LEXAMBIENTE

RIVISTA TRIMESTRALE
DI DIRITTO PENALE DELL'AMBIENTE

ISSN 2612-2103
Rivista classificata scientifica per il settore IUS 17 da Anvur

Con il supporto di
UNIVERSITÀ DEGLI STUDI DI MILANO BICOCCA
DIPARTIMENTO DI GIURISPRUDENZA
SCHOOL OF LAW

NUMERO 2\2021

LEXAMBIENTE
Rivista Trimestrale di Diritto Penale dell'Ambiente
Fasc. 2/2021

(second section - seconda parte)*

THE CRIMINAL ENFORCEMENT OF WASTE MANAGEMENT LAW IN IRISH DISTRICT COURTS: A CRITICAL ANALYSIS

L'APPLICAZIONE PENALE DELLA LEGGE SULLA GESTIONE DEI RIFIUTI NEI TRIBUNALI DISTRETTUALI IRLANDESI: UN'ANALISI CRITICA

di Kevin O'LEARY

Abstract. The paper analyzes the criminal-environmental regulatory framework in Ireland and looks at the strengths and weaknesses of the environmental criminal justice system and how that system could be made more effective.

Abstract. Il documento analizza il quadro normativo penale-ambientale in Irlanda esamina i punti di forza e di debolezza del sistema di giustizia penale ambientale e come tale sistema potrebbe essere reso più efficace.

Parole chiave: Tribunali distrettuali irlandesi, Giustizia penale ambientale

Key words: Irish District Courts, Enviromental criminal justice

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* la prima parte dell'articolo è stata pubblicata nel n. 1\2021

E. Sentencing

The absence of sentencing data is not unique to waste management offences; it has been noted that there is an, "almost complete absence of statistical data on sentencing in Ireland."[1] The absence of a centralised database of environmental offences in general makes it very difficult to determine how many WMA cases go before the courts in any given year and what sentences are imposed. This lack of data causes fundamental problems in trying to ascertain whether criminal enforcement is effective in this area. The EPA's most recent enforcement report states that the EPA and local authorities "[e]nforcement activities have resulted, on average, in 900 court prosecution proceedings being brought to court each year."[2] This figure includes not only prosecutions for WMA offences but also breaches of air, noise and water pollution legislation. It is also difficult to discern from this figure if it is a reference to the number of new cases being brought each year, whether it includes ongoing cases or if it means cases that have concluded. Clarification is certainly required.

Sentencing for environmental offences generally has been criticised for a number of reasons. A common criticism, certainly amongst environmental officers in the UK, is that the penalties imposed do not reflect the seriousness of the offence and have little or no deterrent value.[3] Another criticism is the limited nature of the penalties available.[4] The absence of formal guidance for the courts has also been noted, as has the disparity in sentencing.[5] Finally, there has been criticism of the absence of an "explicit connection between the penalty available or imposed, and the

1 The Irish Sentencing Information System is a steering committee to plan for and provide sentencing information in Ireland. While a much needed and highly commendable project, it is still at an embryonic stage and is handicapped by the sparse resources – just 3 barristers reporting on cases, its limited geographical coverage (2 of the barristers cover the Dublin Circuit, while 1 covers the Cork Circuit), the fact that it is limited to cases in which the barrister has attended all hearings and that decision not yet made as to whether the information garnered will only be made available to judges or more widely available. B. Conroy and P.G. Gunning. "The Irish Sentencing Information System. ISIS. A Practical Guide to a Practical Tool", at page 2. Accessed at: <www.irishsentencing.ie/en/ISIS/.../ISIS%20Courts %20Newsletter.doc>
2 EPA. *Focus on Environmental Enforcement in Ireland* 2009 – 2012. (Dublin, EPA. 2014).
3 DE PREZ, P. *Beyond Judicial Sanctions: the Negative Impact of Conviction for Environmental Offences*. (2000) Environmental Law Review, 2, 11 -22.
4 *Ibid*, page 12
5 *Ibid*, page 12

enforcement aim of safeguarding the environment.".[6]

