



Bribery & Corruption

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Contributing Editors:
Jonathan Pickworth & Jo Dimmock

CONTENTS

| | | |
|-----------------------|---|-----|
| Preface | Jonathan Pickworth & Jo Dimmock, <i>White & Case LLP</i> | |
| Australia | Tobin Meagher & Richard Abraham, <i>Clayton Utz</i> | 1 |
| Austria | Holger Bielesz, Angelika Hellweger & Paul Krepil, <i>Wolf Theiss</i> | 18 |
| Brazil | Rogério Fernando Taffarello, <i>Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados</i> | 29 |
| Cayman Islands | Martin Livingston, Adam Huckle & Adrian Davey, <i>Maples and Calder</i> | 40 |
| China | Hui Xu, Sean Wu & Catherine E. Palmer, <i>Latham & Watkins</i> | 50 |
| France | Stéphane Bonifassi, <i>Bonifassi Avocats</i> | 68 |
| Germany | Christian Pelz, Lars Kutzner & Martin Schorn, <i>Noerr LLP</i> | 79 |
| Greece | Ovvadias S. Namias & Vasileios K. Petropoulos, <i>Ovvadias S. Namias Law Firm</i> | 85 |
| India | Aditya Vikram Bhat & Shantanu Singh, <i>AZB & Partners</i> | 92 |
| Indonesia | Denny Rahmansyah & Nico Angelo Putra Mooduto, <i>SSEK Indonesian Legal Consultants</i> | 102 |
| Ireland | Megan Hooper, Imelda Higgins & Heather Mahon, <i>McCann FitzGerald</i> | 112 |
| Italy | Roberto Pisano, <i>Studio Legale Pisano</i> | 120 |
| Japan | Daiske Yoshida & Junyeon Park, <i>Latham & Watkins</i> | 131 |
| Mexico | Leonel Pereznieto, Santiago Acosta Álvarez & Andrés Sánchez Ríos y Valles, <i>Creel, García-Cuéllar, Aiza y Enríquez, S.C.</i> | 141 |
| Netherlands | Jurjan Geertsma & Madelon Stevens, <i>JahaRaymakers</i> | 156 |
| New Zealand | Ben Upton, <i>Simpson Grierson</i> | 167 |
| Nigeria | Dayo Adu, Ridwan Oloyede & Akinbobola Adeniyi, <i>Famsville Solicitors</i> | 177 |
| Romania | Mihai Mareş, <i>Mareş / Danilescu / Mareş</i> | 188 |
| Russia | Hannes Lubitzsch, <i>Noerr OOO</i> | 202 |
| Serbia | Vladimir Hrle, <i>Hrle Attorneys</i> | 214 |
| Singapore | Chia Boon Teck & Jonathan Chan, <i>Chia Wong LLP</i> | 220 |
| Slovenia | Uroš Čop, Katarina Mervič & Eva Rop, <i>Law firm Miro Senica and attorneys, Ltd.</i> | 240 |
| Spain | Mar de Pedraza Fernández & Paula Martínez-Barros Rodríguez, <i>De Pedraza Abogados, S.L.P.</i> | 252 |
| Switzerland | Marcel Meinhardt & Fadri Lenggenhager, <i>Lenz & Staehelin</i> | 266 |
| Taiwan | Grace Wang, Wen-Ping Lai & Bessie Y. C. Su, <i>Lee and Li, Attorneys-at-Law</i> | 276 |
| Ukraine | Svitlana Kheda, <i>Sayenko Kharenko</i> | 285 |
| UAE | Sarra Alsamarrai & Alessandro Tricoli, <i>Fichte & Co</i> | 300 |
| United Kingdom | Jonathan Pickworth & Jo Dimmock, <i>White & Case LLP</i> | 306 |
| USA | Jeremy B. Zucker, Darshak S. Dholakia & Hrishikesh N. Hari, <i>Dechert LLP</i> | 319 |

Ireland

Megan Hooper, Imelda Higgins & Heather Mahon
McCann FitzGerald

Brief overview of the law and enforcement regime

Up until July 2018, bribery and corruption in Ireland were primarily criminalised under the Prevention of Corruption Acts 1889–2010. Since then, those earlier acts have been repealed and the criminal law on corruption is now largely set out in the Criminal Justice (Corruption Offences) Act 2018 (CJCOA), which started to apply on 30 July 2018. The CJCOA also repealed the offences of active and passive corruption set out in the Criminal Justice (Theft and Fraud Offences) Act 2001 (2001 Act).

