

Anti-Corruption Regulation

Contributing editor
Homer E Moyer Jr



2019

GETTING THE
DEAL THROUGH

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Homer E Moyer Jr
Miller & Chevalier Chartered

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This article was first published in February 2019
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Published by
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Tel: +44 20 3780 4147
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No photocopying without a CLA licence.
First published 2007
Thirteenth edition
ISBN 978-1-912228-90-4

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Anti-Corruption Regulation 2019

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Anti-Corruption Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia and Sweden.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Homer E Moyer Jr of Miller & Chevalier Chartered, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
January 2019

Ireland

Claire McLoughlin, Karen Reynolds and Ciara Dunny

Matheson

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Ireland has signed and ratified the following international anti-corruption conventions:

- the EU Convention on the Protection of the European Communities Financial Interests (and Protocols) – entered into force on 17 October 2002;
- the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions – entered into force on 21 November 2003;
- the Council of Europe Criminal Law Convention on Corruption – entered into force on 1 February 2004;
- the Convention of the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union – entered into force on 28 September 2005;
- Additional Protocol to the Council of Europe Criminal Law Convention on Corruption – entered into force on 1 November 2005;
- the UN Convention against Transnational Organized Crime – entered into force on 17 July 2010; and
- the UN Convention against Corruption – entered into force on 9 December 2011.

Ireland signed the Council of Europe Civil Law Convention on Corruption on 4 November 1999, but has not yet ratified it.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Anti-corruption legislation in Ireland generally prohibits bribery of both public officials and private individuals committed in Ireland and, in certain circumstances (ie, where the subject has a connection with Ireland), committed abroad.

The principal statutory source of bribery law in Ireland is the Criminal Justice (Corruption Offences) Act 2018 (the Corruption Offences Act). The legislation, which was commenced on 30 July 2018, repealed the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906–2010, and modernises and consolidates the Irish law in this area.

Corruption Offences

The Corruption Offences Act includes six ‘Corruption Offences’, given below.

Active and passive corruption

The first offence is that of active and passive corruption. Essentially, it is an offence under the Corruption Offences Act for any person to corruptly give to, or accept from a person, a ‘gift, consideration or advantage’ as an inducement to, reward for, or on account of any person doing an act in relation to his or her office, employment, position or business. Under the Corruption Offences Act ‘corruptly’ is defined widely and includes 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.

Active and passive trading in influence

It is an offence under the Corruption Offences Act for any person to corruptly give or accept a gift, consideration or advantage to induce another person to exert improper influence over an act of an official in relation to that official’s office, employment, position or business. This offence was introduced under the Corruption Offences Act following recommendations of the Mahon Tribunal.

Corruption in relation to office, employment, position or business

It is an offence for an Irish Official (including a wide spectrum from a member of parliament to any other person employed by or acting for the state or any public body) to do any act or use any confidential information in relation to his or her office to corruptly obtain a gift, consideration or advantage.

Giving a gift, consideration or advantage that may be used to facilitate offence under the Corruption Offences Act

It is an offence under the Corruption Offences Act to give a gift where one knows or ought reasonably to know that it will be used to facilitate the commission of an offence under the Corruption Offences Act.

Creating or using a false document

It is an offence under the Corruption Offences Act to create or use a false document with the intention of corruptly influencing another person to do an act in relation to his or her office, employment, position or business.

Intimidation

It is an offence under the Corruption Offences Act to corruptly threaten harm to another, with the intention of corruptly influencing another person to do an act in relation to his or her office, employment, position or business.

Corporate liability

One of the most important developments is the introduction of a strict liability offence for corporates, pursuant to which a corporate body may be held liable for the corrupt actions committed for its benefit by any director, manager, secretary, employee, agent or subsidiary under section 18 of the Corruption Offences Act. The single defence to this offence for corporates is demonstrating that the company took ‘all reasonable steps and exercised all due diligence’ to avoid the commission of the corruption offence by its director, manager, secretary, employee, agent or subsidiary.

