictment a fine (unlimited) or imprisonment not exceeding five years or both.\textsuperscript{1426} This reflects the sanction limits available in relation to the already discussed three EU-driven Regulations concerning market abuse, transparency, and prospectuses. However, it bears no relation to the penalties available under the administrative regime, and especially the large monetary penalties available.\textsuperscript{1427}

Although the financial regulator may hold compliance investigations into the fitness and probity of individuals, no offences have been established for instance, in relation to breach of the Section 50 code or due diligence requirements under it.\textsuperscript{1428} Bewilderingly, 

\textsuperscript{1421} See CBI Fitness & Probity Service Standards (n 1414), 7 as discussed more fully in Appendix K. 
\textsuperscript{1422} See CBI FAQ (n 1413), 30. 
\textsuperscript{1423} See CBI Fitness & Probity Service Standards (n 1414), 1. 
\textsuperscript{1424} See Yeager (n 222), 162 as quoted in Appendix K. Also see Frank (n 218); CD Stone, Where the Law Ends: The Social Control of Corporate Behaviour (Harper Colophon 1975). 
\textsuperscript{1425} CBRA 2010 Part 3 Sections 33, 35, 36, 37 and 48 respectively as set out in Appendix K. 
\textsuperscript{1426} CBRA 2010 section 49. 
\textsuperscript{1427} The `administrative’ procedure – Part IIC regime - penalties for breach at present include: powers to caution or reprimand, direction to refund money to customers, monetary penalties of up to €5 million on a firm or €500,000 on a person, disqualification of a person from management of a regulated financial service provider, direction to cease contravention and direction to pay costs of inquiry. 
\textsuperscript{1428} See CBRA 2010 (Procedures Governing the Conduct of Investigations) Regulations 2012, Statutory Instrument S.I. 56 of 2012, Prn. A12/0356. Made in exercise of powers contained in section 53 (2) of the
the enabling act provides that where an individual under suspension notice performs a CF or the RFSP permits it, then the Head of Financial Regulation may apply *ex parte* to the High Court for an order (effectively a civil mandatory injunction) directing the person or RFSP to comply with such suspension notice\textsuperscript{1429}. It is of significant note that such a contravention has not been legislated to be a criminal offence, similar to breach *inter alia* of an evidentiary notice. Similarly, in the case of a prohibition notice, High Court enforcement for contravention is stipulated, without an offence being created\textsuperscript{1430}. Equally strangely, the section 50 code does not extend to agents such as auditors, lawyers or lobbyists, and nor does it apply to the class of actors known as credit ratings agencies, a curious omission since, although there is no Irish or EU agency as yet, the proposed EU licensing arrangements allow for the operability of the EU passport recognition system.

At the enforcement level in relation to the mode of delivery, presumably the civil injunctive relief statutorily provided for is sought for speed of enforcement response, most especially where such relief is not a recognised criminal law tool. However, adopting a transversal sanction suite including the widest of injunctive powers would enable both civil and criminal law involvement. It seems ridiculous that a civil injunction is sought against a recalcitrant, who flagrantly disregards the law, since the effective ultimate remedy for breach of an injunction is an application to imprison! An extra enforcement layer has been added but to lesser effect. While the criminal law may face the dilemma, that the prima facie proofs threshold of the civil law in granting *ex parte* or interim injunctive relief may not satisfy the criminal law proof beyond reasonable doubt requirement, solutions are possible. These include arrest pending trial, bail restrictions based in the breached suspension or prohibition notice, the granting of power to impose injunctive relief after final verdict, and the use of a parallel proceedings approach across both the civil and criminal jurisdictions at least as far as *ex parte* and interim injunctions are concerned.

\textsuperscript{1429} CBRA 2010 sections 30.
\textsuperscript{1430} CBRA 2010 sections 44.
3.1.10. **Summary**

The overarching conclusion for Ireland is that the independent control agency paradoxically had to be rendered more dependent to better regulate. Within control, framework, implementation and resource deficiencies and impediments have been observed even after post-crisis reforms. The new regulatory contract form depicted in Part 2 Chapter 3 section 2.3.6 has not been established. There is no coordinated interplay strategy. Analysis of Irish practice and policy reveals that the more general international model of financial regulation depicted in Part 2 is only part applied. Falling short of international best practice is evident in several areas. Post-crisis reform has yielded improvement but must be built upon. Many impediments to interplay strategy reform may be noted. While Dicey’s rule of law overarches, traditional real crime perspectives on Packer’s due process values predominate, and Macrory’s accountability and transparency values are under pressure. There are inherent contradictions in the drafting of the double jeopardy enforcement pathway. There is no publicly available set of launching factors governing interplay strategy, while the rule of thumb factors revealed are deficient. Sanction guidelines are incomplete and contain no individual/corporate differentiation. There is no single transversal sanction suite. Historical, foreign and political influences adversely subsist. Intensified, dedicated and integrated supervision and enforcement has encountered business opposition and overreach allegation. Overall, enforcement may be described as both novice in regime and tardy in implementation and, limiting itself to applying protection to undefined stakeholders. The captured independent control agency experiment has been re-subsumed into the Central Bank. While a new targeted risk-based approach mirrors international developments, enforcement strategy is exclusively mired in negotiated resolution at the responsive compliance pole despite values concerns. There is a need to re-evaluate and transformatively implement the role of the unique and qualitatively significant moral signalling voice of the criminal law. There is no discretely defined ‘financial regulatory offence’. Few individuals have been subjected to enforcement action. Rationale and implementation issues surround the preferred discounted negotiated resolution route. This includes opaqueness of real sanction factors and their priority, and lack of both public scrutiny and judicial approval. No testing heuristic with attendant values has been established. No sanction calculation methodology or misconduct scale has been provided. Therefore, many reforms are required.
A large number of deficiency and legitimacy issues have been identified in the construction and operation of the current Irish administrative sanction regime, and even absent a fused binary require redress. These include: a regulator which prosecutes and finalises charges, having previously fixed sanction guidelines; no published handover guidelines from supervisory to enforcement directorate; no published (or any discernible) guidelines governing interplay issues between the use of criminal law or administrative sanction regimes; an ill-considered and contradictory double jeopardy pathway choice; offence and sanction dependent axis deficiencies including no single transversal sanction suite, the need for new offences and updated penalties, and the mirroring of offences and contraventions. Enforcement deficiencies include peripheralising the criminal law pole; over-reliance upon negotiated settlements which are not court (independently) approved; lack of scrutiny of individuals; no provision for whistleblowers and rewards; no statutory plea bargain system or spent convictions statute; no real consideration of the use of proof inferences, rebuttable presumptions or reverse burdens; no independent prosecutorial, or sufficiently independent arbitral, function; non-automatic application of ECHR or Constitutional norms, especially including article 6 and article 37 respectively.
Chapter 2: Findings and Analysis Conclusion

3.2.1. Introduction

This is the final section. After an introductory review, major findings are disclosed, the two research questions are answered and final conclusions are drawn. Implications of the analysis are set out, along with limitations and suggestions for further research.

The research commenced with the GFC demonstrating financial regulatory failure, market actor shortcomings, and motivating reform. The market domain was demonstrated to be crisis-endemic, conflictually cycle and trend driven, and criminogenic. This highly innovative and competitive domain enjoys a uniquely autonomous nature and significance within civil society, but market actor misconduct can rapidly cause devastating economic and social consequences. The need to interrogate market restriction within a bespoke regime, in the form of market actor control targeted to improving compliance, emerged as societally significant and the major research driver.

While not ignoring self-regulatory effects, this research challenge was taken up within the public regulatory space, where coercive control intersects with the markets, and where the markets and control historically developed side-by-side and cross-fed. Building upon diverse incremental and scaffolding elements across the literature, has revealed that coercive deployment for market control, justifies a special if not unique regime, to prevent and protect against market misconduct. Literature and practice gaps when explored, however, revealed that the policing binary of criminal and administrative sanctions was polarised, with criminal elements marginalised, and administrative elements unable on their own to satisfy the control function.

A coordinated interplay strategy with a number of components, a fusion of both enforcement tools, which has more recently been neglected in scholarship and practice, was the research goal throughout. Fusion was found viable to occupy the core of a viable new regulatory contract which also consisted of a number of components. Market elite collaboration with regulatory and society-wide stakeholders is essential to the development and continuance of such a contract, within a context where the socially vital and significant markets thrive. Here, both business and society gain. The modern
sanction paradigm within such an endeavour exhibits many commonalities between the criminal and administrative regimes. This assists fusion around the paradigm spine, adversarialism, discretion-laden autonomies, the offence/sanction dependency, and proofs and procedures forms.

The intersecting three paradigms of the market and its control (two) were discovered to be shifting post-crisis and are still restless. This dissertation drew from the concoction of historical, sociological and philosophical theories, impacting coercive control, from both the criminal and regulatory sides, in its interface with market autonomy. Public control was found to engage the rule of law and a values complex. Procedurally the rule of law afforded rights-based due process protections; and utilised rules, principles and code standards to define offences/contraventions and the consequent sanctions. All three paradigms are normative systems albeit with different underpinning values, and thus, this dissertation entailed a normative interrogation, in an instrumental way, within a reform context.

A normative theoretical framework was developed, emerging from critical analysis of salient theories, purposed to interrogate three fundamentally important exemplar connective tissues between the criminal law and regulation, intending to explore whether an interplay fusion was viable. The analysis mandated re-ordering the balance of the autonomy (liberty) and welfare restriction dyad, where the innovative market leads and control follows. The selected reform lens of the market enforcement police, and more particularly their strategic interplay, a very hot topic post-crisis, engaged the general financial regulatory landscape, with Ireland particularly studied and analysed. Important insights regarding financial regulatory enforcement, and particularly around the enforcement binary capability, have been provided for all stakeholders.

The overarching norms of autonomy and restriction, within which the market domain cannot be allowed to exceed the authorisations and boundaries of the financial regulatory control domain, when explored through select values, yielded the paradoxical conclusion that regulation must be restricted to be most effective. Part of that restriction, which equally paradoxically renders greater autonomy, requires identification and implementation of a coordinated strategy for sanction interplay. These realisations generated the primary and supplemental research questions around the roles of the
criminal law and regulation, targeting improved compliance, and engaged multiple issues. In answering these questions, a fused reform interplay strategy was found to be viable and to consist of various integrated parts including: a wider definition of risk harm management; a re-engineered values complex; new rhythms of discretion and its exercise; more flexible yet better integrated binary (criminal/regulation) control; recognition of the unique moral signalling voice of the criminal law; and an improved and integrated offence/contravention and sanction dependency.

3.2.2. Findings

Conceptual, normative and practice gaps have emerged throughout this research from engaging the salient regulatory, criminal law, criminological and other theories. This justified the eclectic literature approach and presented a broad big picture for the reform context. Analysis of the fundamental components of the three paradigms, the market and coercive control, conducted in Chapters 2 and 3 of Part 1 and synopsised in Appendix C, demonstrated their developmental and continuing connection. It aided the conclusion that interrogating connections as opposed to disconnections was the better research course. It also enabled the research identification of the three essential tissues connecting Teubner’s black boxes of the criminal law and regulation, risk and its management, the values complex and the offence/sanction dependency; and, their subsequent interrogation in Part 2 against the normative theoretical framework.

The resultant findings, which ground enforcement improvement within the sanction pairing, pointed to this conclusion: viable identification and construction of a new coordinated interplay strategy for a fused binary dimension within an over-arching new regulatory contract. This fusion is set within a risk management context. It is grounded in a reciprocal expert to expert values complex, and requires an enforcement pathway, where a flexible parallel pathway was found most likely to be optimal. It also requires the identification and advance publication of factors or criteria to launch discretionary decision-making concerning pathway deployment, and stated means towards its mobilisation. In addition, within the recalibrated sanction paradigm new financial regulatory offences, and published sanction guidelines across a single transversal sanction suite are required. A coordinated interplay strategy consisting of these elements, and
incorporating the best international standards as identified and discussed in some detail in Part 2, is a vital part of any financial regulatory reform approach.

To avoid serious adverse financial stability impact, as shown in Part 1 Chapter 2, the Irish financial market domain cannot be allowed to exceed the authorisations and boundaries of the regulatory control domain which the criminal law and regulation pairing polices. Both the crisis-endemic, cycle-driven and trend conflicting, criminogenic market domain, and the control domain, which consists of this criminal law and regulation pairing, are normative systems, and in practice they prove or confirm the interrogated theoretical literature and other research material. For instance from Part 1 Chapter 2, the Habermas argument that Locke’s autonomy (liberty) is the normative key, and the Polanyi proposition that restriction is the accompanying and reflexive countermovement, which as an autonomy itself must be constrained. Paradoxically, the post-crisis reform restraint of the Irish regulatory control agency, by increasing its dependence, as demonstrated in Part 3 Chapter 1, has both resulted in better regulation and greater regulatory independence.

Having commenced with the given that both the criminal law and regulation were a required presence for effective financial regulatory enforcement in theory, the research yielded the result that a third dimension described as a fusion could maximise their potential. To maximise this potential of both the criminal and administrative sanction elements, and also their fusion, requires increased collaboration, and more state steering, within a new regulatory contract, especially since the market has invited the state to assume greater control. Synopsised in Part 1 Chapter 2 section 1.2.5, and supported by literature and practice, the uniqueness of market and control, where market actors are mainly motivated by self-interest, entails a vital policing role for public financial regulation.

Weighty public interest demands effective financial regulation free of dominating financial market forces. This is best defined however, by the regulatory control agency, after participatory consultation. It may entail the fixing of renewable ethical standards, to which market actors bind themselves as suggested in Part 1 Chapter 2 section 1.2.4. This public interest, thus obtains greater legitimacy, and outweighs the absolute individual autonomy of all or any individual financial actors. Financial regulation enforcement and its sanctioning sub-set, which oversee collaboration between business and regulator, and
engagement with other stakeholders, amount to a new regulatory contract. It is a new form of Hobbes contractarianism within a regulatory commonwealth. Risk-based control promotes targeting, where cooperative real-time supervision, and education, may supplant minor enforcement, but requires flexibility to deal with fluctuating risk conditions. Collaborative marshalling of control resources may include rewarded whistle-blowing, and, the invitation of Wells-type submissions and disclosure from suspects.

The criminal law has been shown to enjoy a qualitatively significant moral signalling voice in enforcement and sanctioning. Not alone does this apply to its own sphere but also extends to influence across the administrative regime when it is realised that a powerful alternative exists. And, in a fusion context is even more influential again where market actors realise they may face a flexible and perhaps parallel enforcement optimum. Thus, to optimise sanction interplay, the analysis discloses that the criminal law cannot be excluded or unduly marginalised. Its form however, requires a transformational paradigm shift, from the old ‘real’ crime mode, when engaged to deal with financial market enforcement and sanctioning.

The conduct of actors within the control domain is best policed by the criminal/administrative pairing, which requires teamwork within a fusion, itself a paradigm shift. Optimising teamwork, and thus the fusion, requires that policy-makers heed the EU generated reform discourse, and adopt a new policy direction, focusing upon identified convergence characteristics. These characteristics as already demonstrated include the three interrogated connections between Teubner’s erstwhile two black boxes representing the criminal law and regulation. Further research outside the scope of this work around yet further connections will be required.

To obtain and/or retain legitimacy as demonstrated in Part 2 Chapter 2, mobilisation must ensue within Dicey’s rule of law, and especially as it pertains to discretionary decision-making which is a key feature of coercive control agencies/autonomies. A renewal of Packer’s theoretical due process values complex is required, and the analysis shows it can be readily accommodated within the law as it stands. Within an expert to expert reciprocity or trade-off, this entails the introduction of new statutory inferences, presumptions and reverse proof burdens, so as to maximise disclosure by regulatory actors, since they are the risk innovators, creators and managers. To compensate, the
traditional real crime standard of proof will be extended to all market actors. Constitutional and international protection values will also automatically be upheld, and not disregarded at regulatory discretion under the guise of ‘consensual’ negotiation. These two developments will enhance legitimacy, and help to stem the outrage felt by market actors toward perceived enforcement overreach.

The expert regulator will investigate all wrongdoing and, in a twin-track approach, refer prosecutorial decision-making to a specialist, independent prosecutor. A specialist court, enjoying full inherent jurisdiction, will deal with all arbitral matters. The definition of discrete ‘financial regulatory’ offences, perhaps with new offence forms such as reckless misconduct and market authorisation/licencing infringement, and reflecting moral culpability and other features explored in Part 2, would improve enforcement. The introduction of new tools including deferred and no prosecution agreements, and extensive yet fully flexible conditionality capability, and enforceable undertakings, would be beneficial. A transversal sanction suite, would benefit if not enable the fusion to reach its full potential, and within advance-published guidelines forestall double penalty jeopardy by guaranteeing cumulative ‘total price’ sanctioning. At best, in order to maintain maximum flexibility, it will incorporate the six categories of sanctioning outlined in Part 2: punitive, protective, preservative, corrective, compensatory, and negotiated resolution. The refinement of the penalty arsenal, and integrated provision for civil class actions, would extend the reform dimension.

At present Irish financial regulation, as interrogated at length in Part 3 Chapter 1, does not maximise the enforcement dyad, or even its two constituent parts. It exhibits some alarming deficiencies, and paradigm shift is required. Some regulatory melanomas require urgent surgery, and it thus presented as an ideal case study for reform proposals. The key to improvement is an inter-connected and integrated, if not coordinated, interplay strategy plus the components (offences and sanctions). This entails the devising and publication of an interplay strategy document containing the preferred sanction pathway choice or choice options, together with the relevant criteria or launching factors, and their means of mobilisation, from which discretionary decision-makers may draw.

As emerged from Part 2 Chapter 3, Braithwaite’s values-based Enforcement Pyramid, located in the third way Responsive Regulation Theory, is both one representational tool,
and one useful heuristic for testing such pathway and launching factors; and, to
demonstrate the sanction options across a tough top, balanced middle, and wider
educational base. Such a tool is best devised as to its discrete detail for financial
regulatory enforcement by the regulator in consultation with stakeholders. The selection
of a presumptive preference, if any, and the mobilisers toward escalation and de-
escalation, must be transparently set out. A workable framework is represented in
Appendix J where the enforcement style drawn across the five-point typology discussed
in Part 2 Chapter 1 section 2.1.4, and the fourteen mirrored launching factors pivoting
around case differentiation and heavily influenced by cooperation discussed in Part 2
Chapter 2 section 2.2.4, are shown juxtaposed against a high-low misconduct scale. The
exact locations for the tough top, balanced middle and educational base must be
determined by engaging Husak’s proposition and Bottoms’ morality that what society
wants to deter it will sanction. Nonetheless, the flexible balanced middle is the obvious
primary battleground for engagement of the proposed interplay strategy. Serious crime,
recidivism and breach of negotiated settlements have been proposed for the upper
legalistic criminal law; while a protocol arrangement has been recommended for the
lower base.

3.2.3. Answering the research question and supplemental

The primary research question identified by and examined within this dissertation was:

*When devising a strategically coordinated binary control policy which targets market
actor compliance, what successful interplay enforcement roles may be occupied by
criminal law and administrative sanctioning, within reform of financial market regulation
as the control domain?*

The analysis demonstrated throughout Part 2, that there is sufficient connection between
the discrete criminal and administrative sanctioning pairing for a fusion to be viable, and
that fusion would improve sanction capability. The new regulatory contract, as
synopsised in Part 2 Chapter 3 section 2.3.6, and manifest within an enforcement pyramid
as shown above, is principled, institutionalised, responsively reciprocal, collaboratively
arrived at, and grounded in law. Within the new strategically coordinated interplay
control policy proposed, engaging the upholding of Dicey’s rule of law around discretionary decision-making particularly, and revising Packer’s due process obstacle course, fusion entails the following flexibility:

- The criminal law occupying the tough top where serious, recidivist and agreement breach infringement reside, and where in a twin-track approach the regulator investigates and refers to the specialist DPP who prosecutes, while a specialist court with full inherent jurisdiction concludes trial and sentence;

- Mixed criminal law and administrative techniques occupying the balanced middle, and equally twin-track mobilised, where cooperation in its widest form will be the major launching factor. At the harder end a parallel approach will enable criminal breach engagement, while at the softer end, discounted negotiated agreements, with maximally flexible conditionality, will be specialist court approved; and,

- Protocol-generated education occupying the base and being exclusively operated by the regulator.

The suggested, upgraded pathway is best reflected by a parallel approach, where cumulative ‘total price’, yet flexible, regulatory-proportionate sanctioning prevails; although, a more coherent and consistent, and reformed double jeopardy pathway may be included or be separately deployed. Launching factors arranged in a hard to soft mirror image, with an in-built weighting or priority mechanism, would mobilise and guide discretionary decision-making. These have been tentatively identified, although additions and/or subtractions may be preferred by policy-makers, and a means to their mobilisation has equally been explored. A single sentence guideline would similarly assist, although judicial constraint, if tightly constrained, may require constitutional amendment. Sanction will best draw from a single, transversal sanction suite containing a disparate and improved arsenal drawn across the six identified catgories.

A new procedural values complex or balance has been shown to be both practical and possible within the existing law. This would update Packer’s theoretical values continuum, based around Macrory’s accountability and transparency, on the part of both expert regulator and expert RFSP. It would amount to an expet to expert reciprocity or trade-off. It would mobilise across all three fusion categories as displayed within the
pyramid above; and, incorporate the criminal law burden and standard of proof. This would be traded-off by new statutorily provided reverse burdens, presumptions and inferences which would aid RFSP disclosure. ECHR and Irish constitutional norms would be fully and automatically upheld, although constitutional amendment, if efficacious, may be contemplated.

And supplementary to the primary question it was posed:

*Drawing upon these findings, what strategic interplay enforcement roles should they occupy in an Irish reform context?*

Part 3 Chapter 1 directly contributes to answering this question, by washing the issues identified by the Part 2 general analysis through the detailed Irish case study. Many international best practice standards which emerged from the analysis, which were fully discussed in Part 2 Chapter 2, are not currently operationalised in Ireland. The new regulatory contract model set out in Part 2 Chapter 3 section 2.3.6 is equally not mobilised. Nor currently, is there an operative, strategic interplay strategy. And a fusion of the criminal and administrative dyad is unknown.

By exclusively mobilising negotiated resolution at the enforcement level and thereby marginalising the criminal law, current Irish financial regulatory sanctioning does not optimise interplay. There are demonstrable, pre-crisis and post-crisis deficiencies, including the legacy problems extensively outlined in the Part 3 Chapter 1 section 3.1.10 *Summary*. These legacies include an ill-thought out regulatory philosophy; unrequited rhetoric; insufficient collaboration with RFSPs; numerous enforcement impairments; and, regulatory processes contrary to best international enforcement practice values. These must be redressed to maximise the enforcement roles of both the criminal law and the administrative regime of themselves and as a fusion. The fusion as demonstrated in answer to the primary research question may readily be employed in Ireland, with all appropriate collaborative, legislative, constitutional and other reforms mobilised.

A fusion, as a special if not discrete system, when based around post-GFC collaboration between business and regulator, amounts to a new form of contractarianism. The new regulatory contract circumscribes the core interplay strategy already described, and entails additional features. Here, the public interest is the justification, all stakeholders’
interests are recognised, the vitally important position of market innovation is supported, and, maximum enforcement flexibility pertains. Different responsiveness to individual infringers and their circumstances is in-built, with future behaviour reform as the main goal. A difference between individuals and corporate entities is also in-built. A target-analytic regulatory approach is preferable, where targeting early negotiated resolution with in-built incentives, such as sanction discount, and correctives, are worthwhile objectives.

The offence/sanction dependency entails drafting new offences, a mirroring of offences and contraventions, perhaps as discrete ‘financial regulatory offences’; and, a transversal sanction suite across the six sanction categories which were identified in Part 2 Chapter 3 section 2.3.3. Constitutional values within the new regulatory contract, which is based upon collaboration, are all inter-connected and draw across regulation and the criminal process including: Macrory’s accountability and transparency; Packer’s revamped universal fair procedure; and, maximised regulatory independence, and transparent discretionary decision-making within Dicey’s prescriptions. As to prosecutorial discretionary decision-making, it will optimally be conducted by specialists, amid independence, accountability and transparency. An interplay document setting out the preferred pathway choice, and the salient launching factors, any presumptive preference, and sanction incentives, will be obligatory. It entails an integrated approach, where strategy and the offence/sanction dependency are mixed. All negotiated settlements will require appropriate conditionality, breach accountability, and specialist judicial approval. Reflexive regulatory learning will be mandatory for improvement and real-time actioning.

3.2.4. Implications of the Analysis

Essentially, this research tentatively illuminates the first shoots of a normative fusion theory. It reflects a new policy direction for financial regulatory enforcement. Manifest as a coordinated interplay strategy, within an over-arching new regulatory contract, it is based in enhanced values, mobilised by more accountable and transparent exercise of discretion, predicated upon enhanced expert to expert market disclosure, with enhanced structures and mechanisms which are both hallmarks of the post-crisis financial regulation paradigm.
The analysis portends a shift in both regulatory philosophy and practice. The standalone, parental ‘real crime’ paradigm, when it sits alongside its administrative sanctioning regime off-spring cum sibling, to be successfully fused, requires a transformational paradigm shift both for it and for fusion enforcement. The market, controlled within the fusion, recognised as a unique and fundamental feature of both civil society and embedded economy, and a socially valuable enterprise, obtains its warranted special enforcement consideration. This special consideration, involving expert regulators and specialist knowledge industry experts, predicates a new regulatory contract form, optimised by public interest collaboration around enforcement issues. Thus, policymakers must enthuse the political and social will toward it, consult widely, and debate and legislate the new forms required to effectuate it. Where constitutional reform is required the people must be guided and then speak.

The new interplay approach significantly changes enforcement practice. A new values complex, based in reciprocal accountability and transparency will govern. A flexible, responsive enforcement approach, within a parallel pathway engages both the criminal and administrative. And, independent discretionary decision-making mobilises multiple advance-published launching factors, subject to an established weighting mechanism at the regulatory level, and independently devised sentence guidelines at the arbitral. A sanction pyramid, or other suitable heuristic, must be collaboratively devised, and thereafter mobilised according to agreed norms and procedures. Introduction of such clearly necessitates policy-maker input; executive drive; collaborative consultation with market actors and other stakeholders, where the state has the prominent steering role; and additionally, legislative input and change, and possibly constitutional change which requires the voice of the people.

Positive implications of a fusion, as shown in the coordinated, integrated interplay strategy described, allow for considerable norm enhancement including: regulatory legitimacy augmented by increasing real collaboration potential and responsibility within the ongoing RFSP expert to regulator expert relationship; reducing the need for business elites to seek out regulatory ‘capture’; upholding autonomy by tending to compliance and, while enabling maximal flexibility, equally upholding restriction within equitable and legitimate bounds; increasing expert to expert disclosure, mutually buttress accountability and transparency, for the benefit of civil society and business within it;
classifying offences as polarised crimes or administrative contraventions, and mobilising an equally polarised punishment or persuade (repair) sanction strategy exclusion, becomes obsolete; upgrading the due process values complex, extends maximal suspect protection, and by automatically applying constitutional and ECHR protections, upholds the rule of law and legality; providing a single sanction suite maximises cumulative ‘total price’ protection and capability; stipulating specialist prosecutorial and arbitral functions reinforces proportionality, consistency and independence; recalibrating values further legitimates, and instrumentally enhances, the adversarial justice process.

Apart from the implications outlined above, there is a need to further explore the general research gaps identified throughout this dissertation, and especially surrounding the binary paradigm in all of its three identified dimensions, and the pin-pointed, sub-optimum deficiencies in Financial Regulation in Ireland.

3.2.5. Limitations and Further Research

In examining the interface of coercive control and financial markets, this dissertation limited itself to public regulation, although self-regulation effects, including co-regulation, were recognised as significant and broached. As to Ireland, the enforcement practice of the financial regulator, once standalone and now restored to the aegis of the Central Bank, was mainly time-defined to the 31st December 2012. While international comparators were broached, they were limited in number, and mainly drawn from common law and EU jurisdictions. Limitations upon this research, beyond the obvious and usual lack of space, and understandable difficulties in arranging interviews with identified targets, have included data deficiencies, the massive size of the project, which from intellectual inception in early 2009 mushroomed almost out of control, and the lack of a commonly accepted paradigm testing heuristic.

Wider reform and future research areas have been identified throughout. This included general umbrella reforms for consideration at the ‘political will’ level, including: making statutory provision for a revised values complex, general and specific regulatory powers, policy initiatives, and new regulatory institutions capacity; the draughtsmanship of the new interplay strategy document; identified offence and sanction dependency deficiencies including defining discrete financial regulatory offences; and, various
enforcement issues. Reforms at the regulatory level include: legislation establishing new and discrete structures, procedures, offences and regulatory enforcement testing and decision-making capability. Finally, reforms at the business and regulator intersection concern: issues inter alia around values, norm generating, offence definition, and judicial review of regulatory decision-making. Compliance testing issues have been highlighted above.

3.2.6. Conclusion

In short, a revamped financial regulatory conceptualisation for Ireland, drawing upon the best international theory, best international practice, and the highest standards has been interrogated and demonstrated workable. A collaborative approach involving industry, regulator and taxpayers/consumers best grounds a new financial regulatory contract. The motivation for such is to recapture and/or establish the highest reputation for Ireland’s financial services industry, the regulatory regime, and the Irish economy.

More specifically, sitting below this contract a fused interplay strategy was found to be viable. A transparent and publicly available, interplay strategy document, setting out a coordinated strategy including a single transversal sanction suite regime is required. It will best incorporate a pathway, launching factors, and sentence guidelines, optimal regulatory flexibility, and rapid, reflexive regulatory learning. A new paradigm philosophy and framework along the lines revealed, amounting to a new policy direction, engaging the full potential of both the criminal and administrative binary and their fusion third dimension, would create a more effective enforcement tool. It will maximise compliance potential. The implementation of such will place Ireland at the global leading edge of financial services regulation. Further research opportunities, perhaps leading to further reforms, have been signalled.
Appendix A: Dissertation Background

Background

The intellectual starting point for this dissertation was the global financial crisis (‘GFC’) which commenced in the United States of America (‘US’) in 2007. For Ireland, the manifestation was a banking crisis, where private debt became socialised public debt, causing the sovereign to seek an international financial bailout amid Euro-zone contagion fears. Globally, banks required recapitalisation and nationalisations followed. And as the financial markets successively discovered sovereign debt weaknesses in Greece, Ireland, Portugal, Spain and Italy the burgeoning and still on-going Euro-zone crisis erupted.

These crises have revealed national and international regulatory failure, market actor issues around risk management culture and behaviour, and stresses upon regulatory enforcement practice and policy. While the crises, and their effects, context this dissertation, they are not its focus. Essentially, they ground both the opportunity and the necessity for financial regulatory enforcement reform. As background, market issues exemplified by the crises will first be explored.

The GFC

Financial markets changed dramatically in the fifty or so years to the new millennium. Gamble and others have charted the financial de-regulation progress from the 1980’s, where the main driver was the US financial sector, and the re-establishment of its global reach and dominance. An important result of such global reach was creating a network of financial centres around the world in which American banks and their subsidiaries could operate freely, and in time lead and strongly influence financial markets and market actor conduct. Using Susan Strange’s ‘casino capitalism’ jibe, Gamble has argued that

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1432 This included their establishment in Hong Kong, Tokyo, Singapore, Frankfurt, especially London, and peripherally Dublin.
such capitalism and its financial growth model flourished particularly in the Anglosphere economies, which includes Ireland. The alternative economic model represented by Germany and Japan, where finance was subordinate to long-term economic aims, had been adversely impacted by two factors, the Japanese economy stalling at the beginning of the 1990s, and by Germany’s preoccupation with the absorption of the East German economy following reunification.

Gradually throughout the 1990’s, controls on capital inflows and outflows were lifted almost world-wide, although the Asian financial crisis (1997), which was blamed on poor fundamentals and local institutions, caused some soul searching; thereafter, liberalization continued with the US and the EU prominent advocates for capital freedom, which was not questioned, except perhaps in crisis situations. Pre-GFC, massive capital inflows at low interest rates - a bonanza for both speculators and genuine businesses - associated with the re-cycling of savings and trade surpluses from China, other emerging market countries, and oil-producing countries, fuelled asset price bubbles especially in housing markets. The financial market response was securitisation innovation.

For the EU, where free capital movement is one of the four fundamental Treaty freedom aspirations, the fall of the Berlin Wall encouraged monetary union which grew into the Euro-zone, while Germany particularly espoused, not alone EU, but also world-wide, unfettered capital flows. By 2007 capital controls were categorised by international financial institutions as a ‘last resort’, unable in a globalised economic world to reduce a country’s vulnerability to crisis, and not a substitute for sound macroeconomic policies. A complex global network of financial flows involving the inter-connected financial hubs was created, the size of annual cross-border capital flows rising forty-fold.

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1433 Gamble (n 87). The anglosphere consists of the US, Canada, Britain, Ireland, Australia and New Zealand, and especially the US and Britain.
1434 The emphasis of the economic model was on long-term investment capacity and skills, the nurturing of successful business, life-long relationships with employees and the subordination of finance to those aims.
1436 See Chwieroth (n 1435).
1437 See Braithwaite and Drahos (n 346); and Chwieroth (n 1435).
1438 N Doyle, ‘Political leadership within the EU and its historical roots (the Franco-German partnership)’ (ANUCES ANU Canberra, 17 January 2012).
1439 See Chwieroth (n 1435).
from approximately 0.5% of world GDP in the mid-1990’s, to approximately 20% in 2007\textsuperscript{1440}.

The period 1992-2006 internationally was characterised by Goodhart as, ‘steady growth, low inflation and interest rates, and rising employment, a ‘golden age’, perhaps the very best economic period ever’\textsuperscript{1441}. Contemporaneous to the hugely significant rise in capital flows was a combination of at least eight structural and cyclical factors including: financial innovation; increased cross-border ownership of financial institutions and investment flows seeking greater returns; reduced capital controls; and, a low-interest environment\textsuperscript{1442}. Amid the massive amounts of analysis and opinions, Davies identified over thirty causal effects in a combustible mixture\textsuperscript{1443}. This included loss of trust around market conduct including risk management and regulatory failure.

Within this milieu, EU Financial market integration benefits were advocated to include\textsuperscript{1444}:

For investors, ‘higher risk-adjusted returns.....through enhanced opportunities for portfolio diversification and more liquid and competitive capital markets’.


\textsuperscript{1441} See Goodhart (n 2).

\textsuperscript{1442} See Reid (n 1440). The full list is: financial innovation; increased cross-border ownership of financial institutions; increased cross-border investment flows geared both to greater returns and changing demographic trends; reduced capital controls; increased internationalisation of manufacturing processes and labour movement; the emergence of former state-run economies; and, a low-interest environment.

\textsuperscript{1443} Davies (n 2). These included societal economic inequality, savings gluts, undisciplined US monetary policy, the subprime mortgage collapse, myriad regulatory failures, third party watchdog failure and complicity, failures around financial firm governance and market activity, irrational expectations around economics and finance theory, and attitudinal and behavioural effects related to the market milieu. WW Lang and JA Jagtiani J, ‘The Mortgage and Financial Crises: The Role of Credit Risk Management and Corporate Governance’ (2010) 38 Atlantic Economic Journal 123 blamed failure at the principal-agent level and poor governance for two reasons: (i) a lack of incentive to worry about ‘fat tail’ (outlier or rare) risk; and (ii) internal controls and risk management were inhibited by weak governance and principal-agent conflict issues. Also see Black ‘Paradoxes and Failures’ (n 442); J Froud A Nilson M Moran and K Williams, ‘Stories and Interests in Finance: Agendas of Governance before and after the Financial Crisis’ (2012) 25(1) Governance 35; Miller (n 234). A concise background is set in the EU-driven De Larosiere Report 2009 (n 1), Introduction, 6 where it is explained: ‘Since July 2007, the world has faced, and continues to face, the most serious and disruptive financial crisis since 1929. Originating primarily in the United States, the crisis is now global, deep, even worsening. It has proven to be highly contagious and complex, rippling rapidly through different market segments and countries. Many parts of the financial system remain under severe strain. Some markets and institutions have stopped functioning. This, in turn, has negatively affected the real economy. Financial markets depend on trust. But much of this trust has evaporated’.

For the corporate sector, ‘easier access to financing capital’,

And, for the intermediation sector, ‘competition....[offering] companies a wider range of financial products at attractive prices’.

The growth of many types of derivatives (including collateralised debt obligations - ‘CDO’s’) in this liberalised, innovative, globalised market was combined with a revised banking strategy which originated in the US and spread to Europe and elsewhere. This was entitled ‘Originate and Distribute’ under which loan business was originated (e.g. residential mortgages, credit card debt, student loans) and then pooled baskets of these loans were securitised and distributed to non-bank financial institutions.\textsuperscript{1445} Risk problems abounded, since these long-term assets were funded by short-term commercial paper. Furthermore, both the banks and the ratings agencies, failed to adequately evaluate these securities.\textsuperscript{1446} As conservative financial models gave way to hubris, white collar crime in the form of mortgage origination fraud and disclosure failures, all within a culture of greed, also played a role.\textsuperscript{1447}

Additionally, while Central Banks and international institutions prior to mid-2007 began pointing to a serious under-pricing of risk, as financial institutions in the low interest market sought to increase yield by moving into these increasingly risky assets,\textsuperscript{1448} monitoring funds/institutions failed to send a sufficiently strong wake-up call to

\textsuperscript{1445} See Goodhart (n 2). The De Larosiere Report 2009 (n 1), 9 concluded: ‘The originate-to-distribute model as it developed, created perverse incentives. Not only did it blur the relationship between borrower and lender but also it diverted attention away from the ability of the borrower to pay towards lending – often without recourse – against collateral. A mortgage lender knowing beforehand that he would transfer (sell) his entire default risks through MBS or CDOs had no incentive to ensure high lending standards. The lack of regulation, in particular on the US mortgage market, made things far worse. Empirical evidence suggests that there was a drastic deterioration in mortgage lending standards in the US in the period 2005 to 2007 with default rates increasing’. Also see Braithwaite and Drahos (n 346).

\textsuperscript{1446} R Lowenstein, ‘Triple-A Failure’ The New York Times (New York, 27 April 2008). The De Larosiere Report 2009 (n 1), 9 castigated the ratings agencies as follows: ‘Credit Rating Agencies (CRAs) lowered the perception of credit risk by giving AAA ratings to the senior tranches of structured financial products like CDOs, the same rating they gave to standard government and corporate bonds..... The major underestimation by CRAs of the credit default risks of instruments collateralised by subprime mortgages resulted largely from flaws in their rating methodologies..... The conflicts of interests in CRAs made matters worse. The issuer-pays model, as it has developed, has had particularly damaging effects in the area of structured finance’.


\textsuperscript{1448} See Goodhart (n 2).
policymakers or to provide operational policy guidance. The risk model became increasingly dependent upon loan originators’ underwriting standards which proved wanting, the risk and liquidity management practices of financial institutions which proved sub-standard, and the performance of the ratings agencies which were riven with conflicts of interest. The conduct of market actors therefore, was of crucial importance, within a cultural switch from higher regulation to laissez-faire self-regulatory predominance.

A period of exceptional financial instability commenced in 2007, which may be divided into two overlapping phases. Firstly, a global credit (liquidity) crunch commencing in August 2007, and secondly, a transformation into a global financial crisis (both solvency and liquidity) in September 2008, after the fall of the giant New York investment bank Lehman Brothers, a major player in the mortgage-based security business; in turn, panic asset selling and massive deleveraging by global financial institutions exacerbated Lehman effects. There was a marked deterioration in market confidence and sentiment, and the stability of the entire financial system was questioned. This

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1449 Chwieroth (n 1435) included the IMF, the G20 Financial Stability Facility ('FSF' later 'FSB') and the Bank for International Settlements ('BIS'). The De Larosiere Report 2009 (n 1), 11 encapsulated the problem thus: 'Regulators and supervisors focused on the micro-prudential supervision of individual financial institutions and not sufficiently on the macro-systemic risks of a contagion of correlated horizontal shocks. Strong international competition among financial centres also contributed to national regulators and supervisors being reluctant to take unilateral action....... Whilst the building up of imbalances and risks was widely acknowledged and commented upon, there was little consensus among policy makers or regulators at the highest level on the seriousness of the problem, or on the measures to be taken. There was little impact of early warning in terms of action – and most early warnings were feeble anyway...... Multilateral surveillance (IMF) did not function efficiently, as it did not lead to a timely correction of macroeconomic imbalances and exchange rate misalignments. Nor did concerns about the stability of the international financial system lead to sufficient coordinated action, for example through the IMF, FSF, G8 or anywhere else'.

1450 See Chwieroth (n 1435).


1452 See Chwieroth (n 1435). The De Larosiere Report 2009 (n 1), 6 in February 2009, describing global markets and economies in panic stated: ‘Significant global economic damage is occurring, strongly impacting on the cost and availability of credit; household budgets; mortgages; pensions; big and small company financing; far more restricted access to wholesale funding and now spillovers to the more fragile emerging country economies. The economies of the OECD are shrinking into recession and unemployment is increasing rapidly. So far banks and insurance companies have written off more than 1 trillion euros. Even now, 18 months after the beginning of the crisis, the full scale of the losses is unknown. Since August 2007, falls in global stock markets alone have resulted in losses in the value of the listed companies of more than €16 trillion, equivalent to about 1.5 times the GDP of the European Union’. There are two basic types of banking, retail (commercial) and investment (shadow) banking, and they are subject to differential
dissertation takes a micro view into a macro problem exposed by the GFC, which warranted the title of the most serious economic and financial crisis the world has ever known.\textsuperscript{1453} And, it precipitated a paradigm shift in financial regulation.\textsuperscript{1454}

Ireland’s Crisis

In the late 1980’s the Irish economy experienced an economic miracle, attributable to a mixture of unintended domestic policy-making ‘genius’, and the invisible helping hand of international economic, political and financial trends.\textsuperscript{1455} This ‘miracle’ fell into two broad parts or waves: investment in Ireland by foreign multinationals and an increasingly stable regulation; the shadow banking system acts effectively means non-bank lenders including money market funds, hedge funds, investment banks, exchange-traded funds and so forth; Shadow banking is intermediated financing in wholesale money markets by banks and other financial intermediaries and lent in the capital markets, according to Errico et al., ‘Mapping the Shadow Banking System Through a Global Flow of Funds Analysis’ (2014) IMF Working Paper (WP/14/10); On the other hand, S Claessans and L R Ratnovski, ‘What is Shadow Banking’, IMF Working Paper (WP/14/25 2014) <http://www.imf.org/external/pubs/ft/wp/2014/wp1425.pdf> accessed 12 February 2014, argue that it is very hard to define shadow banking, acknowledge that describing it as ‘credit intermediation’ is useful, but that really, it is all financial activities outside traditional banking, which require a private or public backstop (guarantee) to operate. The backstop is needed because shadow banking (like traditional banking) involves risk transformation, around credit, liquidity, and maturity risks. The risk activities include securitisation, collateral services, bank wholesale funding arrangements, and deposit-taking and lending. Post-GFC in the US, amid some controversy and intense lobbying, the Volcker Rule, eventually operative on the 10\textsuperscript{th} December 2013, seeks to constrain banking activity, while in the UK see the ring-fencing provisions advocated by The Independent Commission on Banking: Vickers Report, Final Report, September 2011.\textsuperscript{1453} See for instance, Davies (n 2); The Turner Review (n 2); Godhart (n 2); Kaletsky (n 2); Reinhart and Rogoff (n 2). According to MacNeil and O’Brien, IMF estimates of the GFC costs exceed $4 trillion, the vast majority of which can be attributed to systemic failures of corporate, regulatory, and political oversight especially in the US.\textsuperscript{1454} For the EU see especially the De Larosiere Report 2009 (n 1) which precipitated constitutional change explains din more detail later; For the US see The US Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 which was passed in July 2010 after enduring a twenty-two month, separate and then joint, Senate and Congress rite of passage, may be characterised as a legislative leviathan comprising a series of sub-topic pieces of legislation synergised into one great whole. Described as the most sweeping change to US financial regulation since the Depression and a paradigm shift affecting all financial regulatory agencies, it made changes in four key areas: (a) regulatory oversight, establishing many new agencies; (b) derivatives, and especially accountability and transparency; (c) dealing with troubled banks (special if not bespoke resolution vehicles were created mid-crisis in many countries including: the US TARP programme and Federal Reserve interventions; the UK bank failure regime post Northern Rock bank run; in Ireland NAMA the property debt giant; in the EU the EFSF/ESM bailout fund curiously as a limited liability company: see WD Cohan, ‘House of Cards How Wall Street’s Gamblers Broke Capitalism’ (Allen Lane 2009); H Davies and D Green, Global Financial Regulation the essential guide (Polity Press 2009); Elder ‘Ocean Cures’ (n 111); Gray and Akseli (n 3); National Asset Management Agency (NAMA) Act 2010 and Dellway Investments & ors v NAMA & ors [2011] IESC 14 where Denahm J described NAMA as a work-out vehicle; UK Banking Act 2009.\textsuperscript{1455} M O’Sullivan, ‘Ireland’s Bubble: The Great Transformation’ in S Kinsella and A Leddin (eds), Understanding Ireland’s Economic Crisis prospects for recovery (Blackhall Publishing 2010), described Irish economic history from the Middle Ages right up to the late 1980’s being characterised by ‘sustained and painful under-achievement’, when something unexpected happened – an economic miracle - which may be attributed to a mixture of unintended domestic policy-making ‘genius’, and the invisible helping hand of international economic, political and financial trends.
investment climate; and, the flourishing of the domestic economy as aided and abetted by the low real interest rate policy of the Euro-zone\textsuperscript{1456}.

Immediately prior to the new millennium however, the Irish economy experienced an unusually large and insufficiently regulated credit bubble, when lending as a fraction of GNP increased from 60 % in 1997 to over 200% in 2008, twice the level of other industrialised economies\textsuperscript{1457}. The financial crisis hit in 2008, stemming on the economic side from a contraction in property prices and domestic output and the spill-over effects from the US sub-prime crisis, and on the regulatory side from inadequate risk management practices globally, and particularly copied in Irish banks, coupled with the failure of regulatory supervision\textsuperscript{1458}. Post-crisis, the Irish banking system which was subordinate to Euro-zone policy-makers, cast three interrelated problems upon the sovereign state: 1) large losses on loans to property developers; 2) large wholesale liabilities to international bondholders and, increasingly to the European Central Bank; 3) losses on mortgages and business loans\textsuperscript{1459}.

Unfortunately, failures in the Irish banking system brought down the house of cards. Legal commentators, Connery and Hodnett excoriated deregulation and light touch regulation within the Irish banking experience as leading to both a lack of transparency and a lack of prudence in relation to risk taking\textsuperscript{1460}. From the perspective of international bankers in Ireland, Honohan criticised in more particular terms, that the Irish regulatory approach was ‘deferential’; that attempts to strengthen the approach had limited effect; that key governance architecture elements were not put in place; that sanctioning was only reluctantly applied to micro-prudential functions; and, that nine published regulatory

\textsuperscript{1456} See M O’Sullivan (n 1455). This was driven mainly by Franco-German interests.

\textsuperscript{1457} M Kelly, ‘The Irish Credit Bubble’ in S Kinsella and A Leddin (eds), \textit{Understanding Ireland’s Economic Crisis prospects for recovery} (Blackhall Publishing 2010); KPV O’Sullivan, ‘Financial Supervision in Ireland: Where to Now?’ in S Kinsella and A Leddin (eds), \textit{Understanding Ireland’s Economic Crisis prospects for recovery} (Blackhall Publishing 2010).

\textsuperscript{1458} See KPV O’Sullivan (n 1457).

\textsuperscript{1459} See Kelly (n 1457).

\textsuperscript{1460} See Connery and Hodnett (n 6). See Financial Stability and Reform Bill 2013 (bill 41 of 2013) introduced to the Dail on the 19\textsuperscript{th} April 2013 which provided in its recitals that: it was an act to promote the financial stability of Ireland by improving accountability and transparency in the financial system, reduce systemic risk, end “too big to fail”, improve capital adequacy and to protect the state from nontransparent safety net subsidies and open-ended bailouts of monetary and financial institutions; further it was acknowledged that the emergency support by the State to the banking sector has cost the State in excess of €73 billion over the past five years.
principles were never codified\textsuperscript{1461}. Further emphasising the ‘capture’ of the pre-crisis regulator, the academic critique by professor Gregory Connor of NUI Maynooth, was that the Irish political establishment created a, ‘regulatory system that was.....very lax, very secretive, and very accommodating, and it was done deliberately’\textsuperscript{1462}.

In terms of pre-crisis Ireland, the preferred approach which failed, was a soft-touch version of the principles-led regulatory approach, where the spirit over-ruled the letter of the rule, and where a ‘decentred’ form of regulation found many supervisory functions transferred to multiple stakeholders\textsuperscript{1463}. The Irish regime rested upon presumed ethical behaviour and transparency in business dealings at board level. For banks this entailed monitoring alongside a risk-based enforcement regime heavily influenced by the international Basel II ‘risk-weighted’ standards which unfortunately encouraged risk taking. This clearly failed miserably as far as Irish banks were concerned at both the regulatory and the bank control levels\textsuperscript{1464}.

Problems in the fractional reserve banking sector were central to the Irish crisis\textsuperscript{1465}. The prime culprit was the infamous Anglo Irish Bank which at the boom peak in 2007 was loaning €300 million per week\textsuperscript{1466}. Anglo operated a relationship management model which it copied from the US, resulting in Irish banking adopting an international culture of greed driven by profit. It was known to furnish billion euro funds to solicitors’ practices in the early hours of the morning to clinch major property deals. Carswell has provided a complete expose of their operations, where executives deliberately stayed

\begin{itemize}
\item \textsuperscript{1461} Honohan Report (n 6), 59-60. The nine principles include sound governance; transparency and accountability; prudence and integrity; risk control, oversight and reporting; sufficiency of financial resources; and, timely information production.
\item \textsuperscript{1462} G Connor, (Interview broadcast \textit{RTE Prime Time} RTE 1 television Ireland, 10 June 2010).
\item \textsuperscript{1463} See KPV O’Sullivan (n 1457).
\item \textsuperscript{1464} See KPV O’Sullivan (n 1457).
\item \textsuperscript{1465} The business of banks basically is to receive deposits and then to lend them again to others. Leddin and Walsh (n 313) explained that in the economic sense banks act as financial intermediaries, channelling funds from savers to borrowers. The deposits are bank liabilities which must be repaid. Modern banking is based on a system of fractional reserves, a system first developed by medieval goldsmiths, which means that the bank only keeps a fraction of the deposits in reserve to meet withdrawals and lends the rest. For Ireland minimum reserves are now set by the ECB, based on the international Basel Accords standard, and are known as the liquidity ratio. Wessel (n 1254), 209 has explained what happens in a bank loss scenario: ‘Banks set aside a certain amount of capital for every loan – the riskier the loan the more capital. When banks take big anticipated losses, the capital cushion absorbs the pain. With less capital to support lending or purchases of securities, a bank has only two choices: shrink by lending less and selling securities, or raise more capital so it can lend more and buy securities. The first option can be profitable for a bank and its shareholders, but the economy as a whole greatly prefers the second one’.\textsuperscript{1466} Post-crisis it became the shell Irish Bank Resolution Corporation (IBRC) before its demise in February 2013 pursuant to the Irish Bank Resolution Corporation Act 2013.
\end{itemize}
close to property developers, and massaged their business status and hubris, gave them speedy credit decisions, and in return, charged a premium (interest rate) margin. The bank operated a false loan paradigm, granting 100% loans, taking security on property assets in a bubble which they were heavily instrumental in inflating. Other Irish banks noticed Anglo’s seeming-success and copied it, without satisfactory regulatory oversight or intervention. This started a disastrous and highly competitive national lending cycle based almost exclusively in the property sector.

As a relationship lender, Anglo found it almost impossible as time went on to refuse its clients’ burgeoning lending requests, because of this increasing competition, and this resulted in its lending committee taking short-cuts. The Nyberg report highlighted evidence of poor record keeping and decision-making, minutes only being kept after regulatory intervention, and exceptions to lending policy running at a ridiculously high twenty-five percent. During the peak 2005-2007 period, executives almost unbelievably by-passed the lending committee, and informally orchestrated ‘corridor

1467 Carswell, *Anglo Republic: Inside the bank that broke Ireland* (n 326); Also see B Clarke ‘Is ’Corporate Governance’ an Oxymoron?’ (n 616); S Ross, *The Bankers: How the banks brought Ireland to its knees* (Penguin 2009); But Anglo was not the only bad banking model pre-GFC; in the UK the bailed-out bank HBOS was described as an accident waiting to happen, and the bank’s business model was stated to have been inherently flawed while its board was a “model of self-delusion”; see UK Parliamentary Commission on Banking Standards Report ‘An accident waiting to happen’: The failure of HBOS’ (Fourth Report of Session 2012-13, HL Paper 144 HC 705 published 4 April 2013). Also see Gray and Akseli (n 3), concerning the run on UK bank Northern Rock and its subsequent nationalisation. Horan (n 87), 19 wrote that, ‘Ireland has had to deal with extensive revelations of unhealthy business practices, in particular in the banking sector, after a time of great prosperity’; and at some length she quoted the cases of the 19th century collapses of two banks the Tipperary Joint Stock Bank and the Munster Bank as revealing practices which may have now re-emerged. Banking failures are not rare: for instance, well within living memory and well before the GFC, in 1984 the Continental Illinois Bank of Chicago collapsed due to losses on loans; BCCI had its licence revoked in 1991 in the USA and then the UK; in Ireland the ICI, a wholly owned subsidiary of Allied Irish Banks, was saved by the Irish taxpayer in 1985. In the century between 1814 and 1914 there were thirteen banking panics in the USA alone see Wessel (n 1254). Renowned researchers Reinhart and Rogoff (n 2) in carrying out their eight centuries global review of financial folly, record from 1800, 268 banking crises with 22 in Africa, 44 in Asia, 112 in Europe, 65 in Latin America, 21 in North America and 4 in Oceania; record twenty-six high income country banking crises between 1920 and 2007; and eighteen major post-war banking crises in the developed world including a big five of Spain 1977, Norway 1987, Finland 1991, Sweden 1991, and Japan 1992 (2009:225). For advanced economies, during the two century period 1800-2008, the picture that has emerged is one of serial banking crises, with the tally of crises particularly high for the world’s financial centres France (15), The UK(12) and the USA(13) see Reinhart and Rogoff (n 2). Pre-GFC, Braithwaite and Drahos (n 346), 141 presciently characterised regulation in the banking industry as being, “based on uncertainties about how to exercise...power, imperfect information flows between national regulators concerning international crises, and a lack of early warning systems to detect the development of those crises”. Also see Liikanen Report, *High-level Expert Group on reforming the structure of the EU banking sector* (Chaired by Liikanen E final report Brussels 2 October 2012) <http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf> accessed 3 October 2012.

