

# Why Can't We Take Economic Crime Seriously?

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## INTRODUCTION

Economic crime is a defining vice of the neoliberal age. In every direction, the poor, the weak and the vulnerable are being ripped off. The scams take several different forms. Some people are conned when they buy products and services which they want, but which carry conditions exposing them to hidden and unfair charges. Small businesses, which were forced to take out complicated financial derivatives as a condition of a bank loan, were subjected to this by banks on an industrial scale between 1999 and 2009. Many customers were sold worthless financial products as an add-on. Even if the customer knows that they have bought the product, they will not know that the small print means that it gives them no real benefit. This is the case of the many consumers who were sold card protection or payment protection insurance (PPI) policies. Still others are exploited or have money extorted from them. The victims of these crimes could be the little old lady who agrees to part with her savings in a telephone scam, the person who is persuaded to transfer their pension into an offshore development scheme, or the business forced to appoint a fraudulent turnaround consultant who proceeds to strip its assets. Each of these types of economic crime raises its own issues. This brief article will focus on the reasons why all too often, the most blatant and large-scale frauds go unpunished.

## A JUSTICE SYSTEM NOT FIT TO DEAL WITH ECONOMIC CRIME

Neither the British nor the Irish justice system is fit for purpose when it comes to the investigation and prosecution of economic crime. Ken Clarke, barrister, Chancellor of the Exchequer, Lord Chancellor, and the man who would have become leader of the Conservative Party and probably British prime minister but for his pro-European views, was scathing in his assessment of the failure of British justice to

tackle economic crime. In his autobiography, he said:

I have always believed that the British criminal justice system is quite hopeless at enforcing the law on white-collar crime such as fraud. It is far too complicated for the police service, which prefer to deal with the more straightforward offences such as burglary and assault. But it is a hugely lucrative criminal activity and, sadly, had become quite an important part of a lot of the banking and financial services industry. London had undoubtedly become the safest and best place for any dictator, oligarch or corrupt political leader to place his or her ill-gotten gains. ... London ... deserved [its] reputation as the money-laundering capital of the world.<sup>1</sup>

The same is true in Ireland. The Fraud Squad struggled with inadequate powers, out-dated laws, which framed the criminal offences, and chronic under-resourcing. Aidan O'Donnell, president of the Association of Garda Sergeants and Inspectors said, in 2011, that the Garda Bureau of Fraud Investigation (GBFI) was “‘stretched to the limit’ and struggling to cope with the upsurge in white-collar crime.”<sup>2</sup> What has happened since 2011 is that the upsurge has turned into a tsunami. The Garda Inspectorate Report in 2015 found that the GBFI still lacked the necessary skills and means to always be able to conduct a thorough investigation into serious frauds. In 2016, the *Irish Independent* was reporting a backlog of up to six years in garda inquiries into computer crimes.<sup>3</sup> John Devitt, Chief Executive of Transparency International Ireland, condemned the record of different governments in equipping law enforcement agencies with the powers and resources to hold white-collar criminals to account as “dismal.”<sup>4</sup> Though there have subsequently been some increases in capacity, they are far outstripped by the resources the criminals are spending on perpetrating economic crimes.

## ECONOMIC CRIME IS NOT INVESTIGATED PROPERLY

In an age of austerity, economic crime is low on the list of police priorities. It is expensive

1 Ken Clarke, *Some Kind of Blue: A Political Memoir* (London: Macmillan, 2016), 301.

2 Ronan McGreevy, “Gardaí seeks resources in white-collar crime fight,” *The Irish Times*, 19 April 2011, <https://www.irishtimes.com/news/garda%C3%AD-seek-resources-in-white-collar-crime-fight-1.575577>.

3 Tom Brady, “Computer crime cases facing six-year delay due to Garda backlog,” *The Irish Independent*, 1 November 2016, <https://www.independent.ie/business/computer-crime-cases-facing-six-year-delay-due-to-garda-backlog-3517764.html>.