Common law

At common law, the offences of bribery and attempted bribery are punishable by imprisonment or a fine, or both. It is an offence to offer an undue reward to, or receive an undue reward from, a public official to influence that person in the exercise of his or her duties in that office contrary to the rules of honesty and integrity.

The common law bribery and attempted bribery offences have not been judicially considered in recent times and prosecuting authorities mainly rely on the statutory law offences.

The Ethics Act

The Ethics in Public Office Act 1995 (as amended) (the Ethics Act) places obligations on Irish public office holders and other senior members of the Irish public service, to report and surrender gifts and payments above €650. The Ethics Act aims to combat corruption in office by requiring public declarations of financial interests, as well as prohibiting the receipt of gifts, whether or not they are given by the donor with the intention of procuring a certain result or course of action.

Presumptions of corruption

Various presumptions of corruption arise under the Corruption Offences Act and the National Asset Management Agency Act 2009. These include where:

- a payment was made by a person, or agent of a person, who is seeking to obtain a contract from a government minister or a public body;
- an undisclosed political donation above a certain threshold is made to certain specified persons and the donor had an interest in the donee carrying out or refraining from doing any act related to their office or position;
- a public official is suspected of committing an offence under the Corruption Offences Act and the person who gave the gift or advantage had an interest in the public official carrying out a function relating to his or her position as a public official. A list of functions of public officials is provided in the Corruption Offences Act and includes granting or refusing a licence, permit, warrant or authorisation and making a decision relating to a contract, tender, grant or loan of any kind; or
- a gift, consideration or advantage is conferred upon a person performing functions for the National Asset Management Agency (NAMA) by a person whose debts have been assumed by NAMA.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Bribery of a foreign public official arises in the context of the Corruption Offences Act, as described above. Bribery occurring outside of Ireland will only be prosecuted in Ireland if it is carried out by Irish persons or entities or takes place at least partially in Ireland. If an Irish person does something outside Ireland, which, if done within Ireland, would constitute a corruption offence, that person is liable as if the offence had been committed in Ireland. This provision is not reliant on an equivalent offence existing under the laws of the foreign jurisdiction and only applies to certain specified Irish persons including:

- Irish citizens;
- persons who are ordinarily resident in Ireland;
- companies registered under the Irish Companies Acts;
- any other body corporate established under Irish law; or
- certain defined public officials.

In addition, a person may be tried in Ireland for an offence under the Corruption Offences Act if any of the acts constituting the offence were partly committed in the state and partly committed outside Ireland.

4 Definition of a foreign public official

How does your law define a foreign public official?

The definition of 'foreign official' is contained within the Corruption Offences Act as being:

- a member of the government of any other state;
- a member of a parliament, regional or national, of any other state;
- a member of the European Parliament other than a person who is such a member by virtue of the European Parliament Elections Act 1997;
- a member of the Court of Auditors of the European Union;
- a member of the European Commission;
- a public prosecutor in any other state;
- a judge of a court in any other state, including a coroner's court by whatever name called;
- a judge of a court established under an international agreement to which the state is a party;

- a member of a jury in court proceedings (whether criminal or civil), including an inquest in relation to the death of a person, in any other state;
- an arbitrator, including any member of an arbitral board, panel or tribunal, in arbitral proceedings not governed by the law of the state;
- a member of, or any other person employed by, or acting for or on behalf of, an organisation or body established under an international agreement to which the state is a party;
- any other person employed by or acting on behalf of the public administration of any other state, including a person under the direct or indirect control of the government of such a state; or
- a member of, or any other person employed by, or acting for or on behalf of, an international organisation established by an international agreement between states to which the state is not a party.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The Corruption Offences Act does not criminalise all corporate gifts and hospitality; however, regard must be had to the nature and intent of the gift. There is no lower financial threshold under which gifts would not be considered capable of constituting a bribe. If the purpose of corporate gift or hospitality is corrupt and there is an inducement to exert improper influence over an Irish or foreign official, then it falls within the remit of the Corruption Offences Act. Generally, consideration should be had as to the nature of the gift and the relationship between the parties, particularly in instances of public procurement.