Statistics available from England and Wales certainly indicate that the courts there do not impose anywhere near the maximum penalty available.[7] There was a decline in the median fines imposed on corporations from £2,500 in 2001, to £1,500 in 2011. Similarly, the median fine imposed on individuals over the same period declined from £350 to £200.[8] And the increase in the maximum fine in the Magistrates Court to £20,000, introduced by the Environmental Protection Act 1990 (United Kingdom) appears to have made no discernible difference.[9]

While there is a school of thought that higher penalties will have a greater deterrent effect, thereby rendering the criminal enforcement of environmental law more effective, this is by no means a unanimously held view. The belief that substantial penalties are required is premised partly on the view that environmental offences ought to be treated seriously and if consistently low penalties are imposed, this will only serve to create, or confirm, the perception that environmental offences are not real crimes.[10] In addition, it is argued that low fines are ineffective in terms of deterrence, especially when compared with the profits generated by illegal activities.[11]

In examining the penalties associated with environmental crime, it is important to note that prosecutions result in consequences beyond any penalties imposed by the courts.[12] Adverse publicity may impact on an offender's profits as it may deter existing customers from doing business with the offender. It can even result in the loss of potentially profitable contracts.[13] Some would argue that moral stigma attaches to environmental offences, although this is by no means a unanimous view.[14]

WMA enforcement bodies are concerned primarily with the deterrence value of sentencing,

6 *Ibid*, page 12
7 PARPWORTH, N. *Sentencing for Environmental Offences: A New Dawn?*[2013]. Journal of Planning and Environmental Law 1093
8 *Ibid*, page 1096
9 *Ibid*
10 DE PREZ, P. *Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions* [2000]. Journal of Environmental Law. Vol. 12, No. 1, 65.
11 S. BELL, D, MCGILLIVRAY, O. PEDERSEN *Environmental Law* (8th Edition) (Oxford, Oxford University Press, 2013) at page 301.
12 *Supra*
13 *Ibid*, page 12. The writer is aware of a case where a multinational company in Ireland terminated its contract with a waste collection company on finding the company in question was illegally disposing of the waste from the multinational's property.
14 C. ABBOT *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence* (Oxford, Portland, OR, Hart Publishing, 2009) at page 153

hoping that it will deter not only the offender currently before the court but that it will have a general deterrent effect. The idea of general deterrence is based on utilitarian ideas and justifies punishment where the costs to the offender are outweighed by the benefits to society as a whole, but the utilitarian rationale was criticised in the case of CC v. Ireland.[15] Judges on the other hand, may be influenced by principles other than deterrence, although some of these principles may be in keeping with regulatory practice. So for example, a rehabilitative sanction might involve the education and training of an offender. A conviction may have an incapacitatory effect if it leads to the licence being revoked. Reintegration may involve the offender carrying out remedial works, a sanction that would require the offender being involved with the victim of the crime – in this case, the environment.[16]

1. Factors that impact on sentencing

a. The Constitution

The District Court has been held by the Irish Supreme Court to be a court whose jurisdiction is limited and local in nature.[17] Article 38 of the Irish Constitution provides that the District Court can only hear, "minor cases", a term defined in part by the severity of the penalties the court may impose. Indeed in Melling v. Ó Mathghamhna[18] Kingsmill Moore J. held that the difference between a major and a minor offence is the sentence that the court may impose.[19] However, there are no guidelines as to what constitutes a major or minor offence. It has been suggested that whether a penalty is major or minor should be determined by reference to the maximum fine available in 1937,[20] or alternatively the average industrial wage. Currently the maximum fine that can be imposed by the District Court is €5,000[21] but since the civil jurisdiction of the District Court was

