THE DETECTION AND PROSECUTION OF ENVIRONMENTAL CRIME

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INTRODUCTION

Environmental regulators in Ireland are responsible for in excess of 500 environmental protection functions contained within some 100 pieces of legislation. However, the European Commission and European Court of Justice have been critical of Ireland's implementation of European legislation, indeed there have been eight judgments against Ireland. Compliance with these judgments remains a challenge for Irish regulators and the Irish judiciary. As three of these cases (waste, environmental impact assessment and habitats)[1] move back to the European Court of Justice for determination of fines against Ireland, the Commission has articulated specific criticisms regarding the way in which Ireland deals with the detection and prosecution of environmental crime. This paper seeks to explore the basis for these criticisms, reviews national and international initiatives and provides some observations on how to derive further improvements in the enforcement of environmental crime.

I. EUROPEAN COURT OF JUSTICE JUDGMENTS AGAINST IRELAND

As guardian of the EC Treaty, the European Commission oversees implementation of some 200 legal acts in the environmental field throughout the Community. The European Commission's Environment Directorate-General (DG) notes that "one in five open (ongoing) infringement cases dealt with by the Commission relates to the environment".[2] Ireland has had eight

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[1] Details available at: http://newsletter.publicaffairsireland.com/e_article001030834.cfm?x=bcdscLn,b7k3vdfs,w

[2] Directorate-General for the Environment, "Playing by the Rules", (2007) 28 *Environment for Europeans* 4.

European Court of Justice judgments against it for breach of European Directives including the breach of the Waste Framework Directive,[3] Drinking Water Directive,[4] Dangerous Substances Directive,[5] Habitats (and Bird) Directives,[6] Shellfish Directive,[7] the Ozone Depleting Substances Regulation,[8] Nitrates Directive[9] and the Groundwater Directive.[10]

In three of these cases (waste, environmental impact assessment and habitats) the Commission has formally notified Ireland that it intends to return to the court to seek fines and penalties against it for failing to comply with the court judgment. This process is allowed under Article 228 of the EC treaty. In the case of *E.C. Commission v. Ireland*,[11] the European Court of Justice took a novel approach in its judgment against Ireland for not taking adequate measures to correctly implement the Waste Directive.[12] The judgment, which is the focus of this paper, referred to a number of sites where it was determined that the Waste Framework Directive was not implemented, and used this determination to form the view that there was a systemic failure to implement the Directive in Ireland. The judgment states: "[h]ere it is proved that, as is apparent from paragraph 139 of the present judgment, as at the date upon which the two-month period set in the 2001 reasoned opinion expired, Ireland was generally and persistently failing to fulfil its obligation to ensure a correct implementation of Articles 9 and 10 of the Directive".[13] Indeed the Advocate General's opinion, which preceded the judgment, noted that:

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[3] European Parliament and Council Directive [2006] O.J. L114.
[4] Council Directive [1998] O.J. L330.
[5] Council Directive [1967] O.J. L196.
[6] Council Directive [1992] O.J. L206 and Council Directive [1979] O.J. L103.
[7] Council Directive [1979] O.J. L190.
[8] European Parliament and Council Regulation [2000] O.J. L244.
[9] Council Directive [1991] O.J. L375.
[10] Council Directive [1980] O.J. L20.
[11] Case C-494/01 *E.C. Commission v. Ireland* [2005] E.C.R. 1-3331; [2005] 3 C.M.L.R. 14.
[12] European Parliament and Council Directive 75/442/EEC 5 April 2006.
[13] Case C-494/01 *E.C. Commission v. Ireland* [2005] E.C.R. 1-3331; [2005] 3 C.M.L.R. 14 at para. 170.

> In short, a general and structural infringement may be deemed to exist where the remedy for this situation lies not merely in taking action to resolve a number of individual cases which do not comply with the Community obligation at issue, but where this situation of non-compliance can only be redressed by a revision of the general policy and administrative practice of the Member State in respect of the subject governed by the Community measure involved. [14]

This judgment has given the Commission considerable latitude in seeking redress from the Member State and indeed it has now progressed to Article 228 proceedings.[15] In a series of meetings that I attended with the Commission in May and June of 2007 it was apparent that, while the Commission acknowledges the improvements in environmental enforcement,[16] in the area of enforcement of law the Commission continues to charge Ireland with systemic failure, referring to a number of broad areas. These are outlined below.