4 John Devitt, “Why wasn’t corruption an election issue when it cost us so much?” *Transparency International Ireland*, 24 February 2016, [https://www.transparency.ie/news\\_events/election\\_2016](https://www.transparency.ie/news_events/election_2016).

to investigate, difficult to prosecute and does not usually generate the photo opportunities provided by offences against the person. As Elaine Byrne points out, when the crime statistics are compiled, “a relatively uncomplicated welfare fraud case is given the same status as an arduous white-collar crime case.”<sup>5</sup>

In Iceland, thirty-six bankers were jailed for their roles in causing the crash of the banking system. In Ireland, it was just seven (including Bernard Daly and Tiarnan O’Mahoney whose convictions were subsequently quashed) and in the UK, just two. Lynden Scourfield and Mark Dobson both worked at HBOS Reading. They established a racket where a business in distress would be forced to appoint David Mills, or one of his associates, as a turnaround consultant. Both Mills and the bank would then bleed the business dry through charging exorbitant fees. Once the business fell into insolvency, Mills would then buy the business for himself and pay Scourfield or Dobson a commission for their assistance. The scam operated for at least four years and would have remained undetected had Scourfield not also started cheating the bank. Even after Scourfield’s activities had been discovered in 2007, Dobson carried on working at the bank until 2012, and complaints by the owners of the affected businesses were suppressed.

In Ireland, though some executives of Anglo-Irish Bank were convicted of fraud and false accounting (using €7.2 billion in circular transactions in order to bolster the customer deposits figure on Anglo’s balance sheet), Seán Fitzpatrick was acquitted of misleading Anglo’s auditors about loans which had been made to him and to people connected to him. The case against Mr. Fitzpatrick collapsed because untrained staff had coached witnesses and an official under enormous stress had mistakenly shredded documents. The lack of resources for the Office of the Director of Corporate Enforcement was a direct cause of the failure of the prosecution.

The economic crimes that are prosecuted are

only the tip of the iceberg. The prosecuting authorities simply do not have the resources. The Garda National Economic Crime Bureau (GNECB), which replaced the Garda Bureau of Fraud Investigation on 1 September 2016, has just 87 members of staff. A series of myths serve as pseudo-justifications for the authorities’ lack of concern with economic crime. Once those myths have been exposed, there are practical steps, which could turn the odds against the criminals.

## THE MYTH THAT IT IS ONLY THE ETHICALLY DUBIOUS OR THE STUPID WHO ARE CONNED

The BBC television series *Hustle* presented the myth that you cannot con an innocent man. Often the easiest person to con is someone who is fearful. Worthless Payment Protection Insurance (PPI) or Card Protection Insurance policies could be sold by manipulating people’s fear of unemployment or ill-health.<sup>6</sup>

The Internet and the telephone are the weapons of the modern scammer. Like the lion running into a herd of antelopes, the scammer can quickly make contact with large numbers of particular victims and identify the vulnerable, the isolated, the gullible, and deprive them of their savings, before disappearing. In one extreme case of which I am personally aware, scammers scared a vulnerable woman into leaving her home and then sold it without her consent, before spooking her into withdrawing the money and handing it over to someone pretending to be a police officer.

Age Cymru, a charity working for old people in Wales, has described the elderly as being “under siege” from sophisticated and persistent scammers. It estimates that up to 150,000 older people in Wales are conned each year, losing an average of £1,200 each.<sup>7</sup> Investment scams alone tricked people in the UK out of £197 million in 2018, according to Financial Conduct Authority figures.

5 Elaine Byrne, “Ireland’s White-Collar Crime Problem,” *Sunday Business Post*, 11 September 2016, <http://elaine.ie/2016/09/14/irelands-white-collar-crime-problem>.

6 The policies usually would not pay out if you were self-employed or suffering from a pre-existing condition, but these issues were never explored at the point of sale.

7 Jenny Rees, “Elderly ‘under siege’ from fake HMRC and police scammers,” 31 December 2018, <https://www.bbc.com/news/uk-wales-46640693>.



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Companies, too, are being increasingly targeted. PwC Ireland, the consultancy firm, found that the number of Irish firms which were victims of economic crime and fraud had increased from 26% in 2010 to 49% over the 2017 to 2018 period. One in ten of those companies lost more than €4 million.<sup>8</sup> Pat Moran, PwC Cyber Leader, describes economic crime as a big business in its own right; tech-enabled, innovative, opportunistic and pervasive.