15 [2006] 4 IR 1.
16 C. ABBOT *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence* (Oxford, Portland, OR, Hart Publishing, 2009) at pages 157 to 158.
17 M. FORDE and D. LEONARD. *Constitutional Law of Ireland* (Dublin, Bloomsbury Professional, 2013) at page 156. Grimes v. Owners of SS Bangor Bay [1948] 1 IR 350.
18 [1962] 1 IR 1
19 Ibid, at 34
20 The year in which the Constitution was adopted
21 Section 4 of the Fines Act 2010

increased in 2014 to €15,000 from €6,348[22], it could reasonably be argued that a maximum fine of €15,000 in the District Court should be immune from any constitutional challenge. It has been held that a one- year term of imprisonment for a minor offence is constitutional, whereas a two year prison sentence would infringe article 38 of the Constitution.[23]

b. Judicial Attitudes

Judicial attitudes to environmental crime is yet another area in which there has been no research undertaken in Ireland to date. Research on the attitudes of lay magistrates in England and Wales[24] revealed some interesting results. Out of the 110 respondents, 34 magistrates indicated that they "strongly agreed" that they "fully appreciated" the seriousness of environmental offences, while a further 69 said that they "agreed".[25] Moreover the majority of magistrates who responded to this survey appeared to appreciate the compliance approach to environmental enforcement,[26] with 44.04% believing persuasion and informal action was preferable to prosecutions. A further 36.26% were of the view that prosecutions should only be used as a last resort.[27]

The study also found that 79% of the magistrates who responded believed that environmental offenders should be prosecuted more often, while 70% did not think the penalties were too high.[28] Furthermore, the majority of respondents considered deterrence to be the key function of sentencing in environmental cases.[29]

That being the case, how does one reconcile the apparent acknowledgement by magistrates of the seriousness of environmental offences, with the perceived paltry sentences actually handed down? At the time of the research in question, the magistrates in England and Wales had not been issued with sentencing guidelines for environmental offences and the researcher suggested that, in

22 District Court (Civil Procedure) Rules 2014 (SI No. 17 of 2014)
23 Mallon v. Minister for Agriculture, Food and Forestry [1996] 1 IR 517, per Denham and Barron JJ. at 542. The Supreme Court previously held that a six month term of imprisonment fell within the definition of a minor offence – Conroy v. Attorney General [1964] IR 411 per Walsh J. at 438. The Supreme Court has also held that where imposing sentences for minor offences, the District Court can impose a custodial sentence for consecutive offences, so long as the aggregate of the sentences does not exceed two years. Meagher v. O'Leary [1998] 4 IR 33.
24 T. MORAN, *Magistrates Courts and Environmental Regulators – Attitudes and Opportunities* [2005] JEHR Vol.4, Issue 1. Accessed at: <http://www.cieh.org/jehr/magistrates_environmental_regulators.html>. For some reason, stipendiary magistrates and district judges did not form part of the survey.
25 Ibid, page 8
26 See supra for discussion of enforcement strategies
27 *Supra*
28Ibid, page 10
29 Ibid

the absence of such guidelines, magistrates sought a, "moral thread", in the offence and that the presence of such a moral thread would mark an offence as being serious. Conversely, if the moral thread was absent, the offence would be regarded as being less serious.[30] This analysis is consistent with one observation of Irish District Judges, that because they have so much sentencing discretion and no guidance, their sentencing practice is, "undoubtedly shaped by the personal orientations and philosophies of individual judges."[31]

As Moran observes, if magistrates are in fact looking at offences in terms of morality, this means that they are not looking at how bad the offence is but rather at how bad the offender is.[32] This methodology leads to difficulties in gauging the seriousness of an offence; after all, which is more serious – a small amount of deliberate harm or a large amount of inadvertent pollution?[33] Moran's research showed that magistrates regarded committing environmental offences for profit as an aggravating factor, rather than looking to see how bad the pollution was.[34] Moran drew the conclusion that this need to find moral blameworthiness explained why magistrates were failing to impose penalties that had a deterrent value; the offences were "not viewed ultimately as [being] morally blameworthy."[35]

Since environmental prosecutions were relatively rare and because of the absence of guidelines, magistrates were using the "real" crime they dealt with every day as a comparator.[36] This writer has observed some Irish District Judges who clearly view WMA offences as serious matters but seem unsure as to what the appropriate level of penalty should be.

