First Law Conference (in association with the Centre for Criminal Justice & Human Rights of University College Cork)

Two Tier Criminal Law System - Common Law and Regulatory Enforcement:

Is the Traditional Role of the DPP Diminishing?

Compliance and Enforcement –

The ODCE Perspective

Paul Appleby
Director of Corporate Enforcement

Law Society, Blackhall Place, Dublin 7

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Introduction
First of all, I want to congratulate Bart Daly of First Law and UCC for their joint initiative in organising and sponsoring this Conference on what is, I think, an interesting theme.

On a broad level, there has been much talk in recent years about the increase in regulation and the growth of public regulatory agencies in Ireland. Others at this Conference today will no doubt give facts and figures to support that phenomenon. It would, I suggest, require a major empirical study to accurately chart the growth in regulation in recent years, identify the entities which have lost and assumed regulatory power and assess the reasons for those changes.

I suspect that much of that growth in regulation is a simple reflection of our more sophisticated economy and society these days. In that more demanding environment, the effective regulation of discrete areas necessarily required a dedicated and independent resource and the application of professional resources. Thus we have a Competition Authority rather than a central Government Department adjudicating on most competition issues, because they have the professional economic competence to assess the impact on markets of mergers and cartels. Similarly, the Environmental Protection Agency, the Health and Safety Authority, the Pensions Board and any number of other regulatory bodies have professionally qualified staff to help them discharge their respective specialist remits.

Who Prosecutes?
I think therefore that we have to be careful in assuming that the growth of other regulators has necessarily undermined or reduced the traditional role of the Director of Public Prosecutions. I do not see any such phenomenon from where I stand. Statistically if we take 2002 which was the first full year of ODCE operations, the DPP received over 14,500 files, the vast majority of which relate to the prosecution of criminal cases. By 2007, this had increased to more than 15,500 files. Consequently even at that high level, there seems to be no clear evidence that the DPP is conceding ground as a prosecutor. I suspect that the reality is that while many regulators are prosecuting cases on a summary basis, they are also feeding their more serious cases to the DPP for decision.

Lest there be any doubt about it, there is nothing new as a matter of legal history in persons other than the DPP (or his predecessor the Attorney General) being vested with statutory powers to prosecute. Since the foundation of the State, the Oireachtas has been giving Ministers of the Government a power to prosecute summarily. In addition, the Oireachtas has also been giving other regulatory bodies power to prosecute for many decades. For example, on a quick trawl through the electronic statute book for the years prior to 1974 (when the DPP's office was established) , the following examples emerge:

- offences prosecutable by harbour authorities under the Oil in Navigable Waters Act 1926 and the Harbours Act 1946;

- offences prosecutable by local authorities under the Slaughter of Animals Act 1935, the Milk and Dairies Act 1935, the Shops (Conditions of

Employment) Act 1938, the Local Government (Planning and Development) Act 1963 and the Housing Act 1966;

- offences prosecutable by the Bacon Marketing Board under the Pigs and Bacon Act 1935 and by the Pigs and Bacon Commission under the Pigs and Bacon (Amendment) Act 1939 and the Pigs and Bacon (Amendment) Act 1961;

- offences prosecutable by the Revenue Commissioners under the Diseases of Animals Act 1938, the Agriculture Produce (Cereals) Act 1938, the Agricultural Products (Regulation of Import) Act 1938;

- offences prosecutable by aggrieved workers or registered trade unions under the Shops (Conditions of Employment) Act 1938, the Holidays (Employees) Act 1939, the Office Premises Act 1958, the Holidays (Employees) Act 1961;

- offences prosecutable by the Irish Tourist Board under the Tourist Traffic Act 1939;

- offences prosecutable by the Dairy Disposal Company Limited under the Creameries (Acquisition) Act 1943;

- offences prosecutable by the Racing Board under the Racing Board and Racecourses Act 1945;

- offences prosecutable by Health Authorities under the Health Acts 1947 and 1953;

- offences prosecutable by Córas Iompair Éireann under the Transport Act 1950 and the Transport (Miscellaneous Provisions) Act 1971;

- offences prosecutable by the Law Society of Ireland under the Solicitors Act 1954;

- offences prosecutable by the Opticians Board under the Opticians Act 1956;

- offences prosecutable by Bord na gCon and the Irish Coursing Club under the Greyhound Industry Act 1958;

- offences prosecutable by An Cheard-Chomhairle (later AnCo) under the Apprenticeship Act 1959 and the Industrial Training Act 1967;

- offences prosecutable by the Central Bank of Ireland under the Central Bank Act 1971;

- offences prosecutable by the Nuclear Energy Board under the Nuclear Energy (An Bord Fuinnimh Núicleigh) Act 1971;

- offences prosecutable by the Commissioners of Charitable Donations and Bequests for Ireland under the Charities Act 1973.