A. Lack of Timeliness in Implementing the Directive

The Commission believes that the Irish courts system has not taken steps to ensure that, where the authorities need to take court action to achieve an environmental outcome, cases are scheduled and disposed of as quickly as possible. The Commission refers to the length of time to implement remediation measures, and in particular, cites the fact that six years after the detection of waste at the unauthorised site in Whitestown, Co. Wicklow, the waste is still in the ground. The timeline for compliance with the law is excessive.

B. The Low Number of Prosecutions

The Commission believes than an insufficient number of cases are taken under indictment, and that the powers to sanction

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[14] Case C-494/01 *E.C. Commission v. Ireland* [2005] E.C.R. 1-3331; [2005] 3 C.M.L.R. 14, Advocate General Geelhoed's opinion at para. 48.

[15] Letter of Formal Notice of Infringement No. 1999/5112, July 2007.

[16] This would include the establishment of the Office of Environmental Enforcement, the Environmental Enforcement network, a low-call telephone line for reporting environmental crime and closer cooperation between Environmental Protection Agencies, North and South.

available to the Higher Courts are not used as frequently as they could be.

C. Sanctions and Deterrents

The Commission believes that even with the higher monetary sanctions available by way of prosecution on indictment, very few prosecutions on indictment have been brought. It also believes that from the few cases brought, it is not possible to identify a consistent approach to imposing sanctions that deter. In particular it cites:

- A 2007 District Court case in County Cork where a fine of €100 was imposed on a vehicle dismantler that was operating illegally. The application fee for a car-dismantling permit was €253.95; and
- That Waterford County and City Councils were fined €4,000 and €6,000 in the Circuit Court for non-compliance with licence conditions at Tramore and Kilbarry landfills respectively.

D. Policy

The Commission does not believe that a general policy or guidelines on use of sanctions exists in Ireland. The Commission also queried the cognisance taken by the judiciary of judgments from the European Court of Justice, relevant jurisprudence and case law, and the role of the Courts Service in involving and informing the judiciary and systematically bringing the European Court of Justice judgments to the notice of the Irish courts.

To address these issues, I have separated the discussion below under the same broad headings referred to above.

II. LACK OF TIMELINESS IN IMPLEMENTING THE DIRECTIVE

An Environmental Enforcement Network was set up by the Office of Environmental Enforcement in 2004. The priority for the network was to tackle the problems of illegal dumping of waste in Ireland; this could only be done by getting all of the relevant agencies and authorities involved, both North and South,

to work together in a coordinated manner. The agencies include the EPA, local authorities, An Garda Síochána, the Department of the Environment, Heritage and Local Government, the Environmental & Heritage Service of Northern Ireland, the Police Service of Northern Ireland, the Criminal Assets Bureau and the Revenue Commissioners. The *modus operandi* of the network is that a working group of experienced practitioners from relevant agencies is established to deal with a specific issue, such as illegal dumping of waste. The working group analyses the problem and agrees upon the best way to tackle it. Depending on the problem, this may result in direct enforcement action, such as coordinated roadside and facility inspections involving several agencies, or the building of capacity in enforcement agencies through the preparation of guidance or the exchange of experience. Data is collected nationally that informs the agreement of priority enforcement activities (*e.g.* targeting inspections on those suspected of engaging in illegal waste activity) and their implementation. The networks explore issues concerning the implementation of current legislation. The feedback from the network on the use of the Court system to remedy illegal dumping activity is that:

- For an enforcement action to be effective, it has to be timely;
- Having secured convictions against illegal operators, local authorities must then seek a High Court order for a clean-up of the site or to stop the illegal activity;
- Local authorities experience significant numbers of adjournments and continually run the risk of being out of time for bringing a case; and
- Where cases on indictment are taken, judicial review proceedings were initiated as a matter of course.