The Corruption Offences Act does not take the value or type of gift, consideration or advantage into account when determining whether an offence has been committed. Such gifts will fall within the scope of the legislation if provided 'corruptly'.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

A 'facilitation payment' is generally understood to be a payment made to expedite or to secure the performance of a routine governmental action. There is no distinction drawn in Irish law between facilitation payments and other types of corrupt payments. As such, a facilitation payment will be illegal if it fulfils the elements of the relevant offences.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The offences under the Corruption Offences Act clearly envisage the payment, or receipt, of corrupt payments through intermediaries or third parties. It is therefore immaterial whether the payment is made to an intermediary or third party provided the payment ultimately made to a foreign or domestic public official fulfils the other elements of the relevant corruption offence.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Statutory law

The Interpretation Act 2005 provides that in all Irish legislation, references to 'persons' include references to companies and corporate entities. A company can also be guilty of a strict liability offence, which is an offence that does not require any natural person to have acted with a guilty mind, such as health and safety legislation infringements and now, since its commencement on 30 July 2018, under the Corruption Offences Act (see question 1 above).

Individual liability

The Corruption Offences Act provides individual liability for a director, manager, secretary or other officer of a body corporate, or a person purporting to act in such capacity under section 18(3). Under this section, if an act is committed by a body corporate and it is proved that the offence

was committed with the consent or connivance or was attributable to the person's wilful negligence, then that person in their capacity as director, manager, secretary or other officer will be guilty of the offence, together with the body corporate.

Common law

A company can itself be found liable under common law for the criminal acts carried out by its officers and employees by way of vicarious liability. Vicarious liability deems the company liable for the acts of its employees, but those acts remain the acts of the employees and not of the company. The company can also be directly liable where crimes of the company's controlling officers are viewed as those of the company. This 'identification' doctrine has been accepted by the Irish courts in a civil context, although there are no reported decisions of the Irish courts in a criminal context.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Depending on the nature of the transaction, a successor entity can be held liable for a prior offence committed by the target entity of bribery of foreign officials. For instance, where the transaction is by way of a merger by share purchase, the successor entity will be liable. Where there is no merger or the acquisition is by way of asset purchase (whereby it is open to the successor entity to choose the assets of the target entity that are to be acquired), this can allow the successor entity to avoid taking on any liabilities of the target entity, such as potential or existing legal actions arising from an alleged breach of bribery laws.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

The Corruption Offences Act provides for criminal enforcement of Ireland's bribery laws as well as civil recovery. There have been no cases against Irish nationals or companies for bribing foreign public officials to date, although in light of the new legislation, this may change in the near future because of the increased focus of the Irish government on anti-bribery and corruption.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

An Garda Síochána (the Irish police) is the primary body for the investigation and prosecution of crime in Ireland, with a specialised wing for complex fraud-type offences (the Garda National Economic Crime Bureau). There are also a number of regulatory bodies with a separate specific remit to investigate and enforce corporate crime. Such investigations are often carried out with the assistance of the police. These authorities include:

- the Office of the Director of Corporate Enforcement (ODCE), which monitors and prosecutes violations of company law;
- the Office of the Revenue Commissioners (the Revenue Commissioners), responsible for the collection, monitoring and enforcement of tax laws;
- the Competition and Consumer Protection Commission, responsible for competition law and consumer protection;
- the Central Bank of Ireland, which regulates financial institutions;
- the Health and Safety Authority, which enforces occupational health and safety law; and
- the Office of the Data Protection Commission, which is responsible for data protection law.

The prosecution of offences is carried out by the Director of Public Prosecutions (DPP).

The Standards in Public Office Commission (the SIPO Commission) is responsible for the investigation of breaches of the Ethics Act. Following an investigation, if it is of the opinion that an office holder or public servant the subject of the investigation has committed an offence, the SIPO Commission may make a report to the DPP.