1468 Nyberg Report (n 8).
credits’, as well as carrying out drive-by property valuations and back-of –the envelope calculations. At board level, Nyberg criticised non-executive directors as lacking in banking experience, and relying too heavily upon executive decision-making, and as being inactive in challenging the bank lending approach or its unsustainable pace of lending growth. And, then in September 2008 as the end drew nigh, a potential conspiracy was hatched to draw in taxpayer funds to shore up the ailing bank.1469

Amid much rancour, many different viewpoints have been aired as to causes of the Irish crisis, and the contributory conduct of market, political and societal actors. First, back-dropped by the GFC, Ireland’s own discrete financial problems were described, in the immediate political view, as a spectacular regulatory system failure. According to post-crisis Minister for Finance Brian Lenihan, this failure to prevent grossly excessive, and irresponsible lending to the property sector, resulted in Ireland’s most systemically important banks being recapitalised and brought into public ownership, leaving the financial system overall severely shaken and in need of overhaul, and customers and households managing unprecedented levels of debt.1470 Ireland, as a result of socialising the bank debt was obliged to seek a humiliating EU-IMF bailout, which lasted for three years, with after effects ongoing, upon being forced out of the bond markets, by credit rating downgrades.1471 Belatedly, the then Irish Taoiseach Brian Cowen TD

1469 On the 24th June 2013 the Irish Independent newspaper broke the major ‘Anglo Tapes’ story of the existence of tapes of conversations between Anglo bank executives, which caused massive public and political uproar. This occurred at a time when the Irish government, following a failed constitutional referendum concerning future Oireachtas enquiries (October 2011 when 52% voted NO), was slowly progressing legislation to hold a banking enquiry see The Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013. One of the taped interviews between John Bowe the then Anglo head of capital markets and Peter Fitzgerald then Anglo head of retail funding records an ‘in for a penny in for a pound’ conversation, seeking €7 billion taxpayer funding although more was needed, where Bowe stated: ‘The reality is that, actually, we need more than that. But you know the strategy here is you pull them in, you get them to write a big cheque and they have to keep, they have to support their money…. If they saw the enormity of it up front they might decide, they might decide they have a choice. You know what I mean? They might say the cost to the taxpayer is too high. But . . . if it doesn’t look too big at the outset . . . if it looks big, big enough to be important but not too big that it kind of spoils everything’. See for instance, S Carswell, ‘Brass neck and sneers as Anglo tried to hoodwink State’ The Irish Times (Dublin, 25 June 2013).

1470 Lenihan, (n 1413), 441-444. As late as May 2013 it was remarked: ‘The collapse of Ireland’s economy is warning enough of what happens when governments feel compelled to bail out banks that dwarf their economies’. See The Economist, ‘Wall street is back’ (London, 11 May 2013).

1471 The bailout ended at midnight 15th December, 2013. See for instance, V Browne, ‘Irish people did not sign up for what was done to them in the bailout’ The Irish Times (Dublin, 18 December 2013); IMF Press Release, ‘IMF Completes Twelfth and Final Review Under the Extended Fund Facility Arrangement for Ireland’ (Release 13/507 13 December 2013); F O’Toole, ‘Three key truths about the bailout which we are only learning now’ The Irish Times (Dublin, 17 December 2013). Eventually throughout the second half of 2013 the cost of Irish government borrowing began to fall and by mid January 2014 after upgrades by Credit Ratings Agencies to investment status the rate stood at 3.17% for ten-year bonds see J McManus and
acknowledged errors in economic handling, particularly in relation to property tax incentives, and the property bubble\textsuperscript{1472}; to be joined by his predecessor Bertie Ahern, who cited what he called, ‘fierce pressure...[from]...developers, owners of sites, areas that didn’t have the developments, community councils, politicians, civic society – they were forever at us......’, as the drivers of the Irish hubris\textsuperscript{1473}.

Second, within the Nyberg Report’s considered expert view, herding, group-think, national speculative mania, and head-in-the-sand disbelief, within an international and domestic context of adverse culture, values and conduct change, were prominent. He stated:

\textit{In explaining the simultaneity of the failures in Irish institutions, the Commission frequently found behaviour exhibiting bandwagon effects both between institutions (“herding”) and within them (“groupthink”), reinforced by a widespread international belief in the efficiency of financial markets...... Much points to the development of a national speculative mania in Ireland during the Period, centred on the property market......Even obvious warning signs went unheeded in the belief that the world had changed and that a stable economy was somehow automatically guaranteed. Traditional values, analysis and rules could be gradually less observed by the banks and authorities because their relevance was seen as lost in the new and different world. When it all ended, suddenly and inexplicably, participants had difficulty accepting their appropriate share of the blame\textsuperscript{1474}.}

Nyberg concluded that international developments precipitated, but did not in themselves cause, the Irish crisis. The five most salient, underlying conditions and contributory

\textsuperscript{1472} B Cowan, (North Dublin Chamber of Commerce 13 May 2010 and reported in edited extracts in The Irish Times Dublin, 14 May 2010).

\textsuperscript{1473} B Ahern, ‘Fierce pressure’ from builders – Ahern and Ahern accepts he played a role in economic crisis (Speech quoted in Minihan M, The Irish Times Dublin, 15 May 2010 and Collins S and Minihan M, The Irish Times Dublin, 15 May 2010 respectively).

\textsuperscript{1474} See Nyberg Report (n 8), i. Following on from many international precedents, in January, 2010 the Irish government commissioned international expert Peter Nyberg, to prepare a report concerning the institutional factors contributing to the Irish financial crisis. The Nyberg Report’s terms of reference, charged this special one-member Commission with the task of evaluating how various institutions contributed to the Irish financial crisis. Unlike other much more rapidly reporting bodies, Nyberg presented his report to the new Government in March 2011, fourteen months after commencement.
factors, in the pre-GFC Irish market, were identified by him as including: Irish Euro-zone entry; increased market funding of, and foreign competition for, Irish banking; high risk retail products; and, false reliance upon the efficient market hypothesis 1475.

Third, the hindsight expert economist’s view emerged in June 2012, when the Irish print media published an interview with Lars Frisell, a Swedish economist who took over as director of economics and chief economist at the Central Bank 1476. In this interview Frisell revealed what was described as his perspective on the ‘causes, culprits and cures’ of the financial crisis in Ireland. Manifesting a hind-sight, if not revisionist viewpoint, he outlined four culprits including a faulty lending culture, failed corporate governance, and inadequate watchdogs and regulators 1477.

Fourth, the academic and bankers’ views which also highlighted conduct failures. The fractional reserve banking system is a fundamental economic fulcrum upon which efficient capital allocation, essential transaction and intermediation services, and funding for new business and technological advance all depend 1478. For Ireland according to O’Sullivan and Kennedy, the GFC exacerbated the banking crisis, but the real cause was the collapse of the domestic property sector and subsequent contraction in national output, in turn rooted in inadequate risk management practices within banking, coupled with a regulatory failure to effectively supervise such practices 1479. An essential economic plank and its regulator, regarded as much too benign and also presiding over a culture of collusion, failed, and post-crisis root and branch regulatory reform is

1475 Nyberg Report (n 8). The full list is: (i) euro-zone entry which markedly reduced Irish interest rates; (ii) Irish banks increased access to market funding; (iii) Irish bank margins were put under pressure from increased foreign competition in the Irish financial market due to the globalisation of markets and EU membership; (iv) a number of new, potentially high-risk retail products were introduced to the Irish market by new entrants (for example, tracker mortgages, and 100% mortgages for first-time buyers); (v) the efficient financial markets paradigm provided the intellectual basis for the assumption that financial markets, left essentially to themselves, would tend to be both stable and efficient.

1476 S Carswell, ‘Central Bank will draw on Swedish institutional memory’ The Irish Times (Dublin, 5 September 2012).

1477 The full list is: (i) corporate culture at the banks including for example incentive affects such as bonuses based on loan volumes, and the bank boards, who represented big shareholders, and who should have been aware of the risks being taken; (ii) corporate governance failures at the banks; (iii) the role of “trusted third parties” such as accountants specifically, who earned high fees and thus were incentivised towards job continuity, whereas they should have been protecting the interests of small shareholders and the banks’ creditors; and, (iv) the failure of the authorities and politicians.


1479 See O’Sullivan and Kennedy (n 1478).
needed. In September, 2012 former Irish Attorney General and former chairman of Allied Irish Banks (AIB) Dermot Gleeson, under cross-examination during a fraud trial of a former AIB borrower in London, was reported in the print media to have stated that risk models used by the banks were constructed to plan for a one-in-25 year crisis, when the one that occurred was a one-in-a-100 year crisis; and, in his view, that while in retrospect it may have seemed reckless, instead the risk-models were seriously flawed, coupled with some careless lending.

Finally, Honohan and others, highlighted a divers set of numerous post-crisis aggravators, and unintended adverse effects of crisis response, in the aftermath of the Irish banking crisis experience including: the ineffectiveness and un-timeliness of policy response;

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1480 See O’Sullivan and Kennedy (n 1478). Regulation is not a fossilised concept, but is instead live and dynamic, and this includes sanctioning and its modes. As Kahn has asserted, ‘the evolution of regulatory policies will never come to an end’; see AE Kahn, ‘Deregulation: Looking Backward and Looking Forward’ (1990) 7 Yale Journal on Regulation 325, 333-354. While Goodhart (n 2), 141 stated: [T]here will be no conclusion to the exercise of trying to reform and improve financial regulation, just as there will be no end to the process of innovation and development in financial intermediation’.

1481 M Hennessy, ‘Former chairman of AIB defends unusual loans to buy UK property’ The Irish Times (Dublin, 29 September 2012). This evidence was given in the UK fraud trial (re-trial hearing) of Achilleas Kallakis who was convicted of defrauding Allied Irish Banks plc and received a seven year sentence. Explaining the alleged fraud to jurors at the retrial, Victor Temple QC, prosecuting, stated that in total, AIB loaned some £743 million to buy property. The actual total spent was £642 million, together with other costs of £23 million. The surplus available was £77 million. Large sums of money were used to fund Mr Kallakis’s extravagant lifestyle and to pay for his yacht, private jet, helicopter and a new villa in Mykonos.

1482 P Honohan, Untitled (44th Annual Money, Macro and Finance Conference Trinity College Dublin, 7 September 2012) <http://www.centralbank.ie/press-area/speeches/Pages/AddressbyGovernorPatrickHonohanAnnualMoneyMacroFinance.aspx accessed 7 September 2012> accessed 7 September 2012; M Woods and S O’Connell, ‘Ireland’s Financial Crisis: A Comparative Context’ (Central Bank Quarterly Bulletin, 04/October 12) <http://www.centralbank.ie/publications/Documents/Ireland's%20Financial%20Crisis%20a%20Comparative%20Context.pdf> accessed 04 September 2012; B Godfrey and B Golden, ‘Measuring Shadow Banking in Ireland using Granular Data’ (Central Bank Quarterly Bulletin, 04/October 12) <http://www.centralbank.ie/publications/Documents/Measuring%20Shadow%20Banking%20in%20Ireland%20using%20Granular%20Data.pdf> accessed 15 October 2012. The more complete catalogue included: The relative scale of the Irish banking crisis, effectiveness of policy response which optimally must be timely, and developments in the external macroeconomic environment; in terms of scale Ireland proportionately suffering the largest global fiscal costs of bank recapitalisation; regarding recapitalisation of Irish banks, loss recognition was tardy; the systemic nature of the crisis entangled the financial stress of both banks and the sovereign, while the socialisation of losses was exacerbated by reluctance to burden creditors; the 2008 blanket bank guarantee was based in incorrect advice that the banks faced liquidity and not solvency difficulties; the large and hard-to-quantify risk of loan-losses was exacerbated by repeated failures to get the loan-loss estimates correct, which detrimentally affected market sentiment; such loan-loss estimation was adversely impacted by the tardiness of bank management to face up to the scale of losses and the inadequacy of management information; rescue capital was added to the Government debt resulting in budgetary constraints and severe austerity budgeting, exacerbated by overall euro-system policy dictating that senior bondholders – even those outside Government-guarantee – should not be required to burden-share losses; evolving international reform standards increased required bank capital levels rendering the banking solution more difficult; ratings downgrades undermined both sovereign and banks’ market access to funds; the absence at crisis outset of comprehensive specific Irish legislation to deal with bank resolution exposed the authorities to litigation risks that slowed action; although shadow banking, which is significant
the systemic nature of the crisis; repeated bank management failures; evolving international reform standards which increased obligations; ratings downgrades; the absence at crisis outset of comprehensive specific Irish legislation to deal with bank resolution which exposed the authorities to litigation risks that slowed action; and, shadow banking data gaps which disenabled the isolation of shadow banking behaviours.

*The Euro-zone Crisis*

The GFC aftermath precipitated and unearthed the Euro-crisis, which although commencing in Greece, impacted Ireland severely in the early stages, as Ireland became the bulwark against contagion effects. In August 2012, the Irish print media conducted an interview with the German finance minister Wolfgang Schäuble. Perfectly exemplifying the conjunction of the power of financial markets and the credit rating agency oligopoly, the issues of risk, and modern global public finance, all of which frequently exist and operate well beyond the financial regulatory control domain, Herr Schäuble, in a published edited version of a Q&A session insightfully revealed: ‘The real problem in the euro zone is that, as a result of the financial and banking crisis that

in Ireland, was a significant player in the GFC, there are major Irish data gaps disenabling the isolation of shadow banking behaviours. Showing the lasting effects of the Irish crisis, as of May 2013 the Central Bank stated: ‘The largest uncertainty facing the domestic economy is the health of the banking sector and its ability to support the real economy with credit at sustainable rates. The stock of impaired mortgages ...and SME loans has continued to rise and is the main short-term risk...... Longer-term bank viability, and hence credit-supply conditions in Ireland, depend on the banks returning to profitability and their successful transition back to market-based funding, building on recent improvements in funding conditions. Both arrears and sustainable funding will remain challenges in the coming years and will need to be overcome to ensure banks’ resilience’. See Central Bank of Ireland, Macro-Financial Review 2013-1 (2013), 1-2 <http://www.centralbank.ie/publications/Documents/Macro-Financial%20Review%202013.1.pdf> Accessed 22 May 2013. Demonstrating the continuing devastating social consequences of the crisis, even in May 2013 halfway through the sixth year the Central bank reported: ‘High and persistent levels of unemployment also remain a concern. The Irish unemployment rate stood at 14.2 per cent (seasonally adjusted) in 2012 Q4, compared with a euro area average of 11.8 per cent’. See Central Bank of Ireland, Macro-Financial Review 2013-1 (2013), 4 <http://www.centralbank.ie/publications/Documents/Macro-Financial%20Review%202013.1.pdf> Accessed 22 May 2013.

1483 K Alexander ‘Sovereign debt restructuring in the EU’ (n 80), 324 concluded: ‘The EU sovereign debt crisis of 2010 involving Greece and a growing number of eurozone countries demonstrates how financial distress in one Member State can rapidly spread through contagion channels to threaten the macroeconomic and financial stability of both the eurozone and the European Union and also destabilize global financial markets’. The crisis spread to Portugal, Spain, Italy and Cyprus also in that order; Greece was embroiled in repeat bailout efforts.

1484 D Scally, ‘Q &A with Wolfgang Schäuble’ *The Irish Times* (Dublin, 24 August 2012). One influential commentator, *The Economist* (‘Downgraded’ 25 July 2009, 68), described the Credit Rating Agencies as an, ‘anointed oligopoly (with margins to match)’. Over the course of the crisis these agencies downgraded numerous sovereigns including Ireland, and also many financial institutions.
started in America, financial markets identified the risk associated with high public debt.
We have to overcome this loss of trust’.

Round up and Reform focus

On a very sobering note, and showing the dramatic economic and social harm caused by
the crisis, in October 2012 Lagarde highlighted that six years into the crisis, that over 200
million people around the world were unemployed, and that some estimates put GDP in
the US and Europe at about 10-15 percent lower than they would otherwise have been1485.

One EU legislator interviewed for this dissertation stated that the market temperature has
changed, the laissez faire attitude has gone, and so has self-regulation1486. The EU
Commission, pointedly highlighted enforcement as one of four essential reform pillars,
and emphasised both an enhanced role for the criminal law and a beefed up administrative
sanction regime1487.

The Irish market, which heavily innovated as outlined pre-crisis, may clearly be identified
as exceeding control, or as exceeding control failure, potentially dis-embedding from civil
society, and misconduct-riven. Market actor conduct control issues identified in the
background include: questionable risk management practices; fraudulent behaviour;
breaches of trust; business culture concerns; governance, control system and regulatory
failure; business disclosure and transparency inadequacies; ethical concerns including
conflicts of interest; and, ineffectual sanctioning.

In its atypical boom-bubble-bust-regulate cycle, the regulatory debate oscillates from
crisis demands for increased regulation, rushed reform that conduce to over-regulation,
through to equally demanding calls for de-regulation during crisis lulls1488. The crises
detailed above, which involved serious systemic risk, have rightly led to calls for
regulatory reform. In Ireland, and reflecting views elsewhere, Central Bank governor

1485 C Lagarde, Global Financial Sector Reform: An Unfinished Agenda (Speech to the Gala Event Toronto
October 2012). In August 2013 Irish media reports stated that,’ Banks cut 5,500 branches across the
European Union last year, 2.5 per cent of the total, leaving the region with 20,000 fewer outlets than it had
when the financial industry was plunged into crisis in 2008’; see ‘Banks cut 5,500 branches across Europe
in 2012’ The Irish Times (Dublin, 11 August 2013) quoting ECB statistical sources.
1486 Interviewee T EU Legislator Brussels 10 April 2013.
1487 COM (2010) 301 (n 12). In June, 2010 the EU Commission announced that enforcement of sanctions
was largely un-harmonised throughout the EU leading to diverging practices among national supervisors,
and declared that financial regulatory enforcement was one of four intrinsically linked reform pillars.
1488 Braithwaite Regulatory Capitalism (n 86); Gamble (n 87); Haines The Paradox of Regulation (n 14).
Honohan was reported in the Irish national print media as advocating that those guilty of bank crisis crime must face jail\textsuperscript{1489}. A new meta-risk regulation system, the regulation of self-regulation, has been promulgated for the Irish banking industry, incorporating compliance monitoring at three hierarchical levels, the operational workplace, by company directors, and finally by the financial regulator\textsuperscript{1490}. Compliance is the key objective for building and maintaining the essential quality of trust, and through its risk management manifestation may be seen by business as a competitive advantage, although it carries considerable baggage with it, including expense, circumvention, regulatory error, and the rules versus voluntary behaviour tension\textsuperscript{1491}. As a warning to reformists, the many paradoxes of regulation have been highlighted by Haines\textsuperscript{1492}, including its politically and technically attractive primacy as an instrumental form of policy-making, on the one hand, and specific risk which is not amenable to narrow, targeted intervention, on the other. Times of crisis, such as those depicted, highlight the need to bring an unruly market domain, which if left to its own devices may ruinously impact national, regional and the global economy, and the social fabric which relies upon it, within a regulatory control domain. Such crisis occurrence provides an ideal opportunity for collaborative market control reform discussion and proposals.

\textsuperscript{1489} D de Breadun, ‘Honohan says those guilty of bank crisis crime must face jail’ \textit{The Irish Times} (Dublin, 23 February 2010). This call to greater use of the criminal law was also reflected in the UK and USA. In the UK for instance, within the Libor rate-rigging investigation there was a call for higher fines for firms that fail to co-operate with regulators, the need to examine gaps in the criminal law, and a much stronger governance framework at the Bank of England see UK Treasury Select Committee Report (n 13); also see Wheatley Review (n 13). In the US President Obama established the specialist Financial Fraud Enforcement Task Force in November 2009 to hold accountable those who helped bring about the last financial crisis as well as those who would attempt to take advantage of the efforts at economic recovery. With more than 20 federal agencies, 94 US Attorneys’ Offices and state and local partners, it’s the broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled to combat fraud. It has been prominent in numerous financial criminal investigations since (see Stopfraud.gov).

\textsuperscript{1490} See KPV O’Sullivan (n 1453).

\textsuperscript{1491} See Good Bank Global Report 2013 (\textit{The Economist Intelligence Unit}) \texttt{<www.thegoodbankdebate.com> accessed 02 January 2014}; M Kennedy, ‘Banking’s important factors of trust and compliancy’ \textit{The Irish Times} (Dublin, 02 January 2014).

\textsuperscript{1492} Haines \textit{The Paradox of Regulation} (n 14).
Appendix B: Interview discussion topics

Financial markets and market actor conduct, the preferences of business elites, the nature of the financial services sector, its national economic and social importance, crisis-caused reputational damage and its recovery, the maximisation of regulatory compliance, and future public regulatory standards and reform; financial regulatory theory, practice and policy, especially in Ireland, including the scope for new practices and new forms of offences, standards and ethical codes; the perception of white collar crime, the criminal law role and imprisonment threat in the regulatory enterprise, optimal sanction methods for corporate infringers, administrative sanction regimes and in particular the Irish regime, its discretionary apparatus and deployment, the enforcement pathway, underlying options and launching factors, and its interplay strategy and workings, and the composition of a workable and interchangeable sanction suite; the role if any for specialist prosecutors and judges, judicial independence and sentence guidelines, the apparent distinction between ‘real crime’ and financial regulatory crime, the constituents of a financial regulatory offence, double jeopardy, the use of strict liability and reverse burdens of proof; the draughtsmanship of financial regulatory statutes, lobbying implications, legislative policy-making, political policy considerations, citizen and taxpayer participation.

See the text and footnotes for quotations.

List of Interviewees quoted (11):

Interviewee C Regulator Ireland 6 February 2013
Interviewee E Academic Australia 22 March 2012
Interviewee H Parliamentary Draughtsman Ireland 20 December 2012
Interviewee K Regulator Australia 24 May 2012
Interviewee L Judiciary Ireland 7 January 2013
Interviewee N Academic Australia 27 April 2012
Interviewee Q Academic Lawyer Australia 5 November 2011
Interviewee T EU Legislator Brussels 10 April 2013
Interviewee W Academic Australia 2 April 2012
Interviewee X Regulator Ireland November 2012
Interviewee Z Business Leader England 29 November 2012

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<th>Criminal Law Real Crime Paradigm</th>
<th>Comparator</th>
<th>Financial Regulation Binary Paradigm</th>
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<td>Paradigm Overview</td>
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<td>Separation of Powers</td>
<td>Power</td>
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<tr>
<td>Rule of Law (independence)</td>
<td>Rule</td>
<td>Rule of Policy (dependent)</td>
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<tr>
<td>Common law, constitution, statute</td>
<td>Origin/Source</td>
<td>Statute (work, health, and commerce)</td>
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<td>Paradigm Spine</td>
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<td>Amalgam autonomy/welfare</td>
<td>Justification</td>
<td>Social (economic) welfare</td>
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<tr>
<td>Harm (life, health, liberty, property)</td>
<td>Risk Management Focus</td>
<td>Harm (economic: property)</td>
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<td>Control (coercion)</td>
<td>Control tool Rationale</td>
<td>Control (various)</td>
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<tr>
<td>Crisis: Deviance</td>
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<td>Semi-autonomous inter-connected process</td>
<td>Institutionalised</td>
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<tr>
<td>Pre-determined moral and constitutional and statutory values; judicial from case precedent</td>
<td>Principled/Normative</td>
<td>Pre-determined Statutory objectives and goals; norm generating</td>
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<tr>
<td>Common law, statute, constitution, convention</td>
<td>Legally grounded</td>
<td>Constitution, EU legislation, statute, statutory instrument</td>
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<td>Contractarian hypothesis</td>
<td>Contract underpinned</td>
<td>Regulatory contract</td>
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<tr>
<td>Rule of law; independence; due process; adversarial procedure; jury trial; judge sentences; judicial review;</td>
<td>Values</td>
<td>Rule of law; delegated discretionary authority; informal due process; judicial review; constitutional justice;</td>
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<tr>
<td>discretionary decision-making etc</td>
<td>accountability, transparency, equity; etc</td>
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<tr>
<td>Special Features</td>
<td><strong>Exclusive criminal law</strong></td>
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<td>DPP guidelines</td>
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<td>Regulator, Garda and DPP</td>
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<td>Dependent Sanction axis</td>
<td>Offence/contravention/sanction</td>
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<td>Court principles</td>
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<td>Confrontational deterrence</td>
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<td>Regulator guide</td>
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<td>Deterrence/compliance</td>
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The Table below sets out a sample of the offences created within the broader statutory financial regulatory regime (five separate statutory routes), together with the appropriate penalties. Infringements in the main are prescribed contraventions as dealt with by the administrative sanction regime whether under the Central Bank Act 1942 Part IIIC or the EU inspired Regulations.

<table>
<thead>
<tr>
<th>‘Statutory’ Provision</th>
<th>Contravention/Offence</th>
<th>Sanction/Penalty</th>
</tr>
</thead>
</table>
| Part 111C Central Bank Act 1942 (inserted by CBFSAI Act 2004, section 10) | Committing a prescribed contravention of any:  
  
  (a) provision of a designated enactment or designated statutory instrument,  
  
  or  
  
  (b) code made, or a direction given, under such a provision,  
  
  or  
  
  (c) condition or requirement imposed under a provision of a designated enactment, designated statutory instrument, code or direction,  
  
  or  
  
  (d) obligation imposed on any person by Part IIIC or imposed by the Regulatory Authority pursuant to a power exercised | Penalties set out in section 33 AQ (3) and (4) for a prescribed contravention, all of which may be included in a Settlement Agreement, include:  
  
  caution or reprimand;  
  
  a direction to refund or withhold all or part of an amount of money charged or paid;  
  
  a monetary penalty (max €5000,000 for individual, and €5 million for a corporate);  
  
  a direction disqualifying a natural person from being concerned in management for a specified period;  
  
  a direction ordering the financial service provider to cease committing the |
<table>
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<tr>
<th>Central Bank Reform Act 2010, Part 3: five separate criminal offences regarding ‘persons’</th>
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<tbody>
<tr>
<td><strong>section 33(1)</strong></td>
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<tr>
<td>subject to reasonable excuse, failure to comply with an evidentiary notice</td>
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<td>contravene a direction under section 35 (4)(b) preventing or restricting the publication of evidence;</td>
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<tr>
<td>subject to reasonable excuse, failure to produce a document or information in compliance with an evidentiary notice issued under section 32;</td>
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<tr>
<td>subject to reasonable excuse, to (i) refuse or fail to give evidence in compliance with an evidentiary notice, or (ii) to refuse or fail to answer a question put by the Head of Financial Regulation or in cross-examination with the permission of the Head of Financial Regulation;</td>
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<tr>
<td>to provide information or a</td>
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<tr>
<td><strong>section 35(6)</strong></td>
</tr>
<tr>
<td><strong>section 36 (1)</strong></td>
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<tr>
<td><strong>Criminal Law Sanctioning</strong></td>
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<tr>
<td>Same sanction suite applies to all five offences:</td>
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<tr>
<td>Section 49 sets out the penalties available which include:</td>
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<tr>
<td>on summary conviction a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both;</td>
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<tr>
<td>and on indictment a fine (unlimited) or imprisonment not exceeding five years or both</td>
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<tr>
<td>Section 37(1)</td>
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<td>Section 48(5)</td>
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<td>Section 30 and 44</td>
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<tr>
<td>Summary Offence</td>
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<tr>
<td><em>inter alia</em> offence under Regulation 14 (issuer or offeror breaching Reg 12) or Regulation 15 (breach of Reg 13)</td>
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<tr>
<td>Conviction of a summary offence:</td>
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<tr>
<td>Fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both.</td>
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</table>

| Indictment and conviction (Person): |
| section 47 Investment Funds, Companies and Miscellaneous Provisions Act 2005 provides: |
| a fine not exceeding €1,000,000 or imprisonment for a term not exceeding 5 years or both |

<table>
<thead>
<tr>
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<tr>
<td>Prescribed contravention</td>
</tr>
<tr>
<td>Examples include using inside information (Reg 5), and engaging in market manipulation (Reg 6).</td>
</tr>
<tr>
<td>In the case of an adverse assessment, the Central Bank may impose:</td>
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<tr>
<td>a private caution or reprimand;</td>
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<tr>
<td>a public caution or reprimand;</td>
</tr>
<tr>
<td>monetary penalty not exceeding €2,500,000;</td>
</tr>
<tr>
<td>disqualification from management;</td>
</tr>
<tr>
<td>ceasure order (continuing</td>
</tr>
<tr>
<td><strong>Summary criminal offence e.g. contravention of Regulations 5,6, 17-24 etc.</strong></td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td><strong>Transparency (Directive 2004/109/EC) Regulations 2007</strong></td>
</tr>
<tr>
<td>Summary Offence</td>
</tr>
<tr>
<td>-----------------</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Part 9 Regulation 56(5)</td>
</tr>
<tr>
<td>Part 4 Regulation 12 (3)</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>
The Table below provides a useful overview of the financial regulatory control concept:

<table>
<thead>
<tr>
<th>Criminal Law Control</th>
<th>Administrative Regime Control</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harder end</td>
<td>Softer end</td>
</tr>
<tr>
<td>Harm risk</td>
<td>Economic harm risk</td>
</tr>
<tr>
<td>Rules-based</td>
<td>Rules and Principles-based</td>
</tr>
<tr>
<td>Command and Control</td>
<td>CAC continuum Comply or Explain</td>
</tr>
<tr>
<td>Coercion</td>
<td>Negotiation</td>
</tr>
<tr>
<td>Criminal proof and procedure</td>
<td>Civil proof and procedure</td>
</tr>
<tr>
<td>Punishment</td>
<td>Persuasion: Future behaviour change</td>
</tr>
<tr>
<td>Confrontational deterrence sanctioning</td>
<td>Negotiated settlement</td>
</tr>
<tr>
<td></td>
<td>Cooperative compliance sanctioning</td>
</tr>
</tbody>
</table>

Table: Financial Regulation Control Concept Overview © Shaun Elder 2013
Appendix F: Tables (2): Ir Fin Reg Sanctions; and Settlement Agreements

An overview of regulatory sanction action taken by the Irish Financial Regulator during the period 2005-2012 is illustrated in the table below.

<table>
<thead>
<tr>
<th>Table: Regulatory Actions in Ireland: TYPE</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative Sanction Settlement Agreements</td>
<td>0</td>
<td>2</td>
<td>4</td>
<td>9</td>
<td>9</td>
<td>5</td>
<td>10</td>
<td>14</td>
</tr>
<tr>
<td>Securities Markets Sanctions Settlement Agreement</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Warning notices issued regarding unauthorised activity</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>5</td>
<td>6</td>
<td>5</td>
<td>6</td>
<td>34</td>
</tr>
<tr>
<td>Issue of post inspection or other regulatory finding to be corrected</td>
<td>N/A</td>
<td>N/A</td>
<td>143</td>
<td>85</td>
<td>133</td>
<td>297</td>
<td>925</td>
<td>N/A</td>
</tr>
<tr>
<td>Authorisation/Licence/Registration refused</td>
<td>N/A</td>
<td>N/A</td>
<td>1</td>
<td>2</td>
<td>6</td>
<td>4</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>(2011-2 also revoked)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Direction/requirement imposed against credit unions that are in breach of Section 35(2) of the Credit Union Act</td>
<td>N/A</td>
<td>N/A</td>
<td>0</td>
<td>90</td>
<td>25</td>
<td>16</td>
<td>20</td>
<td>42</td>
</tr>
<tr>
<td>Direction/requirement imposed under other legislation</td>
<td>N/A</td>
<td>N/A</td>
<td>13</td>
<td>108</td>
<td>331</td>
<td>41</td>
<td>40</td>
<td>168</td>
</tr>
<tr>
<td>Appointment of independent auditor/inspector required</td>
<td>N/A</td>
<td>N/A</td>
<td>9</td>
<td>6</td>
<td>8</td>
<td>4</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Advertising issues investigated</td>
<td>N/A</td>
<td>N/A</td>
<td>133</td>
<td>177</td>
<td>224</td>
<td>85</td>
<td>90</td>
<td>188</td>
</tr>
</tbody>
</table>
### Table: Enforcement Actions. ©Shaun Elder 2013 source: Financial Regulator Annual Reports; Central Bank Annual Performance Statement 2012

Conclusions to be drawn include:

- 59 settlement agreements between 2004 and 2012;
- A 318% increase in total regulatory action between 2007 and 2011;
- Increase in authorisation refusals and revocation;
- In 2012 more warning notices (34) concerning unauthorised activity were given than in the previous seven years combined, and represented a 570% increase from 2011;
- An increasing number of advertising issues investigated up to a 2009 peak, when it dropped dramatically in 2010, and in 2011 increased again slightly, and increased dramatically by more than doubling in 2012;
- Disclosure of information to other enforcement authorities reached a peak in 2009 and has now levelled off;
- Corrections have increased to a marked degree, by 647% between 2007 and 2011, and unfortunately no figure has been revealed for 2012.

The Annual Performance Statement 2012 and the 2012 Annual Report provided additional statistical information not capable of across the board comparison in the table above. This shows that statistical information is being increasingly compiled, and included:

Directions Imposed under Prospectus Directive in 2010:1, and both 2011:0 and 2012:0;

Supervisory Warnings in 2010:0, in 2011:14, and in 2012:16. The non-statutory device of a supervisory warning is considered a private matter, and a regulatory tool between the RFSP and the Bank. They are used where there is reasonable cause to suspect that a prescribed contravention has occurred but where it is considered that formal disciplinary action is not warranted. Transparency, legitimacy and equity issues readily arise;


Somewhat worryingly but improvingly, Firms Recapitalised due to Solvency Issues in 2010: 29, and dropping in 2011: 7, and dropping to a very healthy 2012:0;

Up to December 2012 no matter had gone to Inquiry under the Part IIIC procedure, although in one case in 2012 an assessor was appointed to a securities matter.

In the below table the sanctioning utilised in the 59 settlement agreements to date is set out:

<table>
<thead>
<tr>
<th>Year &amp; No</th>
<th>Max fine €</th>
<th>Total Fines €</th>
<th>Other Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>04-05</td>
<td>0</td>
<td>nil</td>
<td>Warning in 2005</td>
</tr>
<tr>
<td>2006</td>
<td>2</td>
<td>nil</td>
<td>Revocation; disqualification</td>
</tr>
<tr>
<td>2007</td>
<td>5</td>
<td>5K</td>
<td>Disqualification; monetary penalty; reprimand</td>
</tr>
<tr>
<td>2008</td>
<td>10</td>
<td>3.45 ml</td>
<td>Revocation; disqualification; step down; monetary penalty; refund; reprimand</td>
</tr>
<tr>
<td>2009</td>
<td>9</td>
<td>2.75 ml</td>
<td>Disqualification; monetary penalty; reprimand</td>
</tr>
<tr>
<td>2010</td>
<td>7</td>
<td>2 ml</td>
<td>Monetary penalty; refund; reprimand</td>
</tr>
<tr>
<td>2011</td>
<td>10</td>
<td>3.350ml plus remed</td>
<td>Disqualification and authorisation revocation (1); monetary</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5.050 ml</td>
<td></td>
</tr>
</tbody>
</table>

364
In terms of general commentary, the 59 settlement agreements, up to December 2012, surveyed for this dissertation revealed¹⁴⁹³:

An enforcement hierarchy or pyramid broadly in line with the RRT model¹⁴⁹⁴ described in chapter 5, with criminal penalties absent however, and with revocation, disqualification, monetary penalty, remediation, reprimand and warning as the downward flow. The reprimand is the most frequent accompaniment to a monetary penalty. There has been no declaration by the regulator of the use of such a pyramid, but it is discernible in practice, or at least an equivalent is so discernible¹⁴⁹⁵.

During the period 2004-2012 the largest six fines have been Quinn Insurance Ltd and another €3.45 million (2008), Combined Insurance Company of Europe Limited €3.35m plus remediation of €2.151 million (2011), Alico Life €3.2 million (2012), Merrill Lynch International Bank Ltd €2.75 million (2009), Allied Irish Banks plc €2 million (2010), Ulster Bank Ireland Limited €1.96 million (2012). The range of fines has run from as low as €800 to €3.45 million, with total fines just short of €21 million (excluding remediation) the case average being almost €356,000.

It is clear that monetary penalties have stiffened since the onset of the financial crisis. In fact, almost 65% of all monetary penalties have been imposed during 2011-2012, in twenty-six cases, confirming such a stiffening of Central Bank sanctioning power. No figures are available however, for collection rates for the monetary penalties imposed. The reprimand is the most frequent accompaniment to a monetary penalty. Most infringers are corporate RFSPs and individuals have largely not been ‘prosecuted’. Where

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¹⁴⁹³ See https://www.centralbank.ie/regulation/processes/enforcement/Pages/settlement-agreements.aspx.
¹⁴⁹⁴ See Ayres and Braithwaite (n 90).
¹⁴⁹⁵ Interviewee C Regulator Ireland 6 February 2013 stated that, ‘Well I wouldn’t necessarily describe it like that’.
they have, revocations and disqualifications have sometimes ensued. No corporate RFSP has had a licence revoked.

In addition to the six major infringers named above, other household names sanctioned included investment bankers Goldman Sachs, credit card giants MBNA, Aviva insurance, UBS International Life concerning money-laundering, Bank of Ireland Mortgage Bank, Merrion Stockbrokers Limited, Dolmen Stockbrokers Limited, and Davy stock-brokers.

In terms of breach case type the most prevalent between the years 2004-2012 was under the Consumer Protection Code (19), with a mixed bag of insurance type breaches a close second (13), and five cases of Market Abuse. Twenty-seven out of the sixty-three case types were revealed after the enforcement directorate was established in December, 2010, and a large number were as a result of targeted inspection.

Recognisable themes included the almost ubiquitous co-operation of offenders, where cooperation of varying degrees, and especially during investigation and in early settlement was reported in all cases; that often breaches were not deliberate; that in many cases no client complained; that in a sizeable number of cases offenders voluntarily self-reported breaches; that since 2009 most breaches were found in targeted themed inspections or other inspections; more recently, inadequate internal control systems have been found (e.g. five in 2012) although all have been stated to be rectified; sometimes breaches have extended over lengthy periods, for instance, in 2012 in the case of two insurance companies, the breaches extended over three and a half years in one case and for nineteen months in the other; and, there has only been two repeat offenders, the now nationalised Allied Irish Banks plc and Aviva Insurance through three different corporate entities.

One academic with extensive financial regulatory knowledge, who was interviewed for this dissertation, contributed that settlement events are meaningless, because fines are made part of the business cost by RFSPs, and this in turn adversely affects the façade of enforcement.

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1496 The fifty-nine agreements involved sixty-three case types since some cases involved multiple case types.

1497 Interviewee E Academic Australia 22 March 2012.
The Irish regulator has dealt with three Market Abuse cases by settlement agreement between August 2004 and May 2012 and publicised each according to Oakes\(^{1498}\). Further, the Central Bank has revealed that during 2010 Securities Law Formal Private Cautions were issued in four cases, in 2011 two cases, and in 2012 zero cases; in 2010 fifteen enquiries were initiated regarding possible contraventions, and in 2011 this increased by 100% to thirty enquiries; further, in 2010 nine enquiries were completed regarding possible contraventions, and in 2011 this had increased by over 400% to thirty-seven enquiries\(^{1499}\). As far as Ireland is concerned, apart from the Oakes revelation, there are no specific insider trading statistics available. The best that can be done is to show offences under the Companies acts, the Investment Intermediaries act, and the Stock Exchange act. The table in Appendix G indicates the Irish position regarding crimes of fraud, deception and related offences over the years 2006, 2009 and 2010.

Irish statistics are sadly lacking. By contrast, for instance, the US SEC Performance and Accountability Report 2010\(^ {1500}\) set out a performance results summary in relation to the goal of fostering and enforcing compliance with US federal securities law, across five key performance measures, and ten key performance indicators.

\(^{1498}\) Under the Market Abuse (Directive 2003/6/EC) Regulations 2005; and see Oakes *The role of enforcement* (n 453).

\(^{1499}\) See CBI Annual Performance Statement (n 1094), 18.

Appendix G: Table: Select Irish Criminal Law Statistics

Table: Select Irish Criminal Law Statistics. The following table indicates the Irish position (recorded and detected) regarding crimes of fraud, deception and related offences over the years 2006, 2009 and 2010:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Type</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraud, Deception &amp; related offences: Total</td>
<td>4176</td>
<td>2163</td>
<td>4933</td>
<td>2758</td>
<td>4,953</td>
<td>2,520</td>
</tr>
<tr>
<td>Fraud, forgery and false instrument offences</td>
<td>3,963</td>
<td>2,052</td>
<td>4,184</td>
<td>2,340</td>
<td>4,191</td>
<td>2,082</td>
</tr>
<tr>
<td>Fraud, deception, false pretence offences</td>
<td>2,388</td>
<td>877</td>
<td>2,462</td>
<td>1,122</td>
<td>2,653</td>
<td>1,073</td>
</tr>
<tr>
<td>Forging an instrument to defraud</td>
<td>1,442</td>
<td>1,072</td>
<td>1,650</td>
<td>1,156</td>
<td>1,466</td>
<td>956</td>
</tr>
<tr>
<td>Possession of an article for use in fraud, deception or extortion</td>
<td>114</td>
<td>95</td>
<td>61</td>
<td>55</td>
<td>63</td>
<td>50</td>
</tr>
<tr>
<td>Falsification of accounts</td>
<td>14</td>
<td>4</td>
<td>9</td>
<td>5</td>
<td>9</td>
<td>3</td>
</tr>
<tr>
<td>Offences under the companies act</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Offences under the Investment</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>2006</td>
<td>2007</td>
<td>2008</td>
<td>2009</td>
<td>2010</td>
<td>Total</td>
</tr>
<tr>
<td>--------------------------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td>Intermediaries act</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Offences under the stock exchange act</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other fraud</td>
<td>59</td>
<td>53</td>
<td>184</td>
<td>169</td>
<td>154</td>
<td>129</td>
</tr>
<tr>
<td>Money laundering</td>
<td>15</td>
<td>13</td>
<td>19</td>
<td>18</td>
<td>16</td>
<td>13</td>
</tr>
<tr>
<td>Embezzlement</td>
<td>9</td>
<td>8</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Fraud against the European Union</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Counterfeiting currency and related offences (mainly notes and coins: Total)</td>
<td>152</td>
<td>57</td>
<td>562</td>
<td>246</td>
<td>606</td>
<td>307</td>
</tr>
<tr>
<td>Corruption (involving public office holder)</td>
<td>2</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

Appendix H: Table: Ireland, Prosecutions, Convictions and Acquittals 2008-2011

<table>
<thead>
<tr>
<th></th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total files Received by (DPP)</strong></td>
<td>16,144</td>
<td>16,074</td>
<td>15,950</td>
<td>16,128</td>
</tr>
<tr>
<td><strong>No Prosecution</strong></td>
<td>N/A</td>
<td>4,266 (35%)</td>
<td>4,668 (37%)</td>
<td>4,751 (37%)</td>
</tr>
<tr>
<td><strong>Indictment Total</strong></td>
<td>N/A</td>
<td>3,891 (33%)</td>
<td>3,793 (30%)</td>
<td>3,611 (28%)</td>
</tr>
<tr>
<td><strong>Conviction (Ind)</strong></td>
<td>2,863 (76%)</td>
<td>2,719 (70%)</td>
<td>2,303 (61%)</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Acquittal (Ind)</strong></td>
<td>154 (4%)</td>
<td>125 (3%)</td>
<td>88 (2%)</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Summary Total</strong></td>
<td>N/A</td>
<td>4,159 (32%)</td>
<td>4,071 (32%)</td>
<td>4,231 (33%)</td>
</tr>
<tr>
<td><strong>Total Convictions (Ind) and (%) Won</strong></td>
<td>2,863 (95%)</td>
<td>2,719 (95%)</td>
<td>2,303 (96%)</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>By jury trial</strong></td>
<td>119 (4%)</td>
<td>96 (3%)</td>
<td>75 (3%)</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>By guilty plea</strong></td>
<td>2,744 (91%)</td>
<td>2,620 (92%)</td>
<td>2,228 (93%)</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Total Acquittals (jury)</strong></td>
<td>63 (2%)</td>
<td>70 (3%)</td>
<td>59 (3%)</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Specific Convictions</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Fraud</strong></td>
<td>N/A</td>
<td>34 (97%)</td>
<td>36 (100%)</td>
<td>18 (100%)</td>
</tr>
<tr>
<td><strong>Theft</strong></td>
<td>N/A</td>
<td>98 (95%)</td>
<td>107 (95%)</td>
<td>91 (98%)</td>
</tr>
</tbody>
</table>

©Shaun Elder 2012 source DPP Annual Report 2011
Appendix I: Table: Australian criminal/civil/administrative sanction options numbers, and Fines appraisal

Sanctions: Of sanctions themselves, the ALRC Australian-based survey of a decade ago found a pool of over 2,200 sanction components some of which are combinations and the vast bulk of which are criminal. Freiberg extracted and provided the data contained in the following comparative table which compares Australian federal administrative, civil and criminal sanctions, and then adds a comparator from the Australian State of Victoria:

<table>
<thead>
<tr>
<th>Total Penalties</th>
<th>Administrative</th>
<th>Civil</th>
<th>Criminal</th>
<th>Victoria Statutory Criminal Offences</th>
</tr>
</thead>
<tbody>
<tr>
<td>2,231 (100%)</td>
<td>390 (17%)</td>
<td>257 (12%)</td>
<td>1,566 (70%)</td>
<td>7,000</td>
</tr>
</tbody>
</table>


Fines: According to Freiberg: ‘The ALRC identified 923 penalty provisions involving fines from 2,400 penalty provisions surveyed in [Australian] federal law. Fines can be combined with imprisonment or other orders’; and then identified 5 fine advantages and 8 fine disadvantages:

<table>
<thead>
<tr>
<th>Fines: Advantages</th>
<th>Fines: Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relatively simple and flexible</td>
<td>May be paid by third party</td>
</tr>
<tr>
<td>Generate revenue for the State</td>
<td>Tend to be relatively low</td>
</tr>
<tr>
<td>Less costly than other intermediate sanctions</td>
<td>Courts must take offender means into account</td>
</tr>
</tbody>
</table>

1501 Freiberg The Tools of Regulation (n 119), 215.
1502 Freiberg The Tools of Regulation (n 119), 219.
Often used and thus well understood | Crude instruments of behavioural change
---|---
Can meet standard sentence objectives and especially punishment, deterrence and denunciation | Fine maxima set too high are a disincentive and may produce resistance
Collection rates are low
High costs are associated with default
Default options are difficult to attain and/or are expensive

Freiberg from an Australian viewpoint stated that in general maximum criminal fines tend to be lower than maximum civil penalties; and in the regulatory context identified three limitations of fines:

1. They are relatively indistinguishable from other civil penalties and thus may act as part of a price mechanism as opposed to a stigma;
2. Fine enforcement is uncertain, often with low recovery rates;
3. The deterrent effect is lessened unless set commensurate to financial gain or harm caused.

Freiberg set out five ways of linking fines to financial gain or harm caused, rendering them open-ended penalties, and allowing them to act both as disgorgement mechanisms and as deterents:

1. Make a precise accounting of gain/profit or loss avoided; (ii) Take into account estimated or indicative profits; (iii) Fix a multiple of the wrongful gain/profit; (iv) Express the fine as a percentage of the turnover; (v) Relate the penalty to the volume of commerce affected by the violation.

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1504 Freiberg The Tools of Regulation (n 119), 220.
1505 Freiberg The Tools of Regulation (n 119), 221.
## Appendix J: Table: Enforcement style, mirrored launching factors and misconduct scale

<table>
<thead>
<tr>
<th>Enforcement style</th>
<th>Mirrored launching factors</th>
<th>Misconduct scale</th>
</tr>
</thead>
<tbody>
<tr>
<td>LEGALISTIC</td>
<td>Deliberation</td>
<td>HIGH</td>
</tr>
<tr>
<td></td>
<td>Harm</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Previous Misconduct</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Detection</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Stigma Requirement</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Enforcement Costs</td>
<td></td>
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PART 1 CHAPTER 1


PART 1 CHAPTER 2

65. JA Schumpeter, *The Theory of Economic Development* (Oxford University Press 1934, 1980). According to Adelman, Schumpeter was an advocate of Werner Sombart’s thesis of creative destruction meaning that radical innovation is the essence of capitalism, while the key player is the entrepreneur and innovator. See H Adelman, ‘Trust and Transparency: The Need for Early Warning’ in I MacNeil and J O’Brien (eds), *The Future of Financial Regulation* (Hart 2010). Also see A Greenspan, *The Age of turbulence: Adventures of a New World* (Penguin 2007); TK McCraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction* (Belknap Press 2007); EG Carayannis and C Ziemnowicz, *Rediscovering Schumpeter* (Palgrave Macmillan 2007). While mortgage and debt securitisation were at the heart of the GFC, for the stock market, the October 1987 Wall Street Crash was brought about not by real or even perceived economic problems but by the new complexity of financial markets; see M Lewis, (ed) *Panic! The Story of Modern Financial Insanity* (Penguin 2008). For Lewis there are two financial markets: (i) the real-time Wall Street where the risk takers are anxious and greedy, fearful and devious, and are people with the most sensational psychological disorders that render them unsuited for ordinary social life yet get rich; (ii) the other theoretical after-the-fact Wall Street, in which all these odd human beings, and the chaotic events they create, are made to seem more or less rational and easily explainable.

66. M Weber, *The Theory of Social and Economic Organisation* (translation Henderson and Talcott, Free Press 1947). Also see Goodhart (n 2). One of the major ‘pricers’ of risk used by market commentators is the non-constant market confidence or sentiment. Credit rating agencies (CRAs) which failed the market by under-pricing risk pre-GFC, and which occupy a central place in risk management, developed over a century ago from the US railroad corporate bond market. In a clear conflict of interest CRAs accept commissions and fees (issuer pays model) from their clients to risk price their own clients’ bond offerings for both the primary and secondary (sale-on) markets. More particularly CRAs, which are EU regulated post-GFC, have moved beyond the corporate and sovereign bond markets into newer financial innovations, and rely upon historically-based probability estimates to rate across a non-convergent scale. See for instance, EC Regulation 1060/2009, Official Journal L302, Vol.52, 17th November, 2009 "http://ec.europa.eu/internalmarket/securities/agencies/indexen.htm"; TE Lynch, ‘Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment’ (2009) 59(2) Case Western Reserve Law Review 227; M Richardson and L White, ‘The Rating Agencies: Is Regulation the Answer?’
73. See Kaletsky (n 2). Within his autonomy conceptualisation, explored below in detail, Locke acknowledged from his Puritan theology, akin to Weber’s Calvinist viewpoint, that there are restrictions upon personal accumulation, when he stated: ‘As much as any one can make use of to any advantage of life before it spoils: so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others’. See J Locke, Two Treatises of Government (P Laslett ed, Cambridge University Press 1988), paragraph 31. For Locke, man could not accumulate to waste, and may only enclose and keep what he can work, a chilling reprimand to concupiscient market actors, since possessing more than can be used is an affront to God and to natural law and rights. This dissertation however, does not deal with societal distribution issues.


93. See Kaletsky (n 2). He stated (320), ‘public policy should shape the incentives created in financial markets, rather than merely accepting and following them’. He also stated (313), ‘Businesses will recognize that proactive macroeconomic management and financial regulation are essential for the survival of the capitalist system’.

102. Reinhart and Rogoff (n 2). The more complete catalogue includes: (i) That financial crises have always been with us; (ii) they come in different types including the four major categories of sovereign default, banking crises, exchange rate crises, and bouts of very high inflation (as well as stock market crashes, corporate defaults, and household debt defaults); (iii) the common theme is excessive debt accumulation which in crisis poses greater systemic risk than appears during the preceding boom; (iv) they often occur in clusters and sometimes on a global scale; (v) while the instruments and institutions of financial gain and loss have varied over the ages, and financial crises follow a boom and bust rhythm, human nature does not change; (vi) they enjoy both common macroeconomic antecedents including asset prices, economic activity, and external indicators; and also common patterns in sequencing as they unfold; (vii) and, society, aided by financial professionals and often too by government leaders, self-deludes that old rules of valuation no longer apply, that the current boom economic fundamentals are sound, and, in effect, ‘this time is different’.

109. Levi-Faur ‘Regulatory Networks & Regulatory Agencification’ (n 108); P Craig and G de Burca, EU Law Text, Cases, and Materials (5th edn, Oxford University Press 2011). The EU financial regulatory
enforcement paradigm, grounded in the single market enjoys the following features: Heavily institutionalised at Member State and EU levels; Bottom-up norms process; 3 Hybrid regulatory models (a) market/lightly; (b) restricted regulation in public interest; (c) market-like; Is undergoing an ongoing process of EU constitutionalization; Competitive EU/National regulatory institutions; 3 Tiered: Vertical EU-MS and Horizontal state-state structure; EU norms include two levels EU-MS and Market-MS; Has 4 new post-crisis Supranational Watchdog Institutions; 3 regimes one each for companies, financial markets and accountancy standards; A Legal Base: EU Commission main statutory regulator, and national independent regulators; ECJ as change agent is the most important EU-endogenous force for change; Company Law national prerogatives retained; Is principled: (a) EU-wide agreed principles (i) cross-party norms; and (ii) broad definitions; (b) national level constitutive norms; Norm convergence getting higher but not uniform with enforcement and sanctioning divergence; Treaty competence and subsidiarity compliance legitimacy; (b) national level constitutive norms; Norm convergence getting higher but not uniform with enforcement and sanctioning divergence; Treaty competence and subsidiarity compliance legitimacy; EU securities regulation governance is command-and-control; Regulatory contract grounded; 2 Delegation Levels: EU distinction between a ‘meta’ form of delegation from M states to EU institutions and a traditional delegation channel from the EU institutions to committees and agencies.