A generalised summary of a recent case indicates some of the challenges faced by local authorities:

TABLE 1 - TIMELINE FOR RECENT CASE ON ILLEGAL DUMPING

Activity	Timeline in Months	Number of hearings	Notes
Notice of Motion	0	0	Proven environmental damage arising from illegal waste
Relief granted to seek injunction	10	2	
Order Granted	14	5	Work to be completed in 5 months
Penal enforcement order sought	17	6	Consultant service withdrawn: Discovery of assets initiated
Order granted	26	11	Work to be completed in 14 months
Arguments heard against timeline	27	12	Leave to apply for activation of committal order within 24 hours
Further arguments by Respondent	32	16	Multiple changes of legal team and consultants
Committal order	34	26[17]	Respondents jailed for 6 months, for failing to comply with the Order, commencing 2nd April 2008

[17] Includes the 16 hearings related to respondents in contempt.

Work completed	?	?	• Waste still in the ground • Pollution ongoing • 32 site inspections • 5 days preparation for every hearing • 3,500 miles travelled • Legal costs mounting

Regarding judicial reviews, it is worth noting the judgment of Carroll J. in *McNamara v. An Bord Pleanala,* which stated:

> What I have to consider is whether any of the grounds advanced by the appellant are substantial grounds for contending that the board's decision was invalid. In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result would be. I believe I should go no further than satisfy myself that the grounds are 'Substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial.[18]

As can be seen from the above, the higher courts play a central role in giving effect to the implementation of the Waste and Landfill Directives and associated legislation in Ireland. However in light of the experience and perception of those who use those courts, it is not delivering the type of service expected. A number of views on this subject have been put forth. These include:

- The Macrory Report[19] which suggested the setting up of Environmental Tribunals to deal with environmental

[18] [1995] 2 I.L.R.M. 125, at 130.

[19] Macrory, *Regulatory Justice: Making Sanctions Effective* (London: Cabinet Office, 2006), available at: http://www.berr.gov.uk/files/file44593.pdf.

crime, to ensure that justice is timely and that enforcement action is effective;

- Professor Richard B. Macrory has also suggested the expansion of powers for statutory notices to include cessation notices thereby reversing the burden of proof by putting the onus on the alleged polluter to prove his bona fides;
- That the criteria espoused by Carroll J., set out above, for considering whether grounds are substantial for taking a judicial review, should be expanded to include the filter of any current judgments of the European Court of Justice, particularly those that have yet to be complied with. That is to say that any case that has as its subject an activity that is the subject of a European Court of Justice case should be subjected to the highest scrutiny before acceding to a request for a judicial review;
- That there is a role for the Courts Service in setting down indicative timeframes for High Court proceedings involving environmental crime, providing oversight, and the potential for a case conference if a case is not being disposed of within the indicative timeframes set.

III. THE LOW NUMBER OF PROSECUTIONS

The number of prosecutions taken in the higher courts can be regarded as a function of the level of compliance checking and the level of serious environmental crime. The number of prosecutions cannot be seen in isolation as a signpost to success or failure in meeting the requirements of any given Directive; however, it has a propensity to be bandied about as such. In a recent study commissioned by the EPA[20] to benchmark enforcement activity in Ireland against European and international practice, the statistics for enforcement actions taken in 2004 by 30 out of 34 local authorities were collated and are summarised below:

[20] *Phase 5 Report Key Performance Indicators for Local & Public Authorities*, (Wexford: EPA, 2006).

TABLE 2 – ENFORCEMENT ACTIVITY IN IRELAND 2004	
Action	**2004**
Total Complaints	33,055
Total Site Inspections	22,213
Total Warning Letters	3,483
Total Statutory Notices	3,381
Total Measures Taken	120
Total Prosecutions	2,008
Total Injunctions	11

Inspections completed in 2006 rose to 32,048[21] and a collation of the data from audit and inspection plans prepared by 32 out of 34 Local Authorities suggests that 43,208 inspections will have taken place in 2007. This level of compliance checking is significant, and indicates the willingness of environmental regulators to detect environmental crime and secure the evidence necessary to take cases further if necessary.