The Irish government has recently approved the General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018 for publication. Under the proposed legislation, the OCDE is to be renamed the Corporate Enforcement Authority and to be established as an independent statutory agency; a key action of the government's package of measures aimed at fighting white collar crime in Ireland, which was published in November 2017. The Companies (Corporate Enforcement Authority) Bill 2018 reflects recommendations made by the Law Reform Commission (LRC) in its recently published report on Regulatory Powers and Corporate Offences, which reviewed potential regulatory reforms, examining both regulatory enforcement and corporate criminal liability, as areas that are high on the Irish government's agenda.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There are no specific provisions to allow companies to disclose violations of Irish bribery law in exchange for lesser penalties. Should a company cooperate with an investigation, such cooperation may be taken into account during sentencing but there is no certainty that an imposed penalty will be any less and there is no formal practice in place. This is unlike the position in the United Kingdom, for example, where the Serious Fraud Office encourages corporations to 'self-report' incidents of corruption in exchange for lesser penalties or deferred prosecution agreements (see question 13 below).

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

While cooperation with investigating authorities can be taken into account as a mitigating factor by a court during sentencing, plea bargaining with prosecutors or the court is not permitted and would be constitutionally suspect. This is because, under the Irish Constitution, justice must be administered in public and the courts have exclusive jurisdiction over sentencing matters.

The DPP has limited discretion under the Criminal Procedure Act 1967 to direct that a matter be disposed of summarily in the district court (the court of most limited jurisdiction) where the accused pleads guilty. This would result in a lower penalty being imposed.

In the LRC's Report on Regulatory Powers and Corporate Offences (Volume 1: Regulatory Powers and Volume 2: Corporate Offences), which was published on 23 October 2018, the LRC considered whether a regime of Deferred Prosecution Agreements (DPAs) should be enacted in Ireland. The LRC recommended the enactment of a statutory DPA model comparable to that enacted in the UK in 2013, under which a DPA will only come into effect if it has been approved by a court. The Commission also recommended that the detailed procedures concerning DPAs are best left to be determined in a Code of Practice to be developed by the DPP.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There has been no enforcement of Irish foreign bribery rules as yet.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Irish bribery law does not explicitly provide for the prosecution of foreign companies for bribery outside the Irish state. Instead, the Corruption Offences Act is based on the concept of territoriality - acts committed outside Ireland can only be prosecuted if certain connections to Ireland can be shown, such as the offence having involved the bribery of an Irish official, or the person carrying out the bribe being an Irish citizen or company. To date there have been no prosecutions in Ireland under these extraterritorial provisions.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Criminal sanctions

Corruption Offences Act

Offences under the Corruption Offences Act are triable both summarily and on indictment. A person guilty of either a corruption offence or the discrete offence of corruption in office, under the Corruption Offences Act, is liable to a fine of no more than €5,000, a maximum of 12 months imprisonment or an order for the forfeiture of property, or both. At the upper limit, a person convicted on indictment is liable to an unlimited fine or imprisonment for a term not exceeding 10 years or an order for the forfeiture of property, or both. In the case of a public official, a court may order that they be removed from their public officer position. The court can also prohibit those convicted of corruption offences from seeking public appointment for up to 10 years.

Seizure of proceeds of crime

The DPP can obtain an order of forfeiture of a gift or consideration under the Criminal Justice Act 1994 (as amended by the European Union (Freezing and Confiscation of Instrumentalities and Proceeds of Crime) Regulations 2017), where a judge of the Circuit Court is satisfied that the gift or consideration is corruptly given or received. An order for forfeiture is not dependent upon criminal proceedings being brought but it must be shown that, on the balance of probabilities, the gift or consideration has been corruptly received.

Under the Corruption Offences Act, a member of the Irish police may seize any gift or consideration that they suspect to be a gift or consideration within the meaning of the Corruption Offences Act. The gift or consideration can only be detained for 72 hours unless a circuit court order is obtained which states that extended detention is necessary to properly investigate a corruption offence. A gift or consideration that is so seized may be ultimately forfeited if a circuit court judge is satisfied that, on the balance of probabilities, the gift or consideration was given in the context of a corruption offence.

