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**CHAPTER 8**

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**Simplification:  
Criminal Acts and Omissions**

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## 8.1 Introduction

8.1.1 The Review Group addressed the issue of criminal offences and penalties applying under the Companies Acts in the context of furthering the simplification agenda as set out in Chapter 3. With the enactment of the 2001 Act, there are approximately four hundred separate offences and associated penalties specified in the Companies Acts. That is not, in itself, surprising in view of the scale and complexity of company law. Moreover, within the companies code there are two modes of trial determined for offences, summarily or on indictment. Given that the Group is charged with both simplification of the companies code and improving the efficacy of that code it is appropriate to examine the existing offences and penalties with a view to:

- (i) determining if the overall number of offences could be reduced, for example by the consolidation of some offences and the elimination of others;
- (ii) determining if in some cases a civil action offers a better remedy for an injured party;
- (iii) establishing if penalties are proportionate to offences and if offences are appropriately categorised as to mode of trial;
- (iv) identifying where new sanctions may be appropriate; and
- (v) identifying the appropriate prosecutor for specific summary offences, e.g. the Director of Corporate Enforcement or Registrar.

## 8.2 Approach of the Review Group

8.2.1 The Review Group approached its task by setting out to ascertain the experience to date of prosecutions under the Companies Acts with a view to establishing how successful they have been and the operational difficulties which have arisen in pursuing them. The experience of the Department of Enterprise, Trade and Employment, the CRO and the Chief State Solicitor's Office has all helped to inform the Group's thinking. The Review Group also considered the experience of the Revenue Commissioners in prosecuting offences under the Taxes Consolidation Act 1997.

8.2.2 It was the initial expectation of the Review Group that it would be recommending a significant reduction in the number of offences, for example, because no prosecutions on indictment had been taken during the life of the 1963 Act.

8.2.3 To assist in its deliberations, the Review Group had available to it a schedule of company law offences derived from *Irish Company Law Index* by Donal McGahon<sup>1</sup> and updated to include offences in both Companies (Amendment) Acts of 1999 and the 2001 Act. The results of the Review Group's consideration of each existing offence are set out in the Schedule. In addition to indicating the Group's recommendation in relation to each offence (e.g. repeal/retain, increase/decrease maximum fine, etc.), we draw attention to those offences where we believe a complaint by the wronged party to the Office of the Director of Corporate Enforcement (ODCE) is likely to be the most effective means of securing redress. The result is the suggested repeal of about 22 offences (circa 5% of the total number of offences), albeit largely due to the fact that these are obsolete, or otherwise covered by subsequent legislation.

8.2.4 The overall conclusion from this detailed review has been that almost all of the existing offences should be retained in the interests of achieving the twin policy aims of deterring the commission of offences and ensuring compliance with filing obligations. As outlined above, however, there are aspects to simplification and objectives to be attained in its pursuit other than merely reducing the numbers of offences.