In relation to the level of serious crime, the European Court of Justice, in *E.C. Commission v. Ireland*,[22] appears to accept a submission to the Irish Government in January 2002 by the Institution of the Engineers of Ireland (now Engineers Ireland) of a document entitled "National Waste Management Strategy", which states that "hundreds if not thousands of illegal dumps are scattered across Ireland", as being the true picture of the nature and extent of illegal waste activity in Ireland. This statement is in stark contrast to a report by the EPA published in 2005 that found that a total of 25 unauthorised landfills existed.[23]

Indeed when you look at the type of inspection (discussed below) planned by environmental regulators for 2007, the majority are not activities where you would expect a high degree

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[21] *Focus on Waste Enforcement Bulletin* (Wexford: EPA, 2007).

[22] Case C-494/01 *Commission v Ireland* [2005] E.C.R. 1-3331; [2005] 3 C.M.L.R. 14 at para. 134.

[23] *Nature and Extent of Unauthorised Waste Activities* (Wexford: EPA**,** 2005) p.XVI, available at: http://www.epa.ie/downloads/pubs/waste/unauthorisedwaste/epa_unauthorised_waste_activities.pdf

of criminality. The exceptions are the collection, disposal and export of waste, which were addressed in the 2005 EPA report. Types of inspection planned for 2007 include:

- Permitted facilities
- Certificate of registration sites
- Waste electronic goods
- Producers, self-compliers and major producers, as defined under the Packaging Regulations
- End-of-life vehicles
- Farm plastics
- Plastic bag producers
- Tyres
- Litter
- Illegal Dumping
- Waste collector permits
- Transfrontier shipment

In the event that an environmental crime is detected that warrants taking a case on indictment, its success invariably comes down to the capacity or experience of the environmental enforcement officers, their legal team and the resources available to the team. To deal with the capacity/experience issue, in April 2007, the Office of Environmental Enforcement (OEE) commissioned the preparation of a bespoke training course for environmental regulators on the conduct of investigations into serious environmental offences, report writing, and the presentation of evidence to the Director of Public Prosecutions (DPP). The training will be delivered "just in time", in other words when a local authority makes a decision to take a case on indictment, training will be provided for the local authority at that time. The Department of Environment, Heritage and Local Government will also make funding available through the Environment Fund to contract expert investigation officers. The fund itself is generated through the landfill levy and plastic bag tax. It is anticipated that, for example, retired members of An Garda Síochána will tender for the provision of the necessary

advisory skills and thereby facilitate a better level of case referrals to the DPP.

One County Council, as part of its investigation into illegal exports of waste to Northern Ireland, is employing the services of three retired Gardaí who will undertake the necessary file preparation on its behalf. This initiative is being funded under the Environment Fund at a cost of €110,000, and will take some three months of investigative work, and will serve as a template for other local authorities to follow in this complex work.

Experience gained by the Office of Environmental Enforcement bears out the fact that investigations for cases on indictment are resource-intensive. One such investigation into an illegal waste operation that concluded with the submission of a file to the Director of Public Prosecutions required substantial resources, which are summarised in the following table:

TABLE 3 - INDICATIVE LEVEL OF EFFORT TO COMPLETE ILLEGAL WASTE INVESTIGATION AND PREPARE FILE FOR THE DPP

Witness Statements	95
Question & Answer Interviews	9
Exhibits	390
Locations of Interviews	11
Organisations Involved	17
Meetings with ROI & NI authorities	24
Accumulated time expended by the investigation team	40 months

IV. SANCTIONS AND DETERRENTS

In addressing the criticism of the Commission about the level of sanctions and deterrents, the question arises as to whether there are minimum penalties that the judiciary can be directed not to go below. In the EU Commission study on Criminal Penalties in Environmental Law it was stated that:

> There are no minimum penalties which a judge cannot reduce in Environmental statutes and the legislature is usually reluctant to prescribe such penalties in view of the doctrine of the separation of powers enshrined in the Constitution. Interfering with the discretion of the judiciary as to the fines which they may impose could be viewed as interference by the legislature with judicial powers. However, it is possible for the legislature to prescribe mandatory sentences of various kinds. It has not done this for environmental offences. [24]

On the powers conferred upon judges to reduce penalties, it stated that:

> In general, legislation prescribes maximum penalties. Judges have a general discretion to reduce these in the light of extenuating circumstances. The factors which are to govern the exercise of this discretion are not generally prescribed by legislation. In practice, the following would be considered relevant in determining the appropriate penalty: the record of the polluter, whether the offence was deliberate or accidental, negligent or reckless etc., the economic circumstances of the polluter, the risk or extent of the environmental pollution arising from the act or omission constituting the offence, the attitude of the prosecuting authority. Occasionally legislation prescribes matters which are to be taken into account by a judge in exercising his or her discretion *e.g.* section 10(4) of the Waste Management Act, 1996 states that in imposing a penalty under section 10(1) the court shall 'in particular have regard to the risk or extent of environmental pollution arising from the act or omission constituting the offence'.[25]

Advocacy by prosecutors for greater sanctions is limited, and it would appear that the practice is not encouraged. Indeed the guideline prepared by the DPP is quite explicit that the

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[24] *Criminal Penalties in EU Member States' Environmental Law* (Maastricht: METRO, 2002) p.211 at para. 3.8.1.3, available at: http://ec.europa.eu/environment/docum/pdf/02544_final_report.pdf.

[25] *Criminal Penalties in EU Member States' Environmental Law*, p. 212 at para. 3.8.1.4.

prosecutor must not seek to persuade the court to impose an improper sentence or advocate a sentence of a particular magnitude.[26] The guideline states that, where mitigating measures are advanced before the court, the prosecutor can prove to be wrong, or where the prosecutor has not been given prior notice of the truth of matters which the prosecutor is not in a position to judge, then the prosecutor should invite the Court to insist on the matters in question being properly proved.[27]

In 2005 Peter Hampton produced his report, *Reducing Administrative Burdens: Effective Inspection and Enforcement*, [28] and recommended that the UK Government establish a comprehensive review of regulators' penalty regimes.[29] The Hampton Review in particular stated the principle that "the few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions".[30] The review went on to state that regulatory penalty regimes can be cumbersome and ineffective, and identified the following features as shortcomings:

- Penalties handed down by courts are not seen as an adequate deterrent to regulatory non-compliance, as the level of financial penalty can often fail to reflect the financial gain of non-compliance with regulatory obligations; and
- The range of enforcement tools available to many regulators is limited, giving rise to disproportionate use of criminal sanctions, which can be a costly, time-consuming and slow process.[31]

The UK Government appointed Professor Richard B. Macrory to conduct a review of regulators' penalty regimes and to make

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[26] *Guidelines for Prosecutors*, Office of the Director of Public Prosecutions, 2006 at para. 8.20 available at: http://www.dpp.ie/filestore/documents/Chapter_8_The_Role_of_the_Prosecutor_in_Court.htm.

[27] *Guidelines for Prosecutors*, at para. 818.

[28] Hampton, *Reducing administrative burdens: Effective inspection and enforcement* (Norwich: HMSO, 2005).

[29] Hampton p. 41 at para. 2.86 (recommendation 8).

[30] Hampton p. 7 at para. 23.

[31] Hampton p. 38 at para. 2.74.

recommendations. These were subsequently published in 2006.[32] Professor Macrory made a number of recommendations to the British government, including the following:[33]

- To examine the way in which it formulates criminal offences relating to regulatory non-compliance;

- To ensure that regulators have regard to Six Penalties Principles and Seven Characteristics, as documented below, when enforcing regulations;

- To increase the effectiveness of the Criminal Courts that the Government consider:
    a. Preparing general sentencing guidelines,
    b. Instructing prosecutors to make clear to the court any financial benefits resulting from the non-compliance,
    c. Establishing designated courts for regulatory offences, and
    d. Providing specialist training to prosecutors by regulators, and discussing with the Judicial Studies Board the possibility of regulators also contributing to the training of the judiciary and Justices Clerks;

- To introduce schemes of fixed and variable monetary administrative penalties, available to those regulators who are Hampton compliant,[34] with an appeal to an independent tribunal rather than to the criminal courts;

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[32] Macrory, *Regulatory Justice: Making Sanctions Effective* (London: Cabinet Office, 2006), available at: http://www.berr.gov.uk/files/file44593.pdf.
[33] Macrory p. 98-101.
[34] Hampton-compliant regulators are regulators who have reduced the administrative burden of regulation, while maintaining or even improving regulatory outcomes. To do this they must direct their efforts, inspections and data requirements on regulated facilities on the basis of risk. See Hampton, *Reducing administrative burdens: Effective inspection and enforcement* (Norwich: HMSO, 2005), p1.