The Proceeds of Crime Acts 1996–2016 also contain wide-ranging powers for the Criminal Assets Bureau to seize the proceeds of crime. ‘Proceeds of crime’ are defined as any property obtained or received by or as a result of, or in connection with, the commission of an offence, and include the proceeds of corruption.

Civil sanctions

An employer may have a civil cause of action to recover damages from an employee who has committed an act of bribery and has caused loss to the business. A person who obtains a benefit by reason of a fiduciary relationship (which can include employer–employee and principal–agent relationships) may also be required to account on trust for the unauthorised profit made by him or her.

The European Union (Award of Public Authority Contracts) Regulations 2016 prohibit a natural or legal person from participating in the procurement procedure for public contracts where that person has been convicted of certain offences, including a corruption offence. The Office of Public Procurement has also issued guidance on the ethical requirements on those involved in the public procurement process.

Where a breach of Irish bribery law is committed by a company in connection with a project funded by the World Bank and other international financial institutions, such companies may be debarred from bidding on contracts funded by the World Bank, International Monetary Fund and other international financial institutions, and publicly named.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

See question 10.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Accurate corporate books and records

Irish-incorporated companies are required to keep proper books of account under sections 281 to 285 of the Companies Act 2014. The books must:

- correctly record and explain the transactions of the company;
- at any time enable the assets, liabilities, financial position and profit or loss of the company to be determined with reasonable accuracy;
- enable the directors to ensure that any financial statements of the company and any director report required to be prepared under the Companies Act 2014 comply with the requirements of the Companies Act 2014 and international accounting standards; and
- enable those financial statements of the company so prepared to be audited.

A company that fails to comply with these requirements is guilty of an offence. In addition, a director of a company who fails to take all reasonable steps to secure compliance by the company with these requirements, or has by his or her own intentional act been the cause of any default by the company under any of them, may be held criminally liable.

Section 877 of the Companies Act 2014 sets out that it is an offence for an officer of a company to destroy, mutilate or falsify any book or document affecting or relating to the property or affairs of the company.

Section 10 of the Theft and Fraud Act sets out the offence of false accounting whereby a person who, with the intention of making a gain for themselves or another or of causing a loss to another, provides false information in relation to a document made or required for any accounting purpose, is guilty of an offence.

Effective internal company controls

The Companies Act 2014 contains a number of provisions relating to internal company controls. These relate to confirmation of compliance with ‘relevant obligations’ under company and tax law. It is also a requirement that ‘large companies’ have audit committees.

The Irish Stock Exchange has determined that companies on the exchange must comply with the UK Financial Reporting Council’s Combined Code on Corporate Governance or explain non-compliance in their annual report.

In addition, in respect of credit institutions and insurance undertakings, the Corporate Governance Requirements for Credit Institutions 2015 and the Corporate Governance Requirements for Insurance Undertakings 2015, as issued by the Central Bank of Ireland, set out the minimum statutory requirements for the governance of such institutions.

Periodic financial statements

The annual accounts of a company must be provided to its members at least 21 days before the company’s annual general meeting. These consist broadly of a profit and loss account, a balance sheet, a cash flow statement, notes to financial statements and a directors’ report.

External auditing

Section 380 of the Companies Act 2014 requires that Irish companies appoint an external auditor, whose duty it is to examine the company’s accounts and prepare a report that accurately reflects the company’s financial position. Section 387 of the Companies Act 2014 gives auditors the right to seek access to company documents and to compel information and explanations from company officers and employees.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Reporting obligations

The Criminal Justice Act 2011 gives the Irish police increased powers to compel a person or company by court order to produce documents or evidence that relate to corruption offences.

The Criminal Justice Act 2011 also introduced a positive obligation to report to the Irish police information that a person or company knows or believes might be of material assistance in preventing the commission of certain corruption offences, to include bribery and corruption offences, or securing the arrest, prosecution or conviction of another person for such an offence.

