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IRISH ANTI-CORRUPTION LAWS

All Eyes on Ireland's Expanded Anti-Corruption Regime

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All eyes are on Ireland because of Brexit and the vexed question of the backstop option to prevent a hard border between Northern Ireland and the Republic of Ireland. Businesses around the world are monitoring the impact of Brexit not just on the economies of the U.K. and Ireland, but on the wider international arena. However, there is a top priority beside Brexit for those who are doing business with Ireland. New corruption laws, incorporating a U.K.-style strict liability corporate offence, combined with Ireland's unique mandatory and wide reporting regime, should be urgent focal points.

The companies, partnerships and individuals, both Irish and non-Irish, affected by these developments is growing – because of Brexit, U.K. and international businesses are reportedly moving staff and offices to Dublin, adding to the cosmopolitan mix of technology, financial services, life sciences and other sectors already embedded there.

See “[Compliance Implications of Brexit](#)” (Apr. 26, 2017).

New White Collar Crime Structure for Irish Laws

Similar to the United Kingdom in the early 2000s, Ireland was [criticized](#) by the OECD about its old-fashioned bribery law and the need to develop a suitable model to attribute liability to corporate bodies.

Ireland has now upped its game and reformed its law to give the Irish authorities a good chance of pursuing and convicting the guilty. The new law sends a message to business executives that conviction in Ireland can lead to a substantial prison term and warns corporates that a conviction can entail unlimited fines, in addition to severe damage to reputation and standing.

The new regime in Ireland takes its place against a backdrop of unique Irish mandatory reporting requirements. These factors, together with a post-Brexit increase in foreign actors in Ireland, may see an increase in cross border investigations. Ireland also stands ready by way of its Criminal Justice (Mutual Assistance) Act 2008 to assist overseas enforcement agencies seeking to pursue perpetrators under equivalent foreign measures.

Companies, partnerships and senior executives should be prioritising the management of Irish criminal risk and regulation. This priority is given added urgency by ongoing discussions about further likely reforms to Irish law which potentially include deferred prosecution agreements (DPAs) and a replacement of the identification doctrine, which has made it so hard to prosecute senior management individuals. The Law Reform Commission has recently [described](#) this doctrine, also known as the “directing mind and will” principle, as stipulating that, because a corporate body is an abstraction having no mind or body of its own, its “directing will” must be imputed from one of its agents at the centre of the body’s personality, who is the “directing mind and will” of the corporate body.

Overview of the New Irish White Collar Crime Laws

The criminal law on corruption is now set out in the [Criminal Justice \(Corruption Offences\) Act 2018](#), (the 2018 Act) which came into force on July 30, 2018.

The adoption of the 2018 Act reflected the need to meet Ireland’s international commitments, particularly those under the OECD Convention on Bribery of Foreign Public Officials. Beginning with Ireland’s Phase 2 review in 2007, the OECD’s Working Group on Bribery (WGB) recommended that Ireland consolidate and harmonise its two foreign bribery offences. The WGB also suggested that Ireland review its law on corporate criminal liability with a view to modernising and codifying it so that it could be effectively applied to senior managers who funnel bribes through subordinate employees.

The 2018 Act also adopts recommendations made by the Irish Tribunal of Investigation into Certain Planning Matters and Payments, which was established to investigate corruption in Dublin, particularly with regard to city planning. The Tribunal made a number of findings of corruption as well as recommendations on legislative reform.

The 2018 Act

The 2018 Act sets out the following substantive corruption offences:

- active and passive corruption;
- active and passive trading in influence;
- corruption in relation to office, employment, position or business;
- giving a gift, consideration or advantage that may be used to facilitate an offence;
- creating or using a false document;
- intimidation; and
- corporate offence.

The corporate offence, which is similar to the “failure to prevent” offense contained in Section 7 of the U.K. Bribery Act, is new and imposes corporate liability where an officer, employee, agent or subsidiary of a corporate commits an offence with the intention of benefitting the corporate.

The penalties under the 2018 Act include a fine; imprisonment; forfeiture of property or of an office, position or employment; and a prohibition on holding office for a specified period. The Act also deals with seizure and forfeiture. Under separate legislation dealing with government procurement, an economic operator can be excluded from participation in a public procurement procedure where it has been convicted of corruption.