114. A new constitutional layer in the form of a supranational systemic early warning board or council (ESRB) plus three re-vamped supervisory watch-dogs or authorities underpinned by networks including national regulators tasked to set common market standards and common supervisory norms. These are the EBA-banking based in London, EIOPA-insurance & occupational pensions based in Frankfurt, and ESMA-securities & markets based in Paris, which replaced three earlier Lamfalussy Committees, respectively CEBS, CEIOPS and CESR. See EU Regulation 1095/2010 of 24 November 2010 establishing the European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, at Art 1(5); Regulation (EU) No 1094/2010 of 24 November 2010 establishing the European Supervisory Authority (European Insurance and Occupational Pensions Authority),amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC; Regulation No 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; and Regulation No 1092/2010 of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing the European Systemic Risk Board; All regulations have been published in [(2010) OJ L331].

115. See Elder ‘Ocean Cures’ (n 111). For example, as a result of the sovereign debt crisis in Greece in May 2010 a joint EU-IMF-ECB stability fund was established. The EU portion came in two jigsaw parts commencing with the European Council (ECOFIN) adopting a European Financial Stabilisation Mechanism (EFSM) (Reg 407/2010) under Article 122 of the Treaty which allowed the EU Commission to borrow, in its own name, for lending to member states in difficulties (EFSF Framework Agreement). The European Financial Stabilisation Facility (EFSF) as a temporary three year fund was established as a limited liability company its shareholders being the Euro-zone member states. It has been described as the second piece of the EU jigsaw or safety net (see EFSF Framework Agreement (Amendment) 2011 Annex 1 and EFSF website).

128. The classic statement is located in Sutherland’s detailed case studies approach which gleaned that business exploitative activities were designed for illicit gain-getting bound to the corporate employers’ over-acquisitive profit motive, and he argued that these activities were frequent, widespread and routine in US business life; see E H Sutherland, ‘White-collar criminality’ (1940) 5 Am Soc Rev 1. Also see Croall White Collar Crime (n 87), 5 who stated: ‘Business, trade and commerce have always been associated with various forms of fraud, cheating and corruption’; G Mars, Cheats at Work, and Anthropology of Workplace Crime (George Allen & Unwin 1982),49 who stated: ‘...there is only a blurred line between entrepreneuriability and flair on the one hand and sharp practice and fraud on the other’; C Parker, ‘Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime’ (1999) 26 Journal of Law and Society 215, 227 who explained the dilemma of the individual in a corrupt corporate world in the following terms: ‘Corporate decisions are often immoral, illegal or just bad, because although many individuals are involved in making them, none feels personal responsibility for the ultimate outcome. Psychologists and management theorists have noted phenomena such as “risksy shift”, “groupthink”, and the “Abilene paradox” in all of which people take greater risks on behalf of their organisations than they would on their own account, act in accord with organisational norms even when they clash with their own principles, or go along with group decisions against their better judgement in order to avoid conflict’. C Keane, ‘Loosely Coupled Systems and Unlawful Behaviour: Organisation Theory and Corporate Crime’ in F Pearce and L Snider (eds) Corporate Crime: Contemporary Debates (University of Toronto Press 1995) highlighted that autonomy granted to individuals within looser modern corporate structures established the
potential for abuse of responsibility. Under circumstances where control systems were inadequate, or were inadequately supervised or operated this was proven in the cases of Leeson at Barings Bank, Rusniak at AIB (USA), Kerviel at Societe General, and Adeboli at UBS, where criminal convictions and sentences followed. And see Wheatley Review (n 3) where, a web of traders, were found to have covertly rate-rigged for their remunerative advantage.

130. WS Laufer, Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability (University of Chicago Press 2006); WS Laufer, ‘Secrecy, silence, and corporate crime reforms’ (2010) 9(3) Criminology & Public Policy 455; H van de Bunt, ‘Walls of Secrecy and Silence’ (2010) 9(3) Criminology & Public Policy 435. M Weait, ‘The Serious Fraud Office: Nightmares (and pipe dreams) on Elm Street’ in I Loveland (ed) Frontiers of Criminality (Sweet & Maxwell 1995), 88 stated: ‘The complex and serial nature of financial transactions within organisations also affords opportunities for fraud’. Also note J Gobert and M Punch, Rethinking Corporate Crime (Butterworths/LexisNexis 2003), v affirming Sutherland, but recording decades later that there was an increasing pile of evidence indicating, ‘that companies often deliberately and, sometimes repeatedly, float the law....and that if caught.....the likelihood of a prosecution is remote, the prospects of a conviction......are not promising and the sanctions.....can be derisory’.

131. See Gobert and Punch (n 130), 8-11 who stated that: ‘The range of offences committed by corporate entities is wider than previously thought; The cost of corporate crime is greater than previously thought; Companies too can cause considerable pain and suffering, serious injury and even death; Traditional criminal law plays a small role in controlling corporate illegality; The present ‘real crime’ criminal justice system is not a viable forum to tackle corporate wrongdoing; Finding a suitable punishment is problematic; Law enforcement personnel find it difficult to police companies’. Laufer (n 130); and Punch (n 87). Also see N Passas, ‘Anomie and Corporate Deviance’ (1990) 14 Contemporary Crises 157 who argued that corporate crime was as problematic as street crime and entailed significant implications for the social order; and, Slapper and Tombs (n 87), 43-47 who identified four different strands of corporate crime: financial crime, where there is little UK research, and US research predominates; crimes against consumers including pricing cartels; crimes arising out of the employment relationship including health and safety; crimes against the environment.

142. J Wood, ‘The Serious Fraud Office’ (1989) Criminal Law Review 175 stated: ‘Fraud arises out of greed by the perpetrators and often by the victims; often it arises out of the naivety of those members of the public who come into sizeable sums of money, such as retirement lump sums, without having the necessary skills or experience to invest it wisely and without the worldliness to recognise that those who offer high rates of interest also offer a risky investment’. Punch (n 87), 177 explained: ‘The 1970s and 1980s in Britain witnessed significant changes in the business community as a result of developments in the markets of the global economy. New financial conglomerates arose and the ground rules were fundamentally altered as a Conservative government sponsored ‘deregulation’ of financial markets to open them to international opportunities and to attract a much wider participation in share ownership’.

143. Punch (n 87), 237 stated: ‘Constant pressure, feelings of stress, and the perception of being in a ‘battle’ can lead to ‘combat fatigue’ which lessens restraint in decision making.....One form of pressure may be to bend rules. This, in turn, may be linked to legitimate or illicit rewards’. Punch (n 87), 238 concluded: The crucial point, however, is how managers perceive the reward system and experience the pressure’.

144. See Slapper and Tombs (n 87). Also see A Carr, ‘Is Business Bluffing Ethical?’ in J desJardins and J McCall (eds) Contemporary Issues in Business Ethics (Wadsworth publishing 1985), Punch (n 87), 239 stated: ‘In explaining corporate misconduct, and executive illegality, it is important to see the manager as an actor wrestling with uncertainty and performing in a world of ‘conflicting pressures, contradictory alternatives and ambiguous situations’; also see AB Thomas, Controversies in Management (Routledge 1993), 84.

172. EJ Hobsbawm, Age of Extremes: The Short Twentieth Century 1914-1991 (Michael Joseph 1994), who tackles the subject from a Marxist perspective. Also see Beck (n 121) who stressed in ch 5 that ‘individualisation’ is a new mode of socialisation, a shift in the relation between the individual and society, although it is neither a new phenomenon nor an invention of the late 20th century. For Beck, there has been a triple ‘individualisation’, a disembedding or removal from historically prescribed social forms and
commitments; the loss of traditional securities including guiding norms; and, a new control re-embedding around a new type of social commitment. Two major focal points of liberation or emancipation are the removal from status-based classes, and changes in the situation of women.

173. See Slapper and Tombs (n 87), 2; Punch (n 87), 239 stated: 'The fundamental concerns of senior management are centred on corporate survival, continuity, power, reputation/fame, and profits.....There is a strong emphasis on gaining profits as a determining feature of business, and it is often mentioned as a factor in illegal behaviour...'

174. See Beck Risk Control (n 171), 132 who stated: 'Individualisation means market dependency in all dimensions of living. The forms of existence that arise are the isolated mass market, not conscious of itself, and mass consumption...as well as opinions, habits, attitudes and lifestyles launched and adopted through the mass media. In other words individualisation delivers people over to an external control and standardisation...'; also see Kaletsly (n 2); Taylor (n 87).

177. RK Merton, ‘Social structure and anomie’ (1938) 3(Oct) American Sociological Review 672; Also see Slapper and Tombs (n 87), who for instance at 133-136 cite Box (n 87),35 for the proposition that the defining corporate characteristic is that of a goal-seeking entity, where such goal is profit at least in the long run, making the corporation inherently criminogenic because in the uncertain business environment, 'executives investigate alternative means, including law avoidance, evasion, and violation and pursue them if they are evaluated as superior to other strictly legitimate alternatives’. Also see MB Clinard, Corporate Ethics and Crime: The Role of Middle Management (Sage 1983); C Keane ‘Loosely Coupled Systems and Unlawful Behaviour’ (n 128); S Simpson, 'The Decomposition of Antitrust: Testing a Multi-Level Longitudinal Model of Profit Squeeze' (1986) 51 American Sociological Review 859.

180. WG Jeanrond, ‘Financial Crisis and Economist Pretentions: A Critical Theological Approach’ in I MacNeil and J O’Brien (eds), The Future of Financial Regulation (Hart 2010); See Part 1 Chapter 2 section 1.2.3 where anomie as greed was discussed in the context of crime contribution. Although arising from popular fiction, and yet a seminal work and chronicle of the age (1980’s), also see T Wolfe, The Bonfire of the Vanities (1987, Vintage 2010) where the self-delusional chief protagonist, drawn from the (bond trader) wealth accumulation culture of the financial industry, regards himself as a ‘Master of the Universe’ above and beyond the law or any other constraining force. C Wells and O Quick, Lacey, Wells and Quick Reconstructing Criminal Law Text and Materials (4th edn, Cambridge University Press 2010), 342 stated: ‘Merton’s social structural ‘anomie’ theory suggested that crime increased when there was a disparity between ‘culturally prescribed goals and structurally limited means to fulfil them’.

185. Interviewee T EU Legislator Brussels 10 April 2013. De Larosiere Report 2009 (n 35) as quoted in footnotes; Also see I MacNeil and J O’Brien, ‘Introduction: The Future of Financial Regulation’ in I MacNeil and J O’Brien (eds), The Future of Financial Regulation (Hart 2010),11 who stated: 'The rise of the corporation magnified the need for impartial adjudication.....corporate power had a profound impact on the ‘carefully reasoned’ laissez-faire defence that the ‘economic behaviour promoted and constrained by the institutions of a free market system is, in the main, in the public interest’’. Also see E Mason, ‘The apologetics of managerialism’ (1958) 31 Journal of Business 1. N Dorn, ‘The Governance of Securities Ponzi Finance, Regulatory Convergence, Credit Crunch’ (2010) 50 British Journal of Criminology 23, 56 reiterated that ‘good taste’ and ‘the done thing’ had been eliminated in market culture in the 1980s, leaving only the much inferior market common sense as a worldview touchstone. Punch (n 87) stated well before the GFC: 'It is surely no coincidence that several major business scandals....have been in the financial world of investment banks and security firms....Previous ‘when investment banking was the province of an
elite community of financiers, informal controls based on reputation and loyalty worked fairly well’; but in response to changes in the market environment many of these firms have become, ‘self-designing organisations’ with a ‘high degree of autonomy’, ‘dispersed authority structures’, and a reward structure based on bringing ‘resources (profits, clients, etc.) into the firm’; see N Reichman, ‘Insider Trading’ in M Tonry and AJ Reiss jnr (eds) Beyond the Law (University of Chicago Press 1993), 76.

186. In Ireland, a societal wide speculative culture and greed was identified as a crisis contributor. See Nyberg Report (n 8) and Punch (n 87), 249 reflected controlling the market complexity thus: ‘In effect, when we enter the terrain of the control and regulation of economic activity we encounter not only the intricate and interrelated issues (related to societal, political and market changes), but also shrewd players who match move with counter-move’; also see A Szasz, ‘Corporate resistance to effective regulation of environmental hazards’ (Occasional Paper American Sociological Association, Detroit 1983 as cited by Punch).

191. Merton (n 177). Durkheim Suicide (n 181) classically defined anomie in relation to insufficiently regulated goals, Merton as insufficiently regulated means according to Messner and Rosenfeld (n 171), 16. Slapper and Tombs (n 87), 135 argued that, ‘The processes which result in deviance and anomie thrive in an environment dominated by concerns of cost and benefits and are reinforced by the structural pressures generated within a capitalist mode of production’. Passas (n 131) concluded that the problems highlighted may also be found in the state capitalist command-economy countries. Croall White Colar Crime (n 87), 57 stated: ‘Popular analyses, which assume the high status of offenders, often portrays offences as motivated by greed rather than need, a motivation supported by the selfishness and individualism inherent in the values of capitalist society. This association with the values of capitalism is also used to interpret corporate crime. To some, the conflict between profit goals and the public interest indicates the potential value of anomie or strain theory’. And, from her detailed, to that point, review of the literature concerning white collar crime, she (n 87), 69 added: ‘Some writers argued that anomie theory, which interprets criminality as a response to the structural strain created when goals cannot be achieved by pursuing legitimate means, is particularly appropriate to corporate crime’; see Box (n 87) and Passas (n 131).

193. See HJ Brightman, Today’s White-Collar Crime Legal, Investigative, and Theoretical Perspectives (Routledge 2009). Also see Passas (n 131), 158 who stated that, ‘difficulties in attaining diversely defined goals may be faced by people in the upper social reaches too; they are, therefore, far from immune to pressures toward deviance’.

209. For instance, Sean Fitzpatrick of Anglo Irish Bank, following invitation declined to appear before the Oireachtas Committee on Economic Regulatory Affairs on Tuesday the 17th February 2009, and in the aftermath of this refusal and concerns public comment, Noel Dempsey TD, then Minister for Transport, accused those involved in wrongdoing in Anglo as engaging in “economic treason” (see H McGee Irish Times, 24 February 2009 p1). Also see F O’Toole, ‘Rise and fall of a Tiger tycoon’ The Irish Time (Dublin 17 July 2010); furthermore, G Fitzgerald, was quoted at the MacGill Summer School, Glenties, Co Donegal, in D de Breaduin, “Moral defects’ of society underpin crisis’ The Irish Times (Dublin 19 July 2010), 6 as stating firstly, ‘Our people have shown considerable tolerance of actual financial corruption – enthusiastically re-electing some of the minority of politicians known to be, or widely accepted as having been, financially corrupt’; and then continuing that Irish society had been, “morally damaged by the quite extraordinary scale of tax evasion in recent decades by the self-employed, including many professional people’. Much later, and after the publication of tapes of interviews involving AngloIrishBank executives in June 2013 (see footnote 1469), Sean Fleming, Fianna Fáil’s spokesman on public expenditure and reform stated in a radio interview that he believed the Anglo Irish Bank tapes should lead to treason charges; he stated: ‘I would consider there is a case for treason there and that is actually in our Constitution – somebody who sets out to damage the State’. See E MacConnell, ‘FF spokesman says Anglo bankers should be tried for treason’ The Irish Times (Dublin, 26 June 2013).

225. R Pound, Social Control Through Law (Yale University Press 1942 reprinted 1968). M Fortes, ‘Rules and the Emergence of Society’ (Royal Anthropological Institute of Great Britain and Ireland Occasional Paper No 39 London: Royal Anthropological Institute 1983) argued as follows: ‘The capacity and the need to have, to make, to follow and to enforce rules are of cardinal importance for human social existence.....For without rules there can be neither society nor culture....it was the emergence of the capacity to make, enforce, and by corollary to break rules that made human society possible’. P Devlin,
228. Former President of France Nicolas Sarkozy told his supporters in September, 2008: ‘[T] he idea of
the all powerful market that it must not be constrained by any rules, by any political intervention, was
mad.....the present crisis must incite us to reform capitalism on the basis of ethics and work.....laissez-faire
is finished’. See E Vucheva, ‘Laissez-faire capitalism is finished, says France’, EUObserver.Com (26
September 2008). Interviewee E Academic Australia 22 March 2012 advised that the best way to deal with
financial regulatory enforcement matters was through ethics/integrity outside formal regulation.

229. T Brooks, ‘Introduction’ in T Brooks (ed), Locke and Law (Ashgate 2007). Also see S Elder,
‘Sanctions and Financial Regulation: a meditation upon natural necessity’ (2013) DULJ 217; Hart The
Concept of Law (n 123); Locke Two Treatises of Government (n 73). Constitutional norms as interpreted
by the Irish courts are not cast in stone, may shift, and rely upon a ‘prudence, justice and charity’ yardstick,
heavily influenced by the religious background of Constitutional concept originators such as Locke, but
adhere nonetheless, to Durkheim’s social solidarity value. In Sinnott v Minister for Education [2001] 2 IR
545 (SC) Murray CJ expressed the view that the Constitution is a living document interpreted in
accordance with contemporary circumstances including prevailing ideas and mores; with reference to
Constitutional provisions enjoying a dynamic quality of their own, where they refer to concepts involving
standards and values such as ‘personal rights’, ‘the common good’ and ‘social justice’, Walsh J in McGee –
v- The Attorney General [1974] IR 287 (SC) explained the potential shift in norms stating that it is natural
that from time to time the prevailing ideas of prudence, justice and charity may be conditioned by the
passage of time, because no interpretation of the Constitution is intended to be final for all times; similarly,
in The State (Healy) –v- Donoghue [1976] IR 325 (SC) O'Higgins C.J. observed that Constitutional rights
must be considered in accordance with the concepts of prudence, justice and charity which may gradually
change and develop as society changes and develops and which fail to be interpreted from time to time in
accordance with prevailing ideas.

233. It is noteworthy that homosexual practice was once a criminal offence, as was prostitution; now
consenting homosexual practice is not, and the offence concerning prostitution is cast in terms of the seeker
of the service and is recognised as having a detrimental societal or public impact. Also see Polanyi (n 62).
In R v Hinks [2001] 2 AC 241 (HL), 262 Lord Hobhouse stated: ‘An essential feature of the criminal law is
to define the boundary between what conduct is criminal and what is merely immoral. Both are the subject
of the disapproval of ordinary right-thinking citizens and the distinction is liable to be arbitrary or at
least strongly influenced by considerations subjective to the individual’.

235. Devlin The Enforcement of Morals (n 225). Post crisis the Irish Court of Criminal Appeal drew upon
the concept of social solidarity as a sentence principle concerning crimes against the public purse (social
judgement and sentence made it clear from the outset that an appeal against the severity of a twelve and a
half year sentence (involving twenty-four consecutive sentences) imposed in respect of egregious,
 systematic and long-lasting social welfare fraud, the largest yet uncovered, raised an issue of fundamental
importance at a time of crisis in the public finances. The court specifically referred to the collapse of
Lehman Brothers Bank, the Irish financial crisis, the unparalleled economic contraction, the enormous
fiscal demands upon the public purse, the stoicism of the Irish public in bearing taxation increases and
suffering retrenchment in social services and a diminished social welfare cushion, all of which called for a
high degree of social solidarity.

237. An Blascaod Mor Teo v Commissioners of Public Works (no 3) (27 February 1998) (HC) Budd J at
111. Also see Orange v Revenue Commissioners [1995] 1 IR 517 (HC), 524 where Geoghegan J stated: ‘An
attack on property rights is not unjust by reason of some theoretical argument; it can only be unjust in all
the surrounding circumstances of the case’. R Walsh, ‘The Constitution, Property Rights and
Proportionality: A Reappraisal’ (2009) 31 DULJ 1, 21 has argued that, ‘Constitutional property rights as
interpreted by the Irish courts, do not appear in themselves to impose any limits on the means that can be
employed by the legislature to attain its objectives....This indicates an expansive view of the means open to
the legislature to achieve the common good’.

238. T Aquinas, Summa Theologia (1265-1274) stated that law was: ‘An ordinance of reason made for the
common good by him who has charge of the community and promulgated’. See GW Hogan and GF Whyte,
241. Fuller’s ‘eight ways to fail to make law’ effectively are: (i) General prohibitions or permissions are needed since the lack of such rules of law leads to ad hoc and inconsistent adjudication; (ii) Laws must be publicised or made known, be widely promulgated or easily accessible; and they (iii) Must avoid unclear or obscure legislation; (iv) Be prospective avoiding retroactive legislation; (v) Avoid legal contradictions; (vi) Avoid demands that exceed the power of subjects and those ruled; (vii) Be constant avoiding unstable legislation; (viii) Be congruent between statute book and enforcement avoiding divergence between adjudication/administration and legislation. See Fuller *The Morality of Law* (n 230), 46-90.

244. UK Treasury Select Committee Report, (n 13), paragraph 191, welcomed the fact that the Chairman of the FSA agreed that governance processes must be put in place to ensure accountability and transparency for the process of removing senior bank executives in whom the regulators have lost confidence. The Committee also indicated that it is clear that what was wrong with Barclays went well beyond LIBOR, and, that the culture at Barclays fell well short of acceptable standards.
245. Former chairman of the UK FSA Howard Davies stated in 2000 in his opening address to the Annual European Business Ethics Network Conference: ‘Compliance is not sufficient; for the system to work there needs to be an ethical culture at the level of the organisation, and a commitment to integrity on the part of those who work in the sector’. See H Davies, ‘Ethics in Regulation’ (2001) 10 Business Ethics, A European Review 280. In May 2013 the head of the IFSC in Dublin, former Taoiseach John Bruton stated publicly: ‘Regulation isn’t a substitute for ethics, regulation isn’t a substitute for morality, regulation isn’t a substitute for trust. It may help create all of those but will never and we can never expect it to substitute ethics, morality and trust’. See C Barr, ‘John Bruton calls for ‘rein’ on financial regulation’ IrishTimes.com (Dublin 11 May 2013). Also see UK Treasury Select Committee Report, (n 3), where as part of the Libor rate-rigging investigation into Barclays Bank it was stated that actions by bankers were contributed to by a prolonged period of extremely weak internal compliance and board governance at Barclays, as well as a failure of regulatory supervision. Manipulation by individuals with the intention of personal benefit, was described as misconduct which was a sign of a culture on the trading floor, and higher up, that had gone badly awry. Also see the Wheatley Review (n 13) in which it was made plain that confidence and trust are critical to financial markets; that its breach by rate-rigging is a national and global issue; that mechanisms such as LIBOR are a creation of the market, invented by the market for the market, and for which proper regulation and sanctions are needed; and that, introducing a new regulatory structure for LIBOR, including criminal sanctions for those who attempt to manipulate it, was required; and, that consumers and market participants must be sure that the regulators stand ready to deal quickly and effectively with issues as they arise. Yeager (n 222), tracing research to that point (mid-1990s) all the way back to Sutherland’s foundational ‘white-collar’ crime work, identified three forms of corporate morality, and concluded that, ‘companies may maintain a law abiding (therefore moral) ethos, a rational/calculating approach to compliance (amoral), or even an aggressively antiregulation culture (immoral)’.

246. Wheatley Review (n 13) where it was found concerning LIBOR that the key flaw was the inability in the system to manage conflicts of interest; Traders whose bonuses depended on these deals had an interest in pushing LIBOR up or down, depending on the deal, and they were allowed to do this freely with no oversight. The Review concluded that they were not talking about a few rogue individuals, but instead a systemic problem; in the case of Barclays, for example, there was a web of traders that worked together to try and manipulate LIBOR to benefit one another.

250. Moloney EC Securities Regulation (n 106), 417 stated: ‘The imposition of reputation/suitability and experience requirements in order to ensure that investment firms are prudently and honestly managed is a standard feature of many systems of investment-services regulation’.

251. In Meinhard v Salmon, 249 NY 458; 164 NE 545, 546 (NY 1928) Cardozo CJ seminally explained: ‘Many forms of conduct permissible ....at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour’. Also see C Sampford, ‘Adam Smith’s Dinner’ in I MacNeil and J O’Brien (eds), The Future of Financial Regulation (Hart 2010), 39 who advocated, ‘an institutionalist approach in which institutions are required to justify themselves to the community of which they are part. That justification is in part because of the special privileges granted to financial institutions in limited liability’.

253. See Laufer ‘Secrecy, silence, and corporate crime reforms’ (n 130). Post-GFC three major banks involved in financial controversy, Goldman Sachs, Barclays, and Deutsche Bank have engaged in extensive training programmes and business culture and values re-modelling, seeking to eliminate the ‘say-do’ gap between saying conduct will be measured and sending a message that culture/values really matter by linking them to bonuses. All three banks claim that they have restructured appraisal and promotion processes to assess the strengths of individual employees against the corporate business values. See A Hill, ‘Bankers back in the classroom’ Financial Times (London, 17 October 2013).

260. Interviewee E Academic Australia 22 March 2012. One general, indeed predominant, view of modern regulation is that it is best conceptualised as governance where control is shared by public and private actors and is given effect through both law and private agreement; see Prosser Law and the Regulators (n 21) and Haines The Paradox of Regulation (n 14) for instance. There is no doubt in the financial sector that public regulation is vital and this is the prime concern of this dissertation. Nonetheless, it is equally obvious that the public sector lacks sufficient resource to completely control the market domain, and its attendant risks, and thus self-regulatory effects must buttress the public effort. This is the reason for increased usage
of codes directed toward future culture and individual behaviour change within a monitored self-policing setting. Recognition of the resources deficit begs collaboration or co-regulation between business and regulator in the accomplishment of regulatory tasks purpose to be beneficial to all stakeholders in the required majoritarian pattern according to Interviewee E Academic Australia 22 March 2012.

261. See Bottoms ‘Morality, crime, compliance and public policy’ (n 247), 29-32. He identified four principal mechanisms of compliant behaviour, where ‘true interactional interconnectedness can and does occur’: first, ‘instrumental/prudential compliance, based on rational calculations of self-interest’; second, that based on constraint including social-structural constraint and physical constraint, either natural or imposed and he states: ‘Hence the development of ‘target-hardening’, weapon-removing strategies and other kinds of so-called ‘situational crime prevention’ that seek to reduce the effective opportunities to commit particular crimes’; third, normative compliance, which for him occupies a pivotal position, ‘related to one or more social norms.....to actors’ responses to a principle or standard.....that reflects people’s expectations of behaviour....and serves to regulate action and judgment’; fourth, ‘compliance based on habit or routine, which is the most automatic’. Also see P Cohen, Modern Social Theory (Heinemann Educational 1968). In Bottoms (n 247), 33 view, many policy-makers and scholars considering crime policy insufficiently regard connections between these four mechanisms, and to instead ‘think in separate boxes about different kinds of compliance’, a topic close to the nub of this dissertation.

264. Parker and Nielsen (n 263) heralded the compliance literature as contributing to the development of four interrelated conceptual themes: (i) motives to respond; (ii) internal characteristics and capacities to respond; (iii) the influence of different regulatory enforcement strategies and styles to such response; and, (iv) the emergence of both regulation and responses from business interaction with broader economic, social and political environments. Bottoms ‘Morality, crime, compliance and public policy’ (n 247) posed the question: is the actor acting normatively or from some other motivation when conforming to rule? In his view, both formulation and operation of control rules are linked to positive morality, and normative (morality) factors play an important role in the response of the citizen to those prohibitory rules. This abstract reasoning appears borne out by the empirical observation.

265. R Kagan N Gunningham and D Thornton, ‘Fear, duty and regulatory compliance: lessons from three research projects’ in C Parker and V Nielsen (eds), Exploring Compliance Business Responses to Regulation (Edward Elgar 2011). They identified three interacting motives: (i) economic (material): fear of detection and legal punishment, where subjective decision-making predominates and is affected by specific regulatory contexts (see S Simpson and M Rorie, ‘Motivating compliance: economic and material motives for compliance’ in C Parker and V Nielsen (eds), Exploring Compliance Business Responses to Regulation (Edward Elgar 2011)); (ii) social and normative: adverse reputational concerns; and, (iii) to aid compliance and even ‘beyond compliance’: an internalised sense of moral duty based around acceptance of a ‘just’ underpinning law and especially procedural justice or fairness (see T Tyler, ‘The psychology of self-regulation: normative motivations for compliance’ in C Parker and V Nielsen (eds), Exploring Compliance Business Responses to Regulation (Edward Elgar 2011)).

270. By way of contrast to the deterministic, strict-liability model, so far unused in financial regulation in Ireland, as espoused for instance, by E Ferri, Criminal Sociology (Little Brown 1905), a strict scientific positivist. Of such principle, the opposing Radzinowicz History (n 25), 53 explained, that it was: ‘not the business of criminal justice to assess and to measure the moral guilt of an offender….its function is to determine whether he was the perpetrator of an act defined as an offence, and, if so, to apply to him the measures of ‘social defence’, calculated having regard to his personality and circumstances, to restrain him from committing further crimes’.

275. Dicey (n 25) argued that the French Droit Administratif originated with Bonaparte in 1800, but was grounded in the ancien regime. It originally rested in two ideas: first that government and its servants possess a complete body of rights, privileges or prerogatives based in principles different from those governing the state-citizen relation.; second, a separation of powers which meant that ordinary courts and government officialdom were separate but that the latter were free from the jurisdiction of the former.

276. Ashworth, Principles of Criminal Law (n 97); Dicey (n 25); Weber The Theory of Social and Economic Organisation (n 66); Wells and Quick (n 180); Zedner (n 274). J Habermas, Between Facts and Norms (MIT Press 1998),125 stated: ‘[T]he general right to equal liberties, along with the correlative membership rights and guaranteed legal remedies, establishes the legal code as such. In a word, there is no
legitimate law without these rights’. According to GW Hogan and DG Morgan, *Administrative Law in Ireland* (4th edn, Round Hall 2010) despite the societal developments generated from the Industrial Revolution, which saw the rise of regulation, administrative law has only assumed significance since the Second World War. They powerfully assert that in a modern democracy two components are involved: the instruments of government, which are designed to enable administrators under the direct or indirect control of elected politicians to take decisions and provide services in the public interest; and, the instruments of control themselves being tribunals, Ombudsmen, regulators and most especially the courts which wield the judicial review power.

**PART 1 CHAPTER 3**

287. See HT Edwards, ‘Judicial Norms: A Judge’s Perspective’ in JN Drobak (ed) Norms and the Law (Cambridge University Press 2006), 243 who stated: ‘Judicial independence helps to ensure impartiality and autonomy in the judiciary’. Also see Habermas (n 276), 253 onwards where he draws a distinction between values and norms in the judicial interpretation context, stating that principles or higher-level norms have a deontological sense whereas values are teleological. He stated (255), ‘Valid norms of action obligate their addressees equally and without exception to satisfy generalized behavioural expectations, whereas values are to be understood as intersubjectively shared preferences’.

288. Packer (n 273), 173 argued: ‘Because the Due Process Model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to the law of the constitution’. See also for instance, Part 2 Chapter 2 section 2.2.2 fl 765 regarding the presumption of innocence and its journey to become a constitutionally protected right. The power of courts to generate norms and values, is of long-standing origin, and is itself subject to values constraints. In A v The Governor of Arbour Hill Prison [2006] IESC 45 (SC) in the Supreme Ct Denham J stated: ‘The principle of judicial review of the constitutionality of a law by the Superior Courts was a novel aspect of the Constitution of Ireland, 1937. Ireland led the common law world by expressly incorporating this power into the Constitution. Such a power carries duties. Over the years the courts have developed constitutional principles and presumptions relevant to the exercise of such a constitutional power and duty’.

290. Non-Irish judicial pronouncements upon the distinction between criminal and regulatory offences include the Canadian Supreme Court, where in R v Wholesale Travel Group (1991) 3SCR 154 Cory J reasoned that regulation and ‘true crime’ embody different concepts of fault, with regulatory fault enjoying a significantly lesser degree of culpability because regulatory offences were directed at consequences of conduct and not the conduct itself. In a subsequent UK Court of Appeal decision described by N Lacey C Wells and O Quick, *Reconstructing Criminal Law Text and Materials* (3rd edn, LexisNexis Butterworths 2003), 650 as an example “of the double-thinking that regulatory crime induces”, in David Janway Davies v Health and Safety Executive [2003] IRLR 170 (CAC) Tuckey LJ (2003) applied the Cory J viewpoint that regulatory offences, which are directed to consequences of conduct and not conduct itself, and true crimes, embody different concepts of fault, leading to a significantly lesser degree of culpability for regulatory offenders. Tuckey L J stated that regulatory offences were based upon a reasonable care standard which did not imply moral blameworthiness in the same manner as criminal fault, while conviction suggested nothing more than a failure to meet a prescribed standard of care. Regulatory enforcement in the area of economic activity carried a lesser stigma to both real crime and that in non-economic regulatory areas according to S Kadish S, ‘Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations’ (1963) 30 University of Chicago Law Review 423. The dilution of the culpability element coupled with the proliferation of convictions may lead to an impairment of punitive sanctions in economic regulation according to K Yeung, ‘Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective’ (1999) 23 Melbourne Law Review 440, 460. In Sheldrake v DPP [2005] IAC 264 (HL) regulation of economic life was noted as including offences oblivious to state of mind or moral blameworthiness, and that such offences were not truly criminal particularly where minimal penalties were likely or where no stigma attaches to conviction. In contrast, post crisis on the 16th May 2010, James Hamilton (then Irish DPP) in a rare RTE 1 television interview stated: ‘…..we may need to take some exceptional measures in the area of financial crime’; and, as reported in the Irish print media on the 19th May, 2010 he stated that a regime of serious financial regulation must include the ability to prosecute those infringing, describing this as giving rise to new challenges for the criminal justice system, suggesting a
very serious case management system and pre-trial hearings, and a panel of judges or specialist jurors, while simultaneously acknowledging that a constitutional amendment would be required for the latter two changes. See C Coulter, ‘DPP outlines challenges for justice system of strict financial regulation The Irish Times (Dublin, 19 May 2010).

295. D Garland, ‘Ideology and crime: a further chapter’ in A Bottoms and M Tonry (eds), Ideology, Crime and Criminal Justice – A symposium in honour of Sir Leon Radzinowicz’ (Willan 2002). Garland explained the stages of the development of twentieth century criminology as absorbing the lessons of eighteenth century liberalism and nineteenth century determinism, to end up relying upon a pragmatic position of empirical evidence, institutional needs and piecemeal solutions; Garland then argued that as the millennium dawned the arrival of the Control Position meant that state agencies and civil society adapted to the growth of crime and insecurity that accompanied late modernity. Radzinowicz History (n 25), 127-128 stated: ‘The first flush of enthusiasm for liberty and justice that followed the period of the Enlightenment was bound up with a philosophy of natural progress and individual achievement. It hardened, nevertheless, into the bleak and rigid codes of the Classical School of criminal law’.

297. Republican normative theory of criminal justice, according to Braithwaite, is encapsulated in the key concepts of freedom, equality, parsimony, checking of power, reprobation and reintegration. It is a remove from deterrence and retributivism. For Braithwaite, while the core of the liberal tradition was freedom as non-interference, republican freedom means freedom as non-domination, a symbol of the good society. The essential difference therefore is in the quality of the restriction. He cites this republican ideal in the civic republican tradition of Rome which spread to northern Italian Republics, to the Dutch and English republican ideology of the 17th century, to Montesquieu, and in the US to Paine, Madison and Jefferson. See J Braithwaite, ‘Republican Theory and Crime Control’ in S Karstedt and KD Bussman, (ed) Social Dynamics of Crime and Control: New Theories for a World in Transition (Hart 2000). Also see J Braithwaite and P Pettit, Not Just Deserts: A Republican Theory of Justice (Oxford University Press 1990).

298. Ashworth Principles of Criminal Law (n 97); Coffee jnr ‘Paradigms Lost’ (n 252); D Husak, Overcriminalization: The limits of the Criminal Law (Oxford University Press 2008); Packer (n 273), 153 in order to perceive what he called the ‘normative antimony at the heart of the criminal law’ devised two models of the criminal process, the Due Process Model and the Crime Control Model, and asked where does current practice sit between these two models, while arguing, ‘they represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process’.

299. See Beck Risk Control (n 171); S Kilcommens I O’Donnell E O’Sulivan and B Vaughan, Crime, Punishment and the Search for Order in Ireland (Institute of Public Administration 2004), 6 have stated that the period of the late nineteenth century, ‘witnessed the beginnings of an important shift from individualism as a principle of sentencing – that offences were the product of individual free choice – to individualisation – that sentencing should take into account the particular characteristics of the offender, a key principle of the modern form of punishment’.

301. Both benefiting from an elite Oxford education, overlapping contemporaries throughout the English 17th century revolutionary civil war, amid conflict between a Parliament of the elite among the people and an autocratic monarchy, they advocated conflicting political views. Locke was a constitutional democrat. Hobbes, was a declared constitutional Royalist who spent much time on the continent, and originated the theory of the social contract purposed to the creation of a civil society. Both were abstract philosophers.

304. See J Locke, An Essay Concerning Human Understanding (1690, P Nidditch ed, Oxford University Press 1975); Locke Two Treatises of Government (n 73); Brooks (n 353). Locke located the consent as tacit consent in his society; in Ireland’s modern democracy the consent is clearly located in the autochthonous constitution. It was Durkheim’s view that the social contract presupposed prior cultural agreement see Messner and Rosenfeld (n 171). For Habermas (n 276), 44 ‘The model of the social contract found support in the evidence that modern exchange society seemed to secure something like a natural autonomy and equality for private persons through their participation in market transactions’. The rise of the industrial revolution, which replaced agrarian capitalism, flourished initially in a rural setting and then became an urban phenomenon, as gradually the argument that cheap money and cheap credit enabled risk taking took hold; see JH Plumb, England in the Eighteenth Century (Penguin 1950 reprinted 1976). A movement from repressive law where the state disregarded the interests of the governed, for instance taxing without representation, was framed toward autonomous law around legitimacy or the consent of the citizenry see P
Nonet and P Selznick, *Law and Society in Transition: Toward Responsive Law* (Harper and Row 1978). There was simultaneous flux in both political and economic theory, where freedom lay at the root, political liberty on the one hand and free or laissez faire markets on the other. Politicians and industrialists alike realised that enhanced wealth accumulation meant increased power potential.

305. The view that innate ideas and principles were necessary for the stability of religion, morality and natural law was widespread in England in the seventeenth century but Locke rejected it, instead emphasising the importance of free and autonomous inquiry in the search for truth, albeit with restraint. Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press 2013) asserts that John Locke, and the Enlightenment Scotsmen, David Hume and Adam Smith created an intellectual system, under which governments were required to go beyond the protection of private property, for instance being constrained in their running of large public debt. Also see H-J Chang, ‘The greatest bait and swith in modern history’, *Irish Times* (Dublin, 15 June 2013).

306. Locke’s revolutionary views led on to establishment of a constitutional monarchy, and the supremacy of Parliament in England, and then in turn to US colonial and French revolutions. In the US reformed world particularly, laissez faire triumphed and flourished as ‘classical capitalism’ at least for the new industrial elite; see JK Galbraith, *The Age of Uncertainty* (Andre Deutsch 1977). The US experience was soon followed by a class-centred revolution in France inspired by the principles of equality, brotherhood and freedom and from which the Code Napoleon later sprang. The rights of man emerged as a prime focus and although English radicals were divided by the revolutionary excesses in France, this revolution moulded the course of English – and thus Irish - history, economic and political expression well into the nineteenth century see T Paine, *The Rights of Man* (G Claeys (ed), Hacket 1992); Plumb (n 304).

307. Regarding the mind as a *tabula rasa* or blank sheet until experience, in the form of sensation and reflection, generates simple ideas from which more complex knowledge is constructed, Locke argued that man has the faculties to receive, and the capability to manipulate or process, these ideas. His then controversial reflections upon power evoked discussion of free will, voluntary action, and more, and greatly influenced the underpinnings of liberal politics and economics which endure to the present. He rejected the then current Divine Right of Kings doctrine; see Brooks (n 229), xii who propounded that this doctrine was most clearly spelled out in Sir Robert Filmer’s *Patriarcha*, published in 1680. Locke *Two Treatises of Government* (n 73), paragraph 95 recites: ‘The only way whereby any one devests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe and peaceable living amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it’. RR Sullivan, ‘The schizophrenic self: neo-liberal criminal justice’ in K Stenson and RR Sullivan (eds.) *Crime, Risk and Justice: The politics of crime control in liberal democracies* (Willan 2001) characterised Locke as charting a duality of legal subjects, those ‘rich, enlightened and blessed’ and secondly those ‘noxious’ or ‘degenerate’; and for whom the liberal social contract required an uncompromising war on criminals who by their actions threaten the integrity of such contract.

308. Habermas (n 276), 45 wrote ‘With Adam Smith and David Ricardo, a political economy developed that conceived bourgeois civil society as a sphere of commodity exchange and social labour governed by anonymous economic laws’.

309. Nineteenth century criminal justice evolved a little differently in Ireland due in particular to responses to agrarian agitation and crime see Scott ‘Regulatory Crime’ (n 25). The British criminal justice system framed in the second half of the nineteenth century was carried over into Ireland after 1922. More recently the Irish Constitution (1937) declared Ireland a sovereign democratic state (art 5). In its preamble, and perhaps out of synchronisation with other more secular jurisdictions, it rhetorically invoked the divine, and professed both to assure the dignity and freedom of the individual and the attainment of true social order, while within its articles the justice, liberty and equality principles were espoused alongside the potentially conflicting rights to private property and fundamental rights. Internationally a more humanist outlook prevailed in the wake of the horrors of the Second World War. Universal respect for and observance of human rights and fundamental freedoms was promulgated within a countermanding context to state force, violence and oppression, and later extended via a number of international charters see especially Universal Declaration of Human Rights, General Assembly of the United Nations, 10 December 1948; Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Rome Italy, 4 November 1950
310. To determine the natural rights of the populace, Locke hypothesised the state of nature before government, a state of political equality in which there is no natural superior or inferior, an equality borne of man’s creation by the Divine. Here obligations to mutual love, societal duties, and justice and charity flow from such equality, and it is noticeable that the Irish constitutional preamble similarly so recognises. A common political authority or government is established only by the voluntary transfer of such rights to it by the people. Hobbes was first to draw upon this metaphor of the hypothetical state of nature, where there was an absence of political society and a law-enforcing authority, and as an analyst of power fused the concepts of power and rights to create a theory of rights and obligations. See MacPherson (n 294); S Kilcommins and B Vaughan, ‘The Rise of the Regulatory Irish State: A Response to Colin Scott’ in S Kilcommins and U Kilkely (eds), Regulatory Crime in Ireland (First Law 2010), 90 refer to public protection and security as essential goods of the criminal justice system, and argue: ‘What is striking, however, is that the perception still exists in Ireland that white collar crime does not threaten our security in the same way that street crime does. This is a fallacy.....misconduct in the banking and corporate sectors ....in the political arena and in the distortion of competition in the market poses as much, if not more, of a threat to our everyday lives as ordinary crime (with the potential to affect more people)’.

311. Locke Two Treatises of Government (n 73), paragraph 6 recites: ‘The State of Nature has a Law of Nature to govern it, which obligates every one; And Reason, which is the Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions’. J Locke, A Letter Concerning Toleration (Tully J ed, Hackett 1983), 26 ‘The Commonwealth seems to me to be a Society of men constituted only for the procuring, preserving, and advancing of their own Civil Interests....Civil Interests I call Life, Liberty, Health, and Indolency of Body; and the Possession of outward things, such as Money, Lands, Houses, Furniture, and the like’.

312. See MacPherson (n 294), 58 ‘We must give Hobbes credit for seeing that the hierarchical society of previous centuries was being replaced by a market society......Not only was this equality of right required for the operation of a market society, but at the same time it was the existence of the market that made the new equality possible. Traditional hierarchical society had required unequal rights as between ranks.....Market society brought with it an objective order......A man’s value, his entitlements, were determined by the market’. Radzinowicz History (n 25), Vol 2 Preface vii stated of the criminal law system: ‘It was largely inspired by the creed of laissez-faire and to an appreciable extent was worked by private initiative, principles which were so natural to the Englishman’s way of life and thought’. Also see Gill (n 294), 534 who asserted: ‘[F]ive features have to be institutionalized through collective – either state or corporate – action in order to create a market: property rights, pricing norms, standards of exchange, channels of physical exchange and transaction routines. Markets cannot exist without property rights and much of the development of civil and criminal law regimes was associated with their emergence’. 313. For Polanyi (n 62),81-82, the labour market was the last of the three markets described by Smith, land, capital (money), labour, to be mobilised. It was hindered during the most active period of the Industrial Revolution from 1795-1834, in his view, by the originally well-meaning emergency Speenhamland Law (1795) designed as a welfare subsidy in aid of wages, (a wage plus welfare system) which prevented the establishment of a competitive labour market. However, in 1832 in his view, the middle class had forced its way to power partly in order to remove this welfare obstacle to the new capitalistic economy. Thereafter economan, the ordinary man as opposed to the controlling elite, was subject to wage competition (atomistic and individualistic) or pauperism. For Polanyi (n 62), 89, political economy was born under two opposite perspectives: progress and perfectability (Economic liberalism) as seen in the principle of harmony and self-regulation, on the one hand; and, determinism and damnation (the class concept), as seen in competition and conflict, on the other.

320. Dicey (n 25), 121 stated: ‘The “rule of law,”......may be used as a formula for expressing the fact that......the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals...’. 

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321. Polanyi (n 62), 141. For Polanyi, by the 1820’s economic liberalism stood for its three classical tenets: ‘that labour should find its price on the market; that the creation of money should be subject to an automatic mechanism; that goods should be free to flow from country to country without hindrance or preference’. Polanyi went on (n 62), 143 that, ‘Not until the 1830’s did economic liberalism burst forth as a crusading passion and laissez-faire became a militant creed’. He concluded that laissez-faire could never have arisen unaided, and stated that, ‘laissez-faire was enforced by the state. The thirties and forties saw not only an outburst of legislation repealing restrictive regulations, but also an enormous increase in the administrative functions of the state, which was now being endowed with a central bureaucracy to fulfil the tasks set by the adherents of liberalism’. The Parliamentary Reform Act 1832 (Britain), a precursor of later reforms, enfranchised about half of the middle class (mainly urban) but by leaving a property qualification upon voters only mildly dented the principle of representing property rather than individuals; for an excellent popular rendition of the times see G Eliot, *Middlemarch* (Wordsworth 1994). Similarly see B Disraeli, *Sybil or The Two Nations* (1845, Penguin 1980) which caused a sensation when first published exposing the social polarisation of poverty-stricken industrial workers from the irresponsible excesses of the wealthy; Disraeli, 45 described the century and a half’ use in England of what he termed ‘Dutch finance’ (mortgaging industry to protect property) introduced by William of Orange after the Glorious Revolution, and prophetically he wrote: ‘It has made debt a national habit; it has made credit the ruling power, not the exceptional auxiliary, of all transactions; it has introduced a loose, inexact, haphazard, and dishonest spirit in the conduct of both public and private life; a spirit dazzling and yet dastardly; reckless of consequences and yet shrinking from responsibility. And in the end, it has so overstimulated the energies of the population to maintain the material engagements of the state, and of society at large, that the moral condition of the people has been entirely lost sight of’.

322. See footnote 321 above for detail. Plumb (n 304) highlights that from the mid-end of the seventeenth century the land market changed as estates of the aristocratic grew larger, attracting social and political privileges, while by the early eighteenth century the nature of rural society had changed. Lesser gentry lost out, and in time so did their yeomen and lesser tenants, who in time moved to town and industry. After 1740 due to improved midwifery the population grew and the workforce for the Industrial Revolution swelled, and more of the better off middle class children survived to use their educational advantage. Between1760-1790 there was two worlds, the old agrarian capitalism and the new industrial version. The early industrial capitalists all emerged from the lower middle class of sufficient education, technological background and imbued with an aggressive, inventive, future-success attitude. The rise of a banking industry in the early eighteenth century brought an enhanced capital market, and expanding markets provided the outlet for product and returned the capitalists’ profit objective. As Polanyi has asserted labour became the last market to be organised.


324. Bottoms ‘Morality, crime, compliance and public policy’ (n 247), 23 pointed out: ‘....if and when one asserts that a given authority lacks legitimacy, this is ipso facto an assertion that, in the eyes of at least a significant group of its citizens, that authority is the subject of moral criticism’. This may be termed as a ‘critical morality’ (general moral principles used to critique actual social institutions) as distinguished by nineteenth century utilitarian like Bentham, and later taken up by Hart, from ‘positive morality’ defined as the morality actually accepted by a given social group. Bottoms outlined three criteria for legitimacy, which he regarded as a form of normative compliance: conformity to rules (legal validity); justifiability of rules in terms of shared beliefs; and, legitimation through expressed consent; also see D Beetham, *The Legitimation of Power* (Macmillan 1991).

325. T Hirschi, Causes of Delinquency (University of California Press 1969) outlined a control theory, where his central idea was the breaking of a ‘bond to society’ by infringers, and where the bond has four
elements: attachment, belief, involvement and commitment. Bottoms ‘Morality, crime, compliance and public policy’ (n 247), 38 phrased it in these terms: ‘...deterrence works best with those who have strong stakes in conventionality’. Croall White Collar Crime (n 87), 140 highlighted the long-standing history of financial industry influence and lobbying in the creation of business law-making, in a sense their influencing bonds to society, as follows: ‘Relevant groups are generally consulted in advance of legislative reform and...are indirectly represented in Parliament through sponsorship of individual members, many of whom also have industrial links through investments and company directorships’.

326. S Hall, ‘Financialised Elites and the Changing nature of Finance Capitalism: Investments bankers in London’s Financial District’ (2009) 13(2) Competition and Change 173,173 stated: ‘...suggestions of the demise of ’financialised elites’ in the wake of the global credit crunch may be too hasty’. See earlier regarding the establishment of special resolution vehicles. In the USA, the $700 billion TARP programme was voluntarily sought by many including, the nationalised huge mortgage providers Fannie Mae and Freddie Mac; the bailed-out Citigroup and Bank of America, and AIG the nationalised giant insurer, a subsidiary of which was one of the largest participants in the securitisation markets, which however managed to exist TARP in late 2010; further, after Lehman’s fell the remaining large broker dealers Goldman Sachs and Morgan Stanley under Federal Reserve encouragement voluntarily became bank holding companies so as to access bailout liquidity; see Cioffi (n 1431) who pointed out that in September 2009, US government support for the financial sector totalled $545.3 billion in expenditures and another $23.7 trillion in asset guarantees, and concluded that, ‘the crisis was a nightmare of moral hazard. “Too big to fail” was now an officially confirmed reality’; and see Davies and Green (n 1454); Kaletsky (n 2). Earlier Bear Stearns sought and obtained ‘Fed’ help in its sale/takeover by JP Morgan Chase see Cohan, (n 199); VV Acharya T Philippon M Richardson and N Roubini, ‘A Bird’s Eye View The Financial Crisis of 2007-2009: Causes and Remedies’ in VV Acharya and M Richardson (eds.) Restoring Financial Stability how to repair a failed system (Wiley Finance 2009), 23 described the bail-out compensation system, where bankers voluntarily assumed that taxpayers would pick up the bill, as being “characterised by moral hazard in the form of ‘gambling for redemption’”; Mallaby (n 79), 377 explained the way in which the markets deliberately pass the risk to taxpayers: ‘...each time the government pays the bills for the risk taken by financiers, it reduces the cost of that risk to market players, dampening their incentive to reduce it......government insurance encourages financiers to take larger risks; and larger risks force governments to increase the insurance. It is a vicious cycle’; also see D Wessel, In Fed We Trust (Crown Business 2009), 189 who observed that in 2008 the US government moved into the business of “forcing instant mergers to save and restructure the American financial system”. Regarding the UK, the British government became the majority owner of Northern Rock, the Royal Bank of Scotland (RBS) and Lloyds Banking Group; see the special resolution mechanism established by the UK Banking Act 2009; Goodhart (n 2); J Gray and O Akseli (eds), Financial regulation in Crisis: The Role of Law and the Failure of Northern Rock (Elgar 2011). Setting the scene for the post crisis UK economy, on the 15th September, 2010 Mervyn King told the UK Trades Union Congress (TUC) held in Manchester, “There was nothing fair about the financial crisis. It was caused not by problems in the real economy; it came out of the financial sector ....But it was the real economy that suffered and the banks that were bailed out”; see M Hennessy, ‘Workers right to be angry about bank bonuses, says King’ The Irish Times (Dublin, 16 September 2010). As to Ireland, in or around July 2010 a series of documents were released by the Department of Finance surrounding the disastrous bank guarantee of September 2009, which revealed that the major Irish banks extensively importuned the Irish government to intervene; further, see the earlier revealed ‘Anglo-Tapes’ controversy; also see S Carswell, Anglo Republic: Inside the bank that broke Ireland (Penguin 2011); Honohan Report, The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008 (Report to the Minister for Finance by the Governor of the Central Bank of Ireland Patrick Honohan 2010); Nyberg Report, Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland (Report of the Commission of Investigation into the Banking Sector in Ireland 2011),; S Ross, The Bankers: How the banks brought Ireland to its knees (Penguin 2009).