- 8.2.5 The Review Group considered whether it was appropriate to deal with the issue of offences and penalties separately for public and for private companies. It decided, however, that it was not necessary to treat the two types of company differently in this context, as the same general principles relating to compliance and good practice apply to both types of companies.
- 8.2.6 The Review Group considered, at an initial stage, whether it would be helpful to compile a list of civil remedies currently existing in company law. The expert advice available to the Group was, however, that (a) there is no complete list currently existing of civil remedies relating to the Companies Acts and (b) such a list would be difficult, if not impossible, to compile. Whereas a criminal offence is clearly such and is prosecutable by a limited number of persons, civil remedies are varied and diverse and available to many. Instead, with a view to improving existing models or identifying an effective set of civil remedies the Group decided it would be more useful to identify those civil legal remedies which are most often employed and appear to be the most effective.
- 8.2.7 A number of general principles guided the Review Group in its consideration of this area. The objective of simplification is driven by a concern to bring transparency and clarity to the companies code in the interests of all its users. There is also a concern to foster a culture of compliance with regulatory and administrative requirements while facilitating competitiveness within the Irish economy and between Ireland and other countries. Although the Group's analysis was driven by the objective of simplification, in the review of offences and penalties the Group encountered issues that are not, strictly speaking, to do with simplification but which the Group felt should be addressed.
- 8.2.8 A key issue in examining the whole area of offences and penalties is if, in the absence of a specified offence, it would be possible to enforce a statutory obligation by way of court order. The advice available to the Review Group from the Attorney General is that this is possible. The Group also recognises, however, that the existence of an offence can act as a deterrent to criminal activity and that there is a strong public policy dimension to company law: the companies code prescribes correct and appropriate behaviour. It is also important that the code should continue to outlaw offences of wilful neglect, dishonesty and fraud in order to set the norms of responsible company and commercial practice. The Group judged this last point to be so important that it has concluded that a number of offences should remain on the statute books for this purpose even where they appear to have been prosecuted very rarely or not at all and even if an alternative civil remedy is available.
- 8.2.9 The Revenue Commissioners report that in their experience there is a need for both criminal and civil sanctions. While persistent defaulters may not respond to civil penalties, the notion of criminality and the threat of imprisonment can often act as a significant deterrent.

***The McDowell Group Report and the 2001 Act***

- 8.2.10 The McDowell Group Report sets out at paragraphs 2.6 to 2.9 the responsibility for enforcement of the criminal provisions of the Companies Acts as follows:
- 2.6 Responsibility for enforcement of the criminal provisions of the Companies Acts is divided among the following State agencies -- the Director of Public Prosecutions, the Minister for Enterprise, Trade and Employment and the Registrar of Companies.
  - 2.7 The Director of Public Prosecutions, who functions under the Prosecution of Offences Act, 1974, has the sole right to prosecute on indictment in respect of any offences committed under the Companies Acts and may also prosecute any other offences which are summary offences under the Act.
  - 2.8 Section 240(4) of the Companies Act, 1990 specifically provides that summary proceedings in respect of any offence under the Companies Acts may be prosecuted by the Minister for Enterprise, Trade and Employment. In relation to such summary offences, the Minister has, accordingly, a concurrent right to prosecute with the Director of Public Prosecutions.
  - 2.9 In addition, the Registrar of Companies is specifically authorised to prosecute in respect of 34 summary offences – which relate mainly to offences of omission in respect of obligations to make information available to the public, principally through the Companies Registration Office.

- 8.2.11 The 2001 Act gives effect to the central recommendation of the McDowell Group for the establishment of the ODCE. Section 12 sets out the Director's functions, including:

12(a) to enforce the Companies Acts, including by the prosecution of offences by way of summary proceedings.

Section 14 sets out the transfer to the Director of the Minister's power to bring summary proceedings under the Companies Acts. In essence, responsibility for prosecution under the Companies Acts now is as outlined in the McDowell Group Report save for the substitution of the Director for the Minister in most instances. The Minister remains responsible for prosecution for only a very limited number of offences.<sup>2</sup>

- 8.2.12 The Review Group welcomes the establishment of the ODCE as a significant development in improving enforcement of the Companies Acts and in offering an additional, and in many cases more effective, route to secure redress for shareholders and creditors who have been the victims of offences committed under the Acts. In addition to the powers of prosecution transferred from the Minister, the 2001 Act confers on the Director a range of functions of investigation, prosecution and enforcement. The Group noted, in particular, that the Director has power (under s 371 of the 1963 Act) to seek a High Court order to remedy any default in complying with the provisions of the Companies Act, which could be availed of in instances where no offence is specified.
- 8.2.13 Given the additional resourcing of the administrative, regulatory and investigative bodies – notably the establishment of the ODCE with its dedicated interdisciplinary staff – the Group is optimistic that there will be an increased level of enforcement by way of investigations and prosecutions, at least in the short term as compliance improves. The result of this is likely to be an improved culture of compliance and good practice in the company law area.
- 8.2.14 The Review Group welcomes s 62 of the 2001 Act,<sup>3</sup> amending s 370 of the 1963 Act, in providing that a certificate in writing by the Registrar as to filing details shall be admissible in all legal proceedings without further proof, until the contrary is shown, as evidence of the facts stated in the certificate. This will, in the opinion of the Group, remove an impediment to the efficient running of prosecutions.

