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You won't do time for 'white-collar' crime - no laws seem to cover it

Public anger is mounting at the failure of the authorities to prosecute anyone in the wake of the biggest banking crisis in the world

Last month High Court Judge Peter Kelly refused an application from the gardai and the Office of the Director of Corporate Enforcement (ODCE) for a six-month extension to their joint inquiry into Anglo Irish Bank.

"Will it [the inquiry] ever end?" asked the Commercial Court's listing judge, sparking a wave of defensive outbursts from the gardai, the Director of Public Prosecutions (DPP), the ODCE and the Central Bank.

Three separate investigations are ongoing into Anglo since its spectacular collapse which is expected to cost the taxpayer some €25bn.

Not for the first time, Judge Kelly's remarks have sparked a massive debate about the crisis in public confidence over the State's seeming inability to investigate and prosecute white collar crime.

Compared to America and Britain, Ireland's regulatory record and prosecution of white -collar crime is weak.

The Competition Authority has secured 33 convictions against companies and individuals, but the yield has been low: €600,000 in fines and no one sent to jail.

The ODCE has secured some 280 convictions, mostly in the District Court where fines and penalties are derisory.

On Tuesday that office received a much needed boost when the High Court disqualified Jim Lacey, the former Chief Executive and Director of National Irish Bank, from serving as a director for nine years.

A High Court inspector's report was highly critical of Mr Lacey over his failure to oversee six key practices at the bank.

These included bogus non-resident accounts, incorrectly or fictitiously named accounts, certain insurance policies -- the so called Clerical and Medical policies -- special savings accounts, improper charging of interest and improper charging of fees.

Negligent

The High Court judge who disqualified Mr Lacey found that he had been "grossly negligent" in the breach of his duties, but the action has not deterred the high profile banker.

Earlier this week his lawyers revealed that since he left NIB, Lacey has been engaged in consultative work as a "senior banking specialist."

He intends to appeal the disqualification.

Following the disqualification, which takes immediate effect, Paul Appleby -- the Director of Corporate Enforcement -- said the decision was important because it clearly demonstrated that the corporate watchdog was "serious about promoting and upholding high standards of corporate governance in Ireland".

It is, but Appleby's office is under pressure, and not just from Judge Peter Kelly.

In its 10-year history, the ODCE has never secured a single prosecution for insider trading or market abuse.

The watchdog, which cannot prosecute beyond the District Court -- all crimes attracting a sentence of five years or more must be prosecuted by the DPP -- has never got a prison sentence that was not overturned on appeal. The combined record of Ireland's regulators reinforces the culture of

serial impunity surrounding Ireland's corporate criminals.

It also threatens to undermine the public's respect for the rule of law.

Two-tier system

"The biggest risk we face by failing to hold people to account, if the evidence supports it, is that the public will see a two-tier system of justice that allows the rich and powerful to be immunised from the full reach of the criminal law," said Shane Kilcommins, UCC law lecturer and an expert on white collar crime.

"Misconduct in the banking and corporate sectors, in the distortion of competition in the market, pose as much if not more of a threat to our security than ordinary crime."

Are regulators and investigators to blame or is Ireland's legal system itself unfit for purpose when it comes to holding white-collar criminals to account?

David McFadden, legal advisor to the Competition Authority, says that regulators are constrained by a lack of key powers enjoyed by gardai and regulatory prosecutors in other countries.

"The prosecution of white-collar crime is a modern phenomenon, but we are using Victorian style investigative tools," said the lawyer who wants corporate investigators to have more powers of search, seizure, arrest and detention.

There is some sympathy for Ireland's prosecutors and regulators who encounter a number of structural, evidential and legislative hurdles when they seek to mount a white collar prosecution.

Others say that the banking crisis of 2008 was not caused by any want of regulatory schemes or criminal sanctions: the prosecutorial weapons are there but are not being used.

Comparisons have inevitably been drawn with America where Ponzi scheme operator Bernie Madoff is serving a 150-year jail term.

Former hedge fund billionaire Raj Rajaratnam is also facing up to 20 years in prison there following an insider trading conviction secured in part by FBI phone taps.

US armoury

But there is little appetite to introduce into Ireland some of the main weapons in the US prosecutor's armoury including wire taps, plea bargaining, monetary incentives for witnesses to testify against former colleagues and the wholesale removal of discretion in sentencing from judges.

McFadden says there is a "happy medium" between the American and Irish experience.

He says, for example, that consideration needs to be given to granting US-style immunity from prosecution to corporate criminals to break hard core cartels and the secrecy surrounding wrongful financial transactions.

Protection for the corporate tout is something that has won the backing of some of the country's leading white collar prosecutors.

Senior Counsel Shane Murphy, who believes there are ample laws in place to tackle white collar crime, is one of them. So too is barrister Patrick McGrath who has called for radical changes in the way white collar cases are investigated, brought before and prosecuted in the criminal courts.

McGrath has proposed a six-strong set of reforms that would, if implemented, represent a sea change in how both prosecutors and defendants do their business in the Irish criminal courts.

Stunningly simple

Some are stunningly simple such as the introduction of pre-trial hearings that would eliminate trial by ambush by the defence and would force prosecutors to show their hand at an early stage, concentrating minds and reducing delays.

Such hearings would dispense with thorny issues such as disclosure, admissibility of evidence and disputes over documents and expert evidence before a single juror is empanelled.

McGrath says that one way to secure convictions is to introduce a law, as the UK has done, to

force witnesses (as opposed to suspects) to co-operate with serious fraud investigators.

The refusal of 10 witnesses to co-operate with the ODCE is one of the chief reasons why the two-and-a-half year Anglo probe is delayed, leading to widespread anger.

"We have piecemeal [witness compulsion], in certain areas, but investigators here don't have general powers to compel co-operation," said McGrath.

Evidential hurdles

The lawyer says that Justice Minister Alan Shatter's efforts to tackle evidential hurdles and delays in white collar investigations should go "a long way" towards rumbling the reluctant witness.

The Criminal Justice Bill 2011 will see witnesses being compelled to provide information across a broad range of white collar/fraud categories.

Another provision -- hotly disputed -- seeks to revive an old law making it an offence not to report a crime.

For McGrath and Murphy, Ireland's white-collar impasse will be breached by a series of simple but far reaching procedural reforms including bringing in lawyers at an early stage to strategically focus the investigation and prevent "indictment overloading" that could become a burden on juries.

That's if we ever get that far.

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