329. Habermas (n 276), 44 from a socialist if not Marxist stance, in similar vein critiqued autonomy as restriction, although for him, the creation of institutions within social-contract theories incorrectly assumed, ‘the intentional complex of a free association of originally autonomous and equal members’; and he added (45) that ‘Hegel called this civil society a “system of needs” in which individuals were robbed of all real freedom’. Habermas (45) concluded that moving from an ensemble of conditions authorising freedom, it became a ”system that followed its own logic and subjected society as a whole to the economically decoded imperatives of its self-stabilization”. The result was that law lost its central role in theoretical analysis and instead social life was defined by a non-normative mechanism namely production.
336. Husak Overcriminalisation (n 298); Locke Two Treatises of Government (n 73), paragraph 19 recites: ‘Want of a common Judge with Authority, puts all Men in a State of Nature: Force without Right, upon a Man’s Person, makes a State of War, both where there is, and is not, a common Judge’. Rawls A Theory of Justice (n 282) and Rawls ‘Justice as Fairness’ (n 282) within his own narrow group contractarian approach, described justice as ‘fairness’. This was an attempt at devising reasonable principles by objective consensus which all can accept. Reminiscent of Hobbes and Locke’s approach, Rawls argument commenced from an initial societal construction viewpoint devoid of vested interest and status, a classless and status-less ‘veil of ignorance’. Here, reasonable and rational citizens with an interest, albeit with differing needs and aspirations as to the concept of good, impartially and consensually adopt norms. As an ‘idealised’ construct, which draws from a moral and a political melding, it sits up well in theory, but self-interest is in everyday life impossible to factor out. Two underlying principles were postulated by Rawls, the first a broad liberty concept drawn from the liberal tradition, which included a personal property right but not based upon a natural right of self-ownership, and the second, an equality right destined to ensure distributive justice, both of which required a rank ordering.

342. See Ayres and Braithwaite (n 90); Polanyi (n 62); Rawls A Theory of Justice (n 282); and, Sen ‘Normative Evaluation and Legal Analogues’ (n 277). As one EU supervisory authority for instance, the EBA has a thirty member Banking Stakeholder Group tasked to facilitate the EBA’s consultation with stakeholders, which serves for a two and a half year period, drawing its membership from four areas: Credit and investment institutions operating in the EU and their employees’ representatives; Consumers; Users of banking services; Representatives of SMEs see <http://eba.europa.eu/about-us/organisation/banking-stakeholder-group> accessed 25 June 2013. Dorn ‘The Governance of Securities’ (n 185), 35 argued for democratisation of financial market regulation for two reasons: ‘First, active democratic oversight of financial market regulation is merited on grounds of principle. Second, accountability to national and regional parliaments would result in regulatory diversity, resulting in more robust market systems at global level’.

343. Habermas (n 276), 391 stated: ‘[P]rivate autonomy connected with the status of legal persons in general must be realised in different ways as the social context changes....The development of the welfare state endangers the guarantees for the individual’s autonomous conduct of life....The unintended effects of juridification draw attention to the internal relation between private and public autonomy...The self-programming of an independent administration and the unauthorized delegation of powers can be met by shifting the functional separation of powers into the administrative system itself – through new elements of participation and control, including domain-specific public spheres’.


346. See K Alexander et al, ‘A Report on the Transatlantic Financial Services Regulatory Dialogue’ (2006) 7 European Business Organization Law Review 647; and, J Braithwaite and P Drahos, Global Business Regulation (Cambridge University Press 2000). Dorn ‘The Governance of Securities’ (n 185), 39-40 stated: ‘Financial market stability ..... is a public good that cannot be left to bargains struck between market participants and regulatory agencies. Since everyone is a stakeholder, the debate must be open to all as far as basic principles are concerned; such is the argument in principle. ‘ Anchoring ’ of financial market regulation in democratic oversight seems preferable to handing intrinsically political questions to regulatory specialists and market lobbyists, ‘ independent ’ of government, who negotiate in international but closed fora (such as those lauded by the De Larosière high-level group, see above’).

349. See Pound (n 225). Pound’s postulates include: the assumption by individuals that others will not impose intentional aggression (harm); individuals may control for beneficial purposes what they discover; all individuals will act in good faith towards each other, meeting all promises and undertakings, and restoring all inappropriately acquired gains; others shall act so as not to cast unreasonable risk upon another, and shall contain all things dangerous within acceptable bounds.
350. See Gobert and Punch (n 130). The FSA, for instance, sought to protect consumers specifically in four risk areas: (i) Prudential Risk (investment failure due to bad management/financial collapse – the focus is solvency, safety and soundness); (ii) Bad Faith Risk (fraud, misrepresentation); (iii) Complexity/Unsuitability Risk (investment unsuited to needs/circumstances); (iv) Performance Risk (investment does not produce expected return).

353. Polanyi (n 62) argued that ‘market societies are constituted by two opposing movements – the laissez-faire movement to expand the scope of the market, and the protective countermovement that emerges to resist [it]’. See F Block, ‘Introduction’ in K Polanyi, The Great Transformation: The Political and Economic Origins of our Time (1944 Beacon Press 2001).

354. See Polanyi (n 62), 48; also Radzinowicz History (n 25), Vol 4, 9 confirms, ‘Criminal statistics, first introduced on a regular basis in 1805.....showed a rapid and almost uninterrupted increase in the numbers committed in custody charged with property offences in England and Wales’.

356. James Hamilton, the previous and now retired Irish DPP, in a rare public interview on the 16th May, 2010 informed RTE 1 television viewers that in the wake of the financial crisis, the Irish general public were increasingly regarding white collar crime as real crime with real consequences. He argued for a criminal justice system which can function efficiently in the area of white collar crime, expressing a need for exceptional measures in the area of financial crime including legislative change enabling a judge to order hearings before a panel of judges or a special jury of people with qualifications to understand the issues.

357. Patrick Honohan (Central Bank Governor) was quoted as stating, at a critical time as the Irish crisis unfolded, to a plenary conference of the British-Irish Parliamentary Assembly in Cavan, as reported in D de Breadun, ‘Honohan says those guilty of bank crisis crime must face jail’ Irish Times (Dublin, 23 February 2010): ‘It’s another matter as to whether it’s easy to achieve convictions on highly complex matters, which are made highly complex in some cases in order to make convictions difficult to achieve’. Queried as to this remark, speaking to reporters after his presentation, Honohan added: ‘Certain people doing financial transactions – say, illegal, or transactions we wouldn’t like them to make – might make them complex in order to hide them from the law’.

358. The De Larosiere Report 2009 (n 1), expressed the post-GFC position thus: ‘Although the relative importance assigned to regulation (versus institutional incentives - such as governance and risk assessment, - or monetary conditions...) can be discussed, it is a fact that global financial services regulation did not prevent or at least contain the crisis as well as market aberrations. A profound review of regulatory policy is therefore needed. A consensus, both in Europe and internationally, needs to be developed on which financial services regulatory measures are needed for the protection of customers, the safeguarding of financial stability, and the sustainability of economic growth...... This should be done being mindful of the usefulness of self-regulation by the private sector. Public and self-regulation should complement each other and supervisors should check that where there is self-regulation it is being properly implemented. This was not sufficiently carried out in the recent past’.

361. Dorn ‘The Governance of Securities’ (n 185), 60 argued that, ‘a robust legal framework is needed to underpin market development’. Also see S Picciotto and F Haines, ‘Regulating Global Financial Markets’ (1999) 26(3) Journal of Law and Society 351,368 who well before the GFC presciently stated: ‘The time is overdue for a strong reassessment of the crucial importance of a positive public role in regulating financial markets, not simply to prevent economic collapse, but to ensure that they operate in the broader public interest’.

364. Plumb (n 304) argues that the economic changes of the Industrial Revolution profoundly altered the whole social structure. While at first rural society resisted the capitalist invasion, which prospered in the towns, it gradually spread out. It was in the towns however, where greater state regulation grew in the form of local government and administration. From the 1760s onwards, enterprising urban government procured passage of Acts of Parliament, enabling them to fund urban improvement governed by locally administered commissions. This included funding police commissioners to maintain law and order. Membership of these commissions was widely-based. Plumb (n 304), 86-87 stated: ‘This growth of local authorities is the most important social development of the second half of the eighteenth century.....Without it, the great administrative revolution of 1820-40 would have been impossible to accomplish.....it created a unity of
interest between the administrative class and the new industrial magnates, intensified their belief in order, efficiency, and social discipline.....They became addicts of administrative reform and an easy prey for Bentham....’

365. H Croall, ‘Combating Financial Crime: Regulatory versus Crime Control approaches’ (2003) 11(1) Journal of Financial Crime 45; McAuley and McCutcheon (n 274); I McLean, ‘The history of regulation in the United Kingdom: three case studies in search of a theory’ in J Jordana and D Levi-Faur (eds) The Politics of Regulation (Elgar 2004), 45-46 expounded upon regulatory origin: ‘...in the early nineteenth century....both economic regulation (beginning with the Regulation of Railways Act 1844) and social regulation (of industrial conditions and transport safety) took recognisably modern forms in the UK......while the history of social (risk) regulation in the UK.....is continuous since the early nineteenth century, that of economic regulation is discontinuous – the principles behind it were lost in the 1870s and not rediscovered until the 1980s’.

379. See for instance, Braithwaite and Drahos (n 346); P Denley, ‘The Mediterranean in the Age of the Renaissance, 1200-1500’ in G Holmes (ed) The Oxford Illustrated History of Medieval Europe, (Oxford University Press 1988); G Holmes, ‘Editor’s Foreword’ in G Holmes (ed) The Oxford Illustrated History of Medieval Europe, (Oxford University Press 1988); M Vale, ‘The civilisation of Courts and Cities in the North, 1200-1500’ in G Holmes (ed) The Oxford Illustrated History of Medieval Europe, (Oxford University Press 1988); D Whilton, ‘The Society of Northern Europe in the High Middle Ages, 900-1200’ in G Holmes (ed) The Oxford Illustrated History of Medieval Europe, (Oxford University Press 1988). By way of example, Banking practice evolved in a harmonised form in Europe between the 13th and 16th centuries, while Italian banking custom created ‘law merchants’. By 1450 or so Italian commercial dominance was fading, the Medici bank collapsed, and German and other rivals arose. By 1470 highly urbanised Holland (45% of the population) qualified as a modern capitalist economy, and simultaneously, adventurous merchants and financiers included Germans from Augsburg and Nuremberg, families of Bruges in Flanders equally urbanised, and English families based in North Sea ports. During the 1500’s Antwerp, abetted by Bruges and Ghent, became the major international financial centre and Queen Elizabeth I of England kept a currency dealer (Thomas Gresham) there; following civil wars in Flanders and the Spanish Succession, Amsterdam superceded in the late 17th century as the Dutch maritime power colonised globally; and then in the early1800’s London took over. With the rise of nation states national banks were established, the first being the bank of Amsterdam 1609, the Bank of England followed in 1694, the Bank of France 1800 after false starts commencing 1716, and revamped in 1880, the German Reichsbank in 1875.

406. Haines The Paradox of Regulation (n 14), 3. Also see Kaletsky (n 2), 294 who expressed the aspirational post-crisis worldview that, ‘Policymakers will recognise that the markets are often wrong and therefore [will] be willing to regulate financial institutions, even without any evidence of particular market failures such as imperfect competition, information bottlenecks, or managerial incompetence’.

418. Goodhart (n 2) is a pre-eminnet economics authority; also see Braithwaite Regulatory Capitalism (n 86); Kaletsky (n 2); MacNeil and O’Brien ‘Introduction’ (n 2). Also see Wheatley Review (n 13) where it was found that since the LIBOR rate fixing was unregulated, and was not properly overseen, meant there was a clear lack of external accountability to safeguard that the incentives of those involved in the process were aligned with the wider interests of market participants, benchmark users and the public; further, there was lack of a comprehensive sanctions regime to ensure that those who manipulated the rate were brought to book; the conclusion was that the manipulation paints a clear and damning picture about the prevalence of the wrong incentives, and the sorts of behaviour that was allowed.

429. Conduct of business regulation was only introduced in Ireland in 2003. This mandate focuses on how RFSPs conduct business with their customers, particularly by helping consumers make informed financial decisions in a safe and fair market. This is achieved mainly by: setting business conduct standards and checking they are adhered to; and publishing information to help consumers choose service providers, and the services appropriate, to their particular circumstances. An essential focus here therefore, is countering the already highlighted financial market problem of asymmetric or non-transparent information, rendering an unfair advantage to initiate market players; see J Westrup, ‘Regulatory Governance’ (UCD Geary Institute Discussion Paper Series, 12 November 2007). Also see M Donnelly and F White, ‘Regulation and Consumer Protection: A Study of the Online Market’ (2006) 28 DULJ 27 who pointed out that Irish consumers in society (unlike the UK where the consumer society developed with the industrial revolution in the 19th century) was not identified and specifically protected until the late 1970’s while since the mid-1980’s the protection role has mainly been shaped by the transposition of EU legislation although they describe this as ‘minimal’.

432. In November 2013, the Irish Attorney General Maire Whelan was reported in the print media, when speaking at the launch of the Law Reform Commission’s fourth work programme, as stating that: ‘As we move towards regaining our economic sovereignty, it is imperative that a robust and comprehensive review is carried out so that, insofar as possible, we can proceed to inject systemic resilience and accountability into our corporate criminal law’; see R Mac Cormaic, ‘Attorney General calls for review of white-collar crime law’ The Irish Times (Dublin, 28 November 2013).

433. As a specialist enforcement agency comparator, following a series of scandals and failed prosecutions in the City of London financial milieu, with strong government backing from the then Prime Minister Margaret Thatcher, the Serious Fraud Office (SFO) was established in 1988, and it both investigates and prosecutes. Levi ‘Serious Fraud in Britain’ (n 213), 183 has asserted that: ‘The SFO has brought areas of formerly private commercial misconduct- or areas that, where known about, were public only in the sense of being dealt with by insolvency practitioners or by securities and banking regulators – into the arena of the criminal courts and, thereby, into greater public visibility and debate’.

435. MacNeil and O’Brien ‘Introduction’ (n 2), 3 phrased the issue in the following market-wide terms: ‘...how to deal with a model of financial capitalism based on technical compliance with narrowly defined legislation and a working assumption that, unless a particular action is explicitly proscribed, it is deemed politically and socially acceptable’.

436. See Packer (n 273). In Ireland it is the common law system replicated from the old English common law which also grounds the US, Australian, New Zealand, Canadian, and Dominion and Commonwealth criminal law. Although many of the legal requirements for financial services are set out by EU legislation, domestic and not EU law prevails. EU criminal law cooperation developed as an offshoot of a primary concern with economic freedom of trade and the free movement of economic actors, because of a threat to the financial interests of the EU, and also as a response to the facilitation by the four freedoms of trans-frontier crime in ways which national governments acting independently were powerless to prevent. Criminal law came under the formal aegis of EU law following the conclusion of the Treaty of Maastricht 1992 when the EU Council was nominated as the key institutional figure; in 1995 under the Third Pillar structure known as the area of freedom, security and justice (Treaty of Amsterdam 1997), criminal law became the main enforcement instrument via Framework Decisions; these in turn were overtaken by the Lisbon Treaty 2009 which abolished the Pillar structure and allowed for the adoption of the full legislative range of regulations, directives, decisions, recommendations and opinions. The necessity for criminal sanctions to protect EU interests emerged from a fraud against the Community budget and the ECJ held (Greek Maize case) that Member States were obliged to apply their national criminal law to protect the EC budget, while in 1995 the EU Council established the so-called “PIF Convention” (in force 17th October 2002) which gave rise to the Irish Criminal Justice (Theft and Fraud Offences) Act 2001. Enforcement of EU law in national courts was not mandatory until the ECJ in Pupino (2005) determined that Treaty cooperation obligations extended to criminal matters. Legislatively, the EU may now by way of Directive establish minimum rules concerning the definition of criminal offences and sanctions regarding serious cross-border crime including inter alia money laundering, corruption, counterfeiting, and computer and organised crime. In addition, other crimes may be added to the list including from the financial services area. EU criminal law thus has a three-fold normative, cooperation and direct enforcement aspect. It is an evolving, hybrid, multi-layered patchwork of legislation and case law from both national and European jurisdictions which possesses common notions and values and individual particularities. In a nutshell, it is a
criminal justice system sui generis that applies the rule of law, as yet un-codified, where no aspect of criminal law is excluded from EU influence, where principles developed in the internal market apply to the area of freedom, security and justice, where the Human Rights Convention applies, and where the EU may now require Member States to criminalise certain forms of conduct and introduce rules of criminal procedure. See G Conway, ‘The Council of Europe as a normative backdrop to potential European integration in the sphere of criminal law’ (2007) 19 Denning Law Journal 12; J Hamilton, ‘Improving judicial possibilities to exchange foreign evidence?’ The EEW compared to existing European instruments’ (Speech ERA-ICEL Conference October 2009); Klip (n 283); LKuhl, ‘The Criminal Law Protection of the Communities’ Financial Interests against Fraud’ (1998) Criminal Law Review Pt 1, 259, Pt 2, 323; C McGreal (n 203); Case C 68/88 Commission v Greece [1989] ECR 2965 (Greek Maize); Case C-105/03 criminal proceedings against Maria Papino [2005] ECR 1-5285; art 83 (1) TFEU and art 69B.1 inserted into TEU by Art 2.67 Lisbon Treaty.

439. Garland The Culture of Control (n 25). Also see N Lacey and L Zedner, “‘Community’ and Governance: A Cultural Comparison” in S Karstedt and KD Bussman, (eds) Social Dynamics of Crime and Control: New Theories for a World in Transition (Hart 2000). Also see Kilcommins O’Donnell O’Sullivan and Vaughan (n 299) who examined the Garland crime complex theory in the Irish context, and in relation to the six indices examined they concluded that (i) rehabilitative policies have made little systemic headway; (ii) the politicisation of penal policy was not as dominant a factor as in the US; (iii) although traditionally victims received less attention than in the UK and US, this is changing and greater priority is being ascribed (iv) the use of imprisonment grew sharply in the period concerned; (v) only a perfunctory attitude has been shown by the Irish state to diffusion of crime control; (vi) there is scepticism about the criminal justice system and where managerial rhetoric has been used it has not permeated practice. Nonetheless, it cannot be denied that international movements and especially those in the UK, heavily influence Irish trends.

440. The first of these was the social, economic and cultural changes that occurred after the Second World War, which became most pronounced from the 1960’s onwards. The second was the political realignments, and policy initiatives, that developed in response to those changes. This occurred from the late 1970’s onwards. Some have already been discussed in relation to the market domain and its criminogenic nature, and as market de-regulation already discussed in Part 1 Chapter 2 section 1.2.3 above. K Stenson and A Edwards, ‘Rethinking crime control in advanced liberal government: the ‘third way’ and the return to the local’ in K Stenson and RR Sullivan (eds.) Crime, Risk and Justice: The politics of crime control in liberal democracies (Willan 2001), 68 argue that the ‘third way’ centre-left political ideologies, replacing neoliberal administrations of the 1980s, continued the trend with a renewed focus upon Durkheim’s social solidarity at local level, without losing the support of ‘fearful, fiscally conservative middle-classes’.

443. Fisher Risk Regulation and Administrative Constitutionalism (n 108); Gray and Hamilton (n 408); P O’Malley, Risk, Uncertainty and Government (Glasshouse Press 2004); M Power, The Risk Management of Everything: Rethinking the Politics of Uncertainty (Demos 2004). The De Larosiere Report 2009 (n 1), 8 stated of risk management pre-GFC: ‘There have been quite fundamental failures in the assessment of risk, both by financial firms and by those who regulated and supervised them. There are many manifestations of this: a misunderstanding of the interaction between credit and liquidity and a failure to verify fully the leverage of institutions were among the most important. The cumulative effect of these failures was an overestimation of the ability of financial firms as a whole to manage their risks, and a corresponding underestimation of the capital they should hold…… The extreme complexity of structured financial products, sometimes involving several layers of CDOs, made proper risk assessment challenging for even the most sophisticated in the market. Moreover, model-based risk assessments underestimated the exposure to common shocks and tail risks and thereby the overall risk exposure. Stress-testing too often was based on mild or even wrong assumptions’.

445. Ayres and Braithwaite (n 90); Braithwaite Regulatory Capitalism (n 86); Haines The Paradox of Regulation (n 14). Concerning trending influences post-GFC the banking sector has changed ‘dramatically if not radically’. In September 2008 when Lehman Brothers was allowed to fail, the top ten banks globally by Tier 1 capital were European (4) with HSBC first, US(3), Japanese (1) and Chinese (2). As of December 2012 they were Chinese (4) with ICBC first, US (4), Japanese (1) and European (1). The consolidation of US banks has strengthened them further; however, more people work in the financial industry in London in 2013 than was the case in December 2007, while in New York the opposite is the case. See The Economist, ‘Five years after Lehman’ (London, 14 September 2013), 70.
446. Haines The Paradox of Regulation (n 14). Garland ‘Ideology and crime’ (n 295), 9 phrased it thus: ‘...although the structures of crime control have been transformed in some respects, the most significant change is at the level of the culture that enlivens these structures, orders their use and shapes their meaning. The cultural coordinates of crime control have gradually been changed, altering the way that penal agents think and act, giving new meaning to what they say and do. This new culture of crime control has three key elements: (a) a recoded penal-welfarism [shift to the penal axis]; (b) a criminology of control; and (c) an economic style of reasoning’.

450. See Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310); and S Kilcommins and B Vaughan, Terrorism, Rights and the Rule of Law (Willan 2007). And see Department of Justice Equality and Law Reform, White Paper on Crime, Organised and White Collar Crime (Discussion Document No 3, October 2010). Horan (n 87), 22 refers to a proposal for a Criminal Justice (White Collar Crime) Bill in December, 2010, post-crisis, which was mooted but never published due to a change of government in February, 2011, but contained proposals to extend Garda investigative and questioning powers, for the greater use of community service orders, the indexing and certification of evidence by financial institutions, and the stipulation of an offence for a witness failing to make a statement.

455. See for instance, P Appleby, Reflections on Weaknesses with respect to Accountability (Irish Law Reform Commission Annual Conference 2012 Law Reform – The Current Economic and Fiscal Crisis Dublin,11 December 2012); Black ‘The Credit Crisis and the Constitution’ (n 61); COM (2010) 301 (n 12); S Elder, ‘Financial Regulation Enforcement and the Criminal Dimension: Irish Perspective, EU Context’ (2011) 11 Papers from the British Criminology Conference 54 http://www.britisocrim.org/v11.htm; Elder ‘Sanctions and Financial Regulation: a meditation upon natural necessity’ (n 178) ; Elderfield Opening Remarks (n 417); Oakes Delivering a credible threat (n 431). Within the EU, utilising the powers under article 83 (2) TFEU which provides for the adoption of common minimum rules on criminal law when this proves essential to ensure the effective implementation of a harmonised EU policy, the EU Commission as its initial reform action promptly introduced proposals in the market abuse area, soon to come to fruition, for the first time across the EU providing a common set of offences, and mandating the EU-wide use of the criminal law for sanction purposes; see Europa Press Release “Proposals for a Regulation on Market Abuse and for a Directive on Criminal Sanctions for Market Abuse”, Brussels 20th October 2011 memo/11/715 paragraphs 4 and 5. Within the general regulatory landscape newer ‘governance’ iterations confound the separation of public and private regulatory response and encourage the interweaving or inter-legality of public and private regulatory rules, meanings, and actions, and stress that cooperative action between a variety of actors—whether public or private, weak or strong, competent or less so—can strengthen regulatory action; see D Kingsford Smith, ‘A harder nut to crack? Responsive Regulation in the financial services sector’ (2011) 44 University of British Columbia Law Review 695; Braithwaite Regulatory Capitalism (n 86); D Levi-Faur and J Jordana, The Politics of Regulation: Examining Regulatory Institutions and Instruments in the Governance Age (Edward Elgar 2004). However, as Grabosky conceded when the state loosens its enforcement reins, instead relying upon decentralised and independent interests, there may be a consequent loss of policy coherence or an imbalance in enforcement activity; see P Grabosky, ‘On the interface of criminal justice and regulation’ in H Quirk T Seddon and G Smith (eds), Regulation and Criminal Justice: Innovations in Policy and Research (Cambridge University Press 2010).This clearly was demonstrated pre-GFC, is the subject of much reform consideration, and highly suggestive of greater criminal law sanction involvement.

456. MacNeil, ‘Risk Control Strategies and the Credit Crisis’ (n 408). Also see the post-GFC de Larosiere Report (n 1), 4 which set out a framework to move the EU forward, ‘Towards a new regulatory agenda – to reduce risk and improve risk management; to improve systemic shock absorbers; to weaken pro-cyclical amplifiers; to strengthen transparency; and to get the incentives in financial markets right’.

457. Haines The Paradox of Regulation (n 14). And see Scott ‘Regulation in the age of governance’ (n 16). As an illustration of the problems involved, the de Larosiere Report (n 1), 10 explained the pre-GFC risk issues as including corporate governance failures in a highly competitive milieu as follows: ‘Failures in risk assessment and risk management were aggravated by the fact that the checks and balances of corporate governance also failed. Many boards and senior managements of financial firms neither understood the characteristics of the new, highly complex financial products they were dealing with, nor were they aware of the aggregate exposure of their companies, thus seriously underestimating the risks they were running. Many board members did not provide the necessary oversight or control of management. Nor did the
owners of these companies – the shareholders. Remuneration and incentive schemes within financial institutions contributed to excessive risk-taking by rewarding short-term expansion of the volume of (risky) trades rather than the long-term profitability of investments. Furthermore, shareholders’ pressure on management to deliver higher share prices and dividends for investors meant that exceeding expected quarterly earnings became the benchmark for many companies’ performance.

458. Haines *The Paradox of Regulation* (n 14). Gray and Hamilton (n 408), 8 state: ‘Risk is now viewed as a political rather than a metaphysical problem’; at (n 408), 9 they refer to Foucault’s ‘Governmentality’ perspective and express that for Governmentality theorists risk, ‘is centred around the exploration of how the identification of risks associated with certain behaviour or activities provide a means through which to exercise control over populations, groups or individuals in neo-liberal societies’. In a post-crisis environment the same reasoning could easily be applied to neo-liberalists themselves!

459. This is one concern for the new Irish PRISM risk-targeting approach introduced in 2011. Technical understanding or manifestation of risk accompany the regulatory journey and are the mirror image of the actuarial risk assessment found in modern criminal law theories. In the financial sector, this has been most often demonstrated in the heavily criticised mathematical models used by both mainstream and shadow institutions for risk management purposes since the stock market crash in 1987. This is one of the instrumental commonalities between criminal law pre-targeting and post offence monitoring, and regulatory institutions for risk management purposes since the stock market crash in 1987. This is one concern for the new Irish PRISM risk-targeting approach introduced in 2011. Technical understanding or manifestation of risk accompany the regulatory journey and are the mirror image of the actuarial risk assessment found in modern criminal law theories. In the financial sector, this has been most often demonstrated in the heavily criticised mathematical models used by both mainstream and shadow institutions for risk management purposes since the stock market crash in 1987. This is one of the instrumental commonalities between criminal law pre-targeting and post offence monitoring, and regulatory enforcement at the supervisory level.

461. See Dicey (n 25). Also see Radzinowicz *History* (n 25) Vol 4, 34 records that early nineteenth century alleviation of the pressures for control amounted to schemes to deal with, ‘pauperism, vagrancy and begging’. Later (page 35) he stated: ‘it was a short and natural step from the importunity or fraud of a beggar to the dishonesty of a thief: lack of shame in the one could extend to the other, the two occupations went well together, and robbery and larceny were also prevalent’. Again later in Vol 4, 158 he records Peel’s revolutionary experiment of unified and professional policing in 1829, responding to ‘emphatic and recurring pressure for reform’ and as a vital ‘measure of social protection’, as well as ‘an indispensable arrangement for well-ordered life’. In conjunction the socialist viewpoint of Polanyi equally situates issues around pauperism as being central to the ascendency of the liberal market creed, the notion of a market-economy which in his view replaced that of a society-economy see Polanyi (n 12). In Ireland, the written Constitution, and its rights as stipulated and interpreted backdrop the Dicy rule of law concept, although property rights so central to this dissertation interrogation, do not enjoy an unassailable position. In *A v The Governor of Arbour Hill Prison* [2006] IESC 45 (SC) Murray CJ stated: ‘The Constitution like others, is holistic, provides a full and complete framework for the functioning of a democratic State and an ordered society in accordance with the rule of law, the due administration of justice and the interests of the common good. In providing for the common good and seeking ‘to attain true social order’, in the words of the preamble, the application of the Constitution cannot be distorted by focusing on one principle or tenet to the exclusion of all others’.

462. See McAuley and McCutcheon (n 274) who highlighted that criminal law is of ancient origin, and that the power of punishment gradually shifted from deity to the secular authority, while the influence of moral theologians settled all remaining doubts that intent was an essential proof. The works of institutional writers such as Hale and Coke throughout the seventeenth, and Hawkins, Foster and Blackstone in the eighteenth centuries aided judicial developments, according to Ashworth *Principles of Criminal Law* (n 97). Radzinowicz *History* (n 25) Vol 1 Preface ix, called the criminal law, ‘Child of the Common Law, nourished and moulded by Statute’.

463. See Ashworth *Principles of Criminal Law* (n 274). The reckless trading notion as now found in Company law, may be traced to the UK Jenkins Committee (1962); in Ireland the Companies Act 1963 sec 297A, as inserted by sec 138 Companies Act 1990, contains civil sanctions against reckless trading, while sec 295 prohibits frauds in a liquidation context and sec 297 imposes criminal liability for knowingly being a party to reckless trading. In *Re Heffron Kearns Ltd* [1993] IR 191 (HC), 219 Lynch J stated of this new concept introduced to Irish law, that the sections do not however, ‘impose a collective responsibility on a board of directors...[but] operates individually personally against the officers’. In *O’Keeffe v Ferris* [1997] 3 IR 463 (SC), 470 where the Supreme Court held that no criminal offence was created by sec 295 or 297, and that the ‘punitive damages’ recoverable under sec 297(1) were not unconstitutional, they stated: ‘while more cannot be recovered than is owing to the company, nonetheless an individual may have to pay over more than the wrongful benefit accrued’. In *Donovan v Landys Ltd* [1963] IR 441 (SC), 460-462.
Kingsmill-Moore J conducted a detailed analysis of judicial pronouncements of ‘recklessness’ in the Tort context from which it may be concluded to have a shifting meaning; connote a high degree of negligence; import an element of dishonesty or fraud; connote an indifference to risk although recognising there was a risk and willingly taking it; deliberately running an unjustifiable risk; and his favourite that recklessness was gross negligence, a standard approved later in Heffron. See L MacCann and TB Courtney, Companies Acts 1963-2009 (Bloomsbury Professional 2010).578 who highlight that the test is applied, other than in hindsight fashion, and also pointed out that in Heffron that Lynch J: ‘[O]pted for an objective test...[placing] particular emphasis on the inclusion of the word ‘knowingly’ and concluded that although the test for recklessness is objective it was tempered by subjectivity’. Also see N O’Hanlon, ‘The Corporate Form and Reckless Trading: A Modern Pandora and Epimetheus’ (2006) 28 DULJ 254, 294 who argued that reckless trading law, amounts to a Judicial Review Model of moral hazard, and not a Market Model where economic transactions are left to parties to an arrangement to sort out.

467. An EU-wide consultation process concluded in February, 2011, and reflected the sectoral nature of financial regulation, when 40% of EU consultation contributors were from the financial industry. The Feedback Statement (May 2011) prepared by the EU Commission recited inter alia that although there was general agreement that criminal sanctions could considerably increase deterrence, there was disagreement about their use. Even those agreeing appeared to favour strict conditionality and application to serious offences only. Compare these findings with a public survey carried out in Australia in 2010 concerning cartels when the findings included: even among a high-awareness group only 54% indicated that price-fixing should be a criminal offence; that cartel offences are seen in moral terms rather than economic effects or harmfulness; that both corporate and individuals should be accountable; between 70-80% felt fines should be imposed for breach and that sanction outcomes should be publicised; less than 20% supported the cartel immunity programme; less than 50% felt that cartel conduct should be a criminal offence. See Commission, ‘Feedback Statement On Public Consultation on Commission Communication - Reinforcing Sanctioning Regimes In The Financial Sector’ (May 2011) <http://ec.europa.eu/internal_market/consultations/docs/2010/sanctions/feedback_en.pdf> accessed 13 May 2011; and see C Beaton-Wellis, ‘Anti-Cartel Advocacy – How Has the ACCC Fared?’ (2011) 33 Sydney Law Review 735.

470. Bentham clearly drew upon Hobbes and others. Hobbes (n 281), 353 had propounded in 1651: ‘A Punishment, is an Evill inflicted by publique Authority, on him that hath done.....to the end that the will of men may thereby the better be disposed to obedience’.

472. Ashworth and Zedner (n 407). Packer (n 273), 293 argued: ‘The function of the criminal sanction is to help prevent or reduce socially undesirable conduct through the detection, apprehension, prosecution, and punishment of offenders’. At a practice level see Part 2 Chapter 2 concerning the ECHR and the categorisation of criminal matters.

473. See especially for instance Old Testament Genesis 4 and Exodus 20-24 where the Divine commandments were revealed and His people accepted His word by covenant. Hobbes (n 281), 336 argued: ‘A Crime, is a sinne, consisting in the Committing (by Deed, or Word) of that which the Law forbiddeth, or the Omission of what it hath commanded. So that every Crime is a sinne; but not every sinne a Crime’.

474. Hobbes (n 281), 723 where Hobbes wrote: ‘But among the Israelites it was a Positive Law of God their Sovereign, that he that was convicted of a capitall Crime, should be stoned to death by the People; and that the Witnesses should cast the first stone, and after the Witnesses, then the rest of the People. This was a Law that designed who were to be the Executioners; but not that any one should throw a Stone at him before Conviction and Sentence, where the Congregation was Judge’. Locke Two Treatises of Government (n 73) paragraph 8 wrote: ‘In transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of reason and common Equity, which is that measure God has set to the actions of men, for their mutual security: and so he becomes dangerous to Mankind, the tye, which is to secure them from injury and violence, being slighted and broken by him’. Also see B Calvert, ‘Locke on Punishment and the Death Penalty’ (1993) 68 Philosophy 211; Simmons (n 260). The LRC Report ‘Mandatory Sentences’ (n 469), 3 recites that the five specific aims of criminal sanctions in Ireland are: deterrence, punishment, reform and rehabilitation, reparation, and incapacitation.

475. M Tonry, ‘Punishment Policies and Patterns in Western Countries’ in M Tonry and RS Frase (eds) Sentencing and Sanctions in Western Countries (Oxford University Press 2001), 14-15 referred to the
atyypical USA, for instance where there is ‘a widespread vicarious interest in ensuring that offenders are severely punished or, at least, that they experience all the punishment ordered’ and where ‘certainty and severity are seen as governing values, with proportionality and parsimony being given much less weight’. For him US sentence policy is harsher than elsewhere with various Scandinavian countries (e.g. Finland) enjoying the least punitive. He did conclude however (n 475), 25 ‘[T]he vertical proportionality proposition that more serious crimes should, all else equal, be punished more severely than less serious crimes, and the horizontal equity proposition that comparably serious crimes, all else equal, should be punished comparably severely, are increasingly influential in sentencing systems as diverse as U.S. guidelines, English guideline judgments, and Scandinavian sentencing principles’.

476. Hart Punishment and Responsibility (n 230), the classic Prolegomenon to the Principles of Punishment. These are: (1) pain or unpleasant consequence – the British Law Commissioners (1843) ‘privation and suffering’ conceptualisation; (2) an offence against legal rule; (3) punishment applied to an actual or supposed offender; (4) intentional administration by other humans; and (5) imposition by legal authority against which the offending behaviour was directed (note not the individual ‘victim’). Packer (n 273) set out six criteria for choosing the criminal sanction as optimum see Part 1 Chapter 3 section 1.3.7 below ft 565.

478. Bottoms (n 247); Zedner (n 274). Tonry (n 475), 14 stated: ‘In every country and at every time there is a range of views about punishment for crime that range from classic Kantian arguments that wrongdoers must be punished because they deserve it to classic Benthamite views that wrongdoers must be punished only so much and in such ways as will maximize net public benefit’. Also see A Bottoms, ‘The Philosophy and Politics of Punishment and Sentencing’ in CMV Clarkson and R Morgan (eds) The Politics of Sentencing Reform (Clarendon Press 1995) who seminally described the causes and consequences of ‘populist punitivism’. A Freiberg, ‘Three Strikes and You’re Out – It’s Not Cricket’ in M Tonry and RS Frase (eds) Sentencing and Sanctions in Western Countries (Oxford University Press 2001) described the Australian shift from the British model to a range of international influences as globalization progressed and especially the US influence. For him economic rationalism dismantled criminal justice policy pre-GFC and the concept of the market assumed a dominant role bringing with it privatization, deregulation, small government and competition.

490. Lord Wright’s famous dicta in Sherras v De Rutzen that there is a presumption that mens rea, or intent, must be proved in all cases save where displaced by statutory wording or statutory subject-matter, and where three principal classes of exception may occur, forms the effectual point of departure. In the UK in 1985 Lord Scarman, in Gammon, set out five propositions based upon the case law up to that point: the presumption of mens rea; it is very strong in ‘real’ crime offences; it applies to statutory offences where clear language only may oust it; the relevant statute must regulate a ‘social concern’; and, the presumption stands unless imposing strict liability promotes the objects of the statute by encouraging greater vigilance towards the particular crime prevention. See Sherras v De Rutzen (1895) 1 QB 918 ((QBD); and see Sweet v Parsley (1970) AC 132 (HL), and for Ireland see The People (DPP) v Murray (1977) IR 360 (SC); Gammon (Hong Kong) Ltd v Att-Gen of Hong Kong (1985) AC 1(FC). While there can be little doubt that offences in the general area of financial services or financial regulation are potentially amenable to the strict liability doctrine, it has not occurred to date, and in any event, the creation of statutory strict liability offences is often accompanied by the creation of statutory defences, and these defences are significant for qualifying a liability otherwise deemed absolute; see Scott ‘Regulatory Crime’ (n 25). Mistake, reliance on information supplied, accident or other cause beyond control of the accused, or the exercise of due diligence and taking all reasonable precautions, may all provide typical styles of statutory defence for instance, under section 78 of the Consumer Protection Act 2007. Scott ‘Regulatory Crime’ (n 25), 18 stated: ‘The due diligence defence is highly significant as it incentivises businesses to put in place systems of training and oversight…to exculpate themselves through showing they took the appropriate steps to avoid committing the offence’.

492. Scott ‘Regulatory Crime’ (n 25) tabulated and juxtaposed the contrasting features of both ‘real’ and ‘regulatory’ crime generally (as opposed to financial regulatory crime) across nine key areas, although for financial regulation they are not always absolutely applicable as shown below: liability basis of action and intent (real) and strict (regulatory per Scott, but in contraventions and offences culpability may be required); investigation Garda (real) and Agencies (regulatory per Scott, but Garda may too); prosecution Garda/DPP (real) and Agency/DPP (regulatory per Scott, but Garda may too summarily); enforcement style insistent (real) and persuasive (regulatory); sentencing stringent (real per Scott but really discretionary without
statutory guidelines) and variable (regulatory per Scot but statutory guidelines); orientation moral (real) and instrumental (regulatory); function retribution and rehabilitation (real) and compliance, deterrence (regulatory); defences limited (real per Scott but this is not absolutely accurate) and due diligence (regulatory); formal sanctions imprisonment/ fine (real) and predominantly fines (regulatory). Scott ‘Regulatory Crime’ (n 25), 19 coming from a regulatory perspective, and recognising the difficulty of placing real crime and regulatory crime as parallel regimes within criminal law concluded: ‘If paradigmatic crime involves serious offences against person and property, and involves intent and the possibility of imprisonment then a perception that regulatory offences have been overlaid on the system clearly creates risks both to the integrity of the criminal justice system and to the pattern of regulatory enforcement’.

493. See for instance, R Henham, ‘Sentencing Policy and Guilty Plea Discounts’ C Tata and N Hutton (eds) Sentencing and Society (Ashgate 2002). In January 2014 the UK FCA fined State Street £22.9 million for deliberately overcharging its clients between June 2010 and September 2011, and said the custody bank acted with “complete disregard” for the interests of its customers. And that it had developed and executed a deliberate strategy to charge substantial mark-ups on agreed fees. State Street was given a 30 per cent discount on its fine for settling with the FCA at an early stage; Reuters, ‘UK fines State Street £23m for overcharging NTMA and others’ The Irish Times (Dublin, 31 January 2014). Also see Central Bank of Ireland, Outline of the Administrative Sanctions Procedure (2013), which from the 6th November 2013 introduced a two stage sanction discount, the earliest stage of 31 percent, and the lesser stage 2 of ten percent.

494. Interviewee L Judiciary Ireland 7 January 2013. Also see the De Larosiere Report 2009 (n 1), 13 which defined financial regulation as follows: ‘Regulation is the set of rules and standards that govern financial institutions; their main objective is to foster financial stability and to protect the customers of financial services. Regulation can take different forms, ranging from information requirements to strict measures such as capital requirements. On the other hand, supervision is the process designed to oversee financial institutions in order to ensure that rules and standards are properly applied. This being said, in practice, regulation and supervision are intertwined’.

496. Weber The Theory of Social and Economic Organisation (n 66), 183. Weber wrote: ‘The original modes of market regulation have been various...[including] by welfare policies, and not least by the interests and requirements of the governing authorities of corporate groups’. Polanyi (n 62) agreed with Weber when stating: ‘On the institutional level, regulation both extends and restricts freedom’. McLean (n 314), 46 expounded upon regulatory origin: ‘Regulation has existed for ever, but regulation for defensible reasons of economic or social policy is more recent.....Many examples of regulation in pre-nineteenth century politics (and indeed since) may have originated in what seemed to be good ideas at the time rather than (or in addition to) naked expropriation of one group in favour of another’. Braithwaite and Drahos (n 346), 88 argued that ‘Financial regulation begins with money’, and then identified in an extensive historical review, the earliest forms of such regulation, (n 346), 88-91: tax gathering pre-money in the Egypt of 5300 BC; the use of rings as money in the Egypt of the fourth millennium BC and gold in the second millennium BC; the Babylonian regulated money market of the third millennium BC; the Code of Hammurabi (c. 2123-2081 BC) inter alia regulated the uses of grain and silver as money, provided for credit supply and imposed criminal penalties; the lengthy Chinese history of coinage and paper money.

498. Weber The Theory of Social and Economic Organisation (n 66), 182. Also see footnote 222. Weber identified four modes: (1) traditionally, by the actors’ becoming accustomed to traditionally accepted limitations on exchange or to traditional conditions. (2) By convention....(3) By law, through legal restriction on exchange or on the freedom of competition, in general or for particular groups of persons or for particular objects of exchange. (4)By voluntary action...’. This effectively is Weber’s rule of law underpinning for the regulatory contract. As to the regulatory contract also see Black Rules and Regulators (n 403) and Prosser Law and the Regulators (n 21).

505. For instance, at EU level the European Banking Authority (EBA) through the auspices of a Joint Committee publishes risk assessment reports which identify key cross-sectoral risks facing the EU’s financial markets and system, and sets out recommendations on how these can be addressed through coordinated policy and supervisory action by policy-makers, the three European Supervisory Authorities and Member States (see <http://eba.europa.eu/risk-analysis-and-data/risk-assessment-reports> accessed 25 June 2013). See EBA Joint Committee Report on Risks and Vulnerabilities in the EU Financial System (March 2013) which outlined six risk categories including risks from a weak macro-economic outlook,
which itself included financial regulation and economic performance. At page 7 it was stated: ‘One phenomenon revealed by the 2008 financial crisis was the cross-sectoral interconnectedness and complexity resulting from the repackaging of various debt forms by means of securitization, financial engineering and similar techniques involving the change of risk characteristics along the way. Inadequate accounting, disclosure and prudential requirements hid the underlying financial and behavioural risks behind such complex intermediation. The crisis led to a loss of confidence in such financial intermediation, and consequent regulatory reforms to tighten up prudential and disclosure requirements to restore confidence in the financial system. However....commercial and political pressures..... are again increasing the incentives for firms to arbitrage around new regulatory requirements and increase complex cross-sectoral transformation of financial promises’. Also see O’Hanlon (n 463), 294 who stated: ‘Risk is intrinsic to economic enterprise’; while Bernstein, Against the Gods: The Remarkable Story of Risk (1996), 21 added that capitalism is the epitome of risk-taking.

508. S Coslovsky R Pires and S Silbey, ‘The Pragmatic Politics Of Regulatory Enforcement’ in D Levi-Faur (ed), Handbook on the Politics of Regulation (Edward Elgar 2011). For these authors: Regulatory enforcement is an intrinsically political endeavour, the daily routine of front-line enforcers worldwide existing within a political terrain where they constantly build and revise agreements with regulatees, which realigns interests, reshapes conflicts and reapporitions risks, costs and benefits across various agents rendering compliance tolerable and sometimes advantageous to all regulatory actors.

535. Over sixty years ago Edwin Sutherland coined the phrase ‘white-collar’ crime. As a pioneering American criminologist his experiential genesis was US urban street crime of the 1930’s and ‘40’s. However, very aware of the rich ‘robber barons’ who operated ‘respectable’ businesses accumulating profits in violation of regulatory norms, ruthlessly eliminating competitors and creating cartels, he coined the phrase to refer to crimes committed by the respectable in the course of their occupation. O’Malley criticised this definition as inadequate, extended it to ‘domestic’ settings, and suggested more than one socio-economic group was involved with ‘fraud’, ‘the dishonest appropriation of another’s property through a breach of trust’, his crime rationale. Gobert and Punch (n 130), cite the leading modern scholar Braithwaite, in support of their view that beyond the acts of individuals, the phrase includes corporate crime, and suggest that society has also moved beyond Sutherland’s time-scale to apply greater seriousness and urgency to the problem. See J Braithwaite, Punish or Persuade: enforcement of coal mine safety (State University of New York Press 1985); Gobert and Punch (n 130); Horan (n 87); McCullagh ‘How Dirty is the White Collar? Analysing White Collar Crime’ (n 213); T O’Malley, Sentencing Law and Practice (1st edn, Round Hall 2000), 442; Slapper and Tombs (n 87); E H Sutherland ‘White-collar criminality’ (n 128).


537. McCullagh ‘Two-Tier Society; Two-Tier Crime’ (n 199); J McGrath, ‘Two-tier system puts corporate criminals above law’ The Irish Times (Dublin, 21December 2010); Wells ‘Corporate crime: opening the eyes of the Sentry’ (n 18). Levi ‘Serious Fraud in Britain’ (n 213), 183 asserted: ‘...all the prosecution agencies are much more cautious when dealing with elite suspects and their professional advisers than they are with middle-status people’. Also see M Levi, Regulating Fraud: White-Collar crime and the Criminal Process (Routledge 1987).

545. G Teubner, ‘After Legal Instrumentalism? Strategic Models of Post-regulatory Law’ (1984) 12 International Journal of the Sociology of Law 375. Teubner has argued that social systems such as law, politics and regulated sub-systems are ‘black boxes’ in the sense of being mutually inaccessible to each other. He further argued that, these black boxes may become ‘whitened’ in the sense that an interaction relation develops among them, which is transparent for them in its regularities. Teubner is the leading exponent of the legal theory of autoepoiesis, effectively, that law reproduces itself according to its own norms. In his view political, legal, social and economic systems are sub-systems central to regulation but while being cognitively open to each other, are normatively and operatively closed. One central problem is perceived as creeping legalism or juridification which damages any other sub-system with which law interacts. See Scott ‘Regulation in the age of governance’ (n 16), 151-154.
In Magee v Culligan [1992] 1 IR 233 (SC), 272 Finlay CJ delivering the Supreme Court judgement while making it clear that article 15.5 did not contain a general prohibition against retrospection, stated that it was, ‘an expressed and unambiguous prohibition against the enactment of retrospective laws declaring acts to be an infringement of the law, whether of the civil or the criminal law’.

Under the UN ICCPR see Joseph Kavanagh v Ireland (2001) UNHR Committee Communication no 819/1998 UN doc ccpr/c/71/d/819/1998; also see O Gross and F ni Aolain, Law in Times of Crisis: Emergency Powers in Theory and Practice (Cambridge University Press 2006), 298, who bemoaned that the only recourse offered to Kavanagh where the committee held that the denial of jury trial breached the multi-lateral treaty obligation, was an offer of financial compensation; they also opined that this committee generally evaded the ‘emergency’ issue instead preferring to confront secondary ‘proportionality’ issues in the form of state overreaction to perceived internal threats.

See Dicey (n 25). Dicey pointed out that the right to the writ of habeas corpus existed at common law long before the passage in 1679 (Locke’s epoch) of the Habeas Corpus Act (31 Car. II. C.2) and after it all devices entertained to curtail liberty were stymied. For Polanyi (n 62), 264 ‘The true answer to the threat of bureaucracy as a source of abuse of power is to create spheres of arbitrary freedom protected by unbreakable rules’.

Packer (n 273), 296 argued when: ‘(1) The conduct is prominent in most people’s view of socially threatening behaviour, and is not condoned by any significant segment of society; (2) Subjecting...to the criminal sanction is not inconsistent with the goals of punishment; (3) Suppressing it will not inhibit socially desirable conduct; (4) It may be dealt with through even handed and non-discriminatory enforcement; (5) Controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains; (6) There are no reasonable alternatives to the criminal sanction’.

M Lodge, ‘Accountability and transparency in regulation: critiques, doctrines and instruments’ in J Jordana and D Levi-Faur (eds) The Politics of Regulation (Elgar 2004). Also see Freiberg The Tools of Regulation (n 119); Grabosky ‘On the interface of criminal justice and regulation’ (n 455); Hood Rothstein and Baldwin (n 437); Macrory Review, (n 122) and Macrory ‘Reforming Regulatory Sanctions’ (n 120). One of the prime post-GFC market goals of the De Larosiere Report 2009 (n 1), 4 was stated to be, ‘to strengthen transparency’, while later the Report, 6 stated: ‘Financial markets depend on trust. But much of this trust has evaporated’. DPJ Walsh, Human Rights and Policing in Ireland (Clarus 2009), 781 discussed transparency in the general policing context, and described it as a ‘most urgent and vital ingredient’, and as creating an environment where, ‘breaches and deficits can be detected and remedied’. His commentary is relevant also to the policing binary, where equally public confidence, and active cooperation are essential, and he highlighted the need for publication of operational policies and basic documents; the need for external checks and balances for all activities carried on hidden from public scrutiny; the need for internal systems to record regulatory action and exercise of powers; and concluded that transparency must be instilled into policing regulatory culture.

Dorn ‘The Governance of Securities’ (n 185) has argued that accountability to national parliaments may result in regulatory diversity and more robust market systems. For a contrary view as to the use of a regulatory contract see Sampford (n 251), 39 who stated: ‘...we do not need a new ‘regulatory contract’ – a concept that is potentially useful but more misleading than it is helpful. The concept of trust and fiduciary duty is more helpful’. Also see Black Rules and Regulators (n 403), 136 who stated that there is a ‘regulatory contract’ between regulator and the regulated, where the regulator does not interfere in exchange for compliance.

Lodge (n 567). The Irish financial regulator in his CBI Enforcement Strategy (n 453), 18-19 stated somewhat restrictively: ‘Transparent means that a regulated entity will be advised when issues relevant to that entity have been referred to the Enforcement Directorate’. Also see A Persaud, ‘Macro-prudential Regulation’ in I MacNeil and J O’Brien (eds), The Future of Financial Regulation (Hart 2010), 453 who stated: ‘We must continue to clamp down on fraud and ethical abuses and promote transparency, but this is not enough to avoid crises’. As an EU supervisory authority, the EBA for instance, has been mandated to, ‘contribute to the integrity, transparency, efficiency and orderly functioning of financial markets’, and they state on their website: ‘Disclosing to the markets an adequate picture of financial institutions’ risks is key to ensuring their proper functioning as well as to building trust between market participants and the efficiency

572. See Lodge (n 567). Prosser Law and the Regulators (n 21), 277-279, 281 argued that US rule making – notice and comment rule-making – may be seen as the best procedural example to ensure accountability and participation. It requires prior notice of procedure applied, legal authority, and the substance or subject matter of the proposal, and thereafter interested parties may make written submissions, following which an oral hearing (cross-examination and full record keeping) may be granted; a general statement of rule purpose or reasons for the rule is then incorporated and a judicial review may lie. In his view, and I agree, this procedure lends to legitimacy. He stated that notice and comment makes for wiser and well informed decisions, enhances legitimacy, and better ensures decisions are consistent with both the public (e.g. public interest groups) and public representatives’ views. It is clear that EU participatory consultation procedures, as ‘soft law’ techniques, including the use of networks and supervisory bodies with stakeholder groups such as the EBA, equally seek the same benefits.

582. The Foucault’s argument is that power may positively manifest by producing knowledge (and related discourses) that become internalised by individuals, and thereafter guide the behaviour of populations. This leads to more efficient forms of social control, as such internalised knowledge enables individuals to govern themselves. As conceived within the neo-liberal era, where governmentality is based on the predominance of market mechanisms and the restriction of state action, the knowledge produced allows the construction of auto-regulated or auto-correcting selves according to Foucault.

586. For instance, in the UK, Ireland, and Australia. In Ireland, the McDowell Report (n 26), para 7.5 recited that the Working Group considered that a regulator, ‘without the ability to impose civil sanction to enforce….. would result in ineffective regulation’. Also see Butler et al (n 451); Horan (n 87).

590. See Ayres and Braithwaite (n 90); J Braithwaite, Restorative Justice (n 300); Also see Scott ‘Regulatory Crime’ (n 25) who has critiqued the responsive approach as selective, responsive, oriented towards the regulator’s instrumental objectives and also in conflict with ‘real’ crime universal application principles. Braithwaite the originator of the sanction pyramid notion, in the later Ayres and Braithwaite work proposed two pyramids sitting side by side one for sanction strategy and one for sanctions themselves.

605. P Appleby, ‘Compliance and Enforcement – The ODCE Perspective’ in S Kilcommins and U Kilkelly (eds), Regulatory Crime in Ireland (First Law 2010), 187 cited a six-segment pyramid of his own organisation the ODCE, which he described as a diagram, which showed referrals to DPP at apex, Disqualification, Summary prosecutions, Civil enforcement actions, Administrative and legal action, and Encouraging compliance, as the downward flow. Wood et al (n 591) give numerous worldwide examples of diverse pyramid styles devised by regulators. C Ford, ‘Prospects for scalability: Relationships and uncertainty in responsive regulation’ (2013) 7 Regulation and Governance 14, 16 described the pyramid as, ‘institutional features built outward from a series of human interactions over time’. Also see J Etienne, ‘Ambiguity and relational signals in regulator–regulatee relationships’(2013) 7 Regulation and Governance 30 who has argued that the picture of regulatory encounters offered via the enforcement pyramid hides important variations and the ambiguity of much RFSP behaviour.