### THE MYTH THAT IT IS ONLY MONEY THAT IS LOST

Economic crime does not only deprive people of their money; economic crime destroys their sense of security. A vulnerable person who has been the victim of a telephone scam is on edge every time the telephone rings. An elderly person who has been the victim of an Internet scam avoids using their computer, if at all possible. Companies affected by economic crime suffer from drops in employee morale, business relations and in damage to their brand.

### THE MYTH THAT DIRTY MONEY MAKES THE WORLD GO AROUND

The political will to tackle economic crime is lacking. The UK has established one of the most expensive systems to identify money laundering in the world, yet the National Crime Agency's own estimate is that billions of dollars of dirty money are moved through or into Britain each year. Robert Barrington, of Transparency International, estimates that the City's money markets clean up as much as £90 billion of illicit funds each year. The lack of reforms by successive UK governments strongly suggest that the Treasury believes that dirty money makes the world go around, and that London's place as a world financial centre would be threatened if the dirty money were to be chased out.

Ireland's policymakers seem to have been taken in by the same myth. Ireland has established Financial Vehicle Corporations (FVCs), which held €431 billion in assets in 2015, and which enjoy significant tax advantages under section 110 Irish Finance Act 1997. Dublin City University's Shaen Corbet<sup>9</sup> and Trinity College Dublin's Jim Stewart and

<sup>8</sup> PwC Ireland, "Reported economic crime hits record levels in Ireland," 18 June 2018, <https://www.pwc.ie/media-centre/press-release/2018/irish-economic-crime-survey-2018.html>.

<sup>9</sup> Quoted in: Donal Griffin, "Azerbaijan's biggest bank raised \$900m via Irish SPVs before default," *Irish Independent*, 20 June 2017, <https://www.independent.ie/business/world/azerbaijans-biggest-bank-raised-900m-via-irish-spvs-before-default-35844498.html>. For more by Corbet, consult: Shaen Corbet, "Turning Tigers into PIGS: The Role of Leverage in the Irish Economic Collapse," in *Lessons from the Great Recession: At the Crossroads of Sustainability and Recovery*, ed. Constantin Gurdgiev, Liam Leonard, and Maria Alejandra Gonzalez-perez, vol. 18, Advances in Sustainability and Environmental Justice (Bingley: Emerald Group, 2016).

Cillian Doyle<sup>10</sup> have strongly criticized this light touch regulation, low tax regime, as presenting an open door for money launderers from Russia, Azerbaijan and elsewhere.

Three policy changes would make a significant difference to the fight against economic crime.

### *Pay whistle-blowers*

In Ireland and the UK, those, such as Sally Masterton at Lloyds Bank, who blow the whistle on economic crimes, are rarely thanked for their actions.<sup>11</sup> Despite the procedures introduced by the Public Interest Disclosure Act 1998 in the UK and the Protected Disclosures Act 2014 in Ireland, they are usually dismissed and then find it impossible to find another job within the financial services industry. When it comes to economic crime, no one likes a grass.

In the USA, by contrast, not only is there a Whistleblower Protection Program; those who blow the whistle on economic crimes receive a proportion of any fines imposed. In November 2013, the Security & Exchange Commission paid \$14m to an individual whose testimony enabled the Commission to recover \$147m defrauded from foreign investors in a Chicago-based scam. The awards made to whistle-blowers in the USA (which can range from 10% to 30%) are both a statement about the importance which the USA places on uncovering economic crime and a strong incentive for whistle blowing to take place. Effective protection and financial rewards for whistle-blowers would give the prosecuting authorities vital evidence and, in many cases, earlier warning about frauds.

In April 2018, the European Commission proposed a directive on whistleblowing. The proposal is still stuck in the byzantine processes of the EU legislative process. Unlike the rules in the USA, the directive does not offer those who expose economic crimes any bounty for blowing the whistle. As Dentons, a law-firm which acts mainly for large financial institutions, observes with considerable

understatement: “Given the press coverage on whistle-blowers who brought to light the corporate scandals of recent years, including reports on their lives being destroyed, the new EU legal protection may not be enough to incentivize individuals to blow the whistle.”<sup>12</sup> The proposed directive is, however, a minimum harmonisation directive and does little more than catch up with the legislation already passed in Ireland. It is open to Ireland (and to the UK post-Brexit) to adopt measures that are far more generous to whistle-blowers.