The adoption of the CJCOA was partially motivated by 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 to Ireland that it consolidate and harmonise its two foreign bribery offences which, according to the WGB, potentially contravened each other. The WGB also recommended that Ireland review its law on corporate criminal liability, with a view to modernising and codifying it so that it can be effectively applied to cases where senior managers of companies use subordinate employees to bribe.

The CJCOA also adopts a number of the recommendations made by the Tribunal of Investigation into Certain Planning Matters and Payments, which was established to investigate possible corruption in the greater Dublin planning process. The Tribunal made a number of findings of corruption as well as recommendations on legislative reform, which were based on those findings.

The CJCOA contains several corruption offences, namely:

- 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; and
- intimidation.

It also provides for extensive corporate liability in circumstances where an officer, employee, agent or subsidiary of a body corporate commits an offence with the intention of benefiting the body corporate.

The penalties on conviction for an offence under the CJCOA can include a fine, imprisonment, forfeiture of property or of an office, position or employment as well as a

prohibition on holding office etc. for a specified period. The severity of the penalty will depend on the nature of the specific offence. The CJCOA also provides for seizure and forfeiture of a suspected bribe.

In addition to the offences set out in the CJCOA:

- Section 10 of the 2001 Act criminalises false accounting; and
- the Companies Act 2014 contains various offences relating to the falsification of company books and documents.

Moreover, over the past years, Ireland has adopted a number of other measures designed to promote transparency, particularly in public life. These include:

- The Freedom of Information Act 2014 – This Act 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 Act 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 Act sets out mandatory registration and disclosure requirements for all those carrying out lobbying activities, and applies not only to professional lobbyists but also any business with more than 10 employees.

Overview of enforcement activity and policy during the last year

The past year has also seen the establishment of an Anti-Corruption Unit within the Garda Síochána, the national police force. This is a section of the Garda National Economic Crime Bureau (GNECB) which is a specialist bureau that investigates fraud-related crime involving complex issues of criminal law or procedure. The Anti-Corruption Unit was set up in 2017 in tandem with the passage of the CJCOA through the legislative process. In September 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.

Corruption within the Garda Síochána remained in focus in 2018, with the Disclosures Tribunal publishing its Third Interim Report in October of that year. The Disclosures Tribunal was set up in February 2017 to investigate allegations that Sergeant Maurice McCabe had been smeared by various individuals or agencies for having made complaints of serious corruption within the Garda Síochána. In its Third Interim Report, the Disclosures Tribunal found that Sergeant McCabe was a “genuine person” who was “repulsively denigrated for being no more than a good citizen and police officer”. The new Garda Commissioner, Drew Harris, has fully accepted the findings of the Disclosures Tribunal and committed to ensuring that An Garda Síochána is a safe environment for people to raise issues or concerns.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments fall within the scope of the CJCOA. Depending on its form, hospitality may constitute a bribe under the CJCOA. However, the acceptance of hospitality is also regulated under the Ethics in Public Office Acts 1995 and 2001 (Ethics Acts), the Local Government Act 2001 and in related codes of conduct.

The Irish corruption offences are widely cast and phrased in general terms without distinguishing between facilitation payments and other types of bribes.

For example, 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. As in the case of active corruption, a person may commit the offence of passive corruption either directly or indirectly, by himself or herself or with another person.

The CJCOA also 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.