### 8.3 Experience of prosecutions under the Companies Acts

#### *The Companies Report 2000*

- 8.3.1 The most recent annual Companies Report,<sup>4</sup> for 2000 (published in September 2001), gives a picture of the state of company law prosecutions and investigations. Compliance with the filing of CRO returns improved dramatically over 1999, with 92% of companies filing returns in 2000 as compared with 57% in 1999. The CRO policy of prosecuting or striking off companies in default of filing of annual returns appears to have been a key element in improving compliance.<sup>5</sup>
- 8.3.2 At 31 December 2000 there were ten investigations in progress under relevant sections of the 1990 Act. During 2000, forty-five convictions were obtained by the Minister in respect of breaches of the Companies Acts 1963 to 1999. These figures compare favourably with the position recorded in the McDowell Group Report. That report 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. For example, in 1997 only 13% of companies complied with their obligations to file annual returns on time." The McDowell Group Report was instrumental in ensuring that extra resources were allocated to the CRO and the Company Law Division of the Department. The key recommendation in that report was the establishment of the

<sup>2</sup> For example, s 196 of the 1963 Act requires details of directors to be published in all business letters, unless there is an exemption from this. Because of the powers of the Minister to exempt companies from the requirements of the section, the Minister has retained the power to prosecute. See also s 153(3) of the 1963 Act.

<sup>3</sup> Section 62 provides that in specified instances a certificate in writing made by the Registrar shall in all legal proceedings be admissible without further proof, until the contrary is shown, as evidence of the facts stated in the certificate.

<sup>4</sup> Stationery Office, Dublin, 2001, ISBN 0-7557-1131-9.

<sup>5</sup> Figures cited in this paragraph are for returns made by year-end rather than necessarily on time.

ODCE with significant resources allocated to it for investigation and prosecution of company law offences. As already mentioned, that recommendation was given effect through the 2001 Act.

8.3.3 The Minister was the appointed prosecutor of most offences under the Companies Acts until the transfer of functions to the Director under the 2001 Act. In addition, the 1990 Act conferred considerable powers of investigation on the Minister, which have been transferred to the Director. The law has been amended to address particular problems and unacceptable practices which have come to light on foot of investigations. For example, in the wake of the McCracken Tribunal Report<sup>6</sup> and various investigations of companies initiated under Part II of the 1990 Act, a number of initiatives were undertaken to increase the supervisory role of the Minister.

8.3.4 As the flow of complaints to the Minister regarding possible breaches of the Companies Acts increased on foot of these investigations, there was a consequent increase in the use of the Minister's powers of prosecution. It is worth noting that 2000 saw the highest-ever number of convictions for offences other than filing or failure to file. At end-1999 and end-2000 there were, respectively, ten and eleven such investigations in progress under ss 8 and 19 of the 1990 Act.<sup>7</sup> In November 2001, investigations were still in progress in respect of the following companies:<sup>8</sup>

- Ansbacher (Cayman) Ltd.
- Celtic Helicopters Ltd.
- College Trustees Ltd.
- Guinness & Mahon (Ireland) Ltd.
- Hamilton Ross Company Ltd.
- Kentford Securities Ltd.
- National Irish Bank Ltd., and
- National Irish Bank Financial Services Ltd.