It is therefore nothing new for regulatory bodies – for example, the ODCE, the Competition Authority or the Pensions Board – to be conferred with a power to prosecute.

Distinctions between the DPP and Other Regulators

In looking at this question too, we have to be conscious of the distinctions between the role of the DPP and the roles of other regulatory bodies. In the first instance and to my knowledge, no regulatory body (whether long established or of more recent vintage) enjoys any right to prosecute on indictment. For the purposes of Article 30.3 of the Constitution, the DPP alone has been "authorised in accordance with law" to act for the purpose of prosecuting crimes and offences in non-summary courts in the name of the People – subject, of course, to the small residual category of offences which remain prosecutable by the Attorney General.

On the other hand, the roles of many regulatory bodies are fundamentally different to the role of the DPP. Like other regulators, we in the ODCE have an express statutory function of seeking to encourage compliance with the law – in our case the code of company law. Given that there are some 400 offences in company law and many more obligations which, if breached, do not attract a criminal penalty, this role is no small task. It has two primary dimensions:

- an information-giving and advocacy role which has seen us publish guidance on subjects as diverse as the general powers and duties of companies and directors to discrete areas such as the reporting requirements of auditors and liquidators, directors using company assets for personal purposes and the governance of property management companies;

- interventions to secure the correction of any detected defaults and the cautioning of the parties in default. Most of these interventions are satisfactorily resolved on an administrative basis, but occasionally in the face of inaction, we will seek a High Court Order requiring compliance with a company law obligation.

This compliance role distinguishes us from the DPP who has no comparable role to promote compliance with the law. For example, the DPP prosecutes a very significant number of offences under the Road Traffic Act, but it is the Road Safety Authority which actively encourages compliance with that legislative code.

Another distinguishing feature is the investigative role of bodies like the ODCE. It is a specific part of our remit, and Gardaí seconded to the Office assist us in the conduct of criminal investigations in particular. We may also undertake fact-finding investigations which include the right to seek the appointment of a High Court Inspector to investigate the affairs of a company where certain circumstances of fraud, prejudice or misconduct appear to exist.

In dealing with the area of civil enforcement actions, the ODCE may seek in the High Court the restriction of persons from acting, either directly or indirectly, in certain capacities in a company. We share this role with liquidators and receivers, but the DPP has not been assigned any such role. In addition to initiating restriction proceedings, we alone have been conferred with the administrative task of receiving the reports of the liquidators of insolvent companies and determining the cases where the liquidator should be relieved of their statutory obligation to seek the restriction of all of the company's directors in the High Court.

Since the commencement of the Companies Act 1990, the DPP and certain other parties may seek the disqualification of persons from being appointed or acting as a company director or other officer or being in any way involved in the promotion, formation or management of a company. In the 2001 Act, the Director of Corporate Enforcement was placed on a similar footing to the DPP. In addition, we alone were conferred with the power to seek the disqualification of the directors of dissolved insolvent companies. In other words, no similar right was given to the DPP.

In criminal enforcement matters, the DPP shared with the Minister for Enterprise Trade and Employment up to 2001 the right to bring and prosecute summary proceedings for an offence under the Companies Acts whether or not the offence in question was a summary or indictable one. In the 2001 Act, the ODCE assumed that power from the Minister, and it was explicitly stated in Section 12 that one of the functions of the Director of Corporate Enforcement was "at his or her discretion, to refer cases to the [DPP] where the Director of Corporate Enforcement has reasonable grounds for believing that an indictable offence under the Companies Acts has been committed." This wording, I would contend, necessarily assumes that cases will arise in which, in the exercise of his discretion, the Director of Corporate Enforcement should <u>not</u> refer suspected indictable offences to the DPP. From a practical perspective, that interpretation makes sense when one recalls that, for example, some of the indictable offences under the Companies Acts will often occur at what may be a very low point on the criminal/regulatory spectrum – for example, the non-filing of an annual return with the CRO.