The CJCOA contains a number of presumptions of corruption which reverse the burden of proof once certain facts are established. Specifically, there is a presumption:

- (a) 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 (e.g. the grant of a licence) or in the failure of the official to carry out that function (e.g. the prosecution of an offence);
- (b) 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; or
- (c) of corrupt enrichment, where interests in land or other property have not been disclosed by an Irish official in accordance with applicable legislation: this presumption applies to certain corruption offences.¹

In *DPP v Forsey*,² the Court of Appeal upheld a reverse burden of proof provision set out in the Prevention of Corruption Acts 1889–2010, holding that the relevant provision explicitly reversed the legal burden of proof in the case. While the Court recognised that the presumption of innocence is a constitutional right pursuant to Article 38.1 of the Irish Constitution, as well as a right under common law and under Article 6.2 of the European Convention of Human Rights, it observed that this right is not absolute. According to the Court of Appeal, the reversal of the burden of proof was justified, “*in the unusual circumstances of the prevalence of corruption worldwide and the difficulty of proving intention, even where the circumstances are strongly suggestive of criminality*”.

The acceptance of hospitality, including gifts and entertainment, is governed by the Ethics Acts, by Part 15 of the Local Government Act 2001 as well as by codes of conduct. Generally, a public official must disclose all gifts given to him or her in excess of a certain amount (€650), subject to a number of exceptions. Where an officeholder receives a gift valued in excess of €650, the gift is deemed to be a gift given to the State and vests in

the Minister for Finance. Generally, the codes of conduct go further than the Ethics Acts and prohibit the acceptance of gifts, or at least those that may pose a conflict of interest or interfere with the honest and impartial exercise of official duties.

Key issues relating to investigation, decision-making and enforcement procedures

A number of provisions impose reporting obligations in relation to corruption offences. Most notably, section 19 of the Criminal Justice Act 2011 imposes a reporting obligation in relation to certain “relevant offences” which are defined in that Act. These include an offence under sections 5–10 inclusive of the CJCOA.³

Pursuant to section 19 of the Criminal Justice Act 2011, it is an offence for a person to fail, without reasonable excuse, to disclose information to the Garda Síochána 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 of withholding information is an unlimited fine and imprisonment for up to five years, or both.

However, the constitutionality of aspects of the provision must now be in question, given the recent High Court judgment in *Sweeney v Ireland*.⁴ In that case, the High Court upheld a challenge to the constitutionality of another offence of withholding information, namely, section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 (the 1998 Act). That offence is couched in almost identical terms to section 19(1)(b) of the Criminal Justice Act 2011.

Under section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001, the auditor of a company or other entity must report to the Garda Síochána any information of which the auditor may become aware in the course of an audit which suggests that the audited entity may have committed any of a number of offences of dishonesty.

The enhanced protection for whistleblowers under the Protected Disclosures Act 2014 aims to encourage whistleblowing. The Protected Disclosures Act also requires public bodies to compile and make public reports on the operation of the Act, including the number of disclosures received on an annual basis. For example, the Central Bank of Ireland reports that it received 113 protected disclosures during the reporting period 1 July 2017 to 30 June 2018. It has reported a steady increase in these numbers year on year, beginning with one report of whistleblowing in the first year following the enactment of the legislation. As such, these reports help to shed light on the prevalence of whistleblowing in Ireland and the success of the operation of the Protected Disclosures Act.

Overview of cross-border issues

The CJCOA has some extra-territorial effect. For example, under section 11, a person may be tried in Ireland for an offence under the CJCOA 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 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.

In addition, section 12 of the CJCOA provides for extra-territorial reach where:

- (a) a person does an act outside of Ireland that, if done in Ireland, would constitute an offence under specific sections of the CJCOA,⁵ 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;

- (b) a European Union official working for an EU institution or other body set up under the EU treaties and headquartered in Ireland, does an act abroad that if done in Ireland, would be an offence under section 5;⁶ or
- (c) a person does an act abroad that if done in Ireland, would be an offence under section 5(1),⁷ and this involves certain specified individuals.⁸

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.