- To introduce enforceable undertakings as an alternative to criminal prosecution;

- To strengthen the system of statutory notices backed up by administrative financial penalties and appeal to a regulatory tribunal;

- To introduce pilot schemes involving restorative justice techniques; and

- To introduce alternative sentencing options in the criminal courts for cases related to regulatory non-compliance, such as a profit order, publicity orders and corporate rehabilitation orders.

He recommended that, in designing the appropriate sanctioning regimes for regulatory non-compliance, regulators should have regard to the following penalties and characteristics:

TABLE 4 - MACRORY PENALTIES AND CHARACTERISTICS

A sanction should:	**Regulators should:**
1) Aim to change the behaviour of the offender	1) Publish an enforcement policy
2) Aim to eliminate any financial gain or benefit from non-compliance	2) Measure outcomes not just outputs
3) Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction	3) Justify their choice of enforcement actions year on year to stakeholders, Ministers and Parliament
4) Be proportionate to the nature of the offence and the harm caused	4) Follow-up enforcement actions where appropriate
5) Aim to restore the harm caused by regulatory non-compliance,	5) Enforce in a transparent manner and publish enforcement activities.

where appropriate; and	Each regulator should publish a list on a regular basis of its completed enforcement actions and against whom such actions have been taken
6) Aim to deter future non-compliance	6) Be transparent in the way in which they apply and determine administrative penalties; and
	7) Avoid perverse incentives that might influence the choice of sanctioning response.

The sanctions imposed by courts, which are the subject of the Commission's criticism, were deliberated upon by Mr. Justice Scott Baker in the 1998 Court of Appeal case of *R v. F. Howe & Son (Engineers) Ltd.*[35] This judgment, I believe, sets out a framework for determining the appropriate level of fines and costs associated with regulatory offences.

The case involved an appeal by F. Howe and Son (Engineers) against the severity of fines totalling £48,000 and an order of costs of £7,500 imposed in November 1997 in respect of four offences under the Health and Safety at Work Act, 1974 and related regulations. It is not intended to provide the detail of the case here, but the facts set out before the court were as follows. The prosecution came about as a result of a fatal accident during a cleaning operation using an electric vacuum machine that became live. The electrical supply to the premises was fitted with a residual current device (RCD) designed to trip if a fault developed anywhere in the system. It was apparent from the follow-up investigation that the RCD had been deliberately interfered with. While the prosecution accepted the plea of not guilty specifically related to the RCD, due it would appear to lack of direct evidence as to who had tampered with the RCD, the court noted that good practice dictated that the RCD should have been checked every three months.

The company itself was modest, declaring a total profit in 1996 of £20,000 and employing 10 people. Neither of the two working directors received in excess of £20,000 per annum; there

[35] *R v. F. Howe & Son (Engineers) Ltd* [1999] 2 All E.R. 249 .

was no pension, company car, *etc*., and any fine of significance was likely to be felt by the management of the company and its shareholders. The general points made by the court illuminate its thinking on the matter and add to a framework for determining a fine. The court supported the view expressed in several quarters that fines were too low in the health and safety area, but accepted that the circumstances of individual cases will vary almost infinitely, and that very few cases have reached the courts. As a result it would be difficult for judges, who only rarely deal with these cases, to have an instinctive feel for the appropriate level of penalty. The court then went on to outline fifteen relevant factors that should be taken into account when setting an appropriate level of penalty. These fifteen factors are set out below:

TABLE 5 - FACTORS TO BE CONSIDERED IN SETTING AN APPROPRIATE LEVEL OF PENALTY DEVELOPED BY MR. JUSTICE SCOTT BAKER

General Factors
1) It is impossible to say that the fine should bear any specific relationship to the turnover or net profit of the defendant.
2) In assessing the gravity of the breach, it is often helpful to look at how far short of the appropriate standard the defendant fell in failing to meet the reasonable practicability test.
3) The size of a company and its financial strength or weakness cannot affect the degree of care that is required in matters of safety.
4) The extent of the breaches.
5) Where accounts or other financial information are deliberately not supplied to the court, the court will be entitled to conclude that the company is in a position to pay the financial penalty it is minded to impose.
6) The court could see no reason in principle to scale down the costs awarded so as not to exceed the fine. Where a defendant is in a position to pay the whole of the prosecution costs in addition to the fine there is no reason in principle for the court not to make an order accordingly.
7) Each case must be dealt with according to its own particular circumstances.

8) The standard of care imposed by the legislation is the same regardless of the size of company.	
9) The degree of risk and the extent of danger created by the offence.	
10) The defendant's resources and the effect of the fine on its business.	
11) While the court in general accepted the argument that the fine should not be so large as to imperil the earnings of employees or create a risk of bankruptcy, the court observed that there may be cases where the offences are so serious that the defendant ought not to be in business.	
Aggravating	**Mitigating**
12) Particularly aggravating features include: • Failure to heed warnings • Where the defendant has deliberately profited financially from a failure to tackle the necessary health and safety steps or specifically run a risk to save money.	15) Particular mitigating measures include: • Prompt admission of responsibility and a timely plea of guilty • Steps to remedy deficiencies after they are drawn to the defendant's attention A good safety record.
13) A deliberate breach of Health and Safety legislation with a view to profit seriously aggravates the offence.	
14) Death as a consequence of a criminal act is regarded as an aggravating feature of the offence and the penalty should reflect public disquiet at the unnecessary loss of life.	

In June 2007, the Interpol Pollution Crimes Working Group prepared an advocacy memorandum that set out arguments for prosecutors of environmental crime.[36] The memorandum sets out

[36] Interpol Pollution Crimes Working Group, *Advocacy Memorandum, Arguments for Prosecutors of Environmental Crimes* (Lyon: Interpol, 2007), available at:

a possible format for preparing the financial information referred to in the *R v. F. Howe & Son (Engineers) Ltd.* judgment, and builds on the recommendations for sanction set out in the Macrory Report. They are represented as follows:

TABLE 6 - FACTORS TO BE CONSIDERED IN DETERMINING THE BENEFIT FROM AN ENVIRONMENTAL CRIME	
1) Economic benefit derived	a) Avoided costs of training, personnel, technology, maintenance, monitoring in addition to the avoided costs of storage, treatment and disposal of wastes
	b) Gross revenues gained by being able to continue operation
	c) Revenues derived from customers who assumed they were paying for a legal service
2) Environmental harm	a) Single or repeat offence
	b) Sensitivity of receiving environment
	c) Hazardousness of the pollutant
	d) Types of wildlife affected and their degree of abundance
	e) Estimated recovery time
	f) Costs of remediation
3) Human harm	a) Significant risk of death
	b) Impacts to drinking water and air quality
4) Economic harm	a) Undermining legitimate business
	b) Impact on tourism
5) Public harm	a) Public disruption, evacuations, interferences with water supplies
	b) Costs to the public purse in investigating

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http://www.interpol.int/Public/EnvironmentalCrime/Pollution/issues/ArgumentsProsecutorsEC.pdf.

	sampling and monitoring
6) Threat of harm	a) Where the prompt nature of enforcement limited the harm, the potential damage should be considered
	b) Where harm will not manifest itself for years
7) The characteristics of the defendant	a) Position in the company
	b) Role
	c) Knowledge of illegal activity
	d) Knowledge of potential harm
	e) Experience and education
	f) Abuse of public trust
8) The characteristics of the organisation	a) Pre-existing compliance programme
	b) Pervasiveness of the wrongdoing
	c) Actions taken by the organisation to redress the conditions leading to the environmental crime
9) The conduct of the defendant	a) Previous convictions
	b) Concealment of crime
	c) Ongoing behaviour or isolated act
	d) Knowledge of law relating to the act
	e) Voluntary disclosure
	f) Cooperative behaviour