In summary therefore, it is not the case that the establishment of the ODCE in 2001 served to push the DPP away from his traditional role in the company law area. He still has that role and in respect of the prosecution of indictable company law offences on indictment, he still has that role on an exclusive basis. We have simply substituted for the Minister and joined the DPP in prosecuting offences on a summary basis and in seeking the disqualification of individuals for specified misconduct. In addition of course, we have compliance and investigative functions in particular in the area which are not shared by the DPP.

Considerations leading to the ODCE's Establishment

In evaluating the company law area, I think that you have to look beyond the legal roles which the various parties have had. You must also consider how effective was the regime of regulation at various times. As long ago as 1958, the Report of the Company Law Reform Committee[1] (the Cox Committee) which led to many of the

[1] Pr. 4523

changes brought into Irish law by the Companies Act 1963 included the following statements:

> "We would emphasise that we consider the enforcement of the requirements of the Companies Acts as a matter of major importance. In most cases in which prosecutions for offences under the Companies Acts are brought, there is a tendency to regard the offences as trivial or technical. Incorporation is a privilege and the terms upon which it is granted should be observed. It is necessary in the public interest that compliance with the requirements of the Acts should be enforced..." (Paragraph 48).

Forty years later, a series of scandals engulfed the country. These included:

- alleged malpractice in National Irish Bank involving customer accounts over a period of ten years,

- the alleged operation by Ansbacher (Cayman) Ltd. of its offshore banking business in Dublin over 25 years for customers which included some Irish business and political figures and

- bank practices which facilitated the evasion of their customers' liability to Deposit Interest Retention Tax (DIRT).

The first two were investigated by separate sets of High Court Inspectors who were appointed under the Companies Act 1990, while the DIRT saga became the focus of an investigation by the Comptroller and Auditor General and by the Committee of Public Accounts.

Then as now, Government action was required, and a Working Group on Company Law Compliance and Enforcement (chaired by Mr Michael McDowell SC) recommended inter alia the introduction of stronger investigative and enforcement powers in company law and the establishment of the ODCE. The Report of the Working Group[2] articulated its findings in quite forthright terms:

> "The Group has found that Irish company law has been characterised by a culture of non-compliance and a failure by companies and their officers to meet their obligations in respect of the filing of annual returns on time… [C]ompanies complied with their obligations to file annual returns on time…[in] 13% [of cases] in 1997…" (Paragraph 2.4)
>
> "Enforcement of the law in relation to non-registration type offences is very rare and wholly unpredictable. Most statutory offences have never been the subject of prosecutions, and those which have been prosecuted have resulted in only a handful of convictions…Those who are tempted to make serious breaches of company law have little reason to fear detection or prosecution. As far as enforcement is concerned, the sound of the enforcer's footsteps on the beat is simply never heard." (Paragraph 2.5)

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[2] Pn. 6697 - Report of the Working Group on Company Law Compliance and Enforcement, 30 November 1998.

The Report is relevant in a number of respects to the theme of this Conference in that it addressed the role of the DPP in the company law field. The Group noted for instance that where company law matters were referred to the DPP by liquidators or the Irish Stock Exchange:

> "…the Director of Public Prosecutions can take no independent investigatory steps, and must rely exclusively on An Garda Síochána, to whom he refers such matters, to further investigate such cases." (Paragraph 2.14)

In discussing the DPP's role in the Companies Act 1990 with respect to disqualifications, the Working Group commented that:

> "…the Director of Public Prosecutions is not equipped or organised to investigate and institute civil proceedings for disqualification in the manner envisaged by the Act. The Group concluded that there was an anomaly in providing a civil role in the monitoring of company directors for the Director of Public Prosecutions in matters which may not amount to or disclose the commission of a criminal offence." (Paragraph 2.15)

In reviewing the Minister's role, the Group concluded that:

> "…day to day investigation and prosecution of breaches of company law (other than Companies Registration Office offences) is close to non-existent and that within the existing resources allocated to these functions there is no realistic prospect that the Department's function of enforcement, as envisaged by the Acts, will be discharged." (Paragraph 2.22)

In considering the role of others, the Group stated that:

> "…the provisions of existing law relating to the restriction of directors in the case of company insolvency depends largely upon the activism of the High Court judiciary. Relying on judges or private parties, whether liquidators, creditors, or members to enforce all of the provisions of the Companies Acts is wholly unrealistic." (Paragraph 2.25)

The Group went on to say:

> "The Group is strongly of the view that, without an effective company law enforcement agency, there is a serious and growing risk of major damage to Ireland's reputation as a place in which to do business and, furthermore, that the existing under-enforcement of the provisions of the Companies Acts is likely to give rise to financial scandal, social disharmony, and public disenchantment unless remedied. The Group regards action to counter a culture of under-enforcement, non-enforcement and non-compliance as an urgent economic, social and legislative priority.
>
> The Group has also concluded that the cost of additional resources required to enforce the system of company law while significant is far less than the likely cost of failing to remedy the problem. Apart from unquantifiable, but

> nonetheless real, economic loss arising from a damaged international reputation, the likely cost of inquiries under the Companies Acts, tribunals, court prosecutions and the social cost of non-enforcement in terms of damage to creditors and the like, makes it essential, in the view of the Group, that the State should undertake and discharge the basic responsibility implied by the Companies Acts namely the provision of realistic and adequate resources to ensure enforcement of and compliance with the public law provisions of the Acts." (Paragraphs 2.27 and 2.28)

In a rather elegant statement of the maxim that a law which is not enforced is no law at all, the Working Group commented:

> "Compliance and enforcement are the means by which all legal duties, rights and protections are lifted from the dusty page and have life breathed into them, and without which such rights, duties and protections all return to dust." (Page 5)

Some ODCE Achievements

In the light of recent developments in the banking sector, you may feel inclined to ask: what changed in the last ten years?

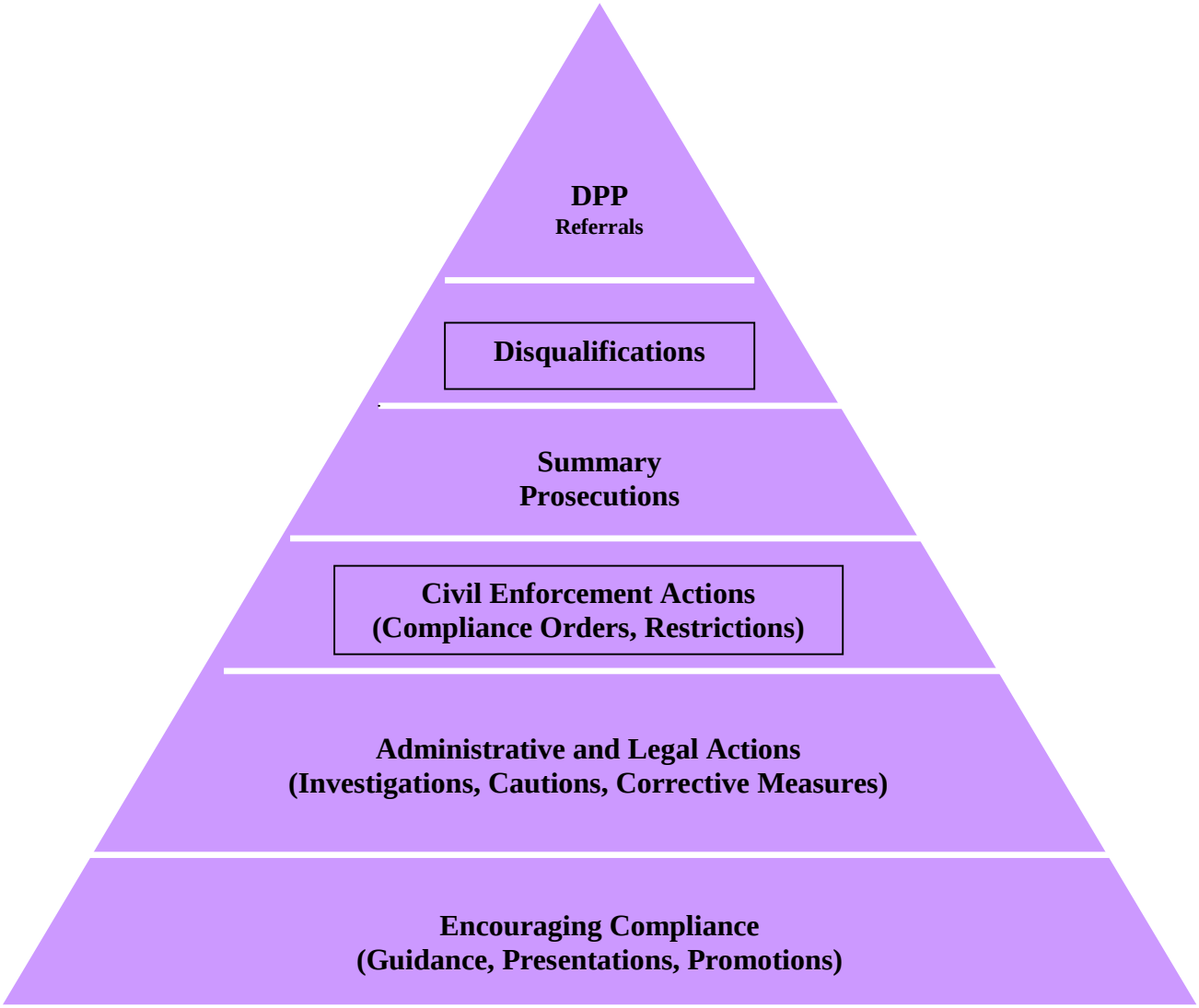
I believe that a lot has changed and for the better. In quantitative terms, the Office has:

- issued some 50 publications including company law guidance materials which have been and are being promoted through professional bodies, business groups and social enterprise networks;
- dealt with over 4,000 public complaints and auditor reports on an administrative basis resulting in many cases in the rectification of defaults;
- secured about 280 convictions against more than 100 companies, company directors and others for various company law offences;
- obtained some 70 disqualifications of company directors and others for various breaches of law or duty and
- supervised the regime under which liquidators have restricted over 800 persons.

Our approach to compliance and enforcement is a graduated one which can usefully be represented graphically in the following manner. In numeric terms, most of our activity takes place in the bottom two segments of the diagram. It is only a handful of cases annually that become the subject of legal action. In relation to the available enforcement options, there may be differing views on the hierarchy for summary prosecutions, restrictions and disqualifications depending on the nature of the breach of law or duty and how the respondent in an individual case might see the various impacts of any resultant Court sanction.

For instance in reviewing ODCE activity in 2008[3]:

- we issued 24,000 copies of our various publications and directly reached over 3,000 people at conferences at which we gave presentations;
- we closed some 850 cases on an administrative basis, many of which resulted in a positive outcome for the complainants to the Office;
- we made a final determination on 280 initial liquidator reports resulting in the directors of 250 insolvent companies not facing restriction proceedings before the High Court. In another 70 cases, the ODCE gave liquidators additional time to complete their investigations;
- we secured some 20 summary convictions and 20 disqualifications and
- one case was successfully prosecuted by the DPP following an ODCE investigation of the suspected commission of a number of indictable offences.



[3] Further details on ODCE activity will be contained in its Annual Report for 2008 which will be published by early June 2009.

Qualitatively too, things have changed for the better since the ODCE was established. In late 2007, we commissioned independent market research from TNS/MRBI. In late 2007 and early 2008, they interviewed some 299 company directors and 141 accountants and liquidators. The 440 respondents were asked for their opinion of the qualitative change in the company law compliance environment over the preceding five years. TNS/MRBI reported that:

- 85% of company directors were of the opinion that company law compliance had improved in the preceding five years, an 11% increase on the equivalent finding of 2005 and

- all 141 accountants and liquidators expressed the belief that compliance had improved!

In rating the effectiveness of the ODCE:

- 75% of company directors said that we were effective or very effective and

- 91% of accountants and 95% of liquidators agreed.

Closing Remarks

Prior to the events which I have described earlier, the State did not exercise its public interest role to any appreciable extent in regulating company affairs. It was a 'laissez faire' environment in the worst sense, where persons could, if they wished, use and on occasion abuse the applicable legislation without fear of effective challenge or sanction. Only those with the financial and professional resources to do so could defend in the Courts their interests against wrongdoing perpetrated against them, while more vulnerable interests found it difficult to assert and uphold their rights.

Accountants and other professionals were often demoralised by a regime which did not encourage and reward proper professional conduct. The tendering of correct advice might often be met by the client asking: "And what happens if I don't do that?" To which the usual answer would have been: "Nothing" which left the conscientious adviser feeling rather pious and foolish. In summary, the framework gave little incentive or support to compliant behaviour in the company law area. Essentially, the framework of accountability which had been constructed so carefully in the legislation to create a proper theoretical balance of rights and duties between the various stakeholders (directors, shareholders, creditors, the relevant professionals and the State acting in the wider public interest) was in practice skewed totally in favour of those directors in charge of company assets.