Corporate liability for bribery and corruption offences

It is generally accepted that corporations can be held criminally liable; however, the precise model for imposing liability has not been conclusively determined by the Irish courts.

Section 18 of the CJCOA deals explicitly with offences under the CJCOA and bodies corporate. Pursuant to section 18(1) of the CJCOA, a body corporate will be guilty of an offence under the CJCOA if an offence under the Act is committed by:

- (a) a director, manager, secretary or other officer;
- (b) a person purporting to act in that capacity;
- (c) a shadow director; or
- (d) 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.⁹

This is a strict liability offence and the liability is not restricted to cases where the natural person(s) involved are prosecuted or convicted. However, it will be a 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) provides that where a body corporate commits an offence under the CJCOA and it is proved that the offence was committed with the consent or connivance, or was attributable to any wilful neglect, of any director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, that person will also be guilty of an offence. In order for the prosecution to rely on this provision, it is not necessary that the corporate entity itself be convicted of bribery: it is sufficient if the prosecution proves that the corporate entity has committed that offence.¹⁰

Finally, 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.

Proposed reforms / The year ahead

The law in the area of bribery and corruption in Ireland has undergone significant reform in the last few months. There will inevitably need to be a bedding-in period to see what works and whether further reforms are needed in this area.

One item of legislation on the horizon is the Judicial Appointments Commission Bill 2017. This is aimed at reforming the system of judicial appointments, both in substance and in procedure, to ensure that all judicial appointments of judges are based on merit. GRECO has expressed concerns about the composition of a proposed new appointments commission, as there would be accountability to parliament. GRECO has questioned if this move is in line with European standards.

The Public Sector Standards Bill 2015 is at the third stage before Dáil Éireann, the lower house of parliament. The explanatory report to the Bill states that it will significantly enhance the existing framework in the public sector for identifying, disclosing and managing conflicts of interest and minimising corruption risk. This will achieve a shift towards a more dynamic and risk-based system of compliance, and ensure that the institutional framework for oversight, investigation and enforcement is robust and effective. The Bill provides for the establishment of a Public Sector Standards Commissioner to oversee a reformed complaints and investigations process, and establishes a set of integrity principles for all public officials.

The Standards in Public Office Commission has a supervisory role under various pieces of legislation including the Ethics in Public Office Act 1995. Broadly speaking, this legislation provides for disclosure of interests, including any material factors which could influence a Government Minister or Minister of State, a member of parliament or a public servant in performing their official duties. The Commission is reported to be developing a communications and outreach strategy to ensure that those subject to the legislation are aware of their obligations. Implementation is expected to commence by the end of 2018.

The Law Reform Commission is expected to publish its Report on Regulatory Powers and Corporate Offences in October 2018. One of the issues that is likely to be addressed in that Report is whether there should be a general test for determining the criminal liability of corporate bodies. In particular, the Commission is likely to consider whether it would be appropriate to have a test that corporate intention or knowledge could be established by reference to both the acts of its senior managers and decision-makers, and to how the organisation's policies and procedures are implemented.

The Report is also likely to consider the related question of whether the two main models for determining the personal criminal liability of senior corporate decision-makers should be adjusted, and whether there is a case for a single test. The first of these tests is the "consent, connivance or neglect" test referred to above, and the second is the "officers in default" test, which is found in the Companies Act 2014.

* * *

Endnotes

1. "Irish official" is also a widely defined term under section 2 CJCOA, including such diverse persons as a member of parliament and a member of a jury in court proceedings.
2. *DPP v Forsey* [2017] IESCDET 45.
3. Namely, active and passive corruption; active and passive trading in influence; corruption in relation to an office, employment, position or business; giving a gift, consideration or advantage that may be used to facilitate an offence under the CJCOA; creating or using a false document; and intimidation.