6 Report of the Tribunal of Inquiry (Dunnes Payments), 25 August 1997.

7 Companies Report 2000.

8 Source: Department of Enterprise, Trade and Employment.

8.3.5 The Companies Report 2000 recorded the following enforcement activity.

Filing offences (s 125 of the 1963 Act)	Convictions obtained against 979 companies and 32 directors.
Failure to maintain proper books of accounts (s 202 of the 1990 Act)	Convictions obtained against 6 companies and 9 directors.
Failure to provide a copy of the register of directors' interests (s 60 of the 1990 Act)	Convictions obtained against 2 companies.
Failure to notify the Registrar of status of company (Regulation 6 of the Single Member Private Limited Companies Regulations, 1994)	1 conviction obtained.
Failure to hold an annual general meeting (s 131 of the 1963 Act)	1 conviction obtained.
Abuse of limited liability (s 381 of the 1963 Act)	1 conviction obtained.
Trading under a misleading name – misuse of 'plc' (s 56 of the 1983 Act)	One conviction obtained.
Failure to maintain a register of members (ss 116–124 of the 1963 Act, as amended)	One conviction obtained.
Failure to comply with a direction to change a company name (s 23 of the 1963 Act)	2 convictions obtained.
Prosecutions for acting as an auditor while not qualified (s 187 of the 1990 Act)	2 convictions obtained.
Restriction of directors (s 150 of the 1990 Act)	113 currently restricted.
Disqualification (s 160 of 1990 Act)	4 directors currently disqualified.

8.3.6 The Companies Report 2000 does not record any instances of prosecution on indictment. In fact, there does not appear to be any recorded instance of prosecution on indictment.

8.3.7 Discussions between the Department of Enterprise, Trade and Employment and the Review Group expanded on the general picture regarding enforcement. Sections 202 (keeping of books of account) and 242 (furnishing false information) of the 1990 Act were cited as particularly useful sections from the point of view of enforcement. Prosecutions for s 202 offences have been taken as a result of a systematic examination of the CRO register of notifications by auditors of inadequate books of account under s 194 of the 1990 Act. Otherwise, investigation to date has, in the main, arisen from complaints to the Department by members of the public<sup>9</sup> concerned about the activities of the relevant companies and directors. The establishment and resourcing of ODCE is likely to ensure a more proactive approach to investigation in the future.

8.3.8 The experience of the Department also suggested that the courts are concerned to vindicate the rights of shareholders. The point was made, however, that company law prosecutions are often expensive to run from the State's perspective if expert witnesses need to be called. Costs are rarely recouped. The Department's view was that disqualification, or the threat of disqualification, from serving as a company director is an effective penalty and serves as a useful deterrent.

**Filing of documents**

8.3.9 It is important to note that the duty to file documents with the CRO is concerned with information disclosure rather than information validation, unlike the situation pertaining in a number of other European countries, e.g. Germany and the Netherlands. The practical consequence of this is that corporate governance decisions are not usually voided merely because no information, or incorrect information, has been filed with the CRO. The Review

9 Frequently company members or creditors.

Group considers that the consequence of validation could serve as a useful aid to ensure compliance and is of the opinion that the feasibility of introducing such a system in Ireland should be examined at a future stage.

- 8.3.10 The Registrar is empowered under the Companies Acts to prosecute a total of forty-five offences. In practice, the sole offence which is currently prosecuted by the Registrar is under ss 125/126 of the 1963 Act (failure to comply with the obligation to file an annual return with the CRO). This is an offence which is provable on the face of the record; third party evidence is not required. Sections 125 and 126, as amended, provide that if a company fails to comply with the filing obligation, the company and "every officer in default" shall be liable to a fine not exceeding £1,500 (€1904.61). Prosecutions for breach of ss 125/126 are labour-intensive from the point of view of both the Registrar and the courts. A maximum of 200 company summonses or 140 director summonses can be listed in any one day before a District Court. Seven to ten days a year are currently dedicated to prosecutions for failure to file documents in the CRO. The expectation is that use of the new s 62 of the 2001 Act (see 8.2.14) will reduce significantly the amount of time spent by CRO staff in court, and should enable greater volumes of summonses to be dealt with by the court.
- 8.3.11 The Review Group reflected on the CRO's experience of prosecutions as set out above. It was noted that a useful remedy available to the Registrar is s 371 of the 1963 Act where, in the case of default, the Registrar could apply to the High Court for enforcement of the duty to comply with the Act. Section 371 provides:
- (1) If a company or any officer of a company, having made default in complying with any provision of this Act fails to make good the default within 14 days after the service of a notice on a company or the officer requiring him or it to do so, the [High] court may on an application made to the court by any member or creditor of the company or by the Registrar make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order.
  - (2) Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officers of the company responsible for the default.
  - (3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default as aforesaid.