C Sentencing Guidelines

Prior to 2014, the Irish High Court and Supreme Court had refused to provide sentencing guidelines, but this situation changed with three decisions of the Irish Criminal Court of Appeal –

30 Ibid, page 11
31 *Supra*
32 *Supra*
33 Ibid page 11
34 Ibid
35 Ibid
36 Ibid

D.P.P. v. Fitzgibbon,[37] D.P.P. v. Ryan[38] and D.P.P. v. Z[39] - all delivered by Clarke J. on 18th March 2014. Prior to these cases, the leading case in the area of sentencing guidelines was the Supreme Court case of The People (D.P.P.) v. Tiernan[40], in which Finlay C.J. held it would not be appropriate for the court to make general observations in the absence of sentencing statistics. The court also refused to set down "any standardisation or tariff for penalties" on the grounds that to do so would interfere with a judge's sentencing discretion.[41]

In all three cases, Clarke J. pointed out that the availability of sentencing data had improved significantly since Tiernan and that counsel in each case was able to refer him to a body of previous sentencing cases and data. However, in Fitzgibbon, he noted that he did not have the same extent of sentencing data available to him as in the other two cases and, as such, sentencing guidance in the case of this particular offence (assault occasioning serious harm) would have to, "…be more tentative",[42] and in Ryan he held that the court would only be in a position to provide guidance where there was sufficient sentencing data.[43]

While these three cases are a welcome development, the vast majority of WMA offences are prosecuted in the District Court and this writer is not aware of a WMA prosecution on indictment where the D.P.P. appealed the sentence imposed by the Circuit Court as being unduly lenient. It is therefore unlikely that the Criminal Court of Appeal will be presented with a WMA case where it would have the opportunity to provide sentencing guidance and, even if it were, the absence of sentencing data would prevent the court from issuing such guidance. As such, WMA prosecutors cannot expect sentencing guidance to come from the judiciary.

This is in marked contrast to the situation in England and Wales, where the, "Environmental Offences Definitive Guidelines"[44] came into effect on 1st July 2014. A significant difference between Ireland and England and Wales is that English and Welsh courts are statutorily obliged to follow sentencing guidelines where they exist.[45] Such guidelines, were they to exist in Ireland,

37 [2014] IECCA 12
38 [2014] IECCA 11
39 [2014] IECCA 13
40 [1988] I.R. 250
41 Ibid, at page 254
42 [2014] IECCA 12, paragraphs 7.2 and 8.9
43 2014] IECCA 11, paragraph 2.4
44 Sentencing Council (UK). *Environmental Offences Definitive Guideline* (London, Sentencing Council, 2014).
45 Section 125(1) of the Coroners and Justice Act 2009 (England and Wales)

might overcome the problem of low penalties and the disparity in penalties imposed across different District Court Districts. However in preparing such guidelines, it would be necessary to gather sentencing data to assist in determining the appropriate sentences. It is interesting to note that when the English Sentencing Council was preparing the guidelines, it found that there was a shortage of sentencing data and it had to collate data from various sources as well as carrying out its own research.[46]

The Judicial Council Act 2019 provided for the establishment of a Judicial Council. One of the functions of this body will be to create sentencing guidelines and hopefully guidelines for environmental criminal offences will be drafted at some point in the not too distant future. The relevant sections – 7 and 91 – of this Act were commenced on 16th December 2019.

d. Mitigation

On entering a guilty plea or on being found guilty following a trial, the offender's lawyer will usually enter a plea in mitigation. De Prez identified two styles of mitigation.[47] The first is the denial of culpability and the second is the trivialisation of the offence. De Prez concluded that the choice of mitigation was based on what the offender and his lawyer assumed was most likely to influence the magistrate.[48] The denial of culpability strategy relies on the fact that the offences are strict liability and it is not necessary for the prosecution to prove 'fault' on the part of the accused,[49] while trivialisation of the offence seeks to show that either there was no actual harm caused, merely that it was a probability, or that the pollution was insignificant.[50] Moran's study[51] would seem to indicate that English and Welsh magistrates do regard environmental crime as a serious matter and de Prez's identification of the abovementioned mitigation strategies does resonate with Moran's findings that magistrates look for a "moral thread".