4. [2017] IEHC 702.
5. These are sections 5 (active and passive corruption); 6 (active and passive trading in influence); 7 (corruption in relation to office, employment, position or business); 8 (giving a gift, consideration or advantage that may be used to facilitate an offence under the CJCOA); 18(1) (offence by a body corporate); or section 9 concerning the creation or use of a false accounting, auditing or financial document,
6. Section 5 deals with the offences of active and passive corruption.
7. 5. (1) A person who, either directly or indirectly, by himself or herself or with another person—
 - (a) corruptly offers, or
 - (b) corruptly 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 shall be guilty of an offence.
8. Those specified persons are: an Irish citizen; a national official of a Member State or an Irish official; or a member of—
 - the European Commission,
 - the European Parliament,
 - the Court of Justice of the European Union, or
 - the Court of Auditors of the European Union.
9. This provision is without prejudice to any circumstances under the general law, whereby acts of a natural person are attributed to a body corporate resulting in criminal liability of that body corporate for those acts. It also does not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories in an offence under this Act.
10. *DPP v Hegarty* [2011] IESC 32.



Megan Hooper

Tel: +353 1 611 9158 / Email: megan.hooper@mccannfitzgerald.com

Megan is an experienced commercial litigation solicitor, advising companies and financial institutions on corporate disputes, internal investigations, regulatory and other statutory investigations and inquiries. Since 2009, she has been a key advisor to IBRC in relation to regulatory, statutory and criminal investigations arising from legacy issues, managing a number of workstreams in parallel. She is knowledgeable about the procedures of the Garda National Economic Crime Bureau, the Director of Public Prosecutions and regulatory bodies such as the Chartered Accountants Regulatory Board, the Central Bank of Ireland and the Office of the Director of Corporate Enforcement, and has experience dealing with privilege, data protection and customer confidentiality issues as well as project-managing and overseeing investigations, disclosure and discovery exercises. She advises clients on all stages of internal investigations from planning, interviews, data investigations to producing reports, often involving complex and sensitive issues and flowing from protected disclosures, ensuring that projects with multiple workstreams are actively and adequately monitored and supervised with internal team meetings and regular client updates. Megan has led a number of internal and external (client) workshops on robust internal investigations and co-authored the Irish chapter of *Global Legal Insights - Bribery & Corruption* for a number of years.



Imelda Higgins

Tel: +353 1 611 9172 / Email: imelda.higgins@mccannfitzgerald.com

Dr Imelda Higgins is a Senior Associate in McCann FitzGerald's Finance Practice, specialising in financial services regulation, including, in particular, compliance and enforcement. Imelda is also part of the firm's Investigations Group. Imelda was engaged as an Adjunct Assistant Professor of Law by Trinity College Dublin for a number of years, in which capacity she set up the first post-graduate course on corruption law in Ireland. She has also spoken widely at conferences and seminars both in Ireland and abroad on corruption as well as on other topics.

Imelda is the author of *Corruption Law*, the first (and only) book on Irish corruption law. She has also published several chapters in edited publications as well a number of articles in legal journals on corruption law among other topical legal issues. Imelda's Ph.D. thesis was on the topic of bribery.



Heather Mahon

Tel: +353 1 607 1206 / Email: heather.mahon@mccannfitzgerald.com

Heather holds a degree in Law and German and an M. Litt from Trinity College Dublin, and qualified as a barrister in 2000. She was in practice at the Bar from 2000–2006. Heather then took up a position with the Office of Parliamentary Counsel to the Government, with responsibility for legislative drafting. She later held a position in the senior management of the Law Reform Commission, with responsibility for a long-running legislation project in the Commission. She has lectured at third level in a number of areas and is a fluent German speaker. She is currently a senior associate with McCann FitzGerald.

McCann FitzGerald

Riverside One, Sir John Rogerson's Quay, Dublin 2, Ireland
Tel: +353 1 829 0000 / Fax: +353 1 829 0010 / URL: www.mccannfitzgerald.com

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