608. Gunningham ‘Enforcement and Compliance Strategies’ (n 603) drew six broad observations of the pyramid approach: escalation and de-escalation are complex actions; genuine dialogue and information flow between regulator and RFSP are essential; where RFSP can be categorised by motivational posture a target-analytic approach may be preferable; risk-based regulation and the enforcement pyramid are not incompatible; in modern complex societies polycentric regulatory regimes are the norm; and, in many industries repeat interaction comparators are absent and threaten pyramid viability. Also see Baldwin and Black (n 593).

616. See Arup (n 538). Also see B Clarke, ‘Is ’Corporate Governance‘ an Oxymoron?’ in I MacNeil and J O’Brien (eds), The Future of Financial Regulation (Hart 2010), 269 who stated: ‘….in the current economic climate, a complete engagement between regulators, company boards and investors will be crucial to the development of an efficient corporate governance response’.

securities class action became lead plaintiff and their lawyers the lead lawyers, but after which shareholders with the largest loss became lead plaintiff. The 1995 act was designed to limit frivolous securities lawsuits; require plaintiffs to provide more proof of fraud before initiating suit; allow judges to decide the most adequate plaintiff in class actions; mandate full disclosure to investors of proposed settlements, including the amount of attorneys’ fees; bar bonus payments to favored plaintiffs; and permit judges to scrutinize lawyer conflicts of interest. Also see E Fry, ‘The Little Louisiana Pension Fund Litigation Monster’ 168(6) Fortune (Europe Edition, 7 October 2013) for an interesting expose of the US civil law system unchanged by the 1995 act (including derivatives suits and merger and acquisition deal cases) mobilised by civil plaintiffs aided by opportunistic lawyers monitoring for breach.

622. See Yeung ‘Quantifying Regulatory Penalties’ (n 290); Yeung ‘Better regulation’ (n 437). Also see Coffee jnr ‘Paradigms Lost’ (n 252), 1888 who stated in the US context two decades ago that, ‘...civil penalties, particularly when administratively imposed, could provide the means for evading constitutional safeguards’.

625. Advantages, revealed from within this entire dissertation discussion, include; (i) a new negotiated and agreed regulatory contract where new market disclosure forms are traded-off against improved due process norms governing the control process; (ii) independent prosecutor separate from the regulator; (iii) a separate body independently fixing transparent statutory sentence guidelines, pathway choice, and industry specific sanction interplay launching factors; (iv) a separate independent judge or arbiter hearing cases, appeals, and approving negotiated settlements including arbitrating conditionality disputes; (v) criminal law proof standards applicable to prosecutorial and arbitral decision-making where within contested hearings there is greater use of inferences, presumptions and reverse burdens; (vi) wider scope in negotiated resolution conditionality enabling closer ‘real-time’ regulation; (vii) a single transversal sanction suite, incorporating a transparent sanction discount capability for negotiated resolution; (viii) a transparent enforcement pyramid and protocol; (ix) new offence forms and sanction tools specifically tailored to the market environment.

PART 2 CHAPTER 1

631. S Gadinis and HE Jackson, ‘Markets as Regulators: A Survey’ (2007) 80 Southern California Law Review 1239. These three models are a ‘government-led’ model, that preserves significant authority for central government control albeit with a relatively limited enforcement apparatus (France, Germany, Japan); a ‘flexibility’ model that grants significant leeway to market participants but relies on government agencies to set general policies and maintain some enforcement capacity (Ireland, UK, Hong Kong, Australia); and a ‘cooperation model’ that assigns a broad range of power to market participants in almost all aspects, but also maintains strong and overlapping oversight of market activity, through well-endowed governmental agencies with more robust enforcement traditions (US, Canada).

633. See for instance, Hart The Concept of Law (n 123), 121 who stated: ‘In any large group general rules, standards and principles must be the main instrument of social control, and not particular directions to each individual separately’.

638. See Braithwaite and Drahos (n 346). At the effective commencement of the modern era of banking regulation, Braithwaite and Drahos highlighted that by the end of the 1930’s there was one overriding principle, the relative independence of central banks from government, but two dominant regulatory models: The first British, found within a highly concentrated market structure with one powerful regulator which operated in a close-knit, exclusive community relying upon understandings, convention, trust and tradition; and the second characterised by the US Federal Reserve, with a highly decentralised market structure, and fragmented regulators both federal and state, where regulation was more rule-bound, formal and bureaucratic. They wrote that, “One of these two systems was generally used by other states as they began to develop national systems of banking supervision” (n 346), 93. Also see Black ‘The emergence of risk-based regulation’ (n 442); J Black, ‘Forms and Paradoxes of Principles Based Regulation’ (LSE Law, Society and Economy Working Papers 13/2008); J Black, ‘The rise, fall and fate of principles-based regulation’ in K Alexander and N Moloney (eds) Law Reform and Financial Markets (Elgar 2011); S Elder, ‘Does the GFC as a Change Agent of Financial Regulatory Models and Approaches in Europe provide lessons for Asia?’ (2013) Asia Europe Journal forthcoming; and see Teuten (n 641 below).
648. Black ‘The emergence of risk-based regulation’ (n 442); Black ‘Managing Regulatory Risks and Defining the Parameters of Blame’ (n 442). Also see M Douglas, Risk and Blame: Essays in Cultural Theory (Routledge 1992), 15, who stated: ‘The idea of risk could have been custom made. Its universalizing terminology, its abstractedness, its power of condensation, its scientificity: its connection with objective analysis, make it perfect’. The approach never had time to get off the ground however, although its style has been deemed a failure see Black ‘Paradoxes and Failures’(n 442). Post-GFC there has been a shift towards a different type of risk-based approach, driven by systemic risk concerns, and which is regulator-led.

651. C Sergeant, ‘Risk-based regulation in the Financial Services Authority’ (2002) 10(4) Journal of Financial Regulation and Compliance 329; Stewart (n 649). Significant risks were demonstrated by the GFC. In the decade after 1996 the financial industry entered a new risk paradigm, with low interest rates, low volatility and high returns, see M Valencia, ‘The gods strike back’ The Economist (Special Report on financial risk 13th February, 2010). This new paradigm hinged mainly upon three closely linked developments: 1) a huge growth in derivatives; 2) the decomposition and distribution of credit risk through securitisation; and, 3) increasing risk management reliance upon risk modelling based upon the combined power of mathematics and computer technology, where the VAR models and bank stress-testing models particularly neglected ‘fat-tail’ or outlier risks. Also see Braithwaite and Drahos (n 346); Goodhart (n 2); R Sollis, ‘Value at risk: a critical overview’ (2009) 17(4) Journal of Financial Regulation and Compliance 398.

652. See Teuten (n 641). Post-GFC the De Larosiere Report 2009 (n 1), 32 recommended: ‘In the future, the risk management function must be fully independent within the firms and it should carry out effective and not arbitrarily constrained stress testing exercises. Firms should organise themselves internally so that incentives are not too much tilted towards risk taking – neglecting risk control. To contribute to this, the Senior Risk Officer in an institution should hold a very high rank in the hierarchy (at senior management level with direct access to the board). Changes to remuneration structures will also be needed: effective checks and balances are indeed unlikely to work if those who are supposed to control risk remain underpaid compared to those whose job it is to take risks’.

654. De Larosiere Report 2009 (n 1), 32 expanding form the corporate role around future risk management set out above, stated same cannot on its own be viewed, ‘as exonerating issuers and investors from their duties. For issuers, transparency and clarity in the description of assets put on the market is of the essence as this report has often stressed; but investors and in particular asset managers must not rely (as has too often been the case) on credit rating agencies assessments; they must exercise informed judgement; penalties should be enforced by supervisors when this is not applied. Supervisory control of firms’ risk management should be considerably reinforced through rigorous and frequent inspection regimes’.

658. See MacNeil, ‘Risk Control Strategies and the Credit Crisis’ (n 408). Also see I Lynch-Fannon, ‘Controlling Risk taking: Whose Job Is It Anyway?’ in S Kilcommins and U Kilkelly (eds), Regulatory Crime in Ireland (First Law 2010); Companies Act 1990 (Ireland) ch 2 and especially sec 160; MacCann and Courtney Companies Acts 1963-2009 (n 412). Section 160 empowers the High Court, inter alia, where a person is described as being ‘guilty’ of ‘any breach of duty’, or their conduct makes them ‘unfit to be concerned’ in company management, whether due to an inspectors report or otherwise, to make a disqualification order for such period as the court thinks fit, disqualifying such person who acted as, inter alia, an officer, auditor, or receiver, from being a company director. Restriction orders may also be sought under the 1990 Act, and the Supreme Court have made it clear that the justification for disqualification as opposed to restriction, has to be much more grave and blameworthy see Business Communications Limited v Baxter and Parsons unreported, High Court, Murphy J., 21 July 1995 (HC) as approved in Director of Corporate Enforcement v Patrick Byrne [2009] 2 ILRM 328 (SC). In Byrne the Supreme Court indicated that the question of unfitness must be assessed generally, commercial misjudgement was not sufficient, that the primary purpose of a disqualification is not to punish the individual but to protect the public, and that the burden of establishing a disqualification rests on the director of corporate enforcement and it is a substantial burden with a high standard of proofs. Interviewee X Regulator Ireland 12 November 2012 however, perhaps expressed the matter most practically when stating: ‘I mean it certainly is the case that disqualification is not regarded as such as a sanction and is regarded as a penalty imposed for the future betterment of society. That may be the case but the individual who is potentially the subject of a disqualification order is not going to see it in that fashion…… I think whatever the law or whoever the law regards disqualification I think it is a sanction and I think simply because it does have a serious effect on the individuals in question so I think for all practical purposes it must be regarded as a punishment for past
behaviour obviously as well as a potential in terms of guarding against future similar behaviour’. Also see Re Ro-Line Motors Ltd (1988) BCLC 698.

660. Goodhart (n 2), 37 argued post-crisis: ‘…there are empirical studies that suggest that countries which allow a less regulated, and more innovative and dynamic, financial system grow faster than their more controlled brethren, despite being more prone to financial (boom/bust) crises. Nevertheless it should be possible to construct a more countercyclical, time-varying, regulatory system in such a way as to mitigate these problems, so long as the regulations are relaxed in the downturn, after having been built up in the boom’.

671. See Black ‘Managing Regulatory Risks and Defining the Parameters of Blame’ (n 442), 2. Gray and Hamilton (n 408), 15 pre-GFC concluded perhaps over-hopefully: ‘Risk regulation in general is about far more than the dry and technical implementation of risk assessment and risk management techniques. Rather it has the potential to reshape relationships between those who govern and those who are governed, to embed norms of behaviour, to attribute blame and to define and delimit both responsibility and accountability’.

676. See Ayres and Braithwaite (n 90); Black ‘Paradoxes and Failures’ (n 442); Omarova (n 653), 416 highlighted: ‘Given the complexity and global nature of the modern financial market, any government’s attempt to regulate it in a purely unilateral command-and-control manner will inevitably encounter the fundamental problem of regulatory arbitrage, whereby financial institutions find ways to get around government rules, thus creating a never-ending spiral of rulemaking and rule evading’.

683. Garland The Culture of Control (n 25). Garland asserted that this new departure is a radical change from the established trajectory of penal development, and that the process of change unfolded in the late 1970’s and 1980’s first in the USA and then in Britain. It first manifested as a critique of correctionalism and also a concerted attack upon indeterminate sentencing and individualised treatment. It ushered in the opposite to enhanced prisoners rights, minimised imprisonment, the restriction of state power, and the ending of predictive restraint.


693. Feeley and Simon ‘The new penology’ (n 641); Feeley and Simon ‘Actuarial Justice’ (n 692); P O’Malley, ‘Risk, power, and Crime Prevention’ (1992) 21 Economy and Society 252 and P O’Malley, ‘Risk, crime and prudentialism revisited’ in K Stenson and RR Sullivan (eds.) Crime, Risk and Justice: The politics of crime control in liberal democracies (Willan 2001); N Rose, Powers of Freedom (Cambridge University Press 1999); Stenson and Edwards (n 389). In Ireland the Criminal Assets Bureau, which seeks to be an integral player in every serious criminal investigation, openly advocate and implement asset targeting as opposed to nindividufal targeting, but in spite of this, cases are not prioritised in terms of monetary value but by the degree of risk posed by individuals concerned; see C Gleeson, ‘Cab chief aims to ensure that nobody is untouchable in battle against crime’ The Irish Times (Dublin, 19 October 2013).

694. See N Lacey C Wells and O Quick, Reconstructing Criminal Law Text and Materials (3rd edn, LexisNexis Butterworths 2003); M Levi, ‘Suite Revenge? The Shaping of Folk Devils and Moral Panics about White-Collar Crimes’ (2009) 49 British Journal of Criminology 48; J O’Leary, ‘I should have been more pushy in opposing risk-taking at bank’ Irish Times (Dublin, 24 July 2010, p11) an extract of remarks by Mr O’Leary a former bank board member at the MacGill Summer School, Glenties, Co Donegal, including: ‘Serious mistakes were made by banks during the boom years, the consequences of those mistakes have been horrendous, and the primary responsibility lies with banks and boards’; and, ‘It was not that Irish banks were recklessly indifferent to risk; it was more a case that they didn’t understand the risks being taken, and were not much assisted in doing so by the tools being used’.
The Irish regulator’s plan from the outset was to align the enforcement and supervisory directorates in tandem in line with international best practice, and under PRISM to target their enforcement resources in two ways: (a) Pre-defined Enforcement – 60% targeting - where cases taken focus on seven themes chosen by the regulator based against priority areas identified by Supervisory colleagues, and where themed inspections strongly influence the targeted Enforcement effort; and (b) Reactive Enforcement – 40% targeting - which entails taking decisive Enforcement action where serious concerns arise from the regulator’s supervisory work and other sources of information and events, both internal and external see CBI Enforcement Strategy (n 453), 4, 9.

702. JPMorgan suffered an estimated $6.2 billion derivatives trading loss in 2012 and was obliged to overhaul its internal controls after uncovering its own traders’ suspicious actions and reporting them to the regulatory authorities; nonetheless, due to failures in risk management and financial reporting systems they were heavily fined in a joint US/UK action totalling $920 million, including $300 million to the US Office of the Comptroller of the Currency, $200 million to the Federal Reserve, $200 million to the US Securities and Exchange Commission and £137.6 million ($219.74 million) to the UK’s Financial Conduct Authority; although the eponymous ‘whale’ Bruno Iksil signed a cooperation agreement (immunity deal) in June 2013 with prosecutors and therefore was not charged with any wrongdoing, in August, 2013, US prosecutors in a parallel proceedings approach, filed criminal charges against two former traders, Javier Martin-Artajo and Julien Grout for conspiracy, keeping false books and records, wire fraud and making false filings with the Securities and Exchange Commission, while the SEC also filed simultaneous civil proceedings. See for instance, Reuters, ‘JPMorgan to pay $920m over ‘London Whale’ scandal’ The Irish Times (Dublin, 19 September 2013); K Scannell, ‘Whale’ loss charges for former traders at JPMorgan’ The Irish Times (Dublin, 15 August 2013).

720. Ashworth Principles of Criminal Law (n 97); L Farmer, ‘The Obsession with Definition: The Nature of Crime and Critical Legal Theory’ (1996) 5 Social and Legal Studies 57; Husak Overcriminalisation (n 298); MacCormick (n 532). According to McCauley and McCutcheon (n 274), 103 punishment is fundamentally a transaction between the State and citizens generally, the object of which is to prevent people from becoming criminals, and can’t be regarded as arising purely where people have already become criminal. This realisation bears a heavy influence upon the preventive superintendence (interventionist) approach to financial regulation. Indeed it has been argued that the most effective punishment is one which never has to be inflicted; see A Kenny, Freewill and Responsibility (London 1978), 76.

721. JS Mill, On Liberty (1859 reprinted in JM Robson (ed) The Collected Works of John Stuart Mill University of Toronto Press 1977); Wells and Quick (n 180). In England the ideas of Hobbes and Mill grounded the liberal or contractarian hypothesis which introduced the harm principle. But, see Council document 5908/14 of 2014-02-05 http://db.eurocrim.org/db/en/vorgang/283/ accessed 14 February 2014, 8 which stated: ‘Another important dimension of fraud…[is] its impact upon social values and sense of well-being. Certainly, this has economic ramifications. All commerce, and even the acceptability of a national currency, depends upon some degree of trust and confidence…In the case of fraud affecting financial institutions….the effects are measurable, but may well extend far beyond the money stolen’.

735. See for instance, T O’Connor (ed), Competition Law Source Book Volumes 1 and 2 (Round Hall Sweet and Maxwell 1996); and as recited therein for instance, the Competition Authority decisions upon notification/application such as: Competition Authority Decision of 10 June 1994 relating to a proceeding under section 4 of the Competition Act 1991 Notification NO. CA/199/92E – Irish Stock Exchange rules in relation to dealings in Irish Government securities where the Authority decided that the rules which inter alia required brokers to charge fixed minimum rates of commission, and which set out such rates, had as their objective the prevention, restriction or distortion of competition in the relevant market. M Levi, Regulating Fraud: White-Collar crime and the Criminal Process (Routledge 1987), 46 stated: ‘Another important dimension of fraud…[is] its impact upon social values and sense of well-being. Certainly, this has economic ramifications. All commerce, and even the acceptability of a national currency, depends upon some degree of trust and confidence…In the case of fraud affecting financial institutions….the effects are measurable, but may well extend far beyond the money stolen’.

Economic Review 392; R Posner, ‘The social cost of monopolies and regulation’ (1975) 83 Journal of Political Economy 807; G Tullock, ‘The welfare costs of tariffs, monopolies, and theft’ (1967) 5 Western Economics Journal 224. Also see DPP v Duffy & Anor [2009] IEHC 208 where McKechnie J described cartels as capable of being used for all forms of anticompetitive behaviour; they are particularly attracted to price fixing, restricting output/limiting production, bid rigging and market allocation; they stifle competition and discourage new entrants, and thus damage economic and commercial liberty; they remove price choice from the consumer, deter customer interest in product purchase and discourage variety; they reduce incentives to compete and hamper invention; they also cause a transfer of consumers’ money to the cartel conspirators.

742. The Corporation was also sentenced to print advertisements in three major trade publications in the United States and Taiwan acknowledging its convictions and punishments and the remedial steps it has taken as a result of its conviction. The company and its American subsidiary, AU Optronics Corporation America, were also placed on probation for three years, required to adopt an antitrust compliance program and to appoint an independent corporate compliance monitor. In addition, the former corporation president and former executive vice president were both sentenced to serve three years in prison and to pay a $200,000 criminal fine.

746. See Alexander Insider Dealing and Money Laundering in the EU (n 135). These are: the moral dimension that crime must not pay or be seen to do so; to deprive criminal organizations of their funding; to prevent unhealthy role models from developing and spreading a bad influence; because criminals are sometimes difficult to detect and convict the pursuit of gate-keeper professionals aids ‘facilitator liability’; the political reality of international pressure especially as exerted by the US, and to a lesser degree by international organisations.

PART 2 CHAPTER 2

752. See Packer (n 273). Packer (n 273), 163 argued: ‘…the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any farther along in the process’. This process he argued, 163-164 engages insistence, ‘on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him’. The desired objective of the mediation between the two models or values complexes is to ensure adversarial justice, otherwise social justice in the legal sphere. Habermas (n 276), 428 stated of the dilemma between law and legitimacy (his word is legitimation), relevant to the shifting mediation of state control and fairness for RFSPs as follows: ‘With the growth and qualitative transformation of governmental tasks, the need for legitimation changes; the more the law is enlisted as a means of political steering and social planning, the greater is the burden of legitimation that must be borne by the democratic genesis of law’. Discharging this burden, I submit, suggests a greater collaborative role for all market stakeholders.

753. Langbein (n 491), 332 has stated: ‘Adversary procedure entrusts the responsibility for gathering and presenting the evidence upon which accurate adjudication depends to partisans whose interest is in winning, not in truth’. Within the general capacity building, whatever form it may take, avoiding juridification, meaning overwhelming the regulated community with detailed rules, standards and instructions, must also be avoided; see F Haines and A Sutton, ‘The Engineers Dilemma: a Sociological Perspective on the Juridification of Regulation’ (2003) 39(1) Law and Social Change 1. This caveat concerns both the substantive rules, for instance as manifested in both offences and contraventions, and the procedural practices required to operationalise binary enforcement. One particularly relevant procedural practice is the very central area of discretionary decision-making discussed more fully in Part 2 Chapter 2 section 2.2.4, whether at the level of prosecutorial determinations of whether to prosecute, what for and how, as well as the later arbitral sentencing stage in accordance with pre-ordained principles or guidelines. Thus, the conclusion to be drawn, in my submission, is to holistically incorporate maximum flexibility.

754. See Elderfield Opening Remarks (n 417) who reiterated that enhanced post crisis enforcement levels would continue and revealed business lobbying to curtail it. Walsh Criminal Procedure (n 281) argued the replacement of the ‘due process’ model by one under which both the State apparatus has power to coerce a much greater degree of co-operation from suspects, and the civil law procedural format utilised in the confiscation of ill-gotten assets, has reversed the burden of proof onto the suspect. M Gallant ‘Alberta and
Ontario: civilizing the money-centered model of crime control' (2004) Asper Rev Int’l Bus & Trade L 13 has asserted that the use of civil legal mechanisms marks the civilising of the money-centred model of crime control.

755. Langbein (n 491). According to Langbein, emerging from the Middle Ages lawyers and ‘police’ had no place in the unstructured ‘altercation’ between accuser and accused, while the accused had to speak up for himself. Into the 1690’s defence counsel were forbidden in serious crime cases (treason and felony), and although allowed, prosecution counsel was rarely employed. It was even asserted right into the 18th century that denying defence counsel benefited the accused. Three celebrated treason trials held during the late Stuart reigns in England were so infamous for perjured evidence and conviction of the innocent that after William became King (The Glorious Revolution) the Treason Trials Act 1696 introduced reforms for such trials enabling defendants the benefit of defence counsel. Thus, the adversarial system began as a limited special-purpose procedure, effectively to serve the interests of wealthy grandees accused of treasonable intrigues.

756. Langbein (n 491) explained that in the 1730’s as a result of changes in prosecutorial practice, and to provide equality of arms, judges began to extend the right to defence counsel in ordinary felony cases such as stealing sheep or shop goods, for purposes of examining and cross-examining witnesses, and gradually throughout the 18th century defence counsel as the bearers of the adversarial procedure began to dominate the felony trial. In addition, so as to thwart unfair pre-trial evidence gathering practices judges created the law of criminal evidence with two essential rules, corroboration was required for accomplice evidence, and confessions which where suspect were excluded. This latter development, also a judicial creation, allowed counsel the oversight of matters bearing upon trial conduct, which were formerly the sole preserve of judge and jury. By articulating and enforcing the prosecutorial burdens of production and proof, defence counsel managed to silence the accused, and this development led to the privilege against self-incrimination and the establishment of the prosecution-borne ‘beyond reasonable doubt’ standard of proof. Judges were complicit in the system’s continuing development not least initially because of the widespread and disliked availability of capital punishment.

757. L Radzinowicz, Ideology and Crime: A Study of Crime in its Social and Historical Contexts (Heinemann 1966), 127-128 stated: ‘The first flush of enthusiasm for liberty and justice that followed the period of the Enlightenment was bound up with a philosophy of natural progress and individual achievement. It hardened, nevertheless, into the bleak and rigid codes of the Classical School of criminal law’.

759. Melling v O’Mathghamhna [1962] IR 1 (SC), 24-25 where Kingsmill-Moore J stated: they involve offences against the community at large and not against an individual; the sanction is punitive, and not merely a matter of fiscal reparation.; and, where mens rea is made an element of an offence it is generally an indication of criminality. In McLoughlin v Tuite [1989] IR 82 (SC) the Supreme Court applied Melling and held that penalties under the tax code fell into the category of a deterrent or incentive and were not criminal sanctions and therefore the sections imposing monetary penalty did not contravene article 38.1 (see ft 767 and 768 below). Also see Goodman International v Hamilton (No 1) [1992] 2 IR 542 (HC & SC) where inter alia the Supreme Court held the Beef Tribunal was not administering justice or carrying out a judicial function, and nor did it have the power or jurisdiction to punish upon a verdict of guilty, nor determine the guilt or innocence of persons charged with offences against the state itself.

760. J McGrath ‘The Colonisation of Real Crime in the Name of All Crime’ (n 335) argues that there are two broad approaches to crime classification, the positivist construction applied in Ireland as in Melling above where the dominant view is of a legal wrong, followed by criminal proceedings which may result in punishment; the second is the sociological perspective. In McGrath’s view the positivist approach has marginalised regulatory crime.

763. Connery and Hodnett (n 6),141 argue that the EU action, ‘using the construct ‘shall’ as opposed to ‘may’....trumps the constitutional bias against civil administrative sanctions by virtue of the effect of article 29.4.10’. Art 29.4.10 provides that no constitutional provision invalidates laws enacted or measures adopted which are necessitated by the obligations of membership of the EU or prevents laws enacted or measures adopted by EU institutions from having the force of law in the state. Also see Van Gend en Loos 26/62 [1963] ECR 1; Costa v Enel 6/64 [1964] ECR 585.
765. D McGrath, *Evidence* (Thomson Round Hall 2005). A bare presumption such as this dictates conclusions which must be reached in the absence of evidence to the contrary. See Part 2 Chapter 3 for a discussion about the standard of proof. And see The People (DPP) v D O’T [2003] 4IR 286 (CCA), 290-291 where Hardiman J pointed out that not alone was the presumption a right in itself, but it also grounded other aspects of the trial in due course of law, and particularly the burden of proof; he went on to state that when instructing a jury the trial judge should explain that the presumption was an essential feature of the trial and the prosecution’s burden of proof, a corollary of the presumption, should be separately explained. In The Queen v Oakes [1986] 1 SCR 103, 121 Dickson CJC stated: ‘The presumption of innocence is a hallowed principle lying at the heart of criminal law......[I]t protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct......This is essential in a society committed to fairness and social justice. The presumption.....confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise’. Also see Re Winship (1970) 397 US 358. D McGrath (n 765), 18 stated: The history of the presumption is traced in *Coffin v United States* (1895) 156 US 432 at 435 ff., where White J. demonstrated that it could be traced back to Roman law, and possibly, to the laws of ancient Greece’. In Ireland in McGowan v Carville [1960] IR 330 (HC), 345 Murnaghan J described the presumption as, ‘a cardinal principle of the administration of the criminal law in this country’; and it received constitutional status in O’Leary v AG [1993] 1 IR 102 (HC),107 when Costello J stated: ‘I have little difficulty in..... construing the Constitution as conferring on every accused in every criminal trial a constitutionally protected right to the presumption of innocence’; this statement was upheld by the Supreme Court on appeal O’Leary v AG [1995] 1 IR 254 (SC), 766. D McGrath (n 765), 18 stated that apart from the normative (faith in humanity) justification stated in Oakes, and, amelioration of the disparity in power and resources between accused and state: ‘...the principal justification for the presumption of innocence is that it allocates the risk of adjudicative error to the prosecution and, thus, reduces the risk of a wrongful conviction’. Horan (n 87), 1058 broached several erosions of procedural protection afforded by the criminal law where administrative regimes are utilised including: ‘the inherent imbalance between the power of the state and the individual’ which I submit as an argument is diminished when considering that financial regulation is an expert to expert relationship; and, ‘the person bringing the charge is also vested with the power to determine the case’, a matter, along with the same person also fixing the sanction guidelines, of which I too am critical and recommend corrective action in the form of an independent body to fix guidelines, and independent prosecutor for all matters, and an independent arbiter to determine all cases including approving settlement agreements and their conditionality.

768. Langbein (n 491), 333 stated: ‘...lawyerization of the trial was a response to the failure to develop a reliable and effective system of pretrial criminal investigation – in the language of economics, the failure to understand that criminal investigation should be a public good’. And Langbein added, 333-334, ‘The adversary system did not have to overcome a truth-promoting system of pretrial or trial procedure. Rather, the lawyer-dominated trial replicated......a truth deficit’. Interviewee L Judiciary Ireland 7 January 2013 however reflected that first a failure should be demonstrated before such reform: ‘[I]f after prosecutions have been attempted there is a demonstrated case for the reverse burden type provision, and I think you could probably justify it, but I think to go off and enact it without it being established that you need it, is something I would instinctively resist’.

770. See O’Leary v AG [1993] 1 IR 102 (HC) (here the burden reversal was found to be an evidential burden) where Costello J (later approved by the Supreme Court) observed obiter that reversing a legal burden may be unconstitutional whereas reversing an evidential burden would not; and see Redmond v Ireland [2009] 2 ILRM 419 (HC) where McMahon J stated: ‘If the prosecution has advanced sufficient evidence against the accused, a prima facie case may be established, which has then the effect of casting an evidential burden on the accused. This shift, however, does not discharge the burden of proof which at all times remains with the prosecution to prove its case beyond reasonable doubt’. Evidential burdens are also not incompatible with the ECHR article 6 (2) see Lingens and Leitgens v Austria 4 EHR 373. Also see R v Lambert [2002] 2 AC 545 (HL) where the balance was achieved by regarding a persuasive burden shift as an evidential burden and therefore not incompatible with the ECHR. And see The Queen v Oakes [1986] 1 SCR 103 where a drugs statute was held to impose a reverse legal burden and thus contravened the Canadian Charter of Rights and Freedoms.
771. Horan (n 87), 324 explained: ‘Rebuttable presumptions of law cause proof of one fact to give rise to a presumption of another fact, which may be rebutted. The rebuttal may be by way of a legal or evidential burden, depending on the statute in question’. See Competition Act 2002 sec 12 (2) as an example where documents reciting individuals as production source are presumed so created unless the contrary is shown. D McGrath (n 765), 59-60 explained that permissive presumptions are non-binding, entitling rather than compelling the tribunal of fact, and that many are really formalised examples of circumstantial evidence.

772. Horan (n 87), 325 stated: ‘Presumptions of fact do not shift the legal or evidential burden’. D McGrath (n 765), 16 explained that most presumptions are statutory in origin and that mandatory presumptions, both legal and evidential, are of particular importance. D McGrath (n 765), 57 indicated an additional protection for an accused when he stated: ‘[W]here the party against whom the presumption operates succeeds in [rebuttal] this has the effect of cancelling it out such that it is as if the presumption had never applied at all’.

773. See Salabiaku v France (1988) 13 EHRR 379 and Pham Hoang v France (1991) 16 EHRR 53. Also see Janosevic v Sweden (2004) 38 EHRR 22. Also see R v DPP ex p Kebilene [2000] 2 AC 326 (HL) where the matter was fully reviewed in the UK, and where in relation to the reasonable limits requirement of the ECtHR, Lord Hope suggested consideration of three questions: 1) What do the prosecutors have to prove in order to shift the onus? 2) Does the burden relate to something difficult to prove by defence or is it within her knowledge or ready access? 3) What is the nature of the societal threat to be combated? In Sheldrake v DPP [2005] 1AC 264 (HL) the House of Lords in reviewing the Convention authorities concluded that there must be an examination of the relevant case specific facts and circumstances, and that the reasonable limits should not be arbitrary. Also see R v Hunt [1987] AC 352 (HL) where the initial three issues to be considered by the court contemplating shift were raised including legislative objective, prosecution and defence proof issues, and the seriousness of the offence.

774. See O’Leary v AG [1993] 1 IR 102 (HC). D McGrath (n 765), has argued: ‘...there are three exceptions where the prosecution are relieved of the obligation to prove every fact necessary to establish the guilt of he accused and/or where a legal burden is placed on the accused: (a) statutory exceptions; (b) insanity; and (c) the peculiar knowledge principle’. D McGrath (n 765), 25-27 submitted that the law in Ireland had been left in an unsatisfactory state, which could be unfavourably compared with the more sophisticated Canadian jurisprudence, and he detailed four principles to be factored into future consideration including construing all burden shifts as evidentiary.

775. Horan (n 87), 322 explained that the legal burden, ‘places an onus on a party to persuade the trier of fact of the existence or non-existence of a particular fact in issue to the requisite standard of proof’ before adding that it normally arises in practice, ‘after the evidence has been adduced and the question is whether the trier of fact is [so] persuaded’. D McGrath (n 765) explained that it has alternatively been described as the probative burden (DPP v Morgan [1976] AC 182 (HL)), the persuasive burden (Hardy v Ireland [1994] 2IR 50 (HC & SC)) and the risk of non-persuasion (Hutch v Dublin Corporation [1993] 3 IR 551 (SC)). Contrastingly D McGrath (n 765), 50 explained that at civil law, ‘The parties themselves may agree on he incidence of the legal burden, for example where there is a written contract between them, Where they fail to so agree, the matter is one of construction of the contract’. One interesting issue therefore, not pursued in this dissertation, surrounds the legality of Central Bank licence conditionality, or settlement agreement conditionality, shifting the legal burden or the evidential burden. D McGrath (n 765), 51 explained: ‘The constitutional constraints applicable in criminal proceedings do not apply in civil proceedings and the courts have, therefore, greater freedom to decide on the allocation of the legal burden in respect of particular issues by reference to considerations of fairness and policy’. See Gilligan v Criminal Assets Bureau (no 2) [1998] 3 IR 185 (HC).

781. R v Davies [2003] ICR 586 (CAC), 595 where Tuckey LJ stated: ‘This regulatory regime imposes a continuing duty to ensure a state of affairs, a safety standard. Where the enforcing authority can show that this has not been achieved it is not unjustifiable or unfair to ask the duty holder who has either created or is in control of the risk to show that it was not reasonably practicable for him to have done more than he did to prevent or avoid it’; and see R v Chargot Ltd (trading as Contract Services) [2009] 1 WLR 1 (HL).

782. D McGrath (n 765), 28 described the peculiar knowledge principle as long established citing its origin to R v Turner [1816] 5 M&S 206. This dissertation has progressed as to the issue of shifting the legal burden in looking at criminal cases, regulatory cases where the criminal burden and standard would apply,
or to quasi-criminal cases where criminal law standards have been assumed most relevant. However, on the civil side (administrative sanction regimes incorporate large elements of civil practice and procedure) burden reversal was considered in Hanrahan v Merck, Sharpe & Dohme [1988] ILRM 629 (SC). Here the justification for the shift in tort cases was stated by Henchy J, 634-635 as: ‘...it would be palpably unfair to require a plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendant’s capacity of proof’; however, mere difficulty of proof was eschewed as sufficient and the interests of justice was stated the appropriate standard for shift... Henchy J, 635 stating: ‘The onus of disproof rests on the defendant only when the act or default complained of is such that it would be fundamentally unjust to require the plaintiff to prove a positive averment when the particular circumstances show that unfairness and justice call for disproof by the defendant’. In the UK, in McGhee v National Coal Board [1972] 3 AER 1008 (HL), 1012 Lord Wilberforce, in an alleged dermatitis case, held: ‘Where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause’. Although this decision was adversely critiqued in the later case of Wilsher v Essex Area Health Authority [1988] AC 1074 (HL), the concept of risk creation, as is the case within financial markets, casting at least an evidential burden shift upon specialist knowledge expert RFSPs, does not seem unreasonable, although perhaps the application of the more stringent criminal law rules of shift should apply to the administrative regime even if regarded as civil law procedure compliant.

783. Minister for Industry and Commerce v Steele [1952] IR 304 (SC), where the pork content of sausages determined the price and where the complainant could not prove same the court held that the defendant could so prove, and shifted the onus, since it was peculiarly within his knowledge; see Emergency Powers (Pork Sausages and Sausage Meat) (Maximum Prices) Order 1943. Furthermore, in DPP v Best [2000] 2 ILRM 1 (SC) it was held that the onus of proof shifted in the case of a parent educating a child at home since the relevant matters were within the special knowledge of the parents; see School Attendance Act 1926. Also see R v Lambert [2002] 2 AC 545.

784. The People (Attorney General) v Shribman and Samuels [1946] IR 431 (CCA) where it was held that the onus of proving that the accused had not got a licence, was not upon the prosecution; see Emergency Powers (Control of Export) Order 1940. Maguire P stated: ‘It is well settled that when an offence consists of doing something which persons are not permitted to do unless duly qualified and under special circumstances, the onus of disproving the qualification does not rest on the prosecution’. Also see R v Edwards [1975] QB 27 (CCA), 39-40 where Lawton LJ expressed that to ensure justice is done that the common law exception to shifting the burden, ‘was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities’. It is clear that RFSPs would be so covered. Further, while in R v Hunt [1987] AC 352 (HL) this statement was approved, Lord Griffiths made it clear that it was a useful general guide but was not comprehensive as to the principles set out. Horan (n 87), 333 remarked: ‘These types of cases are particularly relevant to corporations, as they are governed by the many and varied regulatory bodies that exist and the various statutes which may require corporations to have licences...’.

789. Horan (n 87), 332 explained that this burden is often called by the bar the ‘duty of passing the judge’ or in other words sufficiently raising a prima facie case; she stated: ‘the evidential burden places an onus on a party to raise sufficient evidence for an issue to be fit for consideration by the tribunal of fact’.

790. See R v Schwartz [1988] 2 SCR 443; And see The People (DPP) v Davis [2001] 1 IR 146 (CCA), 156 where Hardiman J stated: ‘the burden on the applicant is not a heavy one...The burden which rests with the accused is to produce or indicate evidence supporting the presence of various elements of the defence. This can be produced either through direct evidence or by inference’. And see McAuley and McCutcheon (n 274); D McGrath (n 765).

791. See Conway Daly and Schweppe (n 448). This trend started with the Criminal Justice Act 1984. See Rock v Ireland [1997] 3 IR 484 (SC) where the Supreme Court upheld the 1984 act provisions and did so by reiterating that the pre-trial right to silence may be restricted. Also see The People (DPP) v Bowes [2004] 4 IR 223 (CCA). Furthermore, the ECtHR has upheld inference-drawing provisions interfering with the right to silence; see Murray v United Kingdom (1996) 22 EHRR 29 where the enabling criteria include case specific circumstances, inference situational circumstances, weight to be attached, and the degree of compulsion. A newer statutory technique is to provide that inferences alone may not be relied upon to
convict in the absence of other evidence see sec 72A Criminal Justice Act 2006 as inserted by sec 9 Criminal Justice (Amendment) Act 2009. The inferences from silence can at present only be drawn where statutorily provided; see The People (DPP) v Finnerty [1999] 4 IR 364 (SC) followed in The People (DPP) v McCowan [2003] 4 IR 349.

795. See Heaney v Ireland [1996] 1 IR 580 (SC); R v Director of Serious Fraud Office, ex p Smith [1993] AC 1 (HL); R v Herbert [1990] 2 SCR 151. The People (DPP) v Kenny [1990] 2 IR 110 (SC), a case concerning the validity of a search warrant, introduced a discretionary and conditional exclusion rule, described as an absolute protection rule of exclusion, when it was held that evidence obtained as a result of a deliberate and conscious violation of constitutional rights of a citizen, saving extraordinary excusing circumstances or unintentional or accidental constitutional breach, must be excluded from the evidence pool.

796. See Heaney v Ireland [1996] 1 IR 580 (SC). Also see Gilligan v Criminal Assets Bureau (no 2) [1998] 3 IR 185 (HC) affirming inter alia that the privilege against self-incrimination was not an absolute right. And see The People (DPP) v Finnerty [1999] 4 IR 364(SC) where it was held that allowing inferences to be drawn from the silence of the accused must be expressly legislated for and proportionate to the objects to be achieved by the legislation. In this case Keane J went further and set out governing principles concerning adducing evidence where an accused had exercised the right to silence.

799. Conway Daly and Schweppe (n 448), 59 state: ‘The right to silence, in particular, has been so curtailed by legislative enactments in recent times that it can no longer truly be claimed that a suspect is free to rely upon it within the Irish pre-trial process’.

800. In Dellway Investments & ors v NAMA & ors [2011] IESC 14 the Supreme Court overturned the High Court and impugned NAMA’s attempt to take in the loan portfolio of Sean McKillen on procedural grounds; but upheld the three-judge divisional High Court view that the NAMA legislation was a proportionate response to a very grave financial situation, where state interference with property rights of the individual citizen was deemed permissible where required by the exigencies of the common good. Murray CJ (12th April 2011) delivering the judgement of the Supreme Court highlighted that NAMA was established as a lawful policy choice by the Irish Oireachtas (Legislature). In DPP v Paul Murray [2012] IECCA 60 the Court of Criminal Appeal in a significant social welfare fraud prosecution stipulated the need for social solidarity as a sentence principle where crimes against the public purse in gross recessionary times were concerned. Furthermore, in well publicised civil proceedings during 2012, both Sean Quinn snr and Sean Quinn jnr were imprisoned for contempt of court by the High Court arising from attempts to conceal assets the subject of court orders on foot of substantial debts.

801. National Irish Bank, Re (No.1) [1999] 1 ILRM 321 (SC); Saunders v UK (1997) 23 EHRR 313 where the successful admissibility complaint related to facts, impressions or opinions held in Saunder’s brain, and where the admissibility at trial was held to offend article 6(1) protection to a fair trial; the ECHR, paragraph 69 stated that the right not to self-incriminate however, ‘does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant’. NH Andrews, ‘Civil liberties and the pin-striped accused: The privilege against self-incrimination and human rights’ (1997) 56 Cambridge Law Journal 243,245 stated concerning the treatment to be afforded the financial expert: [The Court] preferred to promote the ideal of equality in the face of prosecution. It thought that company directors, their will sharpened by years of sophisticated dealing, and aided by the best lawyers and accountants that money can buy, should be protected by the present privilege as stoutly as the most feckless burglar’.

804. In Ireland cautions are administered under the nine Judges’ Rules, 1918 version, under which voluntary questioning must be preceded by a caution, stating inter alia that whatever is said may be used in evidence against the suspect. Only voluntary statements are admissible in evidence. Statements may still be voluntary even if the Rules have not been followed to the letter. Treatment of suspects in custody is governed by the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987 SI 119 of 1987, as amended by the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) (Amendment) Regulations 2006 SI 641 of 2006. And see AG v McCabe 1927] IR 129 (CCA); People (AG) v Cummins {1972} IR 312 (SC); McCarrck v Leavy {1964} IR 225 (SC). Also see Charleton et al (n 281); Conway Daly and Schweppe (n 448); Horan (n 87); and, Walsh
**Crime committed by commercial organisations:** Deferred prosecution agreements (CP9/2012 Cm8364 17 May 2012). See for instance, Interviewee K Regulator Australia 24 May 2012. This interviewee indicated that usually former federal police are employed as investigators; however, since they usually come from a ‘real’ crime background they are interviewed to ensure they sufficiently understand the different clientele they will be dealing with. The dilemma is either choosing people with technical expertise and training them in investigative techniques (this route had in his experience been found not as effective since these investigators if flustered become too technical and self-righteous and threaten to throw the book at the statistician) or whistleblowers; little incentive for corporate wrongdoers to self-report; the narrow range of tools available to law enforcement agencies; the difficulty in proving criminal liability on the part of the regulated entity being interviewed, and even tell them they (regulated entity) cannot do the job to the standard (regulator) can achieve!); and on the other hand, experienced police officers who have a technical interest in the subject who can be somewhat or sufficiently technically trained or can take a technical expert with them to the interview which is the preferred option. Also see Kagan Regulatory Justice (n 501); Barnard (n 527).

807. Ashworth and Zedner (n 407) detailed these as: Not cost-effective; Not preventive; Not necessary; Not appropriate; and, Not effective. Levi ‘Serious Fraud in Britain’ (n 213), 184-185 highlighted that key trial issues centre around the mens rea of the defendant and credibility and intentions of prosecution witnesses, including professionals, who may have a stake in the outcome. Levi highlighted the need for sufficient proofs around who was party to which agreements? Was there a deception? Was the defendant on a frolic of his own? Did the defendant appreciate the risk that ordinary citizens may regard his actions as dishonest?

808. Ministry of Justice Consultation Paper, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (CP9/2012 Cm8364 17 May 2012). These obstacles include: ‘forbiddingly’ long, expensive and complicated investigations and trials (particularly where offences occur across multiple jurisdictions); the already broached, difficulties around identifying wrongdoing in hidden, specialist or technical fields which often depends on corporate cooperation or whistleblowers; little incentive for corporate wrongdoers to self-report; the narrow range of tools available to law enforcement agencies; the difficulty in proving criminal liability on the part of the modern corporate organisation where it is necessary to establish that the ‘directing mind and will’ was at fault.

809. S Murphy, ‘The Trial of Complex Fraud Cases’ (12TH Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 28 May 2011). The Irish factors include the increased use of technology; the implementation of ten year old already statutorily-existent legislation allowing judges to order the provision of documentary evidence to juries; the adoption of a protocol, including immunity, based around encouraging informants, including whistleblowers, to give evidence against fellow conspirators; the earlier engagement of legal counsel in the investigative process; the greater use of agreed pre-trial admissions; the development of court rules to enhance pre-trial case management; and, from a sanctions viewpoint the wider invocation of the confiscation powers jurisdiction held by the Irish DPP especially for cases involving fraud or dishonesty. Also see Horan (n 87); Levi ‘Serious Fraud in Britain’ (n 213) almost twenty years ago highlighted globalisation of financial services, trial difficulties surrounding reconstruction of complex corporate dealings, moral ambiguity in sentencing elite business actors, and regulatory resource and skills constraints, among other factors, as adversely hampering fraud prosecution.

814. Interviewee Z Business Leader England 29 November 2012 advised: ‘[A]n example I think is in the United States that the regulatory power indeed the criminal law power more generally in any corporate or individual crime becomes extreme because you are given the option at the end of the day of reaching an accommodation which often may be a very onerous one or alternatively having the book thrown at you’. Goldman Sachs paid a US $550 million monetary penalty to the SEC in 2010 in connection with misleading investors in relation to sub-prime products called Abacus, and yet in October 2013 were publicly stating that they did nothing wrong. Despite this assertion it was reported that due to clients concerns expressed to them that they had (i) changed internal rules for dealing with clients; (ii) become more open about transaction earnings and its adopted roles; (iii) commenced reprogramming firm culture; (iv) changed the pay and promotion culture toward employee team work rather than revenue generation. See The Economist ‘Goldman Sachs Reform school for bankers’ (5 October 2013), 61-62. Also see A Hill, ‘Bankers back in the classroom’ Financial Times (London, 17 October 2013) where it was revealed that the Goldman Sachs and Barclays Bank culture change programmes are envisaged as a five to ten year journey, and include
resources such as documents, presentations, movies and transcripts including the report of the former’s Business Standards Committee and the latter’s Transform (post-Libor) strategic plan. The real issue is posed as whether bankers (presently 13,000 senior staff at Goldman, and 140,000 staff at Barclays), who will undoubtedly be able to show they have undergone the training/re-training, have absorbed enough of the lessons.

815. Levi ‘Serious Fraud in Britain’ (n 213), 189 who reported: ‘Some white-collar prosecutions raise the hackles of those in the City who complain about the unfairness of “trial by ordeal” as a method of social crime prevention in commerce’.

816. See Conway Daly and Schweppes (n 448); Hogan and Whyte (n 238); LRC Report ‘Mandatory Sentences’ (n 469); Walsh Criminal Procedure (n 281). Fair trial procedures are a significant, well- entrenched, and superior fundamental right which Irish courts diligently uphold. In D v DPP [1994] 2 IR 465 (SC), 473-474 Denham J made it expressly clear that: ‘The applicant’s right to a fair trial is one of the most fundamental constitutional rights accorded to persons. On a hierarchy of constitutional rights it is a superior right’. In re Haughey [1971] IR 217 (SC), 264, O’Dálaigh CJ in his powerful dictum often cited before Irish courts, had earlier stated: ‘Article 40.3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness and it is the duty of the Court to underline that the words of Article 40.3 are not political shibboleths but provide a positive protection for the citizen’.

822. Engel v Netherlands (1979-90) EHRR 647; Ozturk v Germany Application No. 8544/79, Judgement of 21st February, 1984; Janosevic v Sweden (2004) 38 EHRR 22; Jussila v Finland (2007) 45 EHR 39. Effectively, in considering whether a particular matter ought to be classed as criminal, the ECHR adopts three criteria, namely the domestic classification of the proceedings at issue; the nature of the offence in question; and the nature and severity of the penalty that may be imposed. According to D McGrath (n 765), the ECHR in Ozturk particularly, in recognising the category of regulatory crime exceeds the Irish jurisprudence, although the ECHR in his view used purposive and procedural techniques similar to those used in Ireland. Also see Spector Photo Group NV v Commissie voor het Bank-, Financie- en Assurantiewezen C-45/08 [2010] 2 CMLR 30 (CJEU) where the severity of administrative sanctions as well as the seriousness of the offence may qualify them as criminal sanctions and thus garner article 6 ECHR protection.

823. Article 6(1) guarantees the right to a fair hearing in the determination of a person’s ‘civil rights and obligations or of any criminal charge’; where a person is charged with a criminal offence, she is also afforded extra rights under Arts 6(2) and 6(3) (inter alia, the presumption of innocence, the right to legal assistance, the right of confrontation and cross-examination); furthermore, Art 7 provides that there will be no punishment without law, which includes, inter alia, a prohibition against retrospective criminalisation, and there is also a prohibition against double jeopardy under Art 4 of Protocol 7. The wide ambit of article 6 has generated the comment that it is ‘an omnibus provision’ on the administration of justice; see C Ovey and RCA White, Jacobs and White: The European Convention on Human Rights (4th ed, Oxford University Press 2006).

825. In Bendenoun v. France (1994) 18 EHRR 54 a French case involving stated administrative proceedings, the case head-note states: ‘In assessing the nature of the administrative proceedings in question, the Court weighed the characteristics which suggested that the proceedings were not criminal against those suggesting that they were. Four factors in particular suggested that the proceedings were criminal in nature notwithstanding their contrary characterisation under national law:(a) the rules applied to all citizens qua taxpayers, and not a given group,(b) the penalties were intended not as compensation for damages to the Revenue but as punishment to deter re-offending,(c) the purpose of the general rule under which they were imposed was both deterrence and punishment, and (d) they were substantial penalties and failure to pay exposed the offender to imprisonment’. Point (b) seems to be somewhat at conflict with the Irish case of McLoughlin v Tuite [1989] IR 82 (SC) mentioned above. In Ozturk the ECHR suggested that stigmatisation of the defendant was not the defining characteristic. In Case C-489/10 Lukasz Marcin Bonda 5 July 2012 the CJEU reviewed all relevant ECHR precedents to date concerning the concept of criminal proceedings and adopted the three criteria identified namely: the legal classification of the offence under national law; the nature of the offence; and, the nature and degree of severity of the penalty which the accused is liable to incur.
826. E Brown, ‘Article 6 and Civil Cases’ in U Kilkelly (gen ed), ECHR and Irish Law 2nd ed (Jordans 2009) who has pointed out that now the ECHR applies article 6 in a range of disputes in which the state and its control agencies are involved, including employment matters, disciplinary cases involving professional associations, and administrative bodies where some form of judicial appeal or review is required just as in financial services. For this reason the Irish financial regulation regime has an appeal to IFSAT and also recourse to the High Court to ‘enforce’ settlement breach; during the Dail debate upon the Central Bank Act 1942 pt IIIC as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004 (CBA 1942 pt IIIC) it was made clear that the pattern adopted by the Medical Council (a professional disciplinary body), which involved recourse to the High Court, was adopted similarly to the statutorily created Financial Regulator. The courts were specifically excluded in the first instance and are only mobilised in default, which I argue is a sub-optimum procedure requiring reform redress.

829. For Ireland see Gilligan v Criminal Assets Bureau (no 2) [1998] 3 IR 185 (HC) where it was held under Irish domestic law that the procedures under the Proceeds of Crime Act 1996 were not criminal in nature. Furthermore, McGuinness J at 202 stated: ‘While there can be no question but that this Court is entitled to have regard to decisions of the European Court of Human Rights in construing provisions of the Constitution there can be no question of any decision of the European Court of Human Rights furnishing in and of itself a basis for declaring legislation unconstitutional. I am bound by the repeated decisions of the Supreme Court that the European Convention on Human Rights is not a part of the domestic law of this jurisdiction’. From Murphy v GM, PB, PC Ltd [1999] IEHC 5 and Murphy v GM (2001) 4 IR 113 (SC) it is clear that there is no requirement of guilt or moral culpability before forfeiture can be ordered so therefore, issues of criminal wrongdoing are not at issue. Also see King (n 448).

831. See M v Italy App. No. 12386/86, 15 April 1991, 97. This case concerned a convicted Mafiosa yet the proceedings concerned were instituted for preventive measures and confiscation followed. The ECHR held that in Italy preventive measures were not criminal, that no offence was involved, and that confiscation is not a punishment. See King (n 448) for a detailed critique of the reasoning in this case. Also see Air Canada v UK [1995] 20 EHRR 150 where the article 6(1) protections were not held applicable in a case where the airline was subject to £50,000 penalty upon return of a seized plane after a drugs consignment was found on board.

833. The benefits of a flexible enforcement pathway and transparent launching factors around binary interplay include: (i) RFSPs, are enabled to decide for themselves the weight of the evidence against them and this may assist whistle-blowing, self-reporting and/or disclosure, cooperation level, remediation efforts, and negotiated resolution where sanction discount may follow; (ii) regulators and prosecutors similarly can both measure the evidence on a high to low misconduct scale, and the appropriate case differentiated starting point or presumptive preference; (iii) transparency aids legitimacy; (iv) uphold the on-going RFSP-regulator relational exchange, and the values complex; (v) renders both regulator and prosecutor more transparently accountable; (vi) assists judicial scrutiny of regulatory action.

843. AD Lowell and KC Arnold, ‘Corporate Crime after 2000: A new law enforcement challenge or déjà vu?’ (2003) 40 The American Criminal Law Review 21. Also see UK Bribery Act 2010 sec 7(2) which offers a significant incentive for relevant organizations to adopt an anti-bribery compliance and ethics programme, by providing that such a programme may afford a defence if it amounts to adequate procedures designed to prevent persons associated with the organization from undertaking bribery. The Secretary of State is also directed to publish guidelines about such procedures for the benefit of commercial organisations. See PE McGreal, ‘Corporate Compliance Survey’ (2011) 67 The Business Lawyer 227 for a discussion around corporate compliance and ethics programmes.