Enforcement Agencies

In 2017, the Garda Síochána, the Irish national police force, established an Anti-Corruption Unit, which sits in the Garda National Economic Crime Bureau (GNECB), a specialist bureau that investigates fraud-related crime involving complex issues of criminal law or procedure. In 2018, the Anti-Corruption Unit launched the Bribery and Corruption Confidential Reporting Line. The system is message based and enables the caller to leave a confidential voicemail which will be evaluated by staff attached to the Garda Anti-Corruption Unit. The Director of Public Prosecutions must make the decision to prosecute for all but the most minor offences.

Active and Passive Corruption

Under the 2018 Act, a person may be guilty of active corruption where he or she corruptly offers, gives or agrees to give, a gift, consideration or advantage to a person as an inducement to, or reward for, or otherwise on account of, any person doing an act in relation to his or her office, employment, position or business. A person may commit active corruption either directly or indirectly, by himself or herself or with another person.

A person may be guilty of passive corruption where he or she corruptly requests, accepts or obtains, or agrees to accept, for himself or herself or for any other person, a gift, consideration or advantage as an inducement to, or reward for, or otherwise on account of, any person doing an act in relation to his or her office, employment, position or business. Passive corruption can be committed directly or indirectly, with another person.

The Act defines “corruptly” broadly to include acting with an improper purpose personally or by influencing another person, whether:

- by means of making a false or misleading statement;
- by means of withholding, concealing, altering or destroying a document or other information; or
- by other means.

There are presumptions of corruption which reverse the burden of proof once certain facts are established. Specifically, there are presumptions:

1. that a gift, consideration or advantage has been given or received corruptly where an official is tasked with carrying out a certain function and the donor had an interest in the carrying out of that function (such as the grant of a licence) or in the failure of the official to carry out that function (such as the prosecution of an offence);
2. that a political donation over a specific sum or of a specific type is given or received corruptly where there has been a failure to comply with applicable reporting and remitting procedures and the donor had an interest in the person concerned doing an act in relation to his or her office, employment, position or business; and
3. of corrupt enrichment where interests in land or other property have not been disclosed by an Irish official in accordance with applicable legislation

The last presumption applies only to an offence under section 5, 6, 7 or 8 of the 2018 Act.

In *DPP v Forsey* in 2018, the Irish Supreme Court considered similarly worded provisions in Section 4 of the Prevention of Corruption Act 2001. The 2018 Act has reproduced the presumption contained in the 2001 Act as well as provided for additional presumptions of corruption. The Supreme Court's judgment in *DPP v Forsey* clarifies that each of these presumptions will be read as shifting the evidential burden of proof rather than the legal burden of proof to an accused.

It is anticipated that improper and excessive hospitality may be caught by the Act, although the acceptance of hospitality, including gifts and entertainment is already governed by the Ethics Acts, by Part 15 of the Local Government Act 2001, and widely reflected in Irish companies' codes of conduct.

The Ethics Acts provide for the disclosure of interests by holders of certain public offices (including members of the Irish parliament) and designated directors of, and persons employed in, designated positions in certain public bodies. They provide for the appointment by each house of the Irish parliament of an ethics committee and for the establishment of a Standards in Public Office Commission to investigate contraventions of the Acts. They also provide for the establishment of guidelines to ensure compliance with the legislation and prohibit the retention of valuable gifts by holders of certain public offices. Part 15 of the Local Government Act 2001 sets out the ethical framework for the government service at local level.

Cross-Border Issues

The 2018 Act has extraterritorial effect. Under Section 11, a person may be tried in Ireland for an offence under the Act if any one or more of the acts alleged to constitute the offence were committed in Ireland, on board an Irish ship or on an aircraft registered in Ireland, notwithstanding that the other acts alleged to constitute the offence were committed outside Ireland. This is more liberal than the traditional Irish common law position whereby the State has jurisdiction over offences where the last act necessary for the completion of the offence occurs on Irish territory.

Section 12 of the Act provides for extraterritorial reach where:

1. a person does an act outside of Ireland that, if done in Ireland, would constitute an offence under specific sections of the 2018 Act and the act is committed on board an Irish ship or aircraft and the person concerned is an Irish official acting in his or her capacity as such, an Irish citizen or resident, or an Irish company or other body corporate;
2. a European Union official working for an E.U. institution or other body set up under the E.U. treaties and headquartered in Ireland, does an act abroad that if done in Ireland, would be an offence under Section 5; or
3. a person does an act abroad that if done in Ireland, would be an offence under Section 5(1), and this involves certain specified individuals.