46 N. PARPWORTH *Sentencing for Environmental Offences: A New Dawn?* [2013]. Journal of Planning and Environmental Law 1093, at 1094
47 P. DE PREZ *Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions* [2000]. Journal of Environmental Law. Vol. 12, No. 1, 65 at page 67
48 Ibid at page 66
49 Ibid at page 67
50 Ibid at 67 and 72 et seq.
51 Supra

e. Role of the Prosecutor

The potential role of the prosecutor at the sentencing stage should not be underestimated. In reality, a prosecutor plays a very limited role at this stage, other than advising the judge of an offender's previous convictions, the maximum penalties set down in the relevant statute and any other special rules that may apply.[52] Until very recently, this led to the somewhat absurd situation whereby a prosecutor could not make submissions at the sentencing stage of a case but the D.P.P. could then appeal a sentence he/she regarded as being unduly lenient.[53] This situation changed with the three decisions of the Mr. Justice Frank Clarke referred to above.[54]

In D.P.P. v. Z, Clarke J. (as he then was) criticised the anomaly referred to in the paragraph above, describing it as, "incongruous."[55] Clarke J. went further and held that not only was it appropriate for prosecuting counsel to draw a sentencing judge's attention to guidance from previous cases, but that there was now an obligation on prosecuting counsel to advise the judge where the offence under consideration fit into the scheme of sentencing cases and why this was said to be the case. Prosecuting counsel was also obliged to indicate the extent to which s/he accepted the factors pleaded in mitigation.[56]

It is therefore not unreasonable to posit that, in theory at least, the D.P.P. could make submissions at the sentencing stage of a WMA prosecution on indictment. In reality however, the absence of meaningful data on sentences imposed in previous cases of a similar nature will make it very difficult for the prosecutor to offer guidance on the appropriate sentence. The fact that the vast majority of offences are prosecuted summarily makes it difficult to build up a reliable sentencing database. At the District Court level, anecdotal evidence seems to indicate there is such a disparity in sentencing practice amongst District Judges that even were sentencing statistics available, it is doubtful they would be of much assistance.

52 T O'MALLEY. *Sentencing Law and Practice* (Dublin, Thomson Round Hall, 2006) at page 591. In the case of the WMA, the special rules consist of section 12, which provides that the court shall award the prosecuting authority its costs and expenses unless there are substantial reasons for not doing so and section 13, which states that the court shall make an order that the fine shall be paid to the prosecuting authority.
53 Ibid
54 *D.P.P. v. Fitzgibbon* [2014] IECCA 12. *D.P.P. v. Ryan* [2014] IECCA 11 and *D.P.P. v. Z* [2014] IECCA 13.
55 *D.P.P. v. Z* [2014] IECCA12 at paragraph 2.4
56 Ibid, at paragraph 2.7

f. The Range of Penalties

It could be argued that the range of criminal penalties provided by the WMA is quite limited and this in itself impacts on the effectiveness of the Act.

The WMA as amended provides for a maximum fine of €5,000 and/or a maximum term of imprisonment of 12 months[57] on summary conviction. Fines may be ineffective if offenders, especially corporate offenders, see them as an inevitable consequence of doing business and make provision for them, just as they might for any other expense. The company may simply pass the costs on in the form of reduced dividends for its shareholders, pay cuts or job losses for its employees, or increased prices for its customers. These very real scenarios all raise questions about the ability of fines to change corporate behaviour.[58] At the other extreme, the fine a court can realistically impose can be restricted by the offender's ability to pay. A related issue was highlighted earlier in this article, in that offenders commonly plead impecuniosity and this invariably has an impact on the penalty imposed. A large fine imposed on a company might not necessarily be the solution, as it might tip the company into insolvency, leaving a judge with a choice of either putting the company out of business or imposing a fine that does not reflect the seriousness of the offence.[59]