856. In 2010 the SEC introduced three new regulatory tools, all of which may be the subject of conditionality: no prosecution agreements; deferred prosecution agreements (recently recommended for use in both Ireland for financial regulation; and the UK for bribery and corruption cases see MoJ Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (n 754) which are a form of probation; cooperation agreements. In the main they are based around US case law precedent. See for instance, SEC v Diamondback Capital Management LLC (January 2012); SEC v Tenaris S.A. (17th May 2011); SEC v Carter’s Inc (November 2010). For more complete information see: SEC, Non-Prosecution Agreement Carter’s Inc (15 November 2010) <http://www.sec.gov/news/press/2010/2010-252.htm> accessed 11 July 2012; SEC, SEC Charges Former Carter’s Executive With Fraud and Insider Trading (Press Release 2010-252, 20 December 2010)
Global Also Charged
Managers and Analysts in Insider Trading Scheme, Hedge Fund Firms Diamondback Capital and Level Global Also Charged (News Digest 2012-11, 18 January 2012)


SEC, Enforcement Co-operation Initiative (Release 2010-6,13 January 2010)


857. SEC, Enforcement Co-operation Initiative (Release 2010-6,13 January 2010)


859. Conditionality must reflect that: parties consent to the making of the order; they obtained legal advice before so consenting; the agreement is clear and unambiguous and capable of being complied with; that the parties are aware that failure to comply with any order constitutes contempt of court and thus extra enforcement action; and, the competent authority has complied with detailed pre-approval publication requirements. Under section 14B (3) inter alia it is necessary to publish the agreement on a website at least 14 days before such approval application, and, to publish in two daily newspapers circulating in Ireland notice of the approval application.

871. EF Ryan and PP Magee, The Irish Criminal Process (Mercier Press 1983). Also see G Coffey, ‘Raising the Pleas in Bar against a Retrial for the Same Criminal Offence’ (2005) 5 JSIJ 124; G Coffey, “Evaluating the Common Law Principle against Retrials” (2007) 29 DULJ 26; G Coffey, ‘The Constitutional Status of the Double Jeopardy Principle’ (2008) 30 DULJ 138; Horan (n 87); Langbein (n 491); T O’Malley Sentencing Law and Practice 2nd ed (n 727); Walsh Criminal Procedure (n 281). Walsh Criminal Procedure (n 281), 784 explained: ‘The reasoning behind this principle is that an individual should not be put at risk of being punished twice for the same infraction. Thus, it is commonly known as the rule against double jeopardy’. Also see Attorney General v Mallen [1957] IR 344 (SC), a road traffic matter, where Lavery J stated: ‘It is unnecessary to decide whether a plea in bar or, specifically a plea of autrefois acquit or convict...is appropriate in summary proceedings’. The seriousness with which the higher courts in Ireland regard attempts to invoke the bar may be seen from The People (DPP) v Quilligan (no 2) [1989] IR 46 (SC), where the Central Criminal Court had directed the jury to make a not guilty finding in a murder trial, the Supreme Court refused to allow the state to apply to it to order a re-trial, taking the view that to order such a re-trial would amount to ‘effecting a subversion of the legislative will’.

872. Interpretation Act 1937 sec 14 originally, extending the common law position to statutory offences; the section provided: ‘Where any act, whether of commission or omission, constitutes an offence under two or more statutes or under a statute and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those statutes or at common law, but shall not be liable to be punished twice for the same offence’; see R v Miles [1890] 24 QBD 423 (QBD) and R v Thomas [1950] 1 KB 26 (CCA). Also see The People v Dermody [1956] IR 307 (CCA); Walsh Criminal Procedure (n 281). T O’Malley Sentencing Law and Practice 2nd ed (n 727), 117

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stated of sec 14 that, ‘This did not prohibit overlapping offences....but it prevented a convicted person from being punished for both if they arose from the same act or omission’.

873. R v Connelly [1964] AC 1254 (HL) at p 1306; approved by the Supreme Court in O’Leary v. Cunningham [1980] I.R. 367 at p. 379 per Kenny J. Lord Morris reviewed the authorities to that point and re-formulated them into nine propositions. Walsh Criminal Procedure (n 281), 785 highlighted that the main problem in practice, ‘is in determining whether the offence charged is the same as an offence of which the accused has already been convicted or acquitted’; and he added (787): ‘Even where the offences are very similar, such as burglary and larceny arising out of the same incident, an acquittal of one will not necessarily constitute a bar to a prosecution for the other’. T O’Malley Sentencing Law and Practice 2nd ed (n 727), 116 explained that, ‘The prohibition of double punishment also requires that, when sentencing following re-trial, credit should be given for time already served in respect of a previous conviction’; see State (Tynan) v DJ Keane and Anor [1968] IR 348 (SC). In EU criminal law the principle is known as non bis in idem and means prohibition ‘if the accused has already been tried for the same facts by another state’ see Klip (n 283), 231. Also see the Convention implementing the Schengen Agreement articles 54-58, and relevant case law which includes Case C-187//01 and Case C-385/01 Criminal proceedings against Huseyin Gozutok and Klaus Brugge [2003] ECR 1-1345, where it was held that a prior German out of court criminal settlement attracted the principle to a subsequent Belgian prosecution on the same facts. Article 50 of the Charter of Fundamental rights of the European Union upholds the rule of law, and reverts to the relevant case law which includes Case C-187/01 and Case C-385/01 Criminal proceedings against Huseyin Gozutok and Klaus Brugge [2003] ECR 1-1345, where it was held that a prior German out of court criminal settlement attracted the principle to a subsequent Belgian prosecution on the same facts. Article 50 of the Charter of Fundamental rights of the European Union upholds the rule of law, and reverts to the offence criterion, when it provides that: ‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law’; while in Case C-489//10 Lukasz Marcin Bonda 5 July 2012 the CJEU reviewed all relevant precedents to date, and in this case of a Polish farmer who had made a false declaration resulting in exclusion from agricultural aid, sought to prevent a subsequent criminal penalty, it was held that the initial exclusion measures were not criminal in nature so the prohibition did not apply.

874. See National Irish Bank, Re (No.2) [1999] IEHC 134. By way of contrast, see the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 sec 15 which provides that extra-territorial conviction or acquittal will be a bar against prosecution in Ireland where the conduct, or substantially the same conduct is concerned. Horan (n 87), cited Registrar of Companies v Judge Anderson [2004] IESC 10, and argued that the case, ‘suggests that the principle against double jeopardy applies to corporate defendants as well as to individuals, as the Supreme Court did not state otherwise even though a corporation was involved’. In that case the Supreme Court stated that the payment of extra fees for late filing of the company’s annual return was an administrative penalty, pursued to a legitimate administrative objective, and thus no criminal process was involved which could act as a bar to a subsequent prosecution for failure to file the returns.

875. See National Irish Bank, Re (No.2) [1999] IEHC 134, Kelly J; Also see R v Hogan [1960] 2 QB 513 (CCA) where a prior guilty finding, followed by penalty imposition, in disciplinary proceedings did not bar subsequent criminal proceedings. Also see R V Green [1993] CLR 46 (CAC) where an assault following a restraining order, which resulted in penalisation in separate proceedings for contempt of court (the prior restraining order) and the subsequent assault were upheld. T O’Malley Sentencing Law and Practice 2nd ed (n 727),116 also points out: ‘Concurrent wrongdoing by a corporate entity and the person who effectively controls it ...involves two separate offenders’ and thus may safely involve two separate punishments. Concerning white-collar crime across borders and territories, and double jeopardy, a matter of some significance to the EU, G Coffey, ‘Combating White Collar Crime in the E.U.’ (UCC North South Criminology/CCJHR Postgraduate Conference: Rights, Responsibilities, and Wrongdoings: Continuity and Change, University College Cork, 21 June 2013) stated: ‘The Challenge is to make use of an increasingly complex and growing web of legal instruments, balancing operational efficiency and fundamental rights in various transnational, administrative or criminal proceedings’.

880. See Coffey ‘The Constitutional Status of the Double Jeopardy Principle’ (n 871). Horan (n 87), 312-313 argued what she described as the article 38 constitutional guarantee to a fair trial, applied to corporations as also individuals, and that the rule against double jeopardy flowed from it; while for Coffey the rule is best grounded in article 38.1 and is, ‘an aspect of the canon of fundamental fairness of legal procedures, inherent in our Constitution, which is expressed in the maxim nemo debet bis vexari pro eadem causa’. There is conflicting judicial opinion at Supreme Court level as to constitutional status, but the greater weight lies with the bar being so regarded in my submission. In The People (DPP) v Quilligan (no 2) [1989] IR 46 (SC), 57 Henchy J stated the plea bar was, ‘an aspect of the canon of fundamental fairness
of legal procedures, inherent in our Constitution’. However, in State (Tynan) v DJ Keane and Anor [1968] IR 348 (SC), where in a common assault matter, the Supreme Court refused prohibition where the first conviction was held void ab initio, Walsh J, (354) where the applicant for relief had relied upon general principle and the US Constitution as a persuasive precedent, stated: ‘The applicant's case was based upon the broad general principles of the common law – that a man shall not be twice vexed for one and the same cause, that a man ought not to be punished twice for the same offence, and that a man is not to be put twice in peril’, concluding, (355) ‘[i]n this country... the power vested in the Court of Criminal Appeal to order a retrial upon the quashing of a conviction is also a clear indication that this principle is not a fundamental principle of law’. Coffey begs in aid the persuasive, and similarly drafted US constitution to ground his claim that the rule is of constitutional stature in Ireland, and does this with reference to the phrase in article 38 requiring trial ‘in due course of law’. Of the historical and other weight of this phrase, see Conroy v Attorney General [1965] IR 411 (HC & SC), 415 where Kenny J provided the historical rationale for article 38 as, ‘an echo of the phrase in the great charter of Ireland granted in 1216.... [The] phrase “due process of law” was adopted by those who drafted the Fifth Amendment to the Constitution of the United States of America which prevents any person being deprived of life, liberty or property without due process of law. I think that section 1 of the Article gives a constitutional right to every person to be tried in accordance with the law and in accordance with due course of law’; and, in Goodman International v Hamilton (No 1) [1992] 2 IR 542 (SC), 609 where McCarthy J regarded Article 38.1 ‘an echo of the phrase “due process of law” in the Fifth Amendment of the US Constitution’; while, in Donnelly v Ireland [1998] 1 IR 321 (SC), 350 Hamilton CJ stated that the expression in article 38.1 ‘make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures shall be fair and that the person accused will be afforded the opportunity to defend himself’.

881. In Considine v Shannon Regional Fisheries Board, [1997] 2 IR 404 (SC), 421 Hamilton J stated: ‘... the common law rule that there should be no appeal from an acquittal of a criminal charge was subject to the right of the legislature to provide for such an appeal provided that such right was given in clear and unambiguous language and that a trial “in due course of law” did not necessarily involve the preclusion of a right of appeal in the event of an acquittal”.

882. See Coffey ‘The Constitutional Status of the Double Jeopardy Principle’ (n 871), 4. Showing clearly that the doctrine, even if a constitutional right, is not absolute, see The People (DPP) v O’Shea [1982] IR 384 (SC), where an appeal by the DPP against an acquittal by (subsequently upheld) direction of the trial judge, was upheld upon a stated literal interpretation of the Constitution. This decision was over-turned by statute; see Section 11 of the Criminal Procedure Act 1993 as amended by section 44 of the Court and Court Officers Act 1995, with the exception of an appeal on a point of law to the Supreme Court without prejudice to a verdict in favour of the accused under section 34 of the Criminal Procedure Act 1967.

883. See Heaney v Ireland [1996] 1 IR 580 (SC). In Whelan and Lynch v Minister for Justice, Equality and Law Reform [2007] IEHC 374 [2010] IESC 34 Irvine J in the High Court, as later approved by the Supreme Court on appeal, distinguished between two types of proportionality: (a) constitutional proportionality regarding legislation, and (b) proportionality in the context of sentencing. In the latter, proportionality requires that a sentence be proportionate to the gravity of the offence and the circumstances of the offender see T O’Malley Sentencing Law and Practice 2nd ed (n 727). In Gilligan v Criminal Assets Bureau (no 2) [1998] 3 IR 185 (HC) it was held inter alia that the appropriate three-part test to employ, in determining whether the curtailment of a person’s constitutional rights by way of statute was proportionate to the curtailment’s purpose, was whether (a) it was rationally connected to the objective and not arbitrary, unfair or irrational, (b) the right was curtailed as little as possible and (c) the curtailment was such that its effects on rights was proportional to the objective.

886. See Criminal Justice Act 2003 part 10 (UK). The UK catalyst for reform was the Macpherson Inquiry, The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny (Cm 4262, 1999); recommendation 38 stated: ‘That consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented’.

894. Autonomy does not only apply to market actors, as regulators enjoy it as delegated discretion, while the judiciary enjoy the constitutional separation of powers protection. But even for the latter two there is restriction. Regulators cannot exceed their delegation, and must act within their delegated authority in ways consistent with recognised values. The judiciary, in regulating RFSPs and the control agency, take a constitutional oath, and as constraint are bound to uphold the constitution and legal norms. Interviewee X
Regulator Ireland November 2012 stated of RFSPs who are accountable to their licence: ‘I think it is important that people know what is required of them and for a Regulator at least I think it’s of value to have set down in writing what are the standards that are expected of corporates and directors and other actors in that space and ideally that those obligations should be expressed in an assessable way…...and the more assessable whatever guidance or document that’s produced I think the more likely it is that it will be read and understood by the supposed recipients of that message’. At the business and regulator intersection issues inter alia around values such as fair procedure, judicial review, and accountability and transparency, must be reviewed in a reform context. Another matter of concern to business is the curbing of absolute regulatory power by judicial review. Furthermore, the capability of the regulator to set norms and guidelines, investigate alleged wrongdoing and also impose punishment in accordance with the norms it has itself pre-set is the main reason for both the establishment of a fully independent prosecutorial service, and the need for judicial review of all negotiated settlements. One further matter, concerns the thorny issue of spent convictions, enabling rehabilitated individuals and corporate entities to wipe the slate clean and start anew. Finally, the issue of the statute of limitations must be tackled so as to ensure business certainty. In the US securities industry for instance, the general code limitation period is five years for civil penalty suit, but the commencement date differs as between the specialist knowledge and expert regulator, the SEC, where time runs from the date the fraud is completed, and the individual, who is not regarded as being in a state of constant investigation, when time runs from the party suffering injury under the relevant ‘discovery rule’ see 28 USC §2462 which US code provision sets out the general five year limitation, and Gabelli et al v SEC case No. 11-1274 (US Supreme Court 27 Feb 2013).

895. See for instance, Weber The Theory of Social and Economic Organisation (n 66); Kagan Regulatory Justice (n 501); Packer (n 273), 287 argued: '[L]ack of full enforcement necessarily involves discretion in the choice of targets; this discretion is unlikely to be exercised in any but an arbitrary kind of way....[which].... is bound to contribute to the unfortunate sense of alienation on the part of those who see themselves as its victims’.

899. Packer (n 273), 156 argued in his third values proposition that, ‘there is the assumption that there are limits to the powers of government to investigate and apprehend persons suspected of committing crimes’. Packer (n 273), 157 in his fourth proposition argued: ‘There is a complex of assumptions embraced by terms such as “the adversary system”, “procedural due process”, “notice and an opportunity to be heard”, and “day in court”’.

904. For instance see CDPP Prosecution Office Policy, Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process (2008); and K Svatikova, Economic Criteria for Criminalization: Optimizing Enforcement in Case of Environmental Violations (Intersentia 2012). Packer (n 273), 290-291 argued: ‘The worst abuses of discretion in enforcement occur in connection with those offences that are just barely taken seriously….When the proscription is taken seriously but resources are inadequate to provide anything like full enforcement, the discrimination becomes less flagrant but remains objectionable’.

905. T O’Malley, ‘Sentencing and the Prosecutor’ (9th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 24 May 2008), Reference ft 10: Sir Hartley Shawcross, then Attorney-General of England and Wales, speaking in the House of Commons on January 29, 1951 (H.C. Debates, Vol. 483, Col. 681). See also Hetherington, Prosecution and the Public Interest (London, 1989). Packer (n 273), 286 argued: ‘It is of course impossible, for every criminal event to become known to the police or for the identity of the actor in every known criminal event to be ascertained, or for every known criminal to be apprehended. And it is only theoretically possible for every known criminal to be prosecuted and convicted for his crimes. Full enforcement in any such absolute sense as this is a chimera’. For a n example of financial regulatory practice ASIC, ASIC’s approach to enforcement (Information Sheet 151 - 2012). As to Ireland, Interviewee C Regulator Ireland 6 February 2013 stated: ‘Just because there’s been a transgression of a rule or requirement doesn’t mean there’s going to be an enforcement activity’. Interviewee X Regulator Ireland 12 November 2012 stated: ‘….it is simply not practical for Regulators to treat everything seriously. There has to be a degree of selectivity in what they deal with and what they invest their resources in’.

912. Packer (n 273), 296 argued when: ‘(1) The conduct is prominent in most people’s view of socially threatening behaviour, and is not condoned by any significant segment of society; (2) Subjecting...to the criminal sanction is not inconsistent with the goals of punishment; (3) Suppressing it will not inhibit
socially desirable conduct; (4) It may be dealt with through even handed and non-discriminatory enforcement; (5) Controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains; (6) There are no reasonable alternatives to the criminal sanction.’

914. For instance, DPP v Thomas Murphy (Slab) 5 June 2013 unreported (SC) unanimously overturned a High Court decision without hearing argument, which had denied locus standi to contest a discretionary prosecutorial decision to charge before the non-jury Special Criminal Court. Media reports indicated that during the forthcoming full appeal that Murphy will contend that the decision to try him before the non-jury court rather than before a jury in the ordinary courts breached his rights under the Constitution and European Convention on Human Rights (ECHR), including to fair procedures, his good name and equality before the law; and that the power conferred on the DPP under Section 46 of the Offences Against the State Act to certify trial in a special court involves an excessive conferral of absolute power with no screening, transparency or accountability. See M Carolan, ‘Supreme Court rules ’Slab’ Murphy may challenge non-jury trial’ IrishTimes.com (Dublin 5 June 2013).

917. See Interviewee L Judiciary Ireland 7 January 2013; Walsh Criminal Procedure (n 281); Prosecution of Offences Act 1974. Originally set out in 2001, in 2010 the DPP published a third revision of the Prosecution Guidelines which contain general principles to guide the initiation and conduct of criminal prosecutions in Ireland. These include a code of ethics for prosecutors, the factors relevant to choice of charge, and, a charter of the rights of victims and victim’s relatives. See DPP Prosecution Guidelines Third Revision (2010). J Hamilton, ‘Opening Address’ (11th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 24 April 2010) the former DPP argued that his office should retain exclusive control of the prosecution of indictable crime, but confirmed such prosecutions occurred in close conjunction with relevant regulators who were always consulted concerning plea acceptance. P Appleby, ‘Compliance and Enforcement – The ODCE Perspective’ in S Kilcommins and U Kilkelly (eds), Regulatory Crime in Ireland (First Law 2010),178-179 stated that there is nothing new about the DPP being given prosecutorial powers and outlined the extensive list (17 examples cited) of other regulators also so empowered including Harbour Authorities in 1926. Although increasingly regulatory agencies have been delegated powers to investigate and to enforce, advantages in returning the entire prosecutorial role to the DPP include: a better likelihood of consistency in discretionary decision-making: avoidance of legitimacy (fairness) issues where regulators investigate and also perhaps determine launching factors or even sentence guides; better assures the independence/autonomy (the key norm) of the regulatory system; maintains the traditional and well recognised independent investigator/prosecutor/arbiter roles. One way to do this for Ireland is to adopt a variation of the Australian ‘twin-tracks’ approach where regulator investigates and passes cases to the CDPP to prosecute.

922. See Farrell (n 920), 2. These five distinctions are: (i) Public prosecutors ‘universally’ prosecute all crimes where there is sufficient evidence to do so, and no good reason not to, subject to the common-law, so-called ‘Shawcross doctrine’, which rejects any notion of a formal obligation to prosecute every detected or reported offence. See ft 905 above. Regulators on the other hand are considerably more selective, being unable to prosecute all or even most of the offences falling under purview, often resulting from limited prosecutorial resources; (ii) Regulators may ignore, or at least not prosecute certain offences for reasons of expedience, convenience or resourcing. The DPP does not enjoy such a position; (iii) Regulators perform a host of other functions most notably for dissertation purposes investigating offences which are then the subject of prosecution. The DPP contrastingly has no investigative role or function; (iv) The DPP is limited to enforcing a set of pre-existing rules in relation to past behaviour. Regulators are more interested in influencing future conduct. Regulation is about changing the future behaviour of those regulated (see Llewellyn (n 427), 6; (v) Regulators need significant expertise in their particular sector or industry. The expertise of the DPP is principally legal and forensic of a more generic nature.

923. C Loftus, ‘Opening Remarks’ (13th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 19 May 2012). See DPP Prosecution Guidelines Third Revision (2010). Also see Appleby ‘Compliance and Enforcement’ (n 605), 190 stated of the ODCE of which he was the Director at the time of writing: [W]here we do prosecute cases summarily or are considering whether or not to do so, we adhere very closely to the same norms as are generally followed by the DPP’.

936. The fuller list is: (i) The interests of the victim; (ii) The need to tailor general principles to individual cases; (iii) Whether the evidence is sufficient to justify the institution or continuation of a prosecution; (iv) Such evidence of a criminal offence must be ‘admissible, substantial and reliable’; (v) there must be a
‘reasonable prospect of a conviction being secured’; (vi) There must be an evaluation of ‘how strong the case is likely to be when presented in Court’; (vii) Such evaluation must take account of the following five matters: witness credibility, competence and availability; the ‘likely impression’ of such witness upon the judge of fact; the admissibility of any alleged confession or other evidence; any lines of defence plainly open to, or indicated by the alleged offender; and, any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction; (viii) After sifting the evidence the prosecutor must decide in light of the provable facts and the whole of the surrounding circumstances, whether the public interest requires a prosecution to be pursued; Such public interest criterion includes evaluation of twenty specified case weighted matters including: the seriousness or triviality of the alleged offence; mitigating or aggravating circumstances; the alleged offender’s age, circumstances and background; the degree of culpability; alternatives to prosecution available; offence prevalence and the need for general or personal deterrence; actual or potential harm; trial length and costs; the extent of offender cooperation; compensation or reparation entitlements; available sentencing options; and, the need to give effect to regulatory or punitive imperatives.


938. The Principles of Federal Prosecution provide that prosecutors should recommend or commence federal prosecution if the putative defendant’s conduct constitutes a federal offense and the admissible evidence will probably be sufficient to obtain and sustain a conviction unless (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) an adequate non-criminal alternative to prosecution exists. In assessing the existence of a substantial federal interest, the prosecutor is advised to “weigh all relevant considerations,” including the nature and seriousness of the offense; the deterrent effect of prosecution; the person’s culpability in connection with the offense; the person’s history with respect to criminal activity; the person’s willingness to cooperate in the investigation of its agents. All of this offers incentives to design away the kind of opacity that encourages nondisclosure and organizational secrecy’.

939. Nine factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements: (i) the nature and seriousness of the offense, including the risk of harm to the public; (ii) the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management; (iii) the corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it; (iv) the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents; (v) the existence and effectiveness of the corporation’s pre-existing compliance program; (vi) the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or improve an existing one, replace responsible management, discipline or terminate wrongdoers, pay restitution, and cooperate with the relevant government agencies; (vii) collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution; (viii) the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and (ix) the adequacy of remedies such as civil or regulatory enforcement actions. See Principles of Federal Prosecution of Business Organizations, Chapter 9-27.000 US Attorney’s Manual.

941. In determining whether to open an investigation and, if so, whether an enforcement action is warranted, SEC staff considers a number of factors, including: the statutes or rules potentially violated; the egregiousness of the potential violation; the potential magnitude of the violation; whether the potentially harmed group is particularly vulnerable or at risk; whether the conduct is ongoing; whether the conduct can be investigated efficiently and within the statute of limitations period; and whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct. SEC staff
also may consider whether the case involves a possibly widespread industry practice that should be addressed, whether the case involves a recidivist, and whether the matter gives SEC an opportunity to be visible in a community that might not otherwise be familiar with SEC or the protections afforded by the securities laws. See the Enforcement Manual at http://www.sec.gov/divisions/enforce.shtml.

945. Commission ‘Feedback Statement’ (n 467), 4. The fuller list includes: seriousness and duration of the violation; financial strength and size of the offender; benefits deriving from the violation when those can be established; impact on the market/losses incurred by third parties; repeated breach; cooperation by the offender during the investigation; and, survival of the company as a result of the sanction.

949. ASIC ASIC’s approach to enforcement (n 905). It explained how regulatory decision-makers approach their enforcement role; why they respond to particular types of breaches in different ways; and, that enforcement action which is directed to deter misconduct is one of several regulatory tools available. Despite publishing over two hundred and thirty regulatory guides on a wide range of matters, this, an information sheet not a regulatory guide, was the first published document upon the interplay mobilisation. Also see LCEW Consultation Paper on Criminal Liability in Regulatory Contexts (n 570) which recommended, on a more limited basis, that a set of common principles should be established to help regulatory control agencies consider when and how to use the criminal law to tackle serious wrongdoing.

950. These are: 1) Strategic significance (e.g. what is the extent of the harm or loss?); 2) Benefits of pursuing misconduct (e.g. is enforcement cost-effective?); 3) Issues specific to the case including misconduct seriousness, time-scale and frequency, and the admissible evidence pool available; and, 4) Alternatives to formal investigation or enforcement action. In a nutshell, ASIC Launching factors gleanable from this material include: case specific flexibility; strategic significance including the extent of harm or loss; enforcement cost-effectiveness; case specific issues including breach type, misconduct seriousness, time-scale and frequency, and the admissible evidence available; available enforcement alternatives; ultimate achievement possibilities; broad action type selected whether punitive, protective, preservative, corrective, compensatory, or negotiated resolution; reference to the CDPP and the operation of CDPP guidelines; and, publicity requirements.

951. ASIC reserve substantial criminal remedies for the most serious misconduct—for example, misconduct that has a widespread negative impact on investors or creditors. They generally consider criminal action for offences involving serious conduct that is dishonest, intentional or highly reckless, even where there is a civil remedy available for the same breach. Nowhere however is the term ‘serious’ defined, the examples provided reveal copious discretionary wriggle room, and the fraud concept replete with references to guilty knowledge is centrally placed. As an alternative to criminal prosecution, ASIC pursue court-ordered civil penalties. In a civil penalty proceeding, a lesser standard of proof applies to the evidence. Pecuniary penalties are the most frequently applied but there is an extensive range of penalties available, including orders of disqualification and compensation. Although no guidelines are provided as to the exercise of such discretion in the individual case, ASIC always assert the right to make an enforcement outcome public, but may on a discretionary basis give advance notice of such publicity to an interested party.

952. In detail they are: (1) The nature of the misconduct whether mistake, negligence, recklessness or deliberately misleading of auditors; (2) Misconduct origin whether resulting from competitive or corporate pressure or corporate culture, and availability and/or use of corporate compliance control systems; (3) Organisational location of the misconduct whether high in command chain or lower, and whether a blind-eye turned or misconduct systemic; (4) Duration and timing of the misconduct; (5) Degree of harm to investors, other corporate constituencies and stock price; (6) How and by whom the misconduct detection occurred; (7) Timeliness of effective response to such detection; (8) Corporate remediation steps taken upon detection including publicity, recompensing those harmed, and co-operation with regulatory and law enforcement authorities; (9) Corporate processes involved including full command chain; (10) Holding a corporate enquiry or review fully and expeditiously, whether outside agency involved and if so if reported, and whether there was a corporate commitment to a thorough review of the nature, extent, origins and consequences of the conduct and related behaviour; (11) Corporate co-operation in promptly making the review and responses (including any written reports) available to regulatory authority, seeking full co-operation from officers and employees, precisely pinpointing misconduct to aid prompt enforcement action, and voluntarily disclosing generally; (12) Steps taken to avoid misconduct recurrence including new
controls and procedures, and disclosure of such for regulatory effectiveness appraisal; (13) Has the corporate survived or been merged or otherwise altered.

957. SEC Enforcement Co-operation Initiative (n 953); SEC Release No. 34-61340 (n 899); SEC, Enforcement Manual (9 March 2012) <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf> accessed 17 July 2012, 119-123. These are: The assistance provided by the cooperating individual (value and nature of co-operation including if of substantial assistance; timeliness, co-operation quality including truthfulness, reliability and completeness; resources saved; and, the degree of voluntariness and encouragement to others toward co-operation); The importance of the underlying matter in which the individual cooperated (investigation character and danger to investors and others including if a priority investigation; type of securities violation; and, violation frequency, and vintage and duration); The societal interest in ensuring the individual is held accountable for his or her misconduct (including misconduct severity; culpability including ‘scienter’; degree of violation tolerance; remediation efforts; and, other sanctions imposed); The appropriateness of cooperation credit based upon the risk profile of the cooperating individual (including prior offending history; remorse shown; and, potential to re-offend).

970. In Ireland the Court of Criminal appeal or the Supreme Court have to date set the guidelines case by case, although in The People (DPP) v Kelly [2005] 1 ILM 19 (CCA), 29 Hardiman J referred to sentencing principle sources contained in reported cases and academic texts and stated: ‘[A]lthough these sources are available to the public and the media, some public commentary suggests that the principles may not, in fact, be as widely understood as they should be’. In The People (DPP) v Tiernan [1988] IR 251 (SC), a rape sentence appeal, the Supreme Court made it clear that the appellate sentencing court should only deal with issues arising on grounds of appeal submitted in individual cases and should not set down a standard or tariff of penalties of general application. Also see Kelly above; and The People (DPP) v WC [1994] 1I1RM 321 (CCC), 325 a rape trial where Flood J after reviewing the constitutional setting of judicial sentencing independence, stated that it was not open: ‘to a judge in a criminal case when imposing sentence…..to fetter the exercise of his judicial discretion through the operation of a fixed policy, or to otherwise pre-determine that issue’.

971. See Deaton v Attorney General [1963] IR 170 (SC). Also see Weber The Theory of Social and Economic Organisation (n 66), 331 where Weber wrote that as a rational type it is a matter of principle that administration should be completely separate from ‘ownership’ of such administration. Packer (n 273), 155 wrote that it was constitutionally implicit that, ‘the function of defining conduct that may be treated as criminal is separate from and prior to the process of identifying and dealing with persons as criminals’. This critique from two seminal sources may also apply to the Irish practice of no court approving settlement agreements. The common law model for sentencing guidelines is traceable to the US where the US Congress statutorily mandated the US sentencing commission, and in section 3553 of the Sentencing Reform Act 1984 required the sentencing commission to devise sentencing guidelines, to reflect four key factors: (1) the seriousness of the offence, to promote respect for the law and to provide just punishment for the offence; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. See N Morris and M Tonry, Between Prison and Probation (Oxford University Press 1990), 83.

972. Media reports in Ireland on the 4 June 2013 reported that the Irish judiciary had established a six person research team at the Judicial Researchers Office under Mr Justice Peter Charleton (HC), which since September, 2012 meet weekly, seeking patterns in sentencing from Irish criminal courts, which are then disseminated to Irish judges via secure intranet. Charleton J was reported to have stated: ‘It is not rigid, like a sentencing guideline is supposed to be, but is not like making it up as you go along – the accusation often thrown at the judiciary’. See R Mac Cormaic, ‘Using complex data to answer a simple query: how do judges decide on sentences?’ IrishTimes.com (Dublin, 4 June 2013).

974. See The People (DPP) v Tiernan [1988] IR 251 (SC). Also see The People (DPP) v Kelly [2005] 1 ILM 18 (CCA) where the trial judge had indicated that, on the basis of an advance warning policy of deterrence, he would impose a sentence of 20 years’ imprisonment in subsequent cases involving death and serious injury caused by the use of knives, the Court of Criminal Appeal found that he had erred in principle. In Deaton v Attorney General [1963] 170 (SC) where a statute conferring power upon the Revenue Commissioners to select a penalty in a customs case was declared unconstitutional, O Dalaigh CJ stated: ‘...it is inconceivable to my mind that a constitution which is broadly based on the doctrine of
separation of powers....could have intended to place in the hands of the executive the power to select the punishment to be undergone by citizens’.

975. Interviewee L Judiciary Ireland 7 January 2013. Article 35.2 Irish Constitution 1937 fully reflects Dicey’s rule of law as separation of powers when providing that: ‘All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law’. Setting out the broader picture, Tonry ‘Punishment Policies and Patterns in Western Countries’ (n 475), 5 stated: ‘....countries vary greatly in what they do to minimize unwarranted disparities in sentencing and to insure horizontal and vertical equity....The approaches range from use of numerical guidelines....in many US jurisdictions....guideline judgments in England....sentencing information systems in Scotland and New South Wales....and statutory sentencing principles [in most European countries and elsewhere]’. A Ashworth, ‘The Decline of English Sentencing and Other Stories’ in M Tonry and RS Frase (eds) Sentencing and Sanctions in Western Countries (Oxford University Press 2001) described the result of the statutory introduction of sentencing principles in the UK in 1991 (Criminal Justice Act 1991) in terms of judicial militancy demonstrated by a powerful judicial presence in public debate, and where ‘vocal sections of the judiciary revolted’ and ‘sentencing law was devoured by the judiciary as if a rather insignificant amuse-bouche, with the Court of Appeal destroying some provisions through wrecking interpretations, and other judges and magistrates calling for retraction’ so loudly that the government introduced amendments.

976. Can it be said that the following view as to the ubiquity of common law criminal justice principle save in sentencing principle, expressed by Tonry, applies to Ireland in this regard? Tonry wrote: ‘Among the Western countries, at least, there is widespread commitment to democratic values and Enlightenment ideals, and the institutions of criminal justice are everywhere much the same.....There is much more similarity than difference in the content of criminal law doctrine, rules of evidence, and procedural safeguards....Nonetheless, and despite broad similarity in most countries in crime trends....sentencing and punishment policies and patterns vary enormously’. See Tonry (n 475), 3.

996. Tonry (n 475), 6 reflected that sentencing standards must treat like cases alike and different cases differently. In regulatory terms, also reflecting the need for flexibility Macrory, ‘Reforming Regulatory Sanctions’ (n 120), 241 ‘allowed for different responses to different types of businesses and the different circumstances of the breach [and] grounded within a set of more coherent principles of regulatory governance emphasising transparency and accountability’.

PART 2 CHAPTER 3

1000. Although prescribed offence tailored to harm risk, and prescribed maxima-based sanction, are redundant without each other, there is a bridge between them which both enables and drives the discretionary application of the sanction. This bridge is the ‘conviction’ or guilt finding, a finding of either jury or judge sitting alone following a trial, or an acknowledged guilty plea. The implications for enforcement of the bridge requirement are that the offence definition, which determines offence, and thus ultimate sanction, seriousness, sets out the required proofs for any trial or hearing, while the governing procedure sets out the required standard of proof.

1002. Langbein (n 491), 33 stated: ‘The beyond-reasonable-doubt standard of proof for conviction in criminal cases developed at the end of the eighteenth century, in association with the ripening adversary system’. Even before that in R v Edward Coleman [1678] 7 St Tr KB 1, 14 Scroggs CJ stated: ‘[T]he proof belongs to [the Crown] to make out these intrigues of yours’, when addressing the first of those charged with the Popish Plot, although such statement was designed by allowing such protection to deny defence by counsel’.

1003. D McGrath (n 765), 50 explained that the civil principle was he who asserts must prove (Ei incumbit probation qui dicit, non qui negat) whether plaintiff or defendant, and stated that the principle was based on the supposed difficulty of proving a negative citing Gilbert,The Law of Evidence (Dublin 1754). On the civil side it has been acknowledged that although a higher standard cannot be applied, in cases of serious allegation the standard is applied in a more rigorous manner; see D McGrath (n 765).

1004. In Miller v Minister for Pensions [1947] 2 AER 372 (KBD) Denning LJ explained that proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt, but a finding that a defence of possible but not in the least probable won’t exonerate; civil proof carries a reasonable degree of probability not so
high as in a criminal case, and the burden is discharged if the tribunal thinks it more probable than not. For Ireland see The People v Byrne [1974] IR 1 (CCA). Also see C Fennell The Law of Evidence in Ireland (Butterworths 1992) and D McGrath (n 765).

1005. In the seminal case of Banco Ambrosiano SPA v Ansbacher & Co Ltd [1987] ILRM 669 (SC) the Supreme Court rejected the contention that an intermediate standard should apply to fraud allegations in a civil suit. The rationale for rejection included that such a civil/criminal hybrid ran the risk of confusing juries and could introduce uncertainty into the law. D McGrath (n 765), 54-55 stated: [E]xcept where otherwise dictated by legislation, the standard of proof to be met in all civil cases is that of proof on the balance of probabilities. However, it is clear that this standard is applied with a degree of flexibility and where serious allegations are made, they will be required to be clearly proved in evidence’. Also see Georgopoulus v Beaumont Hospital Board [1998] 3 IR 132 (HC &SC); Redge v Home Secretary, ex parte Khawaja [1984] AC 74 (HL).

1006. Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310), 90 argued: ‘A compliance model of justice (negotiation, persuasion, and so on) speaks primarily to the ‘good man’ (who seeks to act in good faith and employs the law as a normative guide to conduct and action), not the ‘bad man’ who seeks to evade the strictures of the law’.

1007. It is almost impossible to calculate the number of regulatory measures or offences alone but they ran beyond five hundred in Ireland according to Scott ‘Regulatory Crime’ (n 25), 15 in April 2009, and to thousands of pages of statutes in the UK (see J Rowan-Robinson PC Watchman and CR Barker, ‘Crime and Regulation’ (1988) Criminal Law Review 211). Offences may arise from EU inspired national legislation, domestic legislation or statutory instrument. Coffee jnr ‘Paradigms Lost’ (n 252) writing of the USA twenty years ago referred to 30,000 regulatory offences! Each ‘crime’ entails proof of the actus reus or physical attributes, and the mens rea or intent element save where such intent is absent as in strict liability offences.

1010. For instance, and although not fully relevant to the financial regulatory sector as currently operated in Ireland, but somewhat instructive, see C Scott, ‘Criminalising the Trader to protect the Consumer: The Fragmentation and Consolidation of Trading Standards Regulation’ in I Loveland (ed) Frontiers of Criminality (Sweet & Maxwell 1995), 150 where he described a ‘regulatory crime paradigm’ as incorporating five characteristics: strict liability offences; state monopoly over criminalisation of conduct; enforcement authorities enjoying considerable discretion; a non-uniform pattern of enforcement policy and practice; the ambivalence of the courts to the use of the criminal law. Also see Lacey Wells and Quick (n 290); G Richardson, ‘Strict Liability for Regulatory Crime: the Empirical Research’ (1987) Criminal Law Review 295. Wells and Quick (n 180), 341 stated: [C]riminalisation of property crime is ... just one among a range of legal arrangements which underpin the conditions of trust and security of expectations which allow a market economy to flourish’.

1011. See Gobert and Punch (n 130); Levi ‘Serious Fraud in Britain’ (n 213); In the Irish context specifically, Horan (n 87) recites corporate fraud offences including conspiracy to defraud, theft, causing a loss or making a gain by deception, false accounting, suppression of documents, forgery and false instruments, and concealing evidence; bribery and corruption; revenue offences; competition law offences; Companies Acts offences including proper books of account, false accounting and related offences, financial assistance for the purchase of company shares (a key issue in the Anglo Irish Bank later IBRC and Quinn family litigation and the prosecution of Anglo executives), liquidation offences, fraudulent trading, loans to directors, disclosure of company contracts, disclosure of loans; securities offences and market abuse; money laundering. Also see M Levi and J Burrows, ‘Measuring the Impact of Fraud in the UK: A Conceptual and Empirical Journey’ (2008) 48 British Journal of Criminology 293, 299 where the authors set out a long list of fraud types including benefit fraud; charity fraud; consumer frauds in broad category; counterfeit intellectual property and products; counterfeit money; embezzlement; gaming frauds; insider dealing/market abuse; investment frauds; lending frauds; and, pension frauds. WK Black recently outlined twelve policy recommendations (some radical) to stem fraud epidemics in the USA context including: (i) appointing a chief criminologist to each financial regulatory agency; (ii) placing undercover agents in the organisations the FBI investigates; (iii) extending access to civil justice; and, (iv) regulatory control agency should pre-select the auditor and credit rating agency which any organisation may use. See WK Black ‘Echo epidemics control frauds generate ‘white-collar street crime’ waves’ (n 87). M Levi, ‘Serious tax fraud and noncompliance’ (2010) 9(3) Criminology & Public Policy 493 has stated that significantly enhanced criminal sanctions have more effect than enhanced audit levels.
1019. Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310), 101 state: ‘...there is also some Irish and ECHR support for the view that a defence of due diligence will suffice to justify a regulatory offence of strict liability’. See C v Ireland and Others [2006] IESC 33 where the Supreme Court struck down a statutory rape offence because of the absence of mens rea and the unavailability of a defence of mistake as to the victim’s age; Regina v City of Sault Sainte Marine [1978] 85 DLR 161; Salabiaju v France (1988) EHRR 379; Shannon Regional Fisheries Board v Cavan County Council [1996] 3 IR 267 (HC), 289 where Keane J obiter suggested that the complete removal of mens rea from criminal offences would be unconstitutional. Coffee jnr ‘Paradigms Lost’ (n 252), 1881 expressing a US viewpoint twenty years ago, argued that control agencies upon their establishment should be conferred with criminal prosecution powers in respect of serious offences involving moral culpability only such as wilful fraud, bribery and reckless endangerment, while technical infringement should be subject to civil penalties. Also see D Prendergast, ‘The Constitutionality of Strict Liability in Criminal Law’ (2011) 33 DULJ 285, 318 who stated: ‘In terms of developing constitutional doctrine to restrain strict liability in Irish law, [C v Ireland and Others] does not provide a persuasive explanation....Nevertheless [it] strongly expresses the notion that strict liability should not be used in serious offences and is likely to deter such use’. Horan (n 87), 21 states of the latest common law commission to investigate: ‘The Commission stated that where criminal offences are created in a regulatory context, they should require proof of fault elements such as intention, knowledge or a failure to take steps to avoid harm being done or serious risks posed’; see The Law Commission of England and Wales, Consultation Paper on Criminal Liability in Regulatory Contexts (LCCP 195, pubd 25 August 2010). She gives the rationale as follows: ‘The argument proffered is that businesses and individuals should generally not be penalised by the criminal law if they have made real efforts to comply with laws requiring the provision of information, for example’. While recognising that strict liability style offences are not utilised in Ireland in the financial regulatory sphere, I submit that the rationale proposed if accepted would clearly establish a two-tier system of justice where effort for business equates to no prosecution or acquittal if prosecuted, while for the general press caught up in the ‘real crime’ system it would merely mitigate penalty.

1020. Scott ‘Regulatory Crime’ (n 25), 8-9. Kilcommins and Vaughan Terrorism, Rights and the Rule of Law (n 450), 138-143 outlined five distinctions which have traditionally been drawn between regulatory crimes and ordinary crimes: (i) the regulatory criminal framework is significantly different to that espoused by real crime, taking more governance but decentred or at a distance, including the DPP losing her monopoly role; (ii) regulatory crime oppositionally operates beyond the real crime paradigm characterised by general defences, a conduct and intent element, and higher procedural standards including proof beyond reasonable doubt; (iii) control agencies have been favoured with wide powers of entry, inspection, examination, search, seizure and analysis; (iv) there is evidence of a more punitive approach to regulation; (v) the proliferation of hybrid enforcement mechanisms.

1024. Kilcommins and Vaughan ‘The Rise of the Regulatory Irish State’ (n 310); They state (n 310), 90: ‘Though we should continue to foster compliance strategies where appropriate, we must also be committed to supporting criminal sanctioning strategies that send out the message to white collar criminals that their wrongdoing is treated seriously by us as a society and will, if the circumstances warrant it, result in imprisonment like it does for street crime’.

1026. Criminal stigma has been recently recommended only for seriously reprehensible conduct, and not as a primary means of ensuring regulatory objectives; see LCEW Consultation Paper on Criminal Liability in Regulatory Contexts (n 570). According to Horan (n 87), 21 the rationale is that: ‘...it is out of proportion for regulators to rely wholly on the criminal law to punish and deter activities that are merely ‘risky’, in that they have the potential to lead to harm, unless the risk involved is a serious one’.

1028. M Welsh, ‘The politics of civil and criminal enforcement regimes’ in Levi-Faur D (ed), Handbook on the Politics of Regulation (Edward Elgar 2011). One of these trade-offs concerns whether white collar crime is real crime or a sub-species of offending. Croall White Collar Crime (n 87), 167 stated that the ambiguous status afforded to the sub-species, ‘is reflected in the discourse of enforcers, legislators, sentencers and defendants....Thus, they are more often described as infringements or violations....caused by mistakes or oversights’.

1029. See for example the Milieu Ltd Report Overview of provisions on penalties (n 835). This report upon the EU environmental sector depicted four different pathway combinations across member state
enforcement: Administrative and Criminal Sanctions; Criminal Sanctions; Quasi-Criminal Sanctions; Administrative Sanctions. For instance, in nine (9) Member States Denmark, Greece, Hungary, The Netherlands, Poland, Portugal, Romania, the Czech Republic and Sweden, both administrative and criminal sanctions may be applied simultaneously.

1033. See for instance, LCEW Consultation Paper on Criminal Liability in Regulatory Contexts (n 570) which argued that civil penalties may be fairer to targeted individuals and firms since they involve less uncertainty and delay. The Commission, clearly only considering a binary of two unconnected or barely connected poles, proposed that (a) regulatory authorities should make more use of cost-effective, efficient, fairer civil measures to govern standards of behaviour; (b) a set of common principles should be established to help agencies consider when and how to use the criminal law to tackle serious wrongdoing; and, (c) existing low-level criminal fines should be repealed where civil penalties could be as effective. Also see Horan (n 87). And see Part 2 Chapter 2 sections 2.2.3 and 2.2.4 for a more complete discussion.

1039. Interviewee X Regulator Ireland 12 November 2012. Levi ‘Serious Fraud in Britain’ (n 213), 181-182

1040. Interviewee X Regulator Ireland 12 November 2012. Levi ‘Serious Fraud in Britain’ (n 213), 181-182 has asserted: ‘Frauds...constitute the arena of business violation that has the closest analogy to ‘real crime,” being concerned largely with the extraction by deception of very large amounts of money from other capitalist organizations or from general investors and pensioners’. Horan (n 87), Preface has highlighted that regulatory offences are often created but little used, wasting resources, and amounting to illusory threats to the citizenry; see LCEW Consultation Paper on Criminal Liability in Regulatory Contexts (n 570) which recommended that the criminal law should be reserved for serious wrongdoing.

1043. In Woolmington v DPP [1935] AC 462, 481 Viscount Sankey LC uttered the seminal obiter dicta: ‘Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt’. Increasingly this admits of exceptions see for instance Horan (n 87), 320-344. In Ireland see Hardy v Ireland [1994] 2 IR 550 (HC & SC); and in O’Leary v AG [1995] 1 IR 254 (SC) the Irish Supreme Court held that the presumption of innocence in a criminal trial is implicit in the requirements of article 38 of the Constitution. Also see R v Hunt [1987] AC 352 (HL) where the House of Lords after reviewing where the burden lies held it lay with the prosecution right throughout the trial. Furthermore, article 6(2) ECHR guarantees the presumption of innocence in criminal proceedings, and when charged but not at investigation stage see X v Germany (1962) 5 Y.B. 192 and X v Netherlands 16 D.R. 184.

1045. Sec 18 Interpretation Act 2005 (Ireland) provides that a ‘person’ includes a body corporate, while Horan (n 87), Preface wrote: ‘It is conceivable that almost every offence which a human person could commit could also be committed by a company’.

1047. See Horan (n 87), and Slapper and Tombs (n 87), 27-28 highlighted that the first criminal prosecution against a corporate entity did not occur until 1842. See R v Birmingham and Gloucester Railway Co. [1842] 3QB 223 (QBD), where Patterson J, 232 stated: ‘A corporation may be indicted for breach of duty imposed on it by law, though not for a felony, or for crimes involving personal violence or for riots and assaults’; and, in 1944 in wartime Britain a significant trio of cases established that a corporate entity could have mens rea or intent see DPP v Kent and Sussex Contractors[1944] 1 KB 810 (KBD); R v ICR Road Haulage Ltd [1944] 1 KB 551 CCA); Moore v Bresler [1944] 2 AER 515 (KBD). As Lacey Wells and Quick (n 290), 665-666) explain corporations are subject to a dual system of liability, that is either directly or vicariously. Vicarious liability, the imputation of corporate liability from employee default, generally arises in strict liability or reverse-onus offences under regulatory schemes. Direct liability, where the employee is regarded as acting as the company itself, requires mens rea proof.

1048. Mens rea proof presents no difficulty where an organ of the company e.g. board of directors or the company in general meeting, has authorised the commission of the offence either by itself or by an agent see R Keane, Company Law (4th edn, Tottel 2007), 165. However such evidence may be hard to locate or it may be difficult to determine if any specific company officer has a sufficiently crucial role to justify conviction. Also see regarding the controlling mind, where the task is to identify someone of sufficient seniority in the corporate command chain: Tesco Supermarkets Ltd v Natrass [1972] AC 153 (HL) unsuccessfully done; Purcell Meats (Scotland) Ltd v McLeod 198 SCCR 672; R v P&O European Ferries (Dover) Ltd [1991] 93 CAR 72 (CAC) unsuccessfully done regarding manslaughter in the Herald of Free Enterprise case; Attorney General’s Reference No 2 of 1999 [2000] 3AER 182 (CAC) unsuccessfully
attempted against the Corporate entity alone regarding Great Western Trains concerning the Southall train crash.

1052. See Scott ‘Regulatory Crime’ (n 25), 18 who exampled section 78 of the Consumer Protection Act 2007, and stated: ‘The due diligence defence is highly significant as it incentivises businesses to put in place systems of training and oversight...to exculpate themselves through showing they took the appropriate steps to avoid committing the offence’.

1060. For instance, under section 242 of the Companies Act 1990, whereby firstly, an offence is committed by any director, manager, secretary, or other company officer attributable to any neglect where false information is furnished; and secondly, where such an offence of furnishing false information has led to a conviction on indictment, and the court is satisfied that the omission contributed to the company being unable to pay debts, or impeded orderly winding-up, or facilitated defrauding of creditors, in which instance the maximum penalty is seven years imprisonment and/or maximum fine of €12,697.38 (see MacCann and Courtney Companies Acts 1963-2009 (n 463)). In relation to financial regulation in Ireland for instance, pursuant to section 33AK of the Central Bank Act 1942 as inserted by section 26 of the Central Bank and Financial Services Authority of Ireland Act 2003, supervised entities upon request by the Central Bank, have a duty to disclose within time limits, and in responding must exercise due diligence and shall not by any act or omission give or cause to be given false or misleading information (Connery and Hodnett (n 6).

1062. In Ireland the Criminal Law Act 1997 replaced complex categorisation rules and effectively provided that complicity, where the amount of contribution is inconsequential, amounted to all in the joint enterprise being principal offenders. Such involvement may take place before, after or during the crime commission, while drug smuggling and trafficking on the real crime side, and insider trading from the business crime sphere, provide obvious examples.

1064. F O’Toole, ‘An inquiry is needed into why a regime of impunity still exists in this state’ The Irish Times (Dublin, 23 July 2013) asserted, after recounting outgoing financial regulator Matthew Elderfield’s statement to the Oireachtas public accounts committee that Ireland needed a proper inquiry into the repeated failure of our legal system to prosecute criminals in high places, that: ‘There is a sickness at the heart of official culture. It is not corruption – it is impunity’.

1065. Appleby Reflections on Weaknesses with respect to Accountability (n 455). Packer (n 273), 359 argued that moral outrage concerning business conduct, and in Ireland there has been plenty of that exhibited as to banker’s conduct, is a necessary precondition for criminalisation. Also see The Economic Voice, ‘Kinetic Partners Global Regulatory Outlook Report’ (29 January 2014), which concluded that 35% of financial services executives interviewed supported criminal charges for the reckless misconduct of bankers. In a binary sanction fusion it is possible to also fuse ‘offence’ definition depending upon the policy position adopted. All infringements may include a common intent component, which may even be graded as full intent, recklessness and possibly negligence; newer offence forms may be defined around positive duties, and particularly around licence conditionality where breach may be more readily proven; positive duty offences around ethical standards such as fiduciary, may be devised; offences and contraventions definitions may be mirrored although this may impact double jeopardy considerations; offences around enforcement of breach of negotiated resolution agreements may result in the invocation of parallel proceedings; a common proof standard may apply; and, the market expert may be required to explain under presumption, inference or reverse proof burden.

1072. Lacey Wells and Quick (n 290), 645 identified: (i) the form of offence definition often omits reference to consequential harm; (ii) liability is usually strict, an historically peculiar feature of regulatory offences, (iii) the enforcement model is us-and-us rather than them-and-us.

1078. Business leaders complain of feeling obliged to accept administrative penalty to avoid financial cost, time cost and/or reputational effects implications. They do not challenge such a system however, because of incentives: the absence of a ‘public’ shaming even where there is limited post sanction publicity; sometimes the avoidance of a recriminatory finding or conviction; the obtaintion of penalty discount for early and/or cooperative resolution. In turn, these incentives have implications for the administration of justice, and the public perception of such, as a two-tier system. Two sets of norms sit beside each other in the traditional criminal law paradigm, one for real crime and one for business regulatory infringement; within the binary the latter norms threaten ascendancy, but themselves are subsumed within perceived lesser administrative
forms. These conflicting norms and their power alignment, impact both upon market actor perception and engagement with the sanction binary, and they beg sanction re-ordering within a fused binary.