### *Pay prosecuting agencies*

The police also have little incentive to investigate and prosecute economic crime. In the United Kingdom, the Thames Valley Police spent £7 million on the HBOS Reading prosecution. It recovered just £2 million of its costs. The fines and confiscations imposed following a successful conviction disappear into the government’s central coffers. The incentives would be different if the police knew that a proportion of the sums awarded in a confiscation order would be paid into their budget to fund similar future investigations.

### *Change juries*

Magna Carta established the idea of trial by your peers. Yet the reality of jury trials in complex cases of fraud is that those who are not their peers try the criminals. Because the prosecution has to explain how the fraud worked to a jury, which may be made up of those who struggled with basic maths at school, trials in cases of complex fraud can last for months. The trial of the Anglo-Irish executive David Drumm was the third-longest criminal trial in the history of the Irish Republic. Seán Fitzpatrick’s trial was the longest on record. Highly educated persons find it easy to get excused from interrupting their important jobs for such a long period, meaning that the criminals may well be tried by a jury which is less numerate than the average member of the population.

Trial by your peers as Magna Carta originally

10 Jim Stewart and Cillian Doyle, “The measurement and regulation of shadow banking in Ireland,” *Journal of Financial Regulation and Compliance* 25, Issue: 4 (2017): 396 – 412.

11 Matt Oliver, “Humiliation for Lloyds over £1bn small firm fraud: Bank forced to compensate whistle-blower over damning dossier on scandal at HBOS Reading,” *This is Money*, 14 November 2018, <https://www.thisismoney.co.uk/money/markets/article-6390341/Humiliation-Lloyds-1bn-small-firm-fraud.html>.

12 Michael Huertas and Markus Schrader, “The EU’s Whistleblowing Directive Proposal’s impact on financial services firms,” *Dentons*, 17 July 2018, <https://www.dentons.com/en/insights/articles/2018/july/17/the-eus-whistleblowing-directive-proposals-impact-on-financial-services-firms>.

envisaged it meant trial by those of the same social standing. A contemporary equivalent would be that complex economic crime was tried by a jury composed of those who held a management position or who had accounting or professional qualifications. In the way in which the mediaeval guilds policed the behaviour of their members, so such a jury should criminalise actions that were predatory and dishonest. Such a specialist jury would face competing incentives: on the one hand, the desire to protect those within the guild, but on the other, the desire to protect the reputation of the guild. The result would not be perfectly just: commercial behaviour that was “out of order” would probably still go unpunished, but it is more likely that commercial behaviour that was “way out of order” would be successfully prosecuted.

An alternative would be for juries to be composed of nine members of the public allied with three expert assessors with such skills. In France, serious criminal cases in France are decided by a jury of nine members of the public sitting together with three judges. A majority of ten would be sufficient to convict. This would limit the ability of one corrupt expert assessor to prevent a conviction.

A final possibility would be for economic crime cases to be tried by a judge, sitting together with, say, two assessors. Prosecuting some types of economic crime can be difficult in tight-knit communities. In Gibraltar, when the Marrache brothers were charged with fraud, suspicions of jury tampering led to the jury being discharged and the judge hearing the case on his own.<sup>13</sup> In England, section 43 of the Criminal Justice Act 2003 provides that in cases of serious or complex fraud, the prosecution can apply for the trial to be conducted by a judge alone without a jury. The section has not been brought into force. Trial without a jury would be likely to be a step too far on the island of Ireland, but is surely wrong to allow financially illiterate juries to be blinded by accounting.

## CONCLUSION

Economic crime is a growing problem. It is a myth that its only victims are the greedy and the stupid. It is a myth that it is only money that is lost. It is a myth that dirty money is necessary to make the world of finance go around. Giving the police increased resources to investigate economic crime, rewarding whistle-blowers, compensating the police for successful prosecutions, and changing the way in which economic criminal trials take place, would all tip the scales against the predatory criminals. These policy changes will not bring an end to economic crime, but they will demonstrate that the Irish government is committed to taking it seriously.

<sup>13</sup> “Marrache Brothers Found Guilty and Remanded in Custody,” *Your Gibraltar*, 2 July 2014, <https://www.youngibralartv.com/crime-policing/6968-jul-02-breaking-marrache-brothers-found-guilty-and-remanded-in-custody-turnbull-cleared>.