Non-payment of fines may also be an issue. Irish Court Service statistics show that prior to January 2016, 15% of fines remain unpaid. The percentage of fines collected since that date are unavailable, but have in all likelihood fallen following the introduction of a new fines collection regime.[60] It is difficult to say to what extent this affects WMA fines, since again, there appears to be no centralised database on this issue. The Irish Courts Service is responsible for the collection of fines and under the pre-January 2016 collection regime, the collection of unpaid fines was referred to An Garda Síochána. The Courts Service now operates a new civil fines collection enforcement procedure. All of this inevitably leads to costs associated with the recovery of fines and raises further questions about their effectiveness.[61]

57 Section 10 of the *Waste Management Act 1996*, as amended by Section 34(a) of the Environment (Miscellaneous Provisions) Act 2015
58 Supra
59 Ibid
60 Courts Service Annual Report 2013, page 74
http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/C2B4BFC1AFEC7B098025842D00473F25/$FILE/Courts%20Service%20Annual%20Report%202018.pdf (accessed 24th May 2020)
61 Supra

Finally, the fact that WMA enforcement bodies bring relatively few prosecutions reduces the deterrent effect of fines, a situation exacerbated by the low fines imposed by the courts when prosecutions are taken.[62]

While the WMA provides for a maximum term of imprisonment of 12 months on conviction in the District Court, custodial sentences are rare in WMA prosecutions. This writer can only recall one case in the last nineteen years in County Cork where a judge imposed a non-suspended custodial sentence[63] and two where a judge imposed suspended prison sentences.[64] The fact that custodial sentences are under-utilised means that it is difficult to gauge their deterrence value in WMA cases, but it follows that since they are so rarely imposed, potential offenders are unlikely to view them as a realistic outcome in the event of being detected and tried.[65]

A key deficiency in the WMA is the absence of meaningful penalties for corporate offenders. It is the writer's experience that when a company and the directors of that company are prosecuted, the directors are quite willing to have a guilty plea entered for the company on the basis that the charges against the directors are withdrawn. The criminal law was originally developed to deal with individuals and as such is in many ways, unsuited to dealing with corporate offenders. Related to this is the pervasive perception that 'white collar' crime is not real crime and therefore the criminal law is not an appropriate mechanism for dealing with corporate offenders.[66]

F. The Use of Convictions in Conjunction with Other Sanctions

Most literature considers the effectiveness of criminal remedies in comparison to administrative and civil sanctions but in reality, administrative, civil and criminal sanctions can be

62 Ibid page 166
63 Supra. A key aggravating factor was the defendant's lack of cooperation, which went as far as attempting to drive over one of the environmental enforcement officers. Another was the fact the waste created an unstable artificial embankment to the Glashaboy River, which was the main drinking water supply source for the village of Glanmire, County Cork. Had the bank collapsed into the river, Glanmire would have been left without drinking water. The defendant appealed his sentence to the Circuit Court where it was reduced to a €3,000 fine. The defendant never carried out any remedial works.
64 Cork County *Council v. Lawrence Duggan*. Cork City District Court. District Judge Riordan. Mr Duggan subsequently reoffended, thus activating the suspended sentence. Judge Riordan ordered him to complete community service in lieu of the prison sentence
65 Supra
66 Supra

used to complement each other. For example, it is this writer's experience that a criminal conviction in the District or Circuit Court can be referred to in an application made to the High Court for injunctive relief under Section 57 and/or Section 58 of the WMA, to great advantage; this is because the burden of proof in a criminal case is higher than in a civil case and the existence of a criminal conviction for an offence affecting a property the subject of the civil application, makes it very difficult for the defendant to deny culpability.[67]