1087. COM (2010) 716 final (n 23), 14 and SEC (2010) 1497 final (n 23). The driver of financial regulation in the EU from the millennial turn was political and economic – sealing market gaps - purposed towards convergence or harmonisation. In 2004 the EU Commission in the wake of a number of financial scandals, and especially that at the Italian corporate giant Parmalat, conducted an examination of the means to prevent corporate and financial malpractice. They recommended four lines of defence including law enforcement, which entailed criminal prosecution, utilising dissuasive sanctions, for both punitive and preventive effects. They also recognised that in all cases there was an overriding need for close co-operation between law enforcers and the bodies that carry out supervision and oversight. In its December, 2005 White Paper the Commission highlighted sound implementation and enforcement of existing rules as a top priority towards delivering on single market integration benefits for both the financial services industry and consumers, and warned that transposition of EU legislation into domestic law was weak, and enforcement mechanisms across the EU required strengthening and co-ordination. The EU reform road to ‘speedy and effective’ financial regulation can more recently be traced from 2007 when the financial crisis began to bite. In December, 2007 the EU Council invited the EU Commission to conduct a cross-sectoral stock-taking exercise of Member State sanctioning powers and regimes, which three years later in December, 2010 resulted in the publication of six identified divergences. Hard on the heels of the 2009 de Larosière Report (n 1) which also recommended the deployment of sanctioning regimes that are sufficiently convergent, strict, and resulting in deterrence, the EU Commission published a Roadmap which specified that one of five key objectives was: more effective sanctions against market wrongdoing. In synchronised choreography, within two weeks the ECOFIN Council called for better regulation of financial markets (SEC (2010) 1497 final (n 23), 3) and advocated rigorous enforcement of financial regulation and transparency, backed by effective, proportionate and dissuasive sanctions, in order to promote integrity in financial markets. Almost nine months later the EU Council emphasised the need to regulate financial markets and prevent market abuse (Stockholm Programme 2009). Six months later in June, 2010 the EU Commission declared that financial regulatory enforcement was one of four intrinsically linked reform pillars. See Commission to the Council and the European Parliament, ‘Preventing and Combating Corporate and Financial Malpractice’ (Communication) COM (2004) 611 final; Commission, ‘2005-2010 Financial Services Policy White Paper’ December 2005; Commission, ‘Driving European recovery’ – the Roadmap (Communication) COM (2009)114; and COM (2010) 301 (n 12).

1088. In The State (C) -v- The Minister for Justice [1967] IR 106 (SC) 122 Walsh J. stated that, ‘The exercise of the judicial power of the State is confined by the Constitution to the Courts and their judges established under the Constitution ’; while in Buckley v AG and another [1950] IR 67 (SC), 84, ‘[t]he effect of [Article 6] and of Articles 34 to 37, inclusive, is to vest in the Courts the exclusive right to determine justiciable controversies...’.

1089. In The State (C) -v- The Minister for Justice [1967] IR 106 (SC) 122 Walsh J. stated that, ‘The exercise of the judicial power of the State is confined by the Constitution to the Courts and their judges established under the Constitution ’; while in Buckley v AG and another [1950] IR 67 (SC), 84, ‘[t]he effect of [Article 6] and of Articles 34 to 37, inclusive, is to vest in the Courts the exclusive right to determine justiciable controversies...’.

1091. McDowell Report (n 26); Also see Butler et al (n 451); COM (2010) 716 final (n 23); Hamilton ‘Do we need a system of administrative sanctions in Ireland?’ (n 451); Horan (n 87); McDowell (n 451). The EU commission for instance, advocated that administrative sanctions should include cease and desist orders; court or administrative injunctions; fines as deterrents; withdrawal of authorisations for cases of recurrent violation of key regulatory provisions; replacement of financial institution managers in cases of serious wrongdoings in management; and, public warning and the publication of sanctions as a significant contribution to general prevention of violations; and further that, specific administrative sanctions should legislatively be tailored to specific violations: see COM (2010) 716 final (n 23). Interviewee K Regulator Australia 24 May 2012 stated that in his area of expertise that, much like road traffic criminal law in various countries including Ireland and the UK, regulated entities can suffer demerit points attaching to their licence as a result of proven breach, and that once a certain level is reached then the licence can be suspended or even revoked.

1092. Article 37 somewhat oddly is drafted in the negative and provides: ‘Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body......notwithstanding that such person or such body...is not a judge or [Constitutionally established] court’. As to what amounts to criminal matters see Part 2 Chapter 2 section 2.2.2 ft 759 above more particularly. The best and most oft quoted statement of what amounts to exceeding ‘limited powers’ is that found in In re Solicitors Act 1954 [1960] IR 239 where Kingsmill Moore J, when effectively framing in the negative, stated: ‘If the exercise of the assigned powers and functions is
calculated ordinarily to affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as “limited”.

1093. In McDonald v Bord na gCon [1965] IR 217 (HC) at p 231, Kenny J then in the High Court outlined five ‘judicial’ characteristics which have been provisionally accepted by the Supreme Court (according to Hogan and Whyte (n 238), 154): A dispute over legal rights or a violation of law; A determination of rights, imposition of liabilities, or infliction of a penalty; A final determination of same subject to appeal; Enforcement of same; The making of a characteristic court order.

1101. Freiberg The Tools of Regulation (n 119); Wells ‘Corporate crime: opening the eyes of the sentry’ (n 18), 377 who echoing earlier commentators warned, ‘Companies influence the form, shape and meaning of regulatory law and enforcement policies’. And see Appendix I.

1109. Ashworth Sentencing and Criminal Justice (n 978), 307.In his view this occurred especially at summary court level where in the UK in an attempt to combine structure with flexibility Magistrates’ Courts Sentencing Guidelines of 2004 allowed for three fine options relative to the offender’s income to ensure equality of impact: At the higher court level in the UK whilst still retaining elements of proportionality relevant to offence seriousness, statutory provision requires fines to be increased for the wealthy and reduced for the poor (see section 164(4) Criminal Justice Act 2003; Ashworth Sentencing and Criminal Justice (n 978), 309).

1110. ALRC Report on Principled Regulation (n 835), para 26.119); Freiberg The Tools of Regulation (n 119). Croall White Collar Crime (n 87), 158 explained and warned: ‘Corporations can be incapacitated by revoking their charter, placing them in the hands of a receiver or nationalising them. This amounts in essence to ‘corporate capital punishment’ and it could, of course, be objected that it could adversely affect booth investors and employees’. While obviously a new corporate vehicle could be established abroad by an involved individual, where a domestic disqualification had occurred in tandem, nonetheless the new vehicle would not have access to old corporate assets, or its branding.

1111. See Part 2 Chapter 3 section 2.3.3. In relation to corporates Ashworth argued that in principle the approach to imposing fines should be similar to that applicable to individuals reflecting offence seriousness and the ability to pay. This raises the question in the case of very wealthy corporates of the methodology of calculation. Ashworth has highlighted that in the UK for example, the Sentencing Advisory Panel found it difficult to guide the UK Court of Appeal as to the relative merits of corporate turnover, profitability and liquidity. See Ashworth, Sentencing and Criminal Justice (n 978), 310-311. On the financial regulatory side in Ireland Labour Party proposals for a turnover percentage in relation to the 2004 sanctioning provisions was not successful as the Bill progressed to enactment, but this provision was introduced within legislation working its way at snail-pace through the Oireachtas; see Central Bank (Supervision and Enforcement) Dail Bill (2011) 43 enacted July 2013.

1115. See Freiberg The Tools of Regulation (n 119), 98. Where criminal proportionality views the crime and the criminal who committed the crime, Freiberg looks at the environment around the crime, not for the effect upon such environment, e.g. society where perhaps a general deterrent sentence may deter repetition of a prevalent harm, or the markets where the infringement may have a price or competition distortion impact upon other market actors; but instead, the effect upon the infringer himself within the environment as a result of his own infringement.

1123. M Levi, ‘Shaming and Regulation of Fraud and Business”Misconduct”: Some Preliminary Explorations’ in S Karstedt and KD Bussman, (eds) Social Dynamics of Crime and Control: New Theories for a World in Transition (Hart 2000). Packer (n 273), 165 argued: ‘The combination of stigma and loss of liberty that is embodied in the end result of the criminal process is viewed as being the heaviest deprivation that government can inflict on the individual’.

1125. See D Luban, ‘The Publicity of Law and the Regulatory State’ (2002) 10(3) Journal of Political Philosophy 296, 312; Interviwee Z Business Leader England 29 November 2012 stated: ‘...insider trading is a classic example. When you get somebody like Raj Gupta put away for a number of years it teaches a lesson’. Also see Butler et al (n 451), 21 who also emphasised the control model strength of the criminal law when stating: ‘[W]e should not underestimate the powerful cathartic effects that the proper use of criminal law can provide in society......the criminal law- and the punishments that follow it – can act as a

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platform for the expression of collective outrage...uphold moral sensibilities...[and] acts as an important safety valve’. DJ Walsh, ‘Persuasion and dissuasion – Seeking Effective Enforcement of Competition Law’ in S Kilcommins and U Kilkelly (eds), Regulatory Crime in Ireland (First Law 2010) advocated a preference for public enforcement of competition law, and added that both civil and criminal punitive sanctions are required. Extolling the whistle-blowing virtues of the cartel immunity programme, a tool which would be of great benefit to the wider financial regulatory area, DJ Walsh (n 1125,174) stated: ‘In reality it is only the imprisonment of individuals involved in cartels that will highlight the seriousness of the offence. The dissuasive effect of a custodial sentence cannot be overemphasized. Equally, the persuasive effect of significant terms of imprisonment should ensure a rush to avail of the immunity programme’

Interviewee Q Academic Lawyer Australia 5 November 2011 stated that in Australia executives rush to seek immunity, because if they reveal first they evade the penalty completely; if the corporation reveals first then there is immunity for itself and for current employees (not past employees); while, if a manager gets in first then only he gets immunity. This provision or tool causes a great deal of information to come to light.

1126. Concerning the issue of the criminal law being a ‘big stick’ influencing regulatory sanction practice, encouraging RFSP responsiveness for the betterment of both regulator and industry, interviewee C Regulator Ireland 6 February 2013 stated: ‘I think that stands to reason but I don’t think it’s just the criminal. I think it’s a fact that you say you are going to do something, you take the enforcement action and you’re seen to be taking the enforcement action and that is what gives you the traction in the marketplace. Ireland is a very small place and it gets out there quite quickly’.

1132. Morris and Tonry (n 971), 38 commenting upon criminal law sanctioning, over two decades ago highlighted the need for ‘interchangeability of punishments’, advocating that a just and efficient sentencing system should include a range of punishments, and not merely a choice between imprisonment at the top and probation at the base, where a variety of intermediate punishments, along with appropriate treatment conditions, are part of a comprehensive, integrated system of sentencing and punishment.

1136. Interviewee C Regulator Ireland 6 February 2013 stated of sanction options: ‘One of the greatest powers that Regulators have.... is the power to impose a direction or a condition of a licence....Calling itself enforcement doesn’t probably do .... justice to the power it is.....if you have the power to issue a direction on a regulated firm to tell it to cease writing business and if it’s an insurance company you have just messed around with that company’s very reason it’s essence for being’. Interviewee Q Academic Lawyer Australia 5 November 2011 referred to the use of the punitive injunction on both the civil and the criminal side which as contemplated would be the most severe sanction when mobilised as both mandatory and interventionist. Rawlings has extolled a statutory grounding of an innovative suite of sanctions, within a set of principles of regulatory governance, while emphasizing transparency and accountability; for him therefore, the marriage is between policy – represented by regulatory principles – and the statutorily grounded and innovative sanction suite; see R Rawlings, ‘Introduction: Testing Times’ in Oliver D Prosser T and Rawlings R (eds), The Regulatory State (Oxford University Press 2010).

1137. Sanction action sought may be punitive such as imprisonment, court orders including community service orders and financial penalties including criminal fines and civil pecuniary penalties; or, may be protective of investors and financial consumers, such as disqualification from managing a corporation or a ban on providing financial services or engaging in credit activities; revocation, suspension or variation of conditions of a licence; and, public warning notices; or, may be preservative such as court-ordered asset protection or an injunction compelling compliance with law, or acting in conjunction with the CDPP or Australian Federal Police to prevent dealings in or confiscate proceeds of crime under the Proceeds of Crime Act 2002; or, may be corrective such as a court order for corrective disclosure—for example, to correct a misleading or deceptive advertisement or other disclosure; or, may be compensatory by way of representative action to recover damages or property for those suffering loss although usually only taken if in the public interest beyond affected consumers, ASIC encouraging alternative options such as lodging a dispute with the Financial Ombudsman Service or taking private legal action; or, may be negotiated resolution where deemed an effective regulatory outcome, such as an enforceable undertaking (such as providing compensation or outlining a process to monitor a person’s continuing compliance with the law) accepted as an alternative to court action, other administrative actions or an infringement notice, or to complement other remedies sought. At a practice level, recently the EU Commission in its preliminary examination of relevant interplay considerations has inter alia opined that: a core set of administrative sanctions is required; administrative sanctions should be tailored to specific infringement; criminal sanctions, and in particular imprisonment, generally send a strong message of disapproval; and, that
criminal sanctions may not be appropriate for all types of financial regulatory violations and in all cases. See COM (2010) 716 final (n 23). If this flexible practice prescription is to be followed, it entails utilising both sides of the binary, and yet preferring one or the other in specific circumstances, and while it is unlikely that there will be an absolute fit of the two poles, a sufficient fit is possible via a complementary sanction capability.

1144. Milieu Ltd Report Overview of provisions on penalties (n 835). The sanctions mobilised throughout different EU member states include: (i) criminal law sanctions such as restriction, suspension or prohibition/ban of the activity; imposition of rectification or corrective measures; dissolution of the legal entity; closure of the installation; (ii) quasi-criminal sanctions known as “administrative criminal”, sitting alongside criminal sanctions and administrative enforcement measures, the use of which is conditional upon the offender’s negligence or intent; (iii) administrative sanctions are in most cases pecuniary sanctions, incorporating a range of fines which may be imposed, depending, amongst other things, on the severity of the offence and its effect on the environment; other sanctions include restriction, suspension or prohibition/ban of the activity; cancellation or restriction of licence; seizure of tools, machinery and equipment; imposition of rectification or corrective measures; closure; loss of tax benefits, credit benefits and credit financing; suspension of the right to obtain subsidies or other benefits issued by national or European public authorities or services; suspension of the right to participate in national and international conferences, exhibitions or markets with the aim of selling or marketing the products or activities, or to participate in public auctions or tenders which have as their object the contract or award of public works; making public the sentence. Interestingly, the highest criminal penalty of all the Member States is found in Ireland, where the maximum penalty is €15,000,000 fine and 15 years imprisonment, quite a remove from the penalties applicable to the financial regulatory sector; In Belgium (Wallonia), the maximum fine is €10,000,000 and 15 years imprisonment.

1145. EU criminal law does not recognise strict liability offences and thus only covers intentional harms. However, the definition of culpability is not consistent across the EU. In common law jurisdictions there are three stages intention, recklessness, and negligence. On the European continent intention is broader and it includes aspects of recklessness. It includes conscious risk taking. See the ship source pollution cases for instance. Negligence is also included namely, gross negligence; but simple negligence is a matter for the civil law. On the European continent there are two stages of culpability first intention, and second negligence. Accordingly, in attempting convergence of culpability the concept of ‘negligence’ is both a legal definition and a political problem. EU law only seeks to abide a minimum harmonisation policy. As to Ireland Mr Justice Frank Clarke of the Supreme Court was quoted post-GFC in the print media as stating: ‘What we have not traditionally done, in Ireland and in many other countries, is treated even gross negligence in the management of important institutions or major companies as criminal activity…. Whether that is a good idea or not is for others to decide and debate, but I think it is important, and perhaps hasn’t been emphasised enough publicly, that if you don’t have those laws – and they certainly couldn't be introduced retrospectively – there are consequences that go with that too’; see R Mac Cormaic, ‘Ireland 'does not treat negligence in major institutions as criminal’ The Irish Times (Dublin, 19 October 2013).

1147. See Europa Press Release “Proposals for a Regulation on Market Abuse and for a Directive on Criminal Sanctions for Market Abuse”, Brussels 20th October 2011 memo/11/715 paragraphs 4 and 5. This includes future policy action extending the market abuse framework to the burgeoning and innovative financial instruments sector to ensure legislative coherence and harmonisation. Showing the lack of alacrity in EU legislation-making, the first reading of proposals for a Directive of the EU Council and Parliament successfully took place on the 3rd to 6th February 2014; see Council document 5908 (n 670), which in its preamble stated: ‘An integrated and efficient financial market and stronger investor confidence requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities, derivatives and benchmarks’.

1148. EU Market Abuse Directive 2003/6/EC (MAD). However, in Ireland there have been few real sanctions imposed. The Irish regulator has dealt with three Market Abuse cases by settlement agreement between August 2004 and May 2012 and publicised each see Market Abuse (Directive 2003/6/EC) Regulations 2005; Oakes The role of enforcement (n 453). Further, the Central Bank has revealed that during 2010 Securities Law Formal Private Cautions were Issued in four cases, in 2011 two cases, and in 2012 zero cases; in 2010 fifteen enquiries were initiated regarding possible contraventions, and in 2011 this increased by 100% to thirty enquiries; further, in 2010 nine enquiries were completed regarding possible
contraventions, and in 2011 this had increased by over 400% to thirty-seven enquiries see Central Bank of Ireland Annual Performance Statement Financial Regulation 2011 – 2012, 18. As far as Ireland is concerned, apart from the Oakes Speech revelation above, there are no specific insider trading statistics available. The best that can be done is to show offences detected under the Companies Acts, the Investment Intermediaries Act, and the Stock Exchange Act, in total being 4 in 2006; 2 in 2009; and, zero in 2010 see Central Statistics Office (CSO) Ireland, (2012), Garda Recorded Crime Statistics 2006-2010, dated April 2012, PRN A12/0699, extrapolated from table 9.1 at page 47, accessed 22-08-2012, available at www.cso.ie.

1149. See ESMA Report (n 835), paragraph 23; Twenty-six MS for insider dealing, and twenty-five MS for market manipulation. The ESMA Report 7 Paragraph 13 highlighted divergence among Member States as regards the launching factors however, for either administrative or criminal sanctions or both in parallel; the trigger was described as being more or less automatic as soon as market abuse is identified, and can be based upon the seriousness of the violation, for instance, whether or not there is ‘intent’. According to the Europa Press Release, ‘Proposals for a Regulation on Market Abuse and for a Directive on Criminal Sanctions for Market Abuse’ (Brussels memo/11/715, 20 October 2011), paragraphs 12-14, The new EU reform proposals, based around the G20 international high-standards framework, include an amendment of the MAD Directive formally mandating Member States to impose criminal sanctions for market abuse. Market integrity is the driver for introducing this mandatory minimum rules change, which relates to both criminal offences (market manipulation and insider dealing) and criminal sanctions. The EU rationale is that criminal sanctions demonstrate a qualitatively higher social disapproval compared to administrative sanctions or civil compensation mechanisms. The new proposals also extend to criminalising inciting, aiding and abetting, as well as attempts at market abuse.

1150. A Manifesto on European Criminal Policy, (2009), published by 14 EU academic criminal law professors drawn from ten member states under the auspices of the European Criminal Policy initiative: These policy principles are all compatible with the common law paradigm, and include, criminalising only to protect fundamental interests and as a last resort of social control; the principle of individual guilt underpinning criminal law legislation; sanctions being proportionate; and, criminal offences both being defined in a clear and unambiguous way and not being retro-active. Also see EU Commission Press Release “Towards a reasonable use of criminal law to better enforce EU rules and help protect taxpayers’ money”, 20th September, 2011, IP/11/1049.

1162. Appleby ‘Compliance and Enforcement’ (n 605), 189 stated of the ODCE of which he was the Director at the time of writing: The process in which we have been and are engaged is one of behavioural change, moving from a culture of non-compliance to one of compliance. In doing so, we have adopted the ‘carrot and stick’ approach. We try to encourage and support compliant behaviours’.

1164. See for instance, Gunningham ‘Negotiated Non-Compliance’ (n 603); Hawkins Environment and Enforcement (n 709); Hawkins and Thomas Enforcing Regulation (n 708); AJ Reiss jnr , ‘Selecting Strategies of Social Control over Organisational Life’ in K Hawkins and JM Thomas (eds), Enforcing Regulation (Kluwer-Nijhoff 1984). Also note that Hobbes (n 281), 717-718 wrote: ‘And to consider the contrariety of mens Opinions, and Manners in generall, It is they say, impossible to entertain a constant Civill Amity with all those, with whom the Businesse of the world constrains us to converse: Which Businesse, consisteth almost in nothing else but a perpetuall contention for Honor, Riches, and Authority. [new paragraph] To which I answer, that there are indeed great difficulties, but not Impossibilities: For by Education, and Discipline, they may bee, and are sometimes reconciled’.

1167. T O’Malley Sentencing Law and Practice 1st ed (n 535) argued that since the classical punishment theory as stated within Benthamite utilitarianism, shaped the penal code from the mid-nineteenth century up to the early twentieth, the structures and ideas developed during this historical period still exert a strong influence on the criminal law and its administration today.

1168. Criminal Law Commissioners, First Report (Parliamentary Papers XXVI - 1834); Norrie Crime, Reason and History (n 211). Also see von Hirsch who has argued extensively for a ‘Measurement Theory’ of punishment, incorporating two proportionality features: the ordinal where parity between offenders, rank-ordering of severity of penalties, and spacing or the size of the increments between penalties reflecting the step-up in crime seriousness from one misconduct to the next, are required; and the cardinal or non-relative where reasonable proportion between absolute levels of punishment and the seriousness of the

1172. S Kilcommins and U Kilkelly, ‘Introduction: Regulatory Wrongdoing in Ireland’ in S Kilcommins and U Kilkely (eds), Regulatory Crime in Ireland (First Law 2010); Butler et al (n 451), 21 argued: ‘Once we recognise the seriousness of white collar wrongdoing, then we must also recognise that compliance strategies alone cannot best guarantee our security. A compliance model of justice (negotiation, persuasion, and so on) speaks primarily to the “good man” (who seeks to act in good faith and employs the law as a normative guide to conduct and action), not the “bad man” who seeks to evade the strictures of the law. In order to encapsulate both forms of conduct, the compliance model must also be supported by a sanctioning model that includes the use of imprisonment’.

1180. T O’Malley Sentencing Law and Practice 2nd ed (n 727). A sentence must be proportionate to the gravity of the offence and the personal circumstances of the accused; see The People (DPP) v McCormack [2000] 4 IR 356 (CCA), 359 where Barron J stated: ‘The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused’; and The People (DPP) v Kelly [2005] 1 ILRM 19 (CCA), 30 a manslaughter case where Hardiman J stated: ‘...under our present sentencing regime, sentences must be proportionate not to the crime but to the individual offender’. Horan (n 87), 405 points out that proportionality must also be applied to corporate entities; see for instance, The People (DPP) v Oran Pre-Cast Ltd (16 December 2003, unreported) CCA, and DPP v O’Flynn Construction Company Ltd [2007] 4 IR 500 (CCA). Kilcommins O’Donnell O’Sullivan and Vaughan (n 299), 11 argued that late-modern punishments are based upon the control of offenders rather than their rehabilitation; it represents a shift toward the aggregate control or incapacitation of criminals; for them the imperative of public protection has overtaken that of individual re-integration as the primary goal of punishment.

1182. State (Healy) v O’Donoghue [1976] IR 325 (SC); The People (DPP) v WC [1994] 1 ILRM 321; The People (DPP) v Sheedy [2000] 2 IR 184; The People (DPP) v Kelly [2005] 1 ILRM 19 (CCA); The People (DPP) v O’Dwyer [2005] 3 IR 134; Pudlizewski v Judge Coughlan [2006] IEHC 304; The People (DPP) v H [2007] IEHC 335 (HC); The People (DPP) v GK [2008] IECCA 110; The People (DPP) v Keane [2008] 3 IR 177 (CCA); The People (DPP) v Harty Court of Criminal Appeal 19 February 2008 (CCA); The People (DPP) v O’C [2009] IECCA 116; and The People (DPP) v Woods [2010] IECCA 118. In The People (DPP) v R McC [2008] 2 IR 92 (SC), 104 Kearns J stated: ‘...any sentencing court should conduct a systematic analysis of the facts of the case, assess the gravity of the offence, the point on the spectrum at which the particular offence or offences may lie, the circumstances and character of the offender and the mitigating factors to be taken into account: all with a view to arriving at a sentence which is both fair and proportionate’. Also see LRC Report ‘Mandatory Sentences’ (n 469), 18, and T O’Malley Sentencing Law and Practice 2nd ed (n 727) of which Hardiman J in The People (DPP) v Kelly [2005] 1 ILRM 19 (CCA), 29 stated that general sentencing principles, ‘are discussed in a growing academic literature in which pride of place must be given to Professor Thomas O’Malley’s book’.  

1186. See The People (DPP) v M [1994] 3 IR 306 (SC); and LRC Report ‘Mandatory Sentences’ (n 469), 12. Also see DL MacKenzie, ‘What Works. What doesn’t Work. What’s Promising’ in P Priestley and M Vanstone (eds) Offenders or Citizens? Readings in Rehabilitation (Willan 2010). In The People (Attorney General) v O’Driscoll (1972) 1 Frewen 351(CCA) in the case of two travellers (itinerants)charged with robbery offences the court determined that the objects of imposing sentence are not merely to deter but also to induce the criminal to turn to an honest life.

1197. Packer (n 273) argued that the disadvantages of low enforcement included lessening of the deterrence threat, and this results in increasing penalties to compensate by severity, in turn allowing the criticism that the punishment is disproportionate.

1203. See for instance LRC Report ‘Mandatory Sentences’ (n 469); I O’Donnell, ‘Information vital to sentencing and punishment’ The Irish Times (Dublin, 17 June 2013); T O’Malley Sentencing Law and Practice 2nd ed (n 727); Tony (n 475). Ashworth The Decline of English Sentencing and Other Stories’ (n 975), 86 repeated Lord Lane’s phrase that sentencing is, ‘an art and not a science’. A von Hirsch, ‘The Project of Sentencing Reform’ in M Tonry and RS Frase (eds) Sentencing and Sanctions in Western Countries (Oxford University Press 2001) argued for a principled approach to sentencing where parsimony
in punishment and fair and proportionate sanction were prominent, and where a direction-pointing sanctioning rationale (e.g. just deserts) preceded the legal norms designed to implement it.

1204. See DPP v Duffy & Anor [2009] IEHC 208; The People (DPP) v M [1994] 3IR 306(SC); The People (Attorney General) v O’Driscoll (1972) 1 Frewen 351 (CCA); The People (Attorney General) v Poyning [1972] IR 402 (CCA); and The People (DPP) v Tierman [1988] IR 251 (SC). Interviewee L Judiciary Ireland stated: ‘One of the important requirements for trust and confidence in the law is that the law should be seen to be consistent in its approach. So sentencing guidelines are important or may be important in ensuring consistency’. As far as financial regulation in Ireland is concerned the CBI Enforcement Strategy (n 453), 18-19 provides that: Proportionate means that a holistic approach will be adopted in each particular case; Consistent means always acting fairly and applying procedures in a way that does not inappropriately discriminate between regulated entities. Looking at commercial fraud, and considering the proportionality of the individual business offender and the offence harm impact upon ‘trade’, M Levi, ‘Fraudulent justice? Sentencing the business criminal’ in P Carlen and D Cook (eds) Paying for Crime (Open University Press 1989), 101 stated: ‘[A] more class interest based analysis of sentencing would look not only at the class of the fraudsters but also at the business interests they affected. Looked at in this way, it is possible to view heavy punishment of high status violators as rational and expected, since they have both ‘let the side down’ and risked harming the general level of trading’. Also see Council document 5908/14 of 2014-02-05 (n 721), which in its preamble stated: ‘Market abuse harms the integrity of financial markets and public confidence in securities, derivatives and benchmarks’.

1211. Intention is regarded as most significant, then recklessness and then negligence. See T O’Malley Sentencing Law and Practice 2nd ed (n 727), 92 where it is stated: ‘Intention to cause harm clearly represents the highest level of culpability and the more harm intended, the greater the blameworthiness. Recklessness, in the sense of a conscious disregard of an unjustifiable risk, comes next, and again the greater and more dangerous the risk, the greater the culpability. Negligence would rank as the lowest form of culpability, which is not to say that it should be met with impunity if it has produced serious harm’.

1216. See Becker (n 688); I Ehrlich, ‘The deterrent effect of criminal law enforcement’ (1972) 1 Journal of Legal Studies 259; Parker and Nielsen (n 263); Posner (n 688); and Stigler ‘The theory of economic regulation’ (n 688). Interviewee N Academic Australia 27 April 2012 stated that Becker, who was looking at the rational choice offender, followed the Bentham view that the state can’t change people by criminal procedure. Bentham’s view was to claw back the “cost” inflicted on the victims or society by the perpetrator. At one time Bentham took the view that punishment should be in solitary confinement to form different habits in the convicted. But, Bentham changed his view. Bentham proposed the Panopticon as a threat or a fear so people did not know if they were under surveillance, but people could not become creatures of foresight. In the panopticon fear ruled. In connection with Bentham, Foucault took up the Bentham position also.

1219. See Law Reform Commission, Consultation Paper on Sentencing (LRC CP 2-1993); and McAuley and McCutcheon (n 274), 104. It has also been asserted that the nature of the crime, the target group of the particular sanction, the extent to which the offending behaviour attracts moral condemnation, the extent to which the public has knowledge of the criminal sanction, and the swiftness of the punishment, also affect deterrence see Gabor and Crutcher “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures” rr2002-1e (Research and Statistics Division, Canadian Department of Justice, 2002) at paragraph 4.3.1. as cited by LRC Report ‘Mandatory Sentences’ (n 469),11ft 24.

1225. See Hart Punishment and Responsibility (n 230). John Gardner in writing the introduction to the second edition of Hart’s work in 2008 (xii) synopsised Hart’s view as: ‘Any action or practice that has costs – and what does not? – needs to pay its way in countervailing benefits’. And then went on to pose the tricky question – so then what constitutes a ‘countervailing benefit’? For Hart, according to Gardner, the thwarted future wrongs never committed constituted such benefit.

1238. Freiberg The Tools of Regulation (n 119); D McBarnet, ‘When Compliance is Not the Solution But the problem: From Changes in Law to Changes in Attitude’ (Canberra Centre for Tax System Integrity, Australian National University Working Paper No 18/2001). The four categories are: (i) Voluntary or committed compliance where the regulatory target performs as expected without need for enforcement; (ii) Capitulative compliance where compliance is forthcoming but unwilling; (iii) Structural compliance where
non-compliance opportunity is factored out; and, (iv) Creative compliance where the regulated entity complies, but both evades the legal impact, and undermines the grounding policy.

1239. See Ayres and Braithwaite (n 90). When surveying RRT and its variants, Gunningham ‘Strategizing compliance and enforcement’ (n 603), perceptively highlighted three fundamental assumptions affecting responsive compliance: (i) they all build from a nuanced and plural understanding of the motivations for business compliance which thus requires plural regulatory strategies, operated in a responsive or smart way; (ii) a holistic understanding focus to business compliance motivation which involves both state and non-state regulatory actors; (iii) examining the commitment and capacity for firms to internally self-regulate is a necessary focus; see C Parker and V Nielsen, ‘Introduction’ in C Parker and V Nielsen (eds), Exploring Compliance Business Responses to Regulation (Edward Elgar 2011). In a very important and newer strategic development, employee whistle-blowing as a form of ‘regulation’, its potential rewards, and its affect upon cooperative compliance outcomes must be factored into both internal and external explanations of compliance, since the actions or potential actions of such help to construct the overall compliance culture and approach of the RFSP; see Feldman and Lobel (n 260).

1240. Grabosky, who views RRT as a seminal approach, has argued for a three-dimensional pyramid enjoying a triangular base and three faces: firstly, the government or Ayres and Braithwaite original; secondly, the regulated entity; and thirdly, third parties including public interest and commercial actors (e.g. accountants). This reflects the Fullenkamp and Sharma (n 420) view of financial regulation broached earlier. Such an approach as Grabosky suggested, pushes the criminal dimension to a heavily peripheralised last resort position, and emphasises a responsive compliance approach with multiple actor involvement. When assessing such a three-sided pyramid from a sanction point of view however, it must be remembered that sanctioning is coercive and arises within the public domain, and involves only two parties the state as prosecutor, whether via regulator or DPP, and the infringer. Apart from evidential involvement the third parties of public interest groups and commercial actors have little role. Concerning victims they certainly have a role, especially within restorative justice. But, they do not make investigative or prosecutorial decisions or impose sentence, although with limited creative effort appropriate procedures may be set in place to adequately protect their obvious interest; see P Grabosky ‘Discussion Paper: Inside the Pyramid’ (n 603); Grabosky ‘On the interface of criminal justice and regulation’ (n 455).

1243. See Ayres & Braithwaite (n 90); Nielsen and Parker ‘Testing responsive regulation in regulatory enforcement’ (n 597). Responsive Regulation Theory has been described as a supremely pragmatic yet virtue-promoting approach to regulating the undesirable by-products of capitalist enterprise by Kingsford-Smith (n 455). As a dynamic collective creation drawn from, and out of, disparate sources and scholars, RRT started out both as a theoretical idea and a very practical strategy about enforcement, and has developed into a multi-dimensional general theory of regulation operationalised world-wide by regulators. Braithwaite ‘The Essence of Responsive Regulation’ (n 603) recently characterised RRT as a dynamic and ‘cumulative creation’ which was based in nine principles or grounding heuristics, including contextual regulatory thinking; fair, respectful, supportive and praising treatment for regulatees; regulatory signalling of supports and a range of sanctions from tough to lesser; and, reflexive regulatory learning.

1244. Ayres and Braithwaite (n 90) and see Appendix L for the original Ayres and Braithwaite Enforcement Pyramid; Braithwaite ‘The Essence of Responsive Regulation’ (n 603), 492-493 stated: ‘The pyramid is a useful heuristic. It is a good discipline to be required to consider all lower levels of a pyramid before contemplating a rush to a high level such as nationalization or privatisation of a troubling organization. But the theory simply creates a presumption that less interventionist remedies at the base of pyramids are normally the best place to start. Normatively justified responsiveness to context does at times require us to go straight to the peak of a pyramid’. Also see Grabosky ‘Discussion Paper: Inside the Pyramid’ (n 603). From the Irish financial regulatory context, Appleby ‘Compliance and Enforcement’ (n 605), 187 cited a six-segment pyramid. I submit that a pyramid best portrays the obvious theoretical and practice hierarchy of sanctions, apex and broadening bands to the educational base, and the need for escalation and de-escalation. Interviewee E Academic Australia 22 March 2012 on the other hand, suggested a Star of David shape (six-pointed star) not a pyramid with licence revocation at apex. With regard to the enforcement pyramid, in his view, breach is the way into the pyramid to activate it, to operate it, while the real problem or issue is licence revocation sitting at the very top, at the apex. Another viewpoint was expressed by Ashworth Sentencing and Criminal Justice (n 978), 269 in discussing a penal ‘ladder’ concept of hierarchy of sentencing options when he argued: ‘...custody should not simply be seen as the top rung of a ladder which starts with discharges and runs upwards through fines and community
penalties. The imposition of a custodial sentence restricts liberty to a far greater degree than any other sentence, and for that reason should require special justification’. A number of points arise. Firstly, Ashworth’s enunciation clearly shows the criminal sentence’s mindset is to move in an upwards direction as regards penalty choices, whereas RRT admits commencement anywhere on the ladder, and permits both upward and downward movement. Secondly, for traditional criminal policy-makers jail is the ultimate sentence, whereas for businessmen the loss of livelihood entailed in disqualification or restriction – their capital punishment - may prove such. Thirdly, there are gradations of punishment, and the criminal and the regulatory spheres have different views as to the composition and ordering of components. Fourthly, the conceptualisation of a penalty framework by way of shape or simulation assists in indicating the primary focus for sanctioners. For instance, the more educational and compliance oriented wider lower tier of the pyramid where most activity is encouraged by RRT. Fifthly, Ashworth views custody as the top rung sentence, a sanction absent from most administrative sanction suites. And, finally the imposition of severe penalties requires particular evidence-based consideration.

1248. The tit-for-tat strategy, appropriate for supervision, entails some legitimacy risks for enforcement. Because cooperation is a very important launching factor, and while it is in order to adopt incentives throughout enforcement, it is vital that RFSPs are not forced into settlement. Furthermore, where there is a settlement an independent arbitral approval or review is required. This must enable an RFSP to dissent from the regulator’s viewpoint as to agreement conditionality for instance, and apply to the approving court for relief. There is also need for a review of severity of sanction. Furthermore, there must be a right for the RFSP to opt for a trial or hearing without additional ‘penalty’ unless frivolous or an obvious delaying tactic. This does not prevent sanction discount applying to more cooperative forms, as an incentive toward self-policing, self-reporting and early ‘real-time’ regulatory finality.

1251. See particularly, Baldwin and Black (n 593); Scott ‘Regulation in the age of governance’ (n 16); C Scott, ‘Regulatory Governance and the Challenge of Constitutionalism’ in D Oliver T Prosser and R Rawlings (eds), The Regulatory State (Oxford University Press 2010); Yeung Securing Compliance (n 437). Both criminal law and administrative law, as already highlighted, share a vital common foundation – a common well-spring – in the form of constitutional values (especially fairness) which are deeply anchored in philosophical and political theories of democracy; see Yeung Securing Compliance (n 437). While the jibe of lack of impartiality on the regulatory side may apply outside Ireland, in Irish law, as opposed to any practice examples not taken to judicial review, impartiality applies; see for instance, O’Sullivan v The Law Society of Ireland & others [2012] IESC 21 where McKechnie J (paragraph 94) held in the Supreme Court that the question of fair procedures (constitutional justice) must be considered at all stages of a tiered disciplinary process in a regulatory matter.

PART 3 CHAPTER 1

1254. See M Moynihan, Currency and Central Banking in Ireland 1922-60 (Gill and Macmillan 1975) and TK Whitaker, ‘Origins and Consolidation, 1783-1826’ in FSL Lyons (ed), Bicentenary Essays Bank of Ireland 1783-1893 (Gill and Macmillan 1983). It has always been the case that national governments have controlled finance and its operation. The quintessential example is that of the Bank of England which was founded in 1694 (and upon which the Bank of Ireland was patterned) which over time became the government’s lender, currency regulator and a bankers’ bank; and by the 1870’s was described by Walter Bagehot as ‘lender of last resort’, the essential characteristic of a central bank. Also see Braithwaite and Drahos (n 346); FSL Lyons, ‘Reflections on a Bicentenary’ in FSL Lyons (ed) Bicentenary Essays Bank of Ireland 1783-1893 (Gill and Macmillan 1983); D Wessel, In Fed We Trust (Crown Business 2009).

1256. Article 43 acknowledges and protects private property rights subject to regulation, ‘by the principles of social justice’, and article 45 empowers the Oireachtas alone to secure the common good regarding the ownership and control of material resources and the operation of free competition. The state is charged to supplement private initiative, and further, to secure reasonable efficiency of private enterprise in the production and distribution of goods (services are not specified) with the goal of protecting the public from unjust exploitation.

1257. See Westrup ‘Regulatory Governance’ (n 429); Connery and Hodnett (n 6). Historically, separate regulatory agencies were distinctly American dating from the late nineteenth century, and were designed to optimise policy outcomes, although British influence has been asserted in US judicial decision-making as
regulators and in institutional design see Prosser Law and the Regulators (n 21); Levi-Faur ‘Regulatory Networks & Regulatory Agencification’ (n 108). The intense social, political and class conflict that characterized the creation of the US regulatory state was not however, replicated in Europe according to Levi-Faur.

1261. See generally Connery and Hodnett (n 6). Banking did not develop significantly in Ireland until around 1958, when the first acquisition by a major bank namely the Bank of Ireland of another bank namely the Hibernian Bank, marking the beginning of the consolidation and amalgamation of banks in Ireland; and the start of the Irish credit union movement. H Smith ‘Legal and compliance risk in financial institutions’ (n 641), 484 has explained: 'Banks trade in legal constructs at the centre of a complex web of law and regulation....If the law governing those constructs does not function as expected, this will impact on the heart of their business models’. Barth Caprio jnr and Levine (n 216) have concluded that political systems shape bank regulatory and supervisory policies, and that these policies influence five important foci (a) banking sector development levels, (b) the efficiency of savings intermediation, (c) national banking system fragility, (d) bank governance, and (e) the degree that corruption impedes savings allocation.

1264. See McDowell Report (n 26), ch 1. The terms of reference included: (i) The role and functions of a single regulatory authority and specified five examples, prudential supervision, the maintenance of orderly markets, safeguarding of clients’ funds, consumer protection, and the development and regulation of conduct of business rules; (ii) The range of financial service providers to be overseen; (iii) Authority organisational structure; and resources, funding and staffing; (iv) Legislative changes.

1265. The following roles and attributes were specified: fully accountable in a transparent way to the Minister for Finance, the Oireachtas and, in part, to a statutory financial services ombudsman; with clear statutory responsibility for implementing regulation and supervision of financial services; implementing both prudential and consumer protection mandates; to be a one-stop-shop for both regulated bodies and their customers; to be self financing with all costs defrayed by entities regulated; and, to provide itself with the skilled staff and resources necessary to carry out its functions see McDowell Report (n 26), ch 6.

1271. Central Bank of Ireland, Annual Report 2012 (5 April 2013). The Central Bank of Ireland was established by the Central Bank Act 1942 and, under the Central Bank Reform Act 2010 (CBRA 2010), became the single integrated structure for both central banking and regulatory activities. The Bank, as the central bank for Ireland, is a member of the European System of Central Banks (ESCB) and has the primary objective of maintaining price stability. Another key statutory objective is the proper and effective regulation of financial institutions and markets, while ensuring that consumers of financial services are protected.

1273. See De Larosiere Report 2009 (n 1). This eight member group report was prepared under mandate from the EU Commission of October 2008, in the wake of the Lehman Brothers Bank collapse in the US and the global financial turmoil that followed. The group’s specific purpose was to give advice on the future of European financial regulation and supervision. In the Avant-Propos it was stated: ‘Financial regulation and supervision have been too weak or have provided the wrong incentives. Global markets have fanned the contagion. Opacity, complexity have made things much worse. Repair is necessary and urgent’.

1274. This includes professional bodies, retail intermediaries, credit institutions (including banks), insurance undertakings, investment firms and those operating in regulated markets. Of the latter the regulated market consists of the main securities market of the Irish Stock Exchange (ISE) which complies with relevant EU legislation transposed into Irish law. The securities covered include equities, corporate bonds, government bonds, investment funds, exchange traded funds and specialist securities.

1280. This term is not as tightly drafted when compared with criminal offences, which are generally isolated to specifics so as to be amenable to criminal proofs. Criminal offences are generally statutorily adopted in accordance with one of three techniques, the main terminology favouring a person who does something specified is guilty of, or commits, an offence and is liable to penalty upon conviction; see McLeod (n 334).

1281. See Section 33AN CBA 1942. Prescribed contraventions are statutorily defined as contravention in one of four categories, which beyond statute, includes codes or regulatory directions. These four categories have been statutorily specified as: (i) a provision of a designated enactment or designated statutory
instrument; (ii) a code made, or a direction given, under such; (iii) any condition or requirement imposed under a designated enactment or statutory instrument, code or direction; and, (iv) any statutory obligation or financial regulator’s obligation imposed by Part IIIC of the CBA 1942. The list of designated enactments and statutory instruments is located in schedule 2 of the CBA 1942 as amended and is not exhaustive since the Financial Regulator issues codes; and, imposes conditions, directions or requirements, pursuant to legislation, directions or codes; while other obligations may be imposed on a bilateral basis known only to the Financial Regulator and the particular service provider involved.

1282. More fully Section 33AN of the CBA 1942 provides for failure to comply; attempting to contravene; aiding and abetting and counselling and procuring a contravention; inducing, or attempting to induce, a person (whether by threats or promises or otherwise) into a contravention; being (directly or indirectly) knowingly concerned in, or a party to, a contravention; and, conspiring with others to commit a contravention.

1284. An examination into the issue may be commenced to establish whether there are reasonable grounds for such suspicion see Financial Regulator Ireland, Outline of Administrative Sanctions Procedure (2005), 1. The regulator, usually via the supervisory function, first obtains information, comments and explanations about the suspected prescribed contravention, including contacting third parties if necessary, and may establish an inquiry if there are sufficient grounds. The inquiry, conducted by a nominated officer or officers commences with the service of a detailed Inquiry Notice see Section 33AP of the CBA 1942. It is informal and mainly based around written submissions, is not bound by the rules of evidence (Section 33AY (2) of the CBA 1942); and, determines on the civil proof balance of probabilities. If the prescribed contravention is found, the regulator imposes the appropriate sanction(s) from the regulatory smorgasbord, and thereafter notifies same in writing. In the alternative, at any time before the conclusion of an inquiry, the matter may be resolved by entering into a legally binding written settlement agreement. Decisions of an inquiry may be appealed to the Irish Financial Services Appeals Tribunal (IFSAT); see generally FRI Outline of Administrative Sanctions (n 1230), 9-15.

1286. Interviewee C Regulator Ireland 6 February 2013 when referring to negotiated settlement agreements stated: ‘...in our settlement meetings that we have with firms we can agree things that necessarily aren’t in the legislation’. This raises several issues such as an ultra vires threat of judicial review, and also the spectre of regulatory pressurising of an RFSP. However, it may also mean that the regulator can keep up to pace with the innovative market operator. The interesting question is in what does the regulator exceed the legislation? No further insight was provided, but it does not appear to be sanctions since all fifty-nine settlement agreements researched in detail for this dissertation disclosed legislated penalties within a narrow range (see Appendix F). Perhaps the answer lies in the proofs standard, or in the evidence gathering, or in the procedures, where worryingly due process violation uneasily rests.

1294. While case transfer between supervisors and enforcers is pivotal to the success of the Bank’s enforcement effort no handover document has yet been published. However, in May 2012 Oakes (Oakes The role of enforcement (n 453) revealed to the industry some of the grounding operational considerations. The Bank took into account referral handover models adopted by other financial services regulators in developing their own. The ‘internal process’, Oakes stated, was referred to as a ‘handover’ from the supervisory function to the enforcement directorate, commences with engagement and interaction between supervisors and enforcers, which is ‘open, high quality and robust’ and in compliance with the PRISM framework. Supervisors are the primary points of contact and receivers of information while the supervisory management makes all referral decisions. The ultimate decision on whether or not a referral is accepted rests with Enforcement.

1308. See CBI Enforcement Strategy (n 453), 18-19 which provides that: Proportionate means that a holistic approach will be adopted in each particular case; Consistent means always acting fairly and applying procedures in a way that does not inappropriately discriminate between regulated entities; A targeted approach, the hallmark of a risk-based regulatory approach, recognises that certain breaches may be more egregious due to the effects on consumers or to the integrity of the wider financial system; Transparent means that a regulated entity will be advised when issues relevant to that entity have been referred to the Enforcement Directorate.

1320. See CBI Enforcement Strategy (n 453), 20. Section 33AT CBA 1942 Part IIIC has two subsections which provide: (1) If a monetary penalty pursuant to section 33AQ or 33 AR is imposed and the prescribed
contravention is “an offence under a law of the state” then the financial service provider “is not liable to be prosecuted or punished for the offence under the law”; (2) No monetary penalty can be imposed by the regulator if both the financial service provider has been charged with an offence and been found guilty or been acquitted, AND, “the offence involves a prescribed contravention”. One of the major problems in introducing compliance strategies is competing regulatory goals within a ‘good’ society, where what is good in one area may paradoxically create incentives for breach in another; see F Haines and D Gurney, ‘The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict’ (2003) 25(4) Law and Policy 353. Thus, establishing one part of binary enforcement either as an exclusive jurisdiction, or even as a double jeopardy alternative, may distort the efficacy of the other binary pole. There is evidence within financial regulatory practice that negotiated corporate sanctioning, for instance, has created a two-tier justice system. An across the entire binary, generic regulatory enforcement technique, without in-built flexibility, on the other hand, in my submission also cannot succeed.

1323. In the draft section 8, Central Bank and Financial Services Authority of Ireland Bill 2003, inserting a new part IIIIC into the CBA 1942, concerning enforcement provided in the proposed section 33BC. The 2003 Bill provided for a ‘board’ procedure. Thus, taking the criminal law lens, where a board was convened to consider an allegation against an RFSP then no prosecution could follow in respect of any offence arising from the same facts; furthermore, where the board was so considering, or had considered after being convened, then no individual concerned in the management of the RFSP could be prosecuted in respect of the same conduct. Scrutiny through the administrative or civil lens revealed that while it appeared possible for both a criminal and civil finding to be made, if a criminal charge based on the same facts was laid and was pending, or if the financial service provider was found guilty or acquitted, then the restriction was that no monetary penalty could be imposed on the provider; and, in the event of a substantiated allegation against a provider, where the conduct of an individual concerned in the management of the provider contributed, then no monetary penalty could be imposed, if either a criminal charge based on the same facts was laid and was pending, or if the individual was found guilty or acquitted.

1333. Outside dissertation scope and effective 6th November 2013 see CBI Outline of the Administrative Sanctions Procedure (2013) (n 493), 9 where disappointing it is stated that ‘the Central Bank will consider the circumstances of each case on its merits’, and, ‘will exercise its discretion, having regard to the Director of Public Prosecution’s [2010] “Guidelines for Prosecutors”’.

1342. See Elderfield Opening Remarks (n 417); Oakes Delivering a credible threat (n 431). Also Interviewee C Regulator Ireland 6 February 2013 who confirmed this information and yet added that ‘the criminal space is where we want to move to’. Interestingly, in September 2013, S Carswell, ‘Anglo executive given immunity deal by the DPP’ The IrishTimes.com (Dublin, 10 September 2013) revealed in the print media that Matt Moran, a senior executive at Anglo Irish Bank (chief financial officer) at the time of the bank’s collapse, was granted immunity from prosecution by the Irish DPP arising from the criminal investigations into the bank. Carswell quoted: “This office does not comment on individual cases,” said a spokeswoman for the DPP. “I would add that the case is of course pending before the courts and due for trial in January 2014.”’ The trial reference is to the then pending trial of three former Anglo executives Fitzpatrick, McAteer and Whelan, which commenced in February 2014.

1349. Thus far there has been a noticeable gap between supervision and enforcement, and in enforcement itself, as far as sanctioning, and particularly conditionality associated with settlement agreements, is concerned. So far conditions have centred upon co-operative behaviour within the settlement itself and the procedural surround, in limited numbers of cases of voluntary licence relinquishment or disqualification, or some remediation (compensation) for consumers. There has been no staff training orders, enforceable undertakings, mandated risk management procedures or the like. The position may however, change somewhat under the new powers for the Central Bank under Central Bank (Supervision and Enforcement) Act 2013 where for instance: Section 9 empowers the Central Bank to require an RFSP to provide a report on any specified matter from a person nominated by it or by the RFSP and paid for by the RSFP, effectively to provide to the Bank information or the production of documents which the Bank may at least in theory use to ground any conditionality (see section 34); similarly under section 22 the Bank may seek information or records while under section 29 authorised officers of the Bank may attend any meeting relating to the business of an RFSP. Regretably no provision was made for enforceable undertakings. Under Part 6 section 43 the Bank may also give to the RFSP a direction to make appropriate redress to customers. Under Part 7 section 45 the Bank also has power to give directions to RFSPs in various circumstances including where it is conducting business in such a manner as to jeopardise or prejudice the rights and interests of customers.
Under Part 9 section 54 the Bank may apply to the High Court for restitution orders where an RFSP has been sanctioned and was unjustly enriched or lost or adverse effect has occurred by sanctioned activity. Under section 57 costs orders must be made against RFSPs convicted unless the relevant court is satisfied that there are special and substantial reasons for not so doing. Part 11 increases sanction penalties including at least doubling monetary penalties.

1353. Financial Regulator Ireland, *Annual Report of the Financial Regulator 2008* (2009), 5-6. These were: (i) Directors’ loans at Anglo Irish Bank, which had been nationalised in January 2009; (ii) Directors’ loans in other institutions; (iii) Circular transactions involving Anglo Irish Bank and Irish Life & Permanent plc; and (iv) Unwinding of a Contracts for Difference position in Anglo Irish Bank involving Sean Quinn. Matters arising from the investigations on items (iii) and (iv) at that time he revealed had been referred to appropriate authorities including the Gardaí, the Office of the Director of Corporate Enforcement (ODCE) and the Irish Auditing and Accounting Supervisory Authority, while a sub-committee examined the regulatory response to the directors’ loans issues at Anglo Irish Bank.

1354. First person charged on 3rd July 2012. Additionally, on the 18th December 2013, three former Anglo bankers were charged and remanded on bail regarding 2008 transactions in connection with Anglo Irish Bank and Irish life and Permanent and Irish Life Assurance namely, Denis Casey, Peter Fitzpatrick and John Bowe, charges of conspiracy to defraud the public under common law and also in the case of Bowe only false accounting being laid, relating to an alleged €7.2 billion fraud; see C Hancock, ‘Three former bankers charged with €7.2bn fraud’ *The Irish Times* (Dublin, 18 December 2013). The trial of Fitzpatrick, McAteer and Whelan commenced in February 2014; Fitzpatrick was acquitted and the other two were convicted and received 240 hours community service.

1359. See Appendix F from which it is clear that post-crisis enforcement has stiffened. Elderfield *Opening Remarks* (n 417) of December 2012. In May, 2013 the Irish media reported a publicly displayed lobbying spat between business leaders Dr Michael Somers and former Taoiseach John Bruton, and the Financial Regulator, as to alleged over-regulation and the loss of important financial corporate entities from the IFSC in Dublin. See for instance, C Barr, ‘John Bruton calls for ‘rein’ on financial regulation’ *IrishTimes.com* (Dublin 11 May 2013), and ‘Elderfield warns against diluting regulation’ *IrishTimes.com* (Dublin 9 May 2013). In August 2013 the Irish print media reported that a Frenchman Cyril Roux would replace Matthew Elderfield as financial regulator effective 1 October 2013, and in the general commentary remarked: ‘Elderfield was given the extra resources and powers, although some feel that he was a touch heavy-handed with the fines that he dished out to various groups’; see C Hancock, ‘Elderfield gives Roux a head start’ *The Irish Times* (Dublin, 22 August 2013). For the US backlash see for instance, *The Economist*, ‘Criminalising the American Company A mammoth guilt trip’ (London, 30 August 2014).