We are making progress, I believe, in the task of developing a more balanced framework of accountability. Directors can no longer easily ignore the requirement to file company information on a timely basis with the Registrar of Companies, because of the heavy penalties and the risk of dissolution of the company which now obtain. Some directors are already the subject of civil or criminal investigation by the ODCE, and others will be aware that non-compliance now carries a significant risk to personal reputation if non-compliance should result in a future Court conviction or other sanction.

The relationship between auditors and directors has also changed. The mandatory requirement on auditors to report suspected indictable offences to my Office means that auditors ignore this legal obligation at their peril. When auditors advise directors that they will be reporting suspected breaches of company law to my Office, many directors make genuine efforts to remedy their non-compliance and correspond directly with us to this effect. The effect of this provision has been to support the independent oversight role which auditors are supposed to discharge in the interests of shareholders in particular and to improve the overall standard of compliance with the requirements of the Companies Acts.

The directors of companies in financial difficulty also know that if a company goes into insolvent liquidation, they will have to account to the liquidator for their actions and omissions in the 12 month period prior to the demise of the company. If they act in a manner which has, for instance, unfairly disadvantaged the interests of creditors, they may find themselves having to justify their behaviour before the High Court. Creditor interests have reported that these provisions have deterred directors from acting unscrupulously in the final stages of a company's demise and that this has improved the return to creditors in company failures.

Improving company law regulation is enhancing market information which enables creditors and other company stakeholders to better evaluate market risks. For instance, we are aware that financial institutions are now taking cognisance of the identities of the newly restricted directors in their lending policies. Creditors now have more timely information available in the Register of Companies to examine the solvency of particular companies. In essence, commercial risk is being reduced for those market participants who use the available information to assess credit risk.

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 by producing accessible and accurate guidance materials and by supporting efforts remedying previous defaults where it is possible to do so. For those who choose not to comply or who fail on proper notice to correct non-compliant behaviours, we closely investigate the circumstances in question and consider if some form of sanction is warranted. Effective enforcement action is of course also serving to reinforce the overall compliance message.

I believe that our approach is fully consistent with that advocated by the Report of the Working Group on Company Law Compliance and Enforcement in their vision for the Office. A balanced framework of company law exists to facilitate enterprise, not to impede it. Moreover, non-compliance with company law *by some* also undermines the economic opportunities *for others*. Echoing the thoughts of the Company Law Reform Committee in 1958, the Report of the Working Group some 40 years later similarly endorsed the value of company law compliance:

> "Quite apart from the general desirability of compliance with, and enforcement of, the law, there are particular reasons why company law should be complied with and enforced. These include:

- protection of the public from fraud and commercial irresponsibility
- protection of employees' interests in the viability of their employers
- protection of traders and suppliers
- protection of the State's revenues and of the tax-payer
- protection of investors and credit institutions
- protection of legitimate business from fraud-based competition
- protection of Ireland's trading and financial reputation.

A compliant corporate sector should yield substantial returns in business efficiency, solvency, revenue yield, social solidarity and in terms of the public and private time saved in dealing with the consequences of non-compliance." (Paragraphs 1.19 and 1.20)

Recent developments in the Irish economy have, I believe, underlined the need for effective regulation. I do not see the ODCE's remit encroaching on the traditional role of the DPP. We are primarily in a separate space promoting compliance and addressing and resolving defaults on an administrative basis. Even in relation to enforcement issues, the DPP's position is paramount as he retains the sole right to prosecute a serious company law breach on indictment. While we prosecute summarily and initiate civil enforcement proceedings, these are areas where the DPP has never been particularly active. We are therefore complementing rather than supplanting the work of the DPP.

I should add that in those cases where 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, as gathered together in his *Guidelines for Prosecutors* the most recent edition of which was published in 2006. I'm also pleased to say that since our establishment in 2001, we have enjoyed and benefited from a very good working relationship with the DPP and his officials. From my perspective and that of my Office, that is a key strength which I'm determined to preserve and to seek to build upon. In no way do I see the DPP's role diminishing either generally or even to a small extent in consequence of the activities of my Office.

Laws are developed by the democratically elected representatives of the people and are enacted to meet some perceived public need and to achieve some defined public good. It makes a mockery of that ambition if the laws as enacted by the Oireachtas are ignored or breached regularly. The present regulatory arrangements are not perfect – we are constantly trying to improve our focus and activity, but our presence and credibility has, I believe, served to improve discipline among company stakeholders in complying with their obligations and in asserting their rights under the Companies Acts.

Thank you for your attention.