The 1963 Act was amended by s 97 of the 2001 Act which creates a new s 317A giving a similar power to the Director.

- 8.3.12 A number of s 371 notices were served by the Registrar on companies and their officers during 2000 in relation to the failure to file annual returns. These arose where a company had asked the CRO to remove its name from a strike-off list because that company claimed that circumstances prevented the returns being filed (e.g. ongoing Revenue inspections which the company alleged were holding up the preparation of accounts, or appearances as a witness before one of the Tribunals of Inquiry or, more commonly, inability to file accounts). In all but one case, the company filed the outstanding return on foot of the Registrar's 14-day notice of intention to apply to court.
- 8.3.13 The advantage of using s 371 is that it is a fast and effective method. The company and its officers appear to take the Registrar's application seriously – possibly because the level of costs and the publicity involved greatly exceed those encountered in a District Court prosecution. This remedy is also available to creditors and members of the company and is now available to the Director, by virtue of s 97 of the 2001 Act. It was noted, however, that this may not be a suitable procedure for a high volume of cases because of the necessary commitment of time and resources.

- 8.3.14 The CRO commenced an enforcement campaign in 2000 against defaulting liquidators. Failure to deliver a liquidator's return is an offence<sup>10</sup> which is prosecutable by the Registrar. Section 302 of the 1963 Act was viewed, however, by the CRO as a more efficient enforcement tool. Under that section, if a 14-day notice is served on a liquidator who is in default of filing returns, and the returns are not filed within that period, application can be made to the High Court by the Registrar for an order directing compliance by the liquidator with the statutory obligation to file returns within such period as the court may specify and for an order for costs. Not only is this far speedier than a summary prosecution, it is also much more likely to achieve the desired result of getting the defaulting liquidator to file the outstanding returns. The Registrar's practice is to issue warning letters in advance of a formal (s 302) notice. Where liquidators did not file, despite receipt of warning letters, s 302 notices were issued. A total of thirty s 302 notices were issued to liquidators during 2000. In almost all cases, issuing the warning letter and/or the s 302 notice was sufficient to secure compliance.
- 8.3.15 The CRO cited the difficulty in prosecuting non-resident directors in the absence of an address within the State. One way in which this might be resolved would be to provide that, in the absence of an address within the State (on Form A1 or B10) for a director of a company, the registered office of the company shall be deemed to be the address of that director for service of all criminal proceedings under the Companies Acts subject to any constitutional constraints. The Review Group recommends accordingly.
- 8.3.16 The Review Group's attention was also drawn by the CRO to the possibility of abuse of the Form B69 procedure. Under this procedure,<sup>11</sup> directors of a company can notify the CRO of the termination of their directorship, if the company itself defaults in its obligation to file a Form B10. Directors who are being prosecuted could seek to avoid responsibility by backdating the date on which they ceased to be a director.
- 8.3.17 It is easier to identify this problem than to come up with a solution. The Review Group recognises that it would be important not to introduce a remedy which penalises the genuine, if tardy, correction of details on the companies register and which might actually lead to such corrections not being made. There is already an offence under s 242 of the 1990 Act in relation to the furnishing of false information but there has never been a prosecution under this section. The Group considers that co-operation between the different enforcement agencies on this matter could solve the problem. The Review Group recommends, therefore, that the CRO should, on receipt of a Form B69, take immediate action against the company in question for failure to file a Form B10, as required under s 195(6) of the 1963 Act. If it emerges, as a result of this action, that false information has been supplied by a person on Form B69, the matter should be referred by the CRO to the ODCE and/or the DPP as appropriate.