Similarly in the area of administrative sanctions, a criminal conviction for an offence listed in Article 21 of the Waste Management (Collection Permit) Regulations 2007 (SI 820 of 2007) can be used in support of a view that an existing or potential permit holder is not a fit and proper person and if he already has a permit, it can be revoked or not renewed, or alternatively he may be refused a permit. The enforcement pyramid has revocation of a licence at its apex and the loss of a permit, with the financial consequences that follow, can be a far greater blow to a permit holder than a conviction in itself.[68]

A related issue to the above is the extent to which the possibility of a criminal conviction being used to support a sanction with far more serious financial consequences has any deterrent value. The writer's own experience at present would seem to indicate that it has little deterrent value, (if the writer's conversations with solicitors defending licence holders accused over the years are anything to go by). Many of these solicitors and presumably their clients, are unaware of the consequences of a criminal conviction and the writer has had to inform defending solicitors on a number of occasions of the consequences of their clients pleading guilty.

Conclusion

In many ways, this article has raised more questions that it has answered and there are many areas worthy of further research including: the prosecution of WMA offences in the Circuit Court; the enforcement policies of the EPA and local authorities, the relationship between policy and

67 The prosecutions against Seán Murphy (supra notes 103 to 105) were referred to in the grounding affidavits in a successful section 57/section 58 WMA application to the High Court, seeking injunctive relief prohibiting Mr. Murphy from bringing further waste on to the site and further, requiring him to remove the ELVs and remediate the site
68 Supra

practice, the effectiveness of criminal prosecutions in comparison to administrative and civil sanctions and the effectiveness of the compliance/risk-based enforcement strategy of environmental enforcement authorities.

One issue that has arisen repeatedly in the course of writing this article, is the absence of a meaningful, centralised database of WMA convictions. Ireland is not unique in this regard and the establishment of such a database has been recommended in other jurisdictions.[69] It is very difficult to truly assess the effectiveness of WMA prosecutions, without this data.[70] This is a matter of real concern and impacts on so many facets of the criminal enforcement of the WMA, including the development of sentencing guidelines.

The absence of sentencing guidelines impacts adversely on the effectiveness of the WMA. Combined with the lack of knowledge of WMA offences and judicial discretion, this leads to significant discrepancies in the penalties imposed by District Judges in different areas of the country.

A tension exists between the complexity of the cases and the fact that they are heard in courts of summary jurisdiction, where judges quite often have neither the time nor the requisite knowledge to deal with the cases in a satisfactory manner.

The WMA in itself is limited in terms of the sentences it makes available and this in turn impacts on the effectiveness of criminal enforcement, since the maximum fine in the District Court is often exceeded by the profits made by those who contravene the WMA. While some imaginative sentencing alternatives have been introduced, such as the use of the community service orders (CSOs). In any event CSOs can only be used in lieu of a custodial sentence and custodial sentences are rarely imposed in WMA cases. A major obstacle in the introduction of alternative sentencing options for the District Court is the Constitutional restraint on the District Court dealing with anything other than minor offences, defined by both the penalties it can impose, including

69 The disparity in environmental crime databases across various EU Member States was noted and it was suggested that a standardised form of reporting should be established on a Europe-wide basis – M.G. Faure, G. Heine. *Criminal Penalties in EU Member States' Environmental Law*. (Maastricht, 2002)

70 A similar finding was made in the UK, where the DEFRA report supra note 291 noted the difficulty in obtaining sentencing data. What data there was, "was hard to come by and gaps existed in what was available" and the report noted a suggestion of what data would be helpful: "effect of prosecution; fines; prosecution and legal costs on defendants; relationship between this and deterrence; and what the appropriate penalty should be." The report commented this suggestion "does not seem systematic enough, but it is clear that the available data does not tell the story one way or another."

secondary penalties, which could be interpreted as restricting for example the publicity orders suggested by Macrory.[71]

As we have seen, defining environmental criminal law in terms of effectiveness is controversial and raises fundamental issues regarding the appropriateness of using criminal law in the fight against those who harm the environment and/or breach environmental legislation. One school of thought sees criminal law as almost being the unique preserve of An Garda Síochána and the DPP, defined in terms of the procedure followed by the police, with certain other elements seen as being indispensable, such as mens rea and equality of treatment. There is a developing school of thought however, that sees not just one but two, forms of crime – the more traditional form and the regulatory form, both of which should receive equal recognition. The potentially devastating implications of environmental pollution not only in terms of human health but in terms of the environment itself, mean that breaches of environmental law fully deserve to be treated as 'real' crime, with all the social stigma and consequences that follow.