Under the Theft and Fraud Act, auditors are required to report to the Irish police any indications of bribery of an EU public official. In addition, the Companies Act 2014 contains a requirement that auditors report to the Office of the Director of Corporate Enforcement any instances of suspected indictable offences under the Companies Acts, committed by a company, its officers or agents.

Whistle-blower protection

Whistle-blowers are protected from identification by the Protected Disclosures Act 2014. Accordingly, great care must be taken not to violate these protections when an investigation involving whistle-blower information is under way. However, the identity of whistle-blowers can be disclosed to prevent a crime or to aid in the prosecution of a criminal offence.

20 Prosecution under financial record-keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Legislation related to financial record-keeping is not used to prosecute domestic or foreign bribery. However, in situations where offences under the financial record-keeping legislation have occurred, bribery may also have taken place and such offences could be prosecuted.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

There are no accounting rules specially or solely associated with the payment of bribes. However, where a bribe has been given or received, an offence may have occurred under sections 281 to 285 of the Companies Act 2014, as outlined in questions 18 and 20.

A person found guilty of contravening sections 281 to 285 or section 877 of the Companies Act 2014 is liable on summary conviction to a fine not exceeding €5,000 or imprisonment to a term not exceeding 12 months, or both. Conviction on indictment can lead to a fine of up to €50,000 or imprisonment for up to five years, or both.

A person found guilty and in contravention of any of sections 281 to 285, and fulfilling any of the following conditions, may be liable to a fine not exceeding €5,000 or imprisonment for up to 12 months, or both on summary conviction. Conviction on indictment in these circumstances can lead to a fine of up to €500,000 or imprisonment for up to 10 years, or both. The conditions are that the contravention:

- arose in relation to a company that was subsequently unable to pay its debts and the contravention has contributed to that inability or has resulted in substantial uncertainty as to the assets and liabilities of the company or has substantially impeded the orderly winding up of the company;
- persisted for a continuous period of three years or more; or
- involved the failure to correctly record and explain one or more transactions of the company, the aggregate value of which exceed €1 million or 10 per cent of the net assets of the company.

A person found guilty of contravening section 10 of the Theft and Fraud Act is liable on summary conviction to a fine not exceeding €2,500 or imprisonment for a term up to 12 months, or both, and, on conviction on indictment, a fine or imprisonment for up to 10 years, or both.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Yes. Section 83A of the Taxes Consolidation Act 1997, which deals with expenditure involving crime, provides that no deduction shall be made in computing the taxable income of a trade for any expenditure that constitutes a criminal offence. The section also prohibits an expense deduction for any payment made outside the state where the making of a corresponding payment in the state would constitute a criminal offence.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

See response to question 2. The new Corruption Offences Act applies to the bribing of a domestic public official.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. See question 2.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Corruption Offences Act

The definition of 'Irish official' is contained within the Corruption Offences Act as meaning:

- a member of Dáil Éireann;
- a member of Seanad Éireann;
- a member of the European Parliament who is such a member by virtue of the European Parliament Elections Act 1997;
- the Attorney General;
- the Comptroller and Auditor General;
- the Director of Public Prosecutions;
- a judge of a court in the state;
- an arbitrator, including any member of an arbitral board, panel or tribunal, in arbitral proceedings governed by the law of the state;
- a member of a jury in court proceedings (whether civil or criminal) in the state or in an inquest held under the Coroners Act 1962;
- an officer, director, employee or member of an Irish public body (including a member of a local authority);
- any other office holder appointed under an enactment who is remunerated out of moneys provided by the Oireachtas and who is independent in the performance of the functions of that office; or
- any other person employed by or acting for or on behalf of the public administration of the state.

This is a very wide definition and includes a wide spectrum of parliament to any other person employed by or acting for the state or any public body. This can extend therefore to anyone employed by any entity in which the state has a majority share.

Public Bodies Act

The Public Bodies Act define a public official as being a person who is an office holder, director or employee of, a public body. 'Public body' itself is extensively defined as meaning any county, town or city council, any board, commissioners or other body that has power to act under any legislation relating to local government or the public health or otherwise to administer money raised by taxes.