## 8.4 Consolidation and recategorisation of offences

- 8.4.1 In the interests of simplification, the Review Group considered the following options regarding consolidation and recategorisation of offences:
- (i) Retain the existing practice in the Companies Acts (other than the 1990 Act) of setting out in the same section the act or omission, together with the offence and the applicable penalties.
  - (ii) Set out in the same section the act or omission and a statement that failure to comply is an offence, with a separate section listing those sections under which offences are created and the penalties applicable thereto, with appropriate categorisation, including daily default fines. This is the approach adopted in the 1990 Act (s 240).
  - (iii) Prescribe the act or omission in the relevant section and, in a separate section: (a) state that failure to comply with an obligation under any of the sections listed is an offence; and (b) set out the penalties applicable, again with appropriate categorisation.
  - (iv) A variation of the third option above: this would involve categorising not only the penalties but also the offences (e.g. filing offences, administrative offences).

10 See ss 262, 263, 272, 273 and 306 of the 1963 Act.

11 See s 47 of the 1999 (No 2) Act.

- 8.4.2 This last is the approach adopted in the TCA 1997. Section 1078 of the TCA 1997 sets out a list of Revenue offences, not merely in relation to direct taxes but to all indirect taxes, capital taxes and duties. It imposes a common penalty for all offences within a specified category, which means that penalties adequately reflect the seriousness of the offence. This consolidation of penalties recognises that there is a certain degree of commonality between the various offences, e.g. failure to make returns, the making of incorrect returns, preparing incorrect documents, failing to keep/retain records, and obstructing officers in the use of their powers. The legal obligation is imposed by the appropriate section which requires the task to be carried out, e.g. the requirement to keep certain records is contained in s 882 of the TCA 1997 but the offence is committed under s 1078 of that Act.
- 8.4.3 The Review Group considered, as an alternative, whether it would be useful to attach to the 1963 Act, and subsequently to the consolidated Companies Act, a complete list of Companies Acts offences and penalties, categorised by type of offence, to assist users of the Acts. Such a schedule would be cited as being included in the Act for convenience of reference, with the appropriate section continuing to cite the offence and the penalty whilst retaining legal primacy.
- 8.4.4 The Review Group believes that some form of consolidation of Companies Acts offences is not only possible but desirable. The Group noted that there were already two possible models for this in the Companies Acts, i.e. at s 22 of the 1986 Act, which cites the sections referred to, and at s 240 of the 1990 Act, which is of general reference. The Group does not consider, however, that a categorisation of company law offences is practicable, unlike Revenue offences, in view of the varied nature of the obligations imposed under the Companies Acts, and the potential number of parties involved. The Group considers, furthermore, that there is merit, in the interests of certainty, in retaining the creation of an offence in the same section in which the obligation arises. Accordingly, the Group recommends the extension of the approach adopted in s 240 of the 1990 Act to all offences under the Companies Acts. While this will not result in a reduction in the number of offences, it will result in a more comprehensible statement of offences and will significantly reduce the amount of text in the Companies Acts<sup>12</sup> thus furthering the objective of simplification.
- 8.4.5 The Review Group is mindful of the obligations of various persons to be aware of (and, in some cases, to notify) the various criminal offences under the Companies Acts, including the obligation placed on auditors by s 74 of the 2001 Act to notify the Director of suspected commissions of indictable offences under those Acts. The Review Group recommends that the Director shall be obliged to publish and maintain a complete list of offences under the Companies Acts, distinguishing between summary and indictable offences. The Group further recommends that when the Director publishes such a list, reliance thereon shall be a defence to any prosecution for failure to notify any person of the suspected commission of any offence not on the list.<sup>13</sup>

## 8.5 Penalties

- 8.5.1 One of the most critical distinctions in the range of penalties specified under company law is whether the offence gives rise to summary prosecution or prosecution on indictment. The difference in approach derives from the difference in degree of seriousness between offences, with less serious offences being pursued by way of summary proceedings in the District Court (and in practice without the involvement of the DPP) and more serious offences being prosecuted on indictment by the DPP in the Circuit Criminal Court. Only indictable offences are tried before a jury. For both types of indictable offence, the penalty can be a prison term as well as, or instead of, a fine. In each case, the level of fines and imprisonment is intended to be proportionate to the offence.
- 8.5.2 The Review Group welcomes the increased rate of compliance illustrated at 8.3.1. The Group also welcomes the increase to £1,500 (€1904.61) in the maximum level of fines for summary offences provided for in the 2001 Act.