The European Forum of Judges for the Environment[37] was created in 2003, and aims to promote, from the perspective of sustainable development, the implementation and enforcement of

[37] Information on this forum is available at: http://www.eufje.org/presentation_eng.php.

national, European and international environmental law by contributing to a better knowledge by judges of environmental law, by exchanging judicial decisions and by sharing experience in the area of training in environmental case law. These aims are similar to the Judicial Studies Institute (JSI), the mission statement for which states: "[i]t recognises that judges work not simply in a context of black-letter law but in a wider human, social and economic milieu. It also recognises that judges of different courts, or even of the same court, may have different experiences, interests and needs.[38]

These organisations have a vital role to play in addressing the concerns of the EU Commission and bringing the wider theory and practice of environmental law and enforcement to the judiciary. They also have a role to play in formulating a framework for the judiciary to use in imposing sanctions and deterrents appropriate for environmental crime. However access to these organisations is restrictive and mechanisms need to be found by these institutes and regulators to communicate and achieve their common goals. To date such dialogue is limited to sporadic occasions such as conferences on environmental or planning law.

V. POLICY

The EU Commission was specific in its criticism of the lack of a National Enforcement Policy. While this criticism ignores the fact that the Office of Environmental Enforcement has had an enforcement policy published on its website[39] for a number of years, it is valid to say that other environmental regulators such as local authorities have not. However it is anticipated that this position will change in the short term.

[38] Available at: http://www.jsijournal.ie/html/aboutus.htm.
[39] Available at: www.epa.ie.

It is also worth noting that the current Programme for Government[40] sets out the work to be completed in the environmental area and in particular commits to enhanced environmental enforcement by completing:

- A review of the level of fines and custodial sentences which can be applied by the lower courts (where the majority of prosecutions are taken) in cases of pollution, dumping, illegal developments and other environmental crimes, so that the punishment fits the crime; and

- As part of the review of the Environmental Protection Agency, initiating a study of all legislation relating to environmental fines.

Such a governmental review may inject the impetus necessary to meet the challenge laid down by the Commission and deliver a system of enforcement that does what it says on the tin, in a timely manner – that is, to sanction appropriately and deter emphatically.

VI. CONCLUSION

Ireland has had a poor track record in complying with the requirements of EU law; however, there have been significant efforts made to meet the standard of regulation and enforcement deemed necessary by the Commission. The European Court of Justice judgment against Ireland relating to the implementation of the Waste Framework Directive has presented challenges to regulators, not least of which are the issues relating to areas outside their traditional remit of experience. These challenges are as much for the courts system as they are for environmental regulators.

The thinking in relation to the detection and prosecution of environmental crime has developed considerably over the last

[40] Programme for Government 2007-2012, (Dublin: Department of the Taoiseach, 2012), available at: http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Eng%20Prog%20for%20Gov.pdf.

number of years, and includes suggestions in the areas of timeliness, sanctions and deterrents that include:

- Setting up Environmental Tribunals;
- Expanding powers for statutory notices to include cessation notices;
- Expanding the criteria for judicial review to include the filter of any "open" judgment of the European Court of Justice;
- Expanding the role of the Courts Service in setting down indicative timeframes for court proceedings and providing for case conferences in lengthy cases;
- Developing guidelines on sanctions for environmental crime, utilising court judgments that have considered this area and indeed the work developed by Hampton, Macrory, Interpol and others; and
- Allowing for greater advocacy by prosecutors to make clear to the court any financial benefits resulting from the environmental crime.

Organisations such as the European Forum of Judges for the Environment and the Judicial Studies Institute have a vital role to play in addressing the concerns of the EU Commission and bringing the wider theory and practice of environmental law and enforcement to the judiciary. More fora are needed for open communication and development on the detection and prosecution of environmental crime as, to date, such dialogue is limited to sporadic conferences on environmental law.

The current Programme for Government commits to enhanced environmental enforcement by completing a review of the level of fines and custodial sentences, in addition to a study of all legislation relating to environmental fines. This review may be the vehicle to deliver a system of enforcement that is timely, which sanctions appropriately and deters emphatically.