1363. Interviewee E Academic Australia 22 March 2012 expressed the view that criminal prosecution is disliked by RFSPs because it harms confidence and trust in them, and once publicised it informs individuals, and may lead to licence revocation also, which is the nexus or connection for corporate actors, because they are afraid to lose their licence. Also see ft467 above where the anti-criminal law views of market actors in the EU and Australia are apparent. Interviewee Z Business Leader England 29 November 2012 stated of the GFC: ‘It’s not in my opinion the absence of the criminal law that created the problem……. There seemed to be a lack of comprehension of macro-economic aspects of this and the effects that it would have rather than I mean perhaps criminality can be established in some particular cases but I don’t think that that is the fundamental problem’.

1365. See Case C 68/88 Commission v Greece [1989] ECR 2965 (Greek Maize case). See CBI Enforcement Strategy (n 453),9 which stated: ‘….where we detect non compliance with laws or regulatory requirements, our objective will be to ensure that proportionate, effective and dissuasive action is taken to protect the interests of stakeholders’.

1367. Financial Regulator Ireland, *Administrative Sanctions Guidelines* (2005) (FRI Sanctions Guidelines), para 14: (i) The nature and seriousness of the contravention (10 sub-categories) including the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention, and any potential or pending criminal proceedings in respect of the contravention which will be prejudiced or barred if a monetary penalty is imposed; (ii) Post-contravention conduct (5 sub-categories) including whether admitted, rapidity of voluntary notification if any, degree of co-operation, likelihood of recurrence, remedial action taken; (iii) Previous record; (iv) General considerations including contravention prevalence.

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1369. CBRA 2010 Part 3 Sections 33, 35, 36, 37 and 48 respectively: (i) Under section 33(1) it is an offence, subject to reasonable excuse, for a person to fail to comply with an evidentiary notice issued by the Head of Financial Regulation under section 32 unless excused, or released from further attendance; (ii) Under section 35(6) it is an offence to contravene a direction of the Head of Financial Regulation under section 35 (4)(b) preventing or restricting the publication of evidence; (iii) Under section 36 (1) it is an offence, subject to reasonable excuse, for a person to fail to produce a document or information to the Head of Financial Regulation in compliance with an evidentiary notice issued under section 32; (iv) Under section 37(1) it is an offence, subject to reasonable excuse, to (i) refuse or fail to give evidence in compliance with an evidentiary notice, or (ii) to refuse or fail to answer a question put by the Head of Financial Regulation or in cross-examination with the permission of the Head of Financial Regulation; (v) Under section 48(5) it is an offence for a person under the preceding four subsections, to provide information or a document to the Head of Financial Regulation or the Central Bank, or in answer to a question make a statement to the Head of Financial Regulation when appearing before him, which he or she knows or ought to know is false or misleading in a material particular.

1373. The pivotal Mazars Report (n 1292) revealed that enforcement was then carried out on a departmental basis by the Irish regulator which was at variance with the approach taken by many international financial regulators which enjoyed centralised enforcement teams with specialist enforcement staff. Two major enforcement recommendations were made. Firstly, that the Regulator’s position, enforcement appetite and internal policy in relation to enforcement should be clarified, communicated and applied consistently across the entire regulatory organisation; and secondly, for the creation of a new Enforcement Directorate with overall responsibility for five areas including a dedicated enforcement team. In December 2010 the Directorate was established.

1374. The Voluntary Reporting Guidance Note (Financial Regulator Ireland, Guidance Note for Regulated Financial Service Providers in Reporting Compliance Concerns to the Financial Regulator (2006)), which has not been updated since its introduction in 2006, stated an expectation that each regulated financial service provider (RSFP) maintain an open and co-operative relationship with the regulator, and to date has clearly influenced sanction decision-making. It set out twelve indicators to assist in voluntarily reporting compliance concerns. These inter alia included (FRI Guidance Note (n 1318) above,1-2, para 4): (i) The existence of facts objectively suggesting deliberate, dishonest or reckless conduct; (ii) likely duration and frequency of the compliance concern; (iii) possible benefit gained or loss avoided; (iv) loss or risk of loss caused to consumers or other market users; (v) whether the compliance concern could reveal serious or systemic weaknesses of the management systems or internal controls; (vi) impact on the orderliness of the financial markets, including public confidence; (vii) previous requests for remedial action; (viii) nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the compliance concern. While these voluntary guidelines were taken from then available international precedent, it is apparent from the US SEC Cooperation regime survey for instance, in Part 2 Chapter 2 section 2.2.4 that these guidelines lag behind the more extensive current international comparators, and do not differentiate between companies and individuals.

1375. The Irish financial regulator acts upon complaints or upon its own initiative, acts through authorised officers, may apply to the Courts to appoint examiners, may appoint inspectors, and may impose administrative civil sanctions – the administrative sanction suite - including: caution or reprimand, issue directions to refund/withhold payment, monetary penalty, disqualify from management, direct contravention ceasure, impose costs, may publish sanction guidelines, establish an enquiry, may issue a supervisory warning, may issue an evidentiary notice; may issue a suspension and/or prohibition notice, may enter into a settlement agreement, may publish adverse decisions; And on the criminal side may prosecute minor or summary offences, and may refer serious offences to the Garda Siochana/DPP. See Connery and Hodnett (n 6), ch 4; and Central Bank Reform Act 2010, Part 3. Also see Appendix F.

1377. McDowell Report (n 26); paragraph 7.6 for instance, recommended examination of all relevant existing legislation to ensure that existing enforcement powers, including power to enforce sanctions, were both adequate and uniform as far as practicable. Also see Butler et al (n 451); COM (2010) 716 final (n 23); Hamilton ‘Do we need a system of administrative sanctions in Ireland?’ (n 451); Horan (n 87); McDowell (n 451). The EU commission for instance, advocated that specific administrative sanctions should legislatively be tailored to specific violations: see COM (2010) 716 final (n 23).
Interviewee X Regulator Ireland 12 November 2012 stated: ‘[T]here is a strong case for substantially increasing the financial penalties that may be imposed on corporate entities vis a vis the individual entity…. a maximum penalty which would be a multiple of the maximum imposed on the individual…… the law should permit that the maximum penalty should be sufficient to permit the prosecution of a serious offence with a penalty which is proportionate to that serious offence, and I think law makers need to tailor the maximum penalties to almost the catastrophic situation, and allow the courts the discretion to select an appropriate penalty within that…..’. The Central Bank (Supervision and Enforcement) Dail Bill (2011) 43 contained extensive reform proposals as recommended by the Financial Regulator, including fines for breaches of designated enactments doubled from €5,000,000 to €10,000,000 for a Body Corporate and €500,000 to €1,000,000 for an individual; and, for larger firms, a potential 10% of turnover. On 11 July 2013, after a two-year wait, the Central Bank (Supervision and Enforcement) Act 2013 was finally enacted, effective 1st August 2013. It strengthened the powers of the Central Bank of Ireland in relation to the supervision of financial service providers and the enforcement of financial services legislation, and provided for a range of new and revised powers for the Bank to ensure proper and effective regulation. The main reform provisions affecting financial service providers include: requiring an independent expert report prepared on a specified regulatory matter; setting out a consolidated authorised officer regime to replace some 20 existing regimes; Bank powers to require a firm's auditor to carry out an examination and prepare a report as to the extent that the firm has complied with obligations; providing a two-level whistle-blowing protection and mandatory disclosure for Pre-Approval Controlled Functions; providing new powers to the Bank to make directions to redress customers for "relevant defaults"; and, providing for Restitution Orders, whereunder, a firm is guilty of an offence or contravention under financial services legislation, and which as a result has been unjustly enriched or a person has suffered loss or adverse effect, such firm will be required to pay a specified sum to the Bank for disbursement to those who have been identified by the Court as entitled to restitution.

1383. Croall and Ross (n 422) referring to corporate entities stated eleven years ago: ‘The vast majority receive fines which are often characterised as too small, whether in relation to the harm which offences involve or to their limited impact on the resources of the corporation’.

1385. Interviewee L Judiciary Ireland 7 January 2013 concerning potential constitutional challenge to the size of penalty imposition stated: ‘The constitution confines the administration of justice to judges appointed under article 35. You could make that argument. I don’t wish to express any view on it’. And later the same Interviewee L added: ‘…..theoretically there is a risk of challenge. There are two ways of approaching it. There is a presumption of constitutionality in respect of all post 1937 legislation. These penalties are imposed under very recent legislative instruments. They are presumed to be constitutional. It is a matter for somebody who believes them to be unconstitutional to take a challenge and if the challenge is upheld well then the government urgently needs to address the situation. The alternative would be….to say well there is a risk here that somebody at some point will challenge and we on a pre-emptive basis ought to act. It’s a matter for the Attorney General really. Presumably this has been looked at. Maybe it hasn’t I don’t know’. Interviewee C Regulator Ireland 6 February 2013 stated as to the top-lining or ceiling of monetary penalties: ‘We do [limit] in Ireland now I’m not a constitutional expert but I am informed that that’s because of a particular constitutional reason’. Also see DJELR White Paper on Crime, Organised and White Collar Crime (n 450) which commented upon constitutional limits to the scope to extend the use of administrative penalties; also see Connery and Hodnett (n 6).

1388. Section 33AV of the Central Bank Act, 1942 as amended; and see FRI Sanctions Guidelines (n 1312), para 13. The Financial Regulator although empowered to enter into written settlement agreements as stated, must meet certain criteria. Provided the basis for settlement is consistent with the general approach to regulation, is fair having regard to all the facts known, and will contribute to the efficient, effective and economic use of resources, the procedure may be mobilised. They are binding on both the Financial Regulator and the RFSP, and the terms of any settlement agreement may contain the name of the RFSP or person concerned in its management, and the sanctions imposed together with any other conditionality. FRI Outline of Administrative Sanctions (n 1284), 6-7 provide that agreements form part of the firm’s compliance record, and in relation to further prescribed contraventions, may influence the Financial Regulator’s decision about whether to commence enforcement action, agree a settlement or to hold an inquiry, and in determining appropriate sanctions.

1390. See Honohan Report (n 6), 44. Habermas (n 276), 125 stated: ‘….wherever normative standards become contingent, regulatory law has been uprooted from the soli of legitimate lawmaking’.

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1394. Interviewee C Regulator Ireland 6 February 2013 described the actual settlement procedure model, with some future, yet minimal, planned innovations, as follows:  ‘We will have the matter referred to us by the supervisors.... That matter would be looked at by Enforcement and if we agree.... there is or appears to be a technical breach.... we’ll notify the firm by a letter of investigation...... probably go out on site and look at the situation, gather the evidence onsite, and there would be an exchange of correspondence with the firm, its lawyers around the law...... where we are comfortable that we can demonstrate that there has been a contravention...... we’ll offer a settlement if the firm wants to take settlement. That meeting is held on a without prejudice basis. We will not walk out of the room [iif] we get an agreement of the facts, we get an agreement of a reprimand, and if the case warrants it an agreement of a financial penalty...... Now to date we have been close in settlements where we have said thank you very much we are not going to entertain these discussions any longer, and it’s not because we are locking ourselves in to a position. It’s because the issue on the table is serving the public interest, and that settlement will not serve the public interest either, because the financial penalty is too low, or they want secrecy around their name, or the facts which led to the situation’.

1397. See Part 2 Chapter 2 section 2.2.4. In Ireland, within the sanction capability launching factor, summary offences are minor offences (article 38.2) and they carry a maximum 12 months imprisonment; however, sentence may be imposed consecutively to arrive at a total of 24 months maximum. Above this sit indictable offences and although imprisonment of less than five years is often imposed, normally in Ireland ‘serious’ offences carry a five year imprisonment potential. As to fines they are usually minor when €5,000 is the general maximum (see Fines Act 2010). The relatively small nature of ‘minor’ criminal law fines compared to the average administrative sanction monetary penalty imposed by the financial regulator at €352,000, clearly is one of the reasons why the financial regulator has opted for the administrative sanction regime, but it brings with it constitutional (hardly a limited judicial function per article 37) and ECHR (punitive and requiring art 6 criminal law due process protections) problems as discussed earlier.

1403. In many jurisdictions within the financial sphere post GFC this has resulted in risk targeting as a regulatory response, and the introduction of new mechanisms and controls directly vectored at systemic risk. This macro-prudential approach has increasingly involved manifestation and action-prompts from the G20 global structure, mirrored for instance in regional developments such as those at EU level, all of which impact the open Irish economy. The upshot is greater direct government intervention or greater governmental steering through its statutorily provided regulatory mechanisms. This has included tightening of regulatory structures such as the return of the Irish financial regulator to the aegis of the Central Bank, and the reform of regulatory supervision and enforcement by framing targeted intervention approaches. But it hasn’t as yet resulted in the use, or the increased use, whether targeted or not, of the criminal law.

1405. See CBI Enforcement Strategy (n 453), 10. The regulator’s plan from the outset was to align the enforcement and supervisory directorates in tandem in line with international best practice, and under PRISM to target their enforcement resources in two ways: (a) Pre-defined Enforcement – 60% targeting - where cases taken will be focused on seven themes chosen by the regulator based against priority areas identified by Supervisory colleagues, and where themed inspections will strongly influence the targeted Enforcement effort; and (b) Reactive Enforcement – 40% targeting - which entails taking decisive Enforcement action where serious concerns arise from the regulator’s supervisory work and other sources of information and events, both internal and external see CBI Enforcement Strategy (n 453), 4, 9.

1407. See CBI Enforcement Strategy (n 453). Concerning Pre-defined Enforcement for instance, the Supervisory Divisions developed seven prioritised targeted themes for 2011 and enforcement cases were taken where breaches of regulatory requirements were suspected and found in the course of thematic inspections. These seven areas were: (i) Governance and Risk Management, including the operation of Risk Committees; (ii) Systems & Controls, including accounting, auditing and other internal controls; (iii) Controls around charging issues, including the prevention of, follow up and resolution of charging errors; (iv) Compliance with the Mortgage Arrears Code; (v) Compliance with Client Money Requirements/Clien Assets; (vi) Timeliness and accuracy of information received by the Central Bank from regulated entities; (vii) Anti Money Laundering/Counter Terrorist Financing. Reactive Enforcement on the other hand involves 40% of enforcement targeting and where serious breaches of regulatory requirements are detected through supervisory work or other sources, while proceedings commence in accordance with the October 2005 Administrative Sanctions Procedure.
1408. A random search of the settlement agreements published by the Financial Regulator on website concerning this issue revealed, for instance: (i) Settlement Agreement between the Central Bank of Ireland and Scotiabank (Ireland) Limited dated 2 June 2011, where a monetary penalty of €600,000 was imposed in respect of two self-reported issues, calculations of the quantitative liquidity ratios performed by the firm were incorrect, and, an automated programme error was found; (ii) Settlement Agreement between the Central Bank of Ireland and MBNA Europe Bank Limited dated 21 June 2011 where a monetary penalty of €750,000 was imposed in respect of two self-reported issues including failing to have and employ effective resources and procedures, systems and control checks that are necessary for compliance with the Consumer Protection Code; (iii) Settlement Agreement between the Central Bank of Ireland and Goldman Sachs Bank (Europe) plc dated 08 September 2011 where a monetary penalty of €160,000 was imposed because inter alia, during the period 16 July 2008 to 17 December 2010, the firm’s internal control mechanism failed to identify that its regulatory counterparty risk capital requirement was incorrectly calculated; (iv) Settlement Agreement between the Central Bank of Ireland and Aviva Life and Pensions Ireland Limited dated 07 March 2012 where a monetary penalty of €245,000 was imposed in respect of four breaches including the firm did not have and employ effectively the resources and procedures, systems and control checks that were necessary for compliance with the Consumer Protection Code; (v) Settlement Agreement between the Central Bank of Ireland and Merrion Stockbrokers Limited dated 21 March 2012 where, following a themed inspection and subsequent self-reporting, a monetary penalty of €65,000 was imposed in respect of a number of breaches including between 1 November 2007 and 20 June 2011, the firm failed to report the correct buy/sell indicator in the details of the execution of 45,782 transactions in financial instruments which were admitted to trading on a regulated market; (vi) Settlement Agreement between the Central Bank of Ireland and Alico Life International Limited dated 29 March 2012, where after a themed inspection carried out in 2009, a large monetary penalty of €3,200,000 was imposed in respect of four breaches including certain of the firm’s administrative procedures and internal control mechanisms not being sound or adequate.

1413. The Central Bank, following industry consultation, issued two separate but inter-linked codes under Section 50 of the CBRA 2010, the Code setting out Standards of Fitness and Probity and Part 1 of the Minimum Competency Code see Central Bank of Ireland, Fitness and Probity - Frequently Asked Questions (2012), 3. Three non-binding guidance documents have also been issued, the 2011 ‘Guidance’, and separate guidance upon investigations and PCF due diligence. There is also a published Individual Questionnaire (‘the IQ’) to aid with due diligence which is completed by an individual seeking a PCF and checked by a second authorised individual in the RFSP (updated 20th August 2012), together with an Online User Manual for fitness and probity applications. Furthermore, the regulator has bound itself to published service standards. On the 20th April, 2010 in a dark hour for the Republic of Ireland, then Minister for Finance the late Brian Lenihan TD, introduced the second stage of the Central Bank Reform Bill 2010, and stated of the then prospective section 50 code: ‘these powers should be brought forward in this legislation because of their importance in helping to set the tone of the new regulatory arrangements’ see Brian Lenihan, Dáil Deb 20th March 2010, Vol 706 No 3, col 442-443.

1415. See Yeager (n 222). Under Schedule 2 of CBRA 2010 (Sections 20 and 22) (Amendment) Regulations 2011, Statutory Instrument S.I. 615 of 2011, Prm. A11/2216, forty-one separate functions affecting the upper echelons of the organisational command chain are specified, covering inter alia board members, partners or sole traders, and senior management positions, and spread across different categories of service providers including bodies corporate generally, RFSP’s generally, partnerships and sole traders generally, insurance undertakings, credit institutions, the Irish stock exchange, investment firms, investment intermediaries, trustees, Undertakings for Collective Investment in Transferable Securities (UCITS), management companies, and payment institutions.

1419. The grounding legislation provided that a person performing in connection with a financial service, what is known as a controlled function (CF), or a pre-approved controlled function (PCF), must have a level of fitness and probity appropriate to the performance of that particular function. Significantly, it applies to all regulated financial service providers (RFSPs) excepting credit unions, and covers financial industry areas including banking and other credit institutions, insurance undertakings, the stock exchange, investment firms, investment intermediaries, trustees, UCITS, management companies, and payment institutions. There are four discrete broad categories of CFs covering eleven CFs in total. Furthermore, there are effectively five broad categories of PCF’s – regarded by the regulator as a sub-set of CF’s - which are defined as controlled functions. Effectively, they are functions relevant to a senior corporate office held and are industry provider specific (see previous footnote).
1420. See CBI FAQ (n 1413), 25. According to the regulator, fitness relates to the qualifications, experience, knowledge and other relevant factors that will make a person fit for the performance of a CF, while probity relates to an individual’s character illuminated by their past behaviour and more particularly means acting honestly, ethically, with integrity and being financially sound. The section 50 Fitness and Probity Code was introduced in 2011.

1421. See CBI Fitness & Probity Service Standards (n 1414), 7. Extensive practical regulatory steps for RFSPs include: compiling and maintaining a list of persons in every CF and PCF; obtaining confirmation from those individuals performing a PCF or a CF that he or she is familiar with the Standards and will comply with them; undertaking due diligence of fitness, competence and probity of those performing PCFs and CFs, and in respect of criminal records; and, compiling and maintaining a register of relevant documents.

1424. See Yeager (n 222), 162 who argued that, ‘A large body of empirical work......has demonstrated that by themselves codes are entirely insufficient for meaningful reform of corporate ethics and legal compliance. What is necessary is that ethical considerations be made the focus of a routine process of inquiry in which managers discuss with each other alternative choices’. Also see Frank (n 218); CD Stone, Where the Law Ends: The Social Control of Corporate Behaviour (Harper Colophon 1975).
Appendix L: The Original Ayres and Braithwaite Enforcement Pyramid

Source: Ayres and Braithwaite (1992:35)
BIBLIOGRAPHY and REFERENCES

Dail and Seanad Eireann Debates


Flanagan C, 19 November 2009 Dáil Deb, Vol. 695 No. 2, at Col 266-267


House of Commons (UK) Debates

Shawcross Sir H, 29 January 1951 H.C. Debates, Vol. 483, Col. 681

Interviews

Conducted with a select sample of interviewees (anonymised) as quoted and referenced in text and footnotes

TV and Video-Recorded Sources


Connor G, (Interview broadcast RTE Prime Time RTE 1 television Ireland, 10 June 2010)
Hamilton J (Irish DPP interviewed by Brian Dowling, Sunday 16th May, 2010 on The Week in Politics, RTE 1 TV)

Prime Time (RTE 1 TV broadcast Ireland, 1March 2011)

Books

A


Alexander RCH, Insider Dealing and Money Laundering in the EU: Law and Regulation (Ashgate 2007)

Aquinas T, Summa Theologia (1265-1274)

Arlidge A et al, Arlidge and Parry on Fraud (3rd edn, Thompson Sweet and Maxwell 2007)


Ashe M and Reid P, Money Laundering Risks and Liabilities (Round Hall Sweet & Maxwell 2000)


Ayers I and Braithwaite J, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press 1992)


Beccaria C, *On Crimes and Punishments* (1764)


Braithwaite J, *Punish or Persuade: enforcement of coal mine safety* (State University of New York Press 1985)


Braithwaite J, *Regulatory Capitalism* (Edward Elgar 2008)
Brightman HJ, *Today’s White-Collar Crime Legal, Investigative, and Theoretical Perspectives* (Routledge 2009)


C

Cahill N, *Company Law Compliance and Enforcement* (Tottel 2008)


Charleton P McDermott PA and Bolger M, *Criminal Law* (Butterworths 1999)

Christiansen T and Reh C, (eds) *Constitutionalizing the European Union* (Polgrave 2009)


Clarke M, *Regulating the City: Competition, Scandal and Reform* (Open University Press 1986)


Clinard MB, *Corporate Ethics and Crime: The Role of Middle Management* (Sage 1983)

Coffey G, *Criminal Law* (Roundhall 2010)
Cohan WD, ‘House of Cards How Wall Street’s Gamblers Broke Capitalism’ (Allen Lane 2009)

Cohen P, Modern Social Theory (Heinemann Educational 1968)

Cohen S, Visions of Social Control (Polity 1985)

Cohen S, Against Criminology (Transaction Books 1988)

Connery N and Hodnett D, Regulatory Law in Ireland (Tottel 2009)


Craig P and de Burca G, EU Law Text, Cases, and Materials (5th edn, Oxford University Press 2011)

Cressey D, Other People’s Money: A Study in the Social Psychology of Embezzlement (Free Press 1953)


D

Davies H and Green D, Global Financial Regulation the essential guide (Polity Press 2009)


Dewey J, How We Think (Heath 1910)


Disraeli B, Sybil or The Two Nations (1845, Penguin 1980)

Donnelly S, The Regimes of European Integration Constructing Governance of the Single Market (Oxford University Press 2010)

Douglas M, Risk and Blame: Essays in Cultural Theory (Routledge 1992)


Durkheim E, *The Division of Labour in Society* (Macmillan 1984)

Dworkin RA, *Taking Rights Seriously* (Duckworth 1977)

E


F


Feinberg J, *Offense to Others* (Oxford University Press 1985)


Ferri E, *Criminal Sociology* (Little Brown 1905)


G


Garland D, *The Culture of Control* (Oxford University Press 2001)


Gilbert, *The Law of Evidence* (Dublin 1754)


Goodhart, CAE, *The Regulatory Response to the Financial Crisis* (Edward Elgar 2009)

Gray J and Akseli O (eds), *Financial regulation in Crisis: The Role of Law and the Failure of Northern Rock* (Elgar 2011)


H


Haines F, *Corporate Regulation: Beyond ‘Punish or Persuade’* (Clarendon Press 1997)

Haines F, *The Paradox of Regulation* (Elgar 2011)


Hart HLA, *Punishment and Responsibility* (Oxford University Press 1968)


Hetherington, *Prosecution and the Public Interest* (London1989)

Higgins I, *Corruption Law* (Round Hall 2012)


Horan S, *Corporate Crime* (Bloomsbury 2011)


K


Kaletsky A, *Capitalism 4.0 The birth of a new economy* (Bloomsbury 2010)


L


Lacey N, *State Punishment: Political principles and community values* (Routledge 1988)


M


Mars G, *Cheats at Work, and Anthropology of Workplace Crime* (George Allen & Unwin 1982)


Miles M and Huberman AM, *Qualitative Data Analysis: an Expanded Source Book* (Sage 1994)


Moynihan M, *Currency and Central Banking in Ireland 1922-60* (Gill and Macmillan 1975)

N


Norrie A, *Crime, Reason and History* (Butterworths 2001)

O


Offences Handbook (Thompson Round Hall 2004)


O’Malley T, *The Criminal Processes* (Round Hall 2009)


P

459
Packer H, *The Limits of the Criminal Sanction* (Stanford University Press 1968)


Paine T, *The Rights of Man* (G Claeys (ed), Hacket 1992)


Picciotto S, *Regulating Global Corporate Capitalism* (Cambridge University Press 2011)


Q


R


Reinhart CM and Rogoff KS, *This Time is Different Eight Centuries of Financial Folly* (Princeton University Press 2009)


Roberts JV, (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011)


S


Sutherland EH, *Criminology* (Lippincott 1947)

Sutherland EH, *White-Collar Crime* (Holt Reinhart and Winston 1949)

Svatikova K, *Economic Criteria for Criminalization: Optimizing Enforcement in Case of Environmental Violations* (Intersentia 2012)

T


Thomas AB, *Controversies in Management* (Routledge 1993)


V


W

Walsh D, *Criminal Procedure* (Thomson Round Hall 2002)


Wessel D, *In Fed We Trust* (Crown Business 2009)


Y


Z

Chapters in Books

A


B


C

Carney PJ, ‘Foreword’ in Charleton P McDermott PA and Bolger M *Criminal Law* (Butterworths 1999)


466


Edelman L and Talesh S, ‘To comply or not to comply – that isn’t the question: how organisations construct the meaning of compliance’ in Parker C and Nielsen V (eds), *Exploring Compliance Business Responses to Regulation* (Edward Elgar 2011)


Gunningham N, ‘Enforcement and Compliance Strategies’ in Baldwin R Cave M and Lodge M (eds), The Oxford Handbook of Regulation (Oxford University Press 2010)


H

Haines F, ‘Facing the compliance challenge: Hercules, Houdini or the Charge of the Light Brigade?’ in Parker C and Nielsen V (eds), Exploring Compliance Business Responses to Regulation (Edward Elgar 2011)


Hamilton J, ‘Do we need a system of administrative sanctions in Ireland?’ in Kilcommins S and Kilkely U (eds), Regulatory Crime in Ireland (First Law 2010)


Holmes G, ‘Editor’s Foreword’ in Holmes G (ed), The Oxford Illustrated History of Medieval Europe (Oxford University Press 1988)


Hutton N, ‘Sentencing, Inequality and Justice’ in Tata C and Hutton N (eds), Sentencing and Society (Ashgate 2002)


Kagan RA, ‘Regulatory Enforcement’ in Rosenbloom DH and Schwartz RD (eds), Handbook of Regulations and Administrative Law, (Marcel Dekker 1994)


L


M


N

Nelken D, ‘Criminal Law and Criminal Justice: Some Notes on Their Irrelation’ in Dennis I H (ed), Criminal Law and Justice (Sweet & Maxwell 1987)


O


P


Prosser T, ‘Models of Economic and Social Regulation’ in Oliver D Prosser T and Rawlings R (eds), *The Regulatory State* (Oxford University Press 2010)


Snider L, ‘“This time we really mean it”: Cracking down on stock market fraud’ in Pontell HN and Geis G (eds), *International Handbook of White-Collar and Corporate Crime* (Springer 2007)


Tonry M, ‘Punishment Policies and Patterns in Western Countries’ in Tonry M and Frase RS (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001)


Van Erp J, ‘Naming and shaming in regulatory enforcement’ in Parker C and Nielsen V (eds), *Exploring Compliance Business Responses to Regulation* (Edward Elgar 2011)


479


Y


Journals and Periodicals

A


Abbott KW and Snidal D, ‘Taking responsive regulation transnational: Strategies for international organizations’ (2013) 7 Regulation & Governance 95


Ayres I, ‘Responsive regulation: A co-authors appreciation’ (2013) 7 Regulation and Governance 145


Benson ML, ‘Denying the guilty mind: accounting for involvement in a white collar crime’ (1985) 23 (4) Criminology 583


Black DJ, ‘The Mobilization of Law’ (1973) 2 J. Legal Studies 125


Black WK, ‘Echo epidemics control frauds generate ‘white-collar street crime’ waves’ (2010) 9(3) Criminology & Public Policy 613


Braithwaite J, ‘For public social science’ (2005) 56(3) The British Journal of Sociology 245

Braithwaite J et al, ‘Can regulation and governance make a difference?’ (2007) 1(1) Regulation and Governance 1


Braithwaite J, ‘Relational republican regulation’ (2013) 7 Regulation and Governance 124

Braithwaite V, ‘Criminal prosecution within responsive regulatory practice’ (2010) 9(3) Criminology & Public Policy 515


Carson WG, ‘Policing the Periphery: the Development of Scottish policing’ (1985) 17(4) Australian and New Zealand Journal of Criminology 207

Charleton P and McDermott PA, ‘Constitutional Implications of Plea Bargaining’ (2000) 5(9) BR 476


Coffey G, ‘Raising the Pleas in Bar against a Retrial for the Same Criminal Offence’ (2005) 5 JSIJ 124


Cotter P, ‘Parallel Civil and Criminal Proceedings’ NAA Gazette

Craig P, ‘Constitutions, Property and Regulation’ (1991) Public Law 538


Dennis I, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ (2005) Crim LR 901


Ehrlich I, ‘The deterrent effect of criminal law enforcement’ (1972) 1 Journal of Legal Studies 259


Everson M, ‘The Fault of (European) Law in (Political and Social) Economic Crisis’ (2013) 24(2) Law and Critique 107


Fuller LL, ‘Positivism and Fidelity to Law – A Reply to professor Hart’ (1957) 71 Harvard Law Review 630


487


Grabosky P and Shover N, ‘Forestalling the next epidemic of white collar crime’ (2010) 9(3) Criminology & Public Policy 641


Hall J, ‘Interrelations of criminal law and torts: I’ (1943) Colum L Rev 753


J


K


Kahn AE, ‘Deregulation: Looking Backward and Looking Forward’ (1990) 7 Yale Journal on Regulation 325


Karkkainen BC, ‘New Governance’ in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping’ (204) 89 Minnesota Law Review 471
King C, ‘Civil forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland’ (2013) Legal Studies 1


Laufer WS, ‘Secrecy, silence, and corporate crime reforms’ (2010) 9(3) Criminology & Public Policy 455


M


Mascini P, ‘Why was the enforcement pyramid so influential? And what price was paid?’ (2013) 7 Regulation and Governance 48


Mason E, ‘The apologetics of managerialism’ (1958) 31 Journal of Business 1


McGreal PE, ‘Corporate Compliance Survey’ (2011) 67 The Business Lawyer 227

Merton RK, ‘Social structure and anomie’ (1938) 3(Oct) American Sociological Review 672


N


Neafsey E and Bonanno ER, ‘Parallel Proceedings and the Fifth Amendment’s Double Jeopardy Clause’ (2011) 7 (3) Fordham Environmental Law Review 719

Needleman ML and Needleman C, ‘Organisational Crime: two models of criminogenesis’ (1979) 20 Sociology Quarterly 517


O


Omarova ST, ‘Wall Street as Community of Fate: Toward Financial Industry Self-Regulation’ (2011) 159 University of Pennsylvania Law Review 411

493

P


Parker C, ‘Twenty years of responsive regulation: An appreciation and appraisal’ (2013) 7 Regulation & Governance 2


Passas N, ‘Anomie and Corporate Deviance’ (1990) 14 Contemporary Crises 157

Pearce F and Tombs S, ‘Ideology, hegemony and empiricism’ (1990) 30 British journal of Criminology 423


Pearce F and Tombs S, ‘Hazards, Law and Class: Contextualising the Regulation of Corporate Crime’ (1997) 6(1) Social and Legal Studies 79


494

Pontell HN and Geiss G, ‘How to effectively get crooks like Bernie Madoff in Dutch’ (2010) 9(3) Criminology & Public Policy 475


R


Ross EA, ‘The Criminaloid’ (1907) 99 Atlantic Monthly 44


S


Simon WH, ‘Optimization and its discontents in regulatory design: Bank regulation as an example’ 2010 4(1) Regulation & Governance 3


Skelcher C and Torfing J, ‘Improving democratic governance through institutional design: Civic participation and democratic ownership in Europe’ 2010 4(1) Regulation & Governance 71


Snider L, ‘Framing E-waste regulation the obfuscating role of power’ (2010) 9(3) Criminology & Public Policy 569

497


Sutherland EH, ‘White-collar criminality’ (1940) 5 Am Soc Rev 1


Torgler B, ‘Serious tax noncompliance motivation and guardianship’ (2010) 9(3) Criminology & Public Policy 535

Tullock G, ‘The welfare costs of tariffs, monopolies, and theft’ (1967) 5 Western Economics Journal 224

van de Bunt H, ‘Walls of Secrecy and Silence’ (2010) 9(3) Criminology & Public Policy 435


Walker RG, ‘Reporting entity concept: a case study of the failure of principles based regulation’ (2007) 43(1) Abacus (Australia) 49


Wells C, ‘Corporate crime: opening the eyes of the sentry’ (2010) 30 (3) Legal Studies 370

Westerman P, ‘Pyramids and the value of generality’ (2013) 7 Regulation and Governance 80


Y


Online Journals and Periodicals


Loewenson CH, ‘Parallel Proceedings’ (2004) <http://www.mofo.com/files/Publication/b72e0c65-297f-455f-a9bb-6e0b63eb28c2/Presentation/PublicationAttachment/bd3bc6f0-6563-4f4b-a3f2-0c18189b5d98/04PLIDO.pdf> accessed 13 January 2014


Conference and Seminar Papers
Ahern D, ‘Replacing 'Comply or Explain' with Legally Binding Corporate Governance Codes: An Appropriate Regulatory Response’ (ECPR Standing Group on Regulatory Governance Biennial Conference Regulation in an Age of Crisis Dublin, 17-19 June 2010)

Barnard JW, ‘Making a Deal with the SEC: Candor, Cooperation, Contrition and Cultural Change’ (The International Conference on Law and Society, session no TBA 02 Financial Regulation: The Soul Searching Continues Hilton Hawaiian Village Hawaii, 8 June 2012)


Doyle N, ‘Political leadership within the EU and its historical roots (the Franco-German partnership)’ (ANUCES ANU Canberra, 17 January 2012)


Fennell C, ‘Of Myths and Margins – Moving from the Particular to what is Core’ (UCC North South Criminology/CCJHR Postgraduate Conference: Rights, Responsibilities, and Wrongdoings: Continuity and Change, University College Cork, 20 June 2013)

Hamilton J, ‘Do we need a system of administrative sanctions in Ireland?’ (Two Tier Criminal Law System Conference Common Law and Regulatory Enforcement: Is the Traditional Role of the DPP Diminishing? Law Society Dublin, 25 April 2009)


Hamilton J, ‘Prosecuting Corruption in Ireland’ (Burren Law School, Clare, 1 May 2010)


Murphy S, ‘The Trial of Complex Fraud Cases’ (12th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 28 May 2011)


O’Malley T, ‘Recent developments in sentencing’ (13th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 19 May 2012)


Reuter P, ‘What do Money Laundering Controls Control?’ (RegNet ANU Canberra, 11 October 2011)


Working Papers


McBarnet D, ‘When Compliance is Not the Solution But the problem: From Changes in Law to Changes in Attitude’ (Canberra Centre for Tax System Integrity, Australian National University Working Paper No 18/2001)


Occasional and Discussion Papers


Muldoon F, ‘Economic and Social Reform’ (Public Seminar ‘Reform in the Aftermath of the Crisis: Exploring Agenda for Health, Political and Financial Reform’ University of Limerick 19 September 2013)


Other Internet Sources


Newspaper, Magazine, Press Releases and other Print Media archive and sources

_\textit{Ireland}_

—, ‘AU Optronics fined $500m for price fixing’ \textit{The Irish Times} (Dublin, 22 September 2012)

—, ‘Banks cut 5,500 branches across Europe in 2012’ \textit{The Irish Times} (Dublin, 11 August 2013)

—, ‘Heather Perrin sentenced to two and a half years in jail’ \textit{The Irish Times} (Dublin, 28 November 2012)

—, ‘JPMorgan had Madoff concerns in 1998 Authorities informed decade later’ \textit{The Irish Times} (Dublin, 08 January 2014)

—, ‘JPMorgan had Madoff concerns in 1998 Authorities informed decade later’ \textit{The Irish Times} (Dublin, 08 January 2014)

Bloomberg, ‘Barclays fined £290m over bank rates’ The Irish Times (Dublin, 28 June 2012)

Bloomberg, ‘Citigroup to pay $730 million to settle claims of misleading investors’ The Irish Times (Dublin, 19 March 2013)

Browne V, ‘Irish people did not sign up for what was done to them in the bailout’ The Irish Times (Dublin, 18 December 2013)

Carolan M, ‘Claims that Quinns put assets beyond bank's reach’ The Irish Times (Dublin, 22 March 2012)

Carolan M, ‘Supreme Court rules ’Slab’ Murphy may challenge non-jury trial’ IrishTimes.com (Dublin, 5 June 2013)

Carolan M, ‘Anglo Irish Bank criminal cases could run for several years, High Court told’ Irish Times (Dublin, 14 January 2014)

Carroll S, ‘Bloxham halts regulated activities over ‘irregularities’’ The Irish Times (Dublin, 28 May 2012)

Carroll S, ‘FitzPatrick faces trial on charges of financial misdeclarations’ The Irish Times (Dublin, 22 December 2012)

Carroll S and Carswell S, ‘Former Anglo Irish chief Seán FitzPatrick charged’ The Irish Times (Dublin, 24 July 2012)

Carswell S, ‘Cypriot court lifts Quinn injunction, The Irish Times (Dublin, 16 March 2012)

Carswell S, ‘Central Bank wants to talk to financial partner at Bloxham’ The Irish Times (Dublin, 29 May 2012)

Carswell S, ‘Central Bank will draw on Swedish institutional memory’ The Irish Times (Dublin, 5 September 2012)

Carswell S, ‘Central Bank governor backs new ECB bond-buying plan’ The Irish Times (Dublin, 7 September 2012)
Carswell S, ‘Brass neck and sneers as Anglo tried to hoodwink State’ The Irish Times (Dublin, 25 June 2013)

Carswell S, ‘Anglo executive given immunity deal by the DPP’ The IrishTimes.com (Dublin, 10 September 2013)

Carswell S, ‘Clean living: The man who cost AIB $691m’ The Irish Times (Dublin, 12 September 2014)

Chang H-J, ‘The greatest bait and swith in modern history’ The Irish Times (Dublin, 15 June 2013)

Collins S and Carswell S, ‘Taoiseach defends his handling of economy before crash’ The Irish Times (Dublin, 14 May 2010)

Coulter C, ‘DPP outlines challenges for justice system of strict financial regulation’ The Irish Times (Dublin, 19 May 2010)

Coulter C, ‘Judges' implicit criticism highlights structural problem with appeals court’ The Irish Times (Dublin, 2 July 2012)

de Breadun D, ‘Honohan says those guilty of bank crisis crime must face jail’ The Irish Times (Dublin, 23 February 2010)

de Breadun D, ‘’Moral defects’ of society underpin crisis’ The Irish Times (Dublin, 19 July 2010)

Gallagher C, ‘Thomas Byrne convicted of stealing €52 million from banks and defrauding 13 clients’ The Irish Times (Dublin, 19 November 2013)

Gleeson C, ‘Cab chief aims to ensure that nobody is untouchable in battle against crime’ The Irish Times (Dublin, 19 October 2013)

Hancock C, ‘Elderfield gives Roux a head start’ The Irish Times (Dublin, 22 August 2013)

Hancock C, ‘Three former bankers charged with €7.2bn fraud’ The Irish Times (Dublin, 18 December 2013)
Hennessy M, ‘Workers right to be angry about bank bonuses, says King’ The Irish Times (Dublin, 16 September 2010)

Hennessy M, ‘Former chairman of AIB defends unusual loans to buy UK property’ The Irish Times (Dublin, 29 September 2012)

Jackson T, ‘Unravelling the mysteries of private equity world The Irish Times (Dublin, 26 July 2010)

Keena C, ‘Anglo takes contempt of court action against Quinns’ The Irish Times (Dublin, 14 February 2012)

Keena C, ‘Court told Quinn nephew advised on foiling Anglo’ The Irish Times (Dublin, 22 March 2012)


Keenan D, ‘US attorney general says Prism cannot routinely breach privacy of individuals’ The Irish Times (Dublin, 15 June 2013)

Kennedy M, ‘Banking’s important factors of trust and compliancy’ The Irish Times (Dublin, 02 January 2014)

Mac Connell E, ‘FF spokesman says Anglo bankers should be tried for treason’ The Irish Times (Dublin, 26 June 2013)

Mac Cormaic R, ‘Using complex data to answer a simple query: how do judges decide on sentences?’ IrishTimes.com (Dublin, 4 June 2013)

Mac Cormaic R, ‘Ireland 'does not treat negligence in major institutions as criminal’’ The Irish Times (Dublin, 19 October 2013)

Mac Cormaic R, ‘Trawl of boomtime hubris shone unflattering light on ‘frenzied’ era’ The Irish Times (Dublin, 19 November 2013)

Mac Cormaic R, ‘Ex-solicitor Byrne moves to Mountjoy to begin jail term’ The Irish Times (Dublin, 04 December 2013)

McCaffrey U, ‘Banks to return €25m to customers over insurance breaches’ The Irish Times (Dublin, 4 October 2013)

McCaffrey U, ‘Banks forced to refund €67m in ‘mis-sold’ payment protection’ The Irish Times (Dublin, 7 March 2014)

McGrath J, ‘Two-tier system puts corporate criminals above law’ The Irish Times (Dublin, 21 December, 2010)

McManus J, ‘Top bankers appear to be passing test of fitness and probity’ The Irish Times (Dublin, 7 May 2012)


Neate R, ‘Iceland's ex-PM guilty on one financial crisis charge’ The Irish Times (Dublin, 24 April 2012)

O’Brien C, ‘Central Bank plans increased scrutiny and enforcement to restore credibility’ The Irish Times (Dublin, 22 December 2010)

O’Brien D, ‘Big finance has failed and its rottenness has not yet been purged’ The Irish Times (Dublin, 10 August 2012)

O’Doherty ER, ‘Independent voice needed to balance lobbying of finance sector’ The Irish Times (Dublin, 19 July 2010)

O'Donnell I, ‘What to do with an overpriced field and an ill-conceived jail plan?’ Irish Times.com (Dublin, 27 June 2011)

O’Dwyer D, ‘Dataspying: Does it work?’ The Irish Times (Dublin, 15 June 2013)

O’Halloran B, ‘Bank chiefs pass fitness and probity review’ The Irish Times (Dublin, 29 June 2012)
O’Leary J, ‘I should have been more pushy in opposing risk-taking at bank’ *Irish Times* (Dublin, 24 July 2010)

O’Toole F, ‘Rise and fall of a Tiger tycoon’ *The Irish Times* (Dublin, 17 July 2010)

O’Toole F, ‘An inquiry is needed into why a regime of impunity still exists in this state’ *The Irish Times* (Dublin, 23 July 2013)

O’Toole F, ‘Three key truths about the bailout which we are only learning now’ *The Irish Times* (Dublin, 17 December 2013)

Reddan F, ‘Markets welcome ratings upgrade as bond yields fall’ *The Irish Times* (Dublin, 20 January 2014)

Reuters, ‘Standard Chartered agrees settlement’ *The Irish Times* (Dublin, 14 August 2012)

Reuters, ‘RBS fined $615m over rate scam’ *The Irish Times* (Dublin, 6 February 2013)

Reuters, ‘Judge questions fairness of $590 million Citigroup settlement’ *The Irish Times* (Dublin, 2 April 2013)

Reuters, ‘JPMorgan to pay $920m over ‘London Whale’ scandal’ *The Irish Times* (Dublin, 19 September 2013)

Reuters, ‘HSBC unit hit with $2.46bn judgment in class action’ *The Irish Times* (Dublin, 19 October 2013)

Reuters, ‘UK fines State Street £23m for overcharging NTMA and others’ *The Irish Times* (Dublin, 31 January 2014)

Scally D, ‘Q &A with Wolfgang Schäuble’ *The Irish Times* (Dublin, 24 August 2012)

Scannell K, ‘Whale’ loss charges for former traders at JPMorgan’ *The Irish Times* (Dublin, 15 August 2013)

Sheridan K, ‘Book of evidence a blockbuster as trio of Anglo bankers sent for trial’ *The Irish Times* (Dublin, 9 October 2012)
Walsh F, ‘Banks count the cost of a massive scandal’ *The Irish Times* (Dublin, 20 February 2013)

**UK**


Palmer A, ‘Rebuilding the Banks’ (Special Report on international banking *The Economist* 16 May 2009)

FT.com, ‘UK bill for economic crime soars to £38bn’ (London, 27 January 2011)

*The Economist*, ‘It’s a rich man’s world’ (London, 25 June 2011)

*The Economist*, ‘Bradley’s winnings’ (London, 15 September 2012)

*The Economist*, ‘Prosecuting bankers Blind justice’ (London, 4 May 2013)

*The Economist*, ‘Wall street is back’ (London, 11 May 2013)

*The Economist*, ‘Five years after Lehman’ (London, 14 September 2013)

*The Economist*, ‘Goldman Sachs Reform school for bankers’ (5 October 2013)

*The Economist*, ‘Financial firms on the defensive a culture of fear’ (London, 2 November 2013)

*The Economist*, ‘SAC Capital No winners’ (London, 9 November 2013)


*The Economist*, ‘Criminalising the American Company A mammoth guilt trip’ (London, 30 August 2014)

EU

E Vucheva, ‘Laissez-faire capitalism is finished, says France’, EUObserver.Com (26 September 2008)

IMF


USA


White Papers and Commentary, and Consultation Papers

Ireland


UK


Speeches and Presentations

Ireland

Ahern B, ’Fierce pressure’ from builders – Ahern and Ahern accepts he played a role in economic crisis (Speech quoted in Minihan M, The Irish Times Dublin, 15 May 2010 and Collins S and Minihan M, The Irish Times Dublin, 15 May 2010 respectively)


Brady P, Banking supervision: our new approach (Central Bank of Ireland speech delivered 21 June 2010)

Cowan B, (North Dublin Chamber of Commerce 13 May 2010 and reported in edited extracts in The Irish Times Dublin, 14 May 2010)

Elderfield M, Untitled (The European Insurance Forum in Dublin, 29 March 2010)


Elderfield M, Untitled (Irish Funds Industry Association Dublin, 12 September 2012)


Hamilton J, ‘Improving judicial possibilities to exchange foreign evidence? The EEW compared to existing European instruments’ (Speech ERA-ICEI Conference October 2009)

Honohan P, Untitled (Plenary conference of the British-Irish Parliamentary Assembly in Cavan, as quoted and reported in de Breathn D, ‘Honohan says those guilty of bank crisis crime must face jail’ *The Irish Times* Dublin, 23 February 2010)


517

McMahon J, Banking supervision: our new approach (Central Bank of Ireland Dublin, 21 June 2010)

Neary P, Untitled (IFSC 2.0 Conference Dublin, 5 March 2008)


USA

Frank JN, The Sin of Perfectionism (Speech to the Annual Meeting of American Institute of Accountants, held at the Hotel Peabody Memphis Tennessee, 18 October 1940 <www.sec.gov> accessed 17 August 2012)


International


Shafik N, *Global Economic Challenges and Fostering Future Prosperity* (Speech to the University of Iceland Reykjavik, 28 October 2011  

Reports, Regulatory and Prosecutorial Documents, Policy Statements, Press Releases, White Papers, Communications, Guidelines

*Ireland*


Central Bank of Ireland, *Fitness and Probity Standards (Code issued under Section 50 of the Central Bank Reform Act 2010)* (2011)

Central Bank of Ireland, *Guidance on Fitness and Probity Standards* (2011)


Central Bank of Ireland, *PRISM Explained* (2011)


Central Bank of Ireland, *Fitness and Probity* (Statement 28 June 2012)

Central Bank of Ireland, *Fitness and Probity - Frequently Asked Questions (2012)*

Central Bank of Ireland, *Central Bank Publishes Enforcement Priorities for 2012* (Information release 13 February 2012)


Central Bank of Ireland, *Central Bank of Ireland Policy on Consultations* (undated but first appearing on CB website October 2012)

Central Bank of Ireland, *Annual Report 2012* (5 April 2013)


Comptroller and Auditor General, *Financial Regulator* (Special Report 72-2010)


DPP Annual Report (2011)

520
DPP Prosecution Guidelines Third Revision (2010)


National Economic and Social Council (NESC), *The Euro: An Irish Perspective* (Report 121- July 2010 released 18 August 2010)


Parker-Willis Banking Commission (1927)


EU


European Criminal Policy Initiative, *A Manifesto on European Criminal Policy* (Published by 14 EU academic criminal law professors drawn from ten member states, 2009)


*EU Commission and Council Documents*


Commission Press Release, Towards a reasonable use of criminal law to better enforce EU rules and help protect taxpayers’ money, (IP/11/1049, 20 September 2011)

Commission, ‘Regulating Financial Services for sustainable growth’ (Communication) COM (2010) 301


Commission, ‘Reinforcing sanction regimes in the financial services sector’ (Communication) COM (2010) 716 final


Commission, ‘Towards an EU criminal policy – Ensuring the effective implementation of EU policies through criminal law’ (Communication) COM (2011) 573 final


Commission, ‘Europeans’ Perceptions on the State of the Economy’ Eurobarometer 75, Spring 2011


EU/IMF Programme of Financial Support for Ireland Programme Documents 1December 2010 (draft subject to alterations)


UK


Criminal Law Commissioners, First Report (Parliamentary Papers XXVI - 1834)

Criminal Law Commissioners, Seventh Report (Parliamentary Papers XIX - 1843)


Ministry of Justice Consultation Paper, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (CP9/2012 Cm8364 17 May 2012)


UK Financial Reporting Council, Combined Code on Corporate Governance (June, 2008)


CFTC Press Release, ‘CFTC obtains federal court order against Nicholas Cosmo for engaging in unauthorised futures trading that resulted in tens of millions of dollars in investor losses’ (PR 6402-12, 25 October 2012)

Department of Justice Press Release, ‘JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $228 Million to Federal and State Agencies’ (7 July 2011)

Department of Justice Press Release, ‘Allen Stanford Sentenced to 110 Years in Prison for Orchestrating $7 Billion Investment Fraud Scheme’ (14 June 2012)

Department of Justice Press Releases, ‘Phoenix Men Convicted in Money Laundering and Tax Scheme’ (26 July 2011) and ‘Arizona Man Sentenced to More Than 15 Years in Prison in Money Laundering and Tax Scheme’ (16 August 2012)


Khuzami R, (SEC Press Release 2010-252)

Khuzami R, (SEC News Digest 2012-11)


528


SEC Press Release, ‘SEC Charges Merrill Lynch With Misleading Investors in CDOs’ (12 December 2013)


The Department of the Treasury USA, The Department of the Treasury Blueprint for a Modernised Financial regulatory structure (Paulson HM jnr, 2008)
Australia

ASIC, Annual Report 2010-2011 (2011)

ASIC, Enforcement action - no undertakings (Regulatory Guide RG15 originally issued on the 18 April 1994 as Practice Note PN49, 2007)

ASIC, Disclosure of convictions and proceedings (Regulatory Guide RG20 originally issued on the 18 May 1992 as Practice Note PN20, 2007)

ASIC, Enforcement action submissions (Regulatory Guide RG52 originally issued on the 10 May 1993 as Practice Note PN52, 2007)

ASIC, Enforceable Undertakings (Regulatory Guide RG100 – 2012)

ASIC, ASIC’s approach to enforcement (Information Sheet 151 - 2012)


CDPP Prosecution Office Policy, Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process (2008)

International

Council of Europe, ‘Consistency in Sentencing’ (Strasbourg, Council of Europe 1993)

Gabor and Crutcher “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures” rr2002-1e (Research and Statistics Division, Canadian Department of Justice, 2002)


IMF Report, Report following the International Monetary Fund (IMF) Article IV Mission to Ireland (Report 07/326 - 2007)
IOSCO, *Summary of Responses to the Questionnaire on Principles and Best Practice Standards on Infrastructure for Decision Making for CIS Operators* (May 2000)


OECD Report, *OECD Guiding Principles for Regulatory Quality and Performance*  


**Select Websites and Blogs**

*Ireland*

www.bailii.org

www.betterregulation.ie

www.centralbank.ie

www.clrg.org

www.cso.ie

www.dppireland.ie

www.extempore.ie

www.financialregulator.ie

www.financedublin.com

www.finance.gov.ie

www.finance-watch.org
www.irishtimes.com
www.justice.ie
www.ifss2009.com
www.lawreform.ie
www.mccannfitzgerald.ie
www.oireachtas.ie
www.williamfry.ie

Australia
www.asic.gov.au
www.cdpp.gov.au

EU
www.ecb.europa.eu
www.ec.europa.eu
www.euractiv.com
www.europintelligence.com

UK
www.bankofengland.co.uk
www.britsoccrim.org
www.fca.org.uk
USA

www.crimesolutions.gov

www.fcic.gov

www.federalreserve.gov

www.govtrack.us

www.justice.gov

www.secactions.com

www.sec.gov

www.stopfraud.gov

International

www.acus.org

www.echr.coe.int

www.icffr.org

www.imf.org

www.oecd.org