<sup>12</sup> This may seem a fine distinction but the fact is that currently the offence provisions in individual sections of the Acts contain two or three paragraphs, repeated with variation approximately 400 times through the Acts. On foot of the above proposal we would estimate a reduction in the present volume of text devoted to penalties to about one-third of its current amount.

<sup>13</sup> Along the lines of s 202(10) of the 1990 Act.

The strike-off/prosecution approach, coupled with the increased maxima, enhances the effectiveness of enforcement. However, it should be noted that the experience of the Department and of the CRO is that it has been the practice of the courts to impose low fines for company law offences – of the order of £250 (€317.43). This does not help the deterrent factor. Accordingly, the Group recommends that, as per the TCA 1997, there should be a minimum fine for summary offences under the Companies Acts of €500, save with such limited statutory exceptions (if any) as are necessary to comply with the constitutional rights of the defendant.

- 8.5.3 As with the Companies Acts, offences under the TCA 1997 can be prosecuted summarily or on indictment, depending on the severity of the offence. One point of interest is that there is, effectively, a minimum penalty of £375 (€476.15) in relation to offences as s 1078(3) of the TCA 1997 prohibits mitigation of the standard penalty to below one quarter of the fine. Furthermore, s 1078(8) prevents other offences from being taken into consideration, i.e. where the offence is proven but the court effectively consolidates the fine with a fine in relation to another offence of which the individual has been convicted. As a result, the penalty imposed on summary conviction can be substantial; the experience of the Revenue Commissioners is that this acts as a deterrent and helps to ensure substantial compliance.
- 8.5.4 The Review Group acknowledged that the failure to pay fines is a problem, and one not confined to fines imposed under the Companies Acts. At present, the only remedy available is arrest on foot of a bench warrant. The Group sees merit in the introduction of a power to apply an attachment of earnings or assets procedure to persons in default, and recommends that consideration be given by the Minister for Justice, Equality and Law Reform to the introduction of such a power.
- 8.5.5 Work is also underway in the Department of Justice, Equality and Law Reform on the indexation of fines imposed by the District Court. The Review Group understands that legislation may be proposed, the objective of which is to provide an efficient mechanism whereby fines can be revised at regular intervals to reflect changes in the value of money. It is proposed that all fines will be indexed through a band system, in order to ensure consistency. Four levels of fine are envisaged. Proposals to effect this change are likely to be submitted to Government in the future.
- 8.5.6 In its consideration of the range of fines for indictable offences under the Companies Acts, the Review Group noted the fact that the maximum level of fine payable for individual offences is, in a number of instances, low proportionate to the seriousness of the offence and having regard to the associated maximum prison term.<sup>14</sup> In identified instances in the attached schedule, the Group recommends that the maximum fine for certain indictable offences should be increased and also recommends that the lowest maximum fine for all indictable offences be increased to €12,500. At present, the lowest maximum fine is €3,200 approximately.
- 8.5.7 The Review Group also considered the impact of the provisions of the Criminal Justice Act 1984, s 4 of which gives power to the Garda Síochána to arrest and detain, for up to 12 hours, a person suspected of committing an indictable offence, without warrant in cases relating to indictable offences carrying a term of imprisonment of five years or over. By virtue of s 104 of the 2001 Act, this power can now be invoked in respect of all 164 indictable offences under the Companies Acts.<sup>15</sup> The Review Group gave some consideration as to whether the seriousness of an indictable offence under the Companies Acts justified the availability of the exercise of this power. The Group decided, on balance, that s 4 of the Criminal Justice Act 1984 should continue to apply to such offences, on the basis that the provision acts as a significant deterrent in relation to the commission of offences under the Companies Acts.