Making increased used of administrative sanctions may seem an attractive option but two substantial obstacles stand in the way. The first is that the introduction of certain administrative sanctions, especially those that carry large fines, would almost certainly result in a constitutional challenge and the mere likelihood of such an event might possibly be sufficient to deter legislators from seeking to introduce administrative sanctions legislation.

Furthermore, existing jurisprudence of the Irish High Court and Supreme court makes it very difficult to introduce non-criminal sanctions, without them falling foul of the administration of justice referred to in Article 34 of the Constitution, the validation of the limited powers of a judicial nature by bodies other than the courts, "in matters other than criminal matters", as per Article 37 and the requirements of due process, set out in Article 38.1.[72] That said, administrative sanctions do exist in Ireland and the courts have also upheld the constitutionality of administrative sanctions in the areas of taxation[73], company law[74] and prison disciplinary rules[75]

The second obstacle is that de-criminalising certain offences and transferring them to the

71 Cabinet Office (UK) *Regulatory Justice: Making Sanctions Effective. Final Report*. Professor Richard Macrory (London, 2006) paragraph 4.64 et seq.
72 McDowell ibid, pages 133 to 134
73 *McLoughlin v. Tuite* [1989] IR 82
74 *Registrar of Companies v. Judge Anderson* [2005] 1 IR 21
75 *State (Murray) v. McRann* [1979] IR 133

administrative realm, may be interpreted as downgrading these offences at a time when it is necessary to persuade the judiciary as a whole that environmental offences do indeed constitute real crime. Nevertheless there is a cogent argument to be made in favour of removing some offences from the criminal sphere in a manner that would not be detrimental to, and may actually enhance, the effectiveness of the criminal enforcement of other WMA offences. Moreover, the use of criminal prosecution may not be appropriate for certain minor offences and an administrative solution might be better suited to dealing with these infringements, both in terms of making the best use of limited resources by enforcement bodies and in the sense that they would be a proportionate response.[76]

A number of far-reaching proposals were suggested in the Hampton and Macrory reports in England and Wales. The District Court however, is a court of limited and local jurisdiction and only empowered to deal with minor offences; therefore, any attempt to grant the District Court with the powers suggested in the report would almost certainly be subject to constitutional challenge.

It is clear that more research is required in the area of the criminal enforcement of the WMA before any firm suggestions to improve its effectiveness can be implemented. Nevertheless I would tentatively suggest at this point that in time the ideal solution would be the establishment of an environmental court with regional bases. An interim solution and one that is much needed, is the training of at least a selected number of District Judges in environmental matters[77] and the designation of certain District Courts as environmental courts. The WMA is also very restricted in terms of penalties and consideration should also be given to the creation of more imaginative sentencing options.

This article reflects the research, findings, and views of the author and not those of Cork County Council.

76 It has been noted that the use of criminal proceedings is expensive not only for the enforcement body but for the accused. It also involves, "severe moral condemnation and a criminal record to a business or individual, which may not be appropriate for all regulatory breaches, especially where no intention or recklessness is involved." Cases can take a considerable period of time to go through the court system, placing an unnecessary strain on some businesses. Cabinet Office (UK*) Regulatory Justice: Sanctioning in a post-Hampton World.* Better Regulation Executive. (London, Cabinet Office, 2005), at paragraphs 1.28 to 1.30

77 J D LYNOTT, *The Detection and Prosecution of Environmental Crime* [2008] Judicial Studies Institute Journal 185 at page 207 and Macrory supra note 220 paragraph 3.16.

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