In all cases, the act in question must be an offence under the law of the place where it was done. Also, in each case, a guilty party will be exposed to the same penalty as if the act had been done in Ireland.

Section 11 will apply to any person, whether an individual or a body corporate, foreign or domestic, carrying on activity in Ireland. Section 12 has the potential to apply to the actions of Irish subsidiaries of overseas entities for actions carried out abroad as well as to their staff depending on their citizenship and residency.

See [“The Fiendishly Difficult Problem of Managing Parallel Resolutions”](#) (Sep. 4, 2019).

Corporate Liability for Bribery

Pursuant to Section 18(1) of the Act, a body corporate will be guilty of an offence if it is committed by:

1. a director, manager, secretary or other officer;
2. a person purporting to act in that capacity;
3. a shadow director; or
4. an employee, agent or subsidiary of the body corporate,

with the intention of obtaining or retaining business for the body corporate, or an advantage in the conduct of its business.

This is a strict liability offence and the liability is not restricted to cases where the natural person or people involved are prosecuted or convicted. However, there is a statutory defence for a body corporate to prove that it took all reasonable steps and exercised all

due diligence to avoid the commission of the offence.

Section 18(3) deals with liability for consent or connivance, or wilful neglect, of any director, manager, secretary or other officer of the body corporate, or a person. It is not necessary that the corporate entity itself be convicted of bribery; rather, it is sufficient if the prosecution proves that the corporate entity has committed that offence.

Where the affairs of a body corporate are managed by its members, the same will apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.

Other Relevant Irish Laws

Section 10 of the Criminal Justice (Theft and Fraud Offences) Act 2001 criminalises false accounting and the Companies Act 2014 sets out various offences dealing with the falsification of company books and documents.

Ireland has also adopted measures to promote transparency, particularly in public life, including:

- [The Freedom of Information Act 2014](#). This gives every person the right to access information held by public bodies and to obtain reasons for decisions affecting that person.
- [The Protected Disclosures Act 2014](#). This provides a general suite of employment protections and legal immunities to whistleblowers, including not only employees but consultants, contractors, trainees, volunteers, temporary workers, former employees and job seekers.

- The Regulation of Lobbying Act 2015.
This sets out mandatory registration and disclosure requirements for all those carrying out lobbying activities and applies not only to professional lobbyists but also to any business with more than 10 employees.

Key Issues Relating to Reporting

Section 19 of the Criminal Justice Act 2011 imposes a unique universal reporting obligation for 30 categories of relevant offences, which include offenses contained in Sections 5-10 of the 2018 Act.

Section 19 makes it an offence for a person to fail, without reasonable excuse, to disclose information to the police that he knows or believes might be of material assistance in a) preventing the commission of a relevant offence or b) securing the apprehension, prosecution or conviction of any other person for a relevant offence. The maximum penalty for the offence is an unlimited fine, imprisonment for up to five years or both.

A similar offence was recently challenged on constitutional grounds in the case of *Sweeney v Ireland* but the challenge was unsuccessful.

Other Irish Reporting Laws

By Section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001, the auditor of a company or other entity must report any information of which it may have become aware in an audit which suggests that the audited entity may have committed certain offences of dishonesty.

The Protected Disclosures Act 2014 aims to encourage whistleblowing and requires public bodies to compile and make public reports on their operation, including the number of disclosures received on an annual basis. The Central Bank of Ireland has reported that it received 128 protected disclosures in the 12 months to December 2018 and there has been a steady increase in these numbers.

See [“A New Era in FCPA Disclosure”](#) (Feb. 1, 2017).

The Future

The Irish Government and the Law Reform Commission’s publications in 2017 and 2018 confirm Ireland’s commitment to the roll out of further white collar crime law reform. Given the ever-increasing number of international and U.S. companies with headquarters and subsidiaries in Ireland, boards of directors and staff must be aware of these new initiatives and trained in the company’s risk mitigation policies and procedures. These policies must be updated and expanded to deal with new criminal risk to assist in providing statutory defences where applicable.

See the Anti-Corruption Report’s two-part interview with Irish Data Commissioner Helen Dixon: [“GDPR Enforcement One Year In”](#) (May 29, 2019) and [“Thorny GDPR Issues and a Potential U.S. Privacy Law”](#) (Jun. 26, 2019).

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