14 e.g. the maximum fine of £2,500 (€3,174.35) applicable to s 24(6) of the 1983 Act which provides: A person who knowingly or recklessly authorises or permits the inclusion in a statement circulated under subsection (5) of any matter which is misleading, false or deceptive in a material particular shall be guilty of an offence. Section 24 deals with the allotment of shares, subs (5) deals with the statement setting out the reasons for and financial details of the allotment.

15 Section 104 of the 2001 Act provides that in any provision of the Companies Acts for which a term of imprisonment of less than 5 years is provided in respect of a conviction on indictment, the maximum term of imprisonment shall be taken to be 5 years.

## 8.6 Payment of recognisances

- 8.6.1 The Revenue Commissioners highlighted difficulties which have arisen where a company is being prosecuted. The issue arose in relation to two separate cases being prosecuted for Revenue offences. One of the cases was also being prosecuted for fraudulent trading under the Companies Acts. Under s 22 of the Criminal Procedures Act 1967, a person may be returned for trial. Pending trial he may be held in custody or released on bail. If released on bail, a person may be required to provide recognisances, with or without sureties. If a company is being prosecuted, recognisances are required. In practice, this can only be provided by the directors or officers of the company. If they refuse to provide the recognisances, problems can clearly arise in progressing the prosecution.
- 8.6.2 The District Court Rules provide that the court can dispense with the requirement for a recognisance. In at least one case in which the Revenue Commissioners were involved in prosecuting a company, however, the court refused to dispense with the requirement and the prosecution failed because the directors/officers of the company refused to provide the recognisance.
- 8.6.3 The Review Group considers that it is desirable to seek a solution to this difficulty in order to facilitate the prosecution of companies (whether under the Companies Acts or otherwise). This could be done by providing in the Companies Acts that it is an offence for a director or other officer of a company not to comply with a requirement to provide a recognisance. The Review Group accordingly recommends the creation of such an offence.



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8.7 Summary of Recommendations

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## 8.7 Summary of recommendations

- Subject to any constitutional restrictions, s 379 of the 1963 Act should be amended to require all non-resident directors on appointment (on Form A1 or B10) to nominate an address within the State for the purpose of service of all criminal proceedings under the Companies Acts. **(8.3.15)**
- The CRO should, on receipt of a Form B69, take immediate action against the company in question for failure to file a Form B10, as required under s 195(6) of the 1963 Act. If it emerges, as a result of this action, that false information has been supplied by a person on Form B69, the matter should be referred by the CRO to the ODCE and/or the DPP as appropriate. **(8.3.17)**
- The approach adopted in s 240 of the 1990 Act should be extended to all offences under the Companies Acts, i.e. the same section should set out the act or omission and a statement that failure to comply is an offence, with a separate section listing those sections under which offences are created and the penalties applicable thereto, with appropriate categorisation, including daily default fines. **(8.4.4)**
- The Director should be obliged to publish and maintain a complete list of offences under the Companies Acts, distinguishing between summary and indictable offences. When the Director publishes such a list, reliance thereon shall be a defence to any prosecution for failure to notify any person of the suspected commission of any offence not on the list. **(8.4.5)**
- A minimum fine for summary offences should be established under the Companies Acts, save with such limited statutory exceptions (if any) as are necessary to comply with the constitutional rights of the defendant. This minimum should be set at €500. **(8.5.2)**
- The Review Group sees merit in the introduction of a power to apply an attachment procedure to persons in default, and recommends that consideration be given by the Minister for Justice, Equality and Law Reform to the introduction of such a power. **(8.5.4)**
- The lowest maximum fine for all indictable offences should be increased to €12,500. **(8.5.6)**
- There should be a provision in the Companies Acts to make non-compliance with a requirement to provide a recognisance in breach of a court order an offence. **(8.6.3)**

**Specific recommendations on individual sections of the Companies Acts follow in the schedule attached to this Chapter.**





# eightschedule

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Schedule of Offences under the Company Acts

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