Ethics Act

The Ethics Act, by its nature, applies only in respect of public officials. It has no single definition of public officials, but rather divides public officials into categories, to which differing rules apply. For example, an 'office-holder' faces more stringent oversight than a 'public servant'.

An 'office-holder' under the Ethics Act generally means a minister in the Irish government and certain other members of the Irish parliament. The term 'public servant' encompasses a wide number of persons, and essentially covers all civil servants above the grade of principal officer in the civil service, as well as statutory commissioners and officers, ombudsmen and employees of state-owned and state-controlled companies.

Update and trends

Generally, Ireland is recognised as a low-rule economy for which it has been criticised following the financial crisis. In response, the Irish government in November 2017 published a suite of measures aimed at enhancing corporate governance, increasing transparency and strengthening Ireland's response to white-collar crime.

The plan included the government's intention to:

- establish the ODCE as an independent company law compliance and enforcement agency, with the ability to recruit and enlist expert staff;
- pilot a Joint Agency Task Force to tackle white-collar crime to address payment fraud (including invoice redirection fraud and credit card fraud) – a criminal enterprise that is increasingly exploited by sophisticated criminal enterprises and that can have devastating effects on individuals and on businesses, resulting in closures of companies and job losses;
- enact the Criminal Procedure Bill, which will, among other things, streamline criminal procedures to enhance the efficiency of criminal trials;
- implement the Markets in Financial Instruments Directive II (MiFID II) to improve the functioning of financial markets, making them more efficient, resilient and transparent and strengthen investor protection;
- evaluate the Protected Disclosures Act to ensure that the legislation has been effective in line with its objectives and to identify how it might be improved, if necessary;
- ensure this package of measures will be subject to regular scrutiny by the government to monitor the implementation and effectiveness of the measures; and
- enact the Criminal Justice (Corruption Offences) Bill, which was enacted and commenced on 30 July 2018.

In addition to the commencement of the Corruption Offences Act this year, the Law Reform Commission's Report on Regulatory Powers and Corporate Offences (Volume 1: Regulatory Powers and Volume 2: Corporate Offences) was published on 23 October 2018. The report recommends a number of reforms, including:

- a statutory Corporate Crime Agency and a dedicated unit in the Office of the Director of Public Prosecutions should be established, and properly resourced;
- economic regulators should have the power to impose significant financial sanctions and to make regulatory enforcement agreements, to include redress schemes; and
- reform of fraud offences to address egregiously reckless risk taking.

The report also recommends that regulatory powers should apply not only to the regulation of financial services but also to the wider economic context, such as in competition law, communications regulation and health products regulation. The Law Reform Commission set out a number of recommendations for corporate offences that would clarify the circumstances in which a corporate body could be held criminally liable for systemic failures by its senior executives.

It will be interesting to see whether this renewed focus on white-collar crime will provide the impetus to get the legislative proposals for enhanced powers to be published this year. According to the government's legislation programme for autumn/winter 2018, the heads of the Companies (Corporate Enforcement Authority) Bill, which will provide for the restructuring of the ODCE, were under preparation by the Department of Business, Enterprise and Innovation at the time of publication of the programme in September 2018. The General Scheme of the Bill has not materialised; however, the government's legislative programme for autumn/winter 2018 suggests this Bill is expected to undergo pre-legislative scrutiny by the end of 2018.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Public servants and elected members of the Irish parliament may participate in commercial activities but are required to disclose the following interests under the Ethics Act:

- occupational income above a certain threshold, other than that received as an office-holder or member;
- shares;
- directorships;
- land and buildings above a certain value;
- remunerated position as a lobbyist; or
- contracts with the Irish state above a certain value.

In addition, an office-holder is required to disclose any interests of the office holder's spouse, civil partner, child, or child of a spouse or civil partner that could materially influence the performance of the office-holder's function. Furthermore, if the office-holder or a person connected to the office-holder has a material interest in the performance of a function of his office, there is a requirement to furnish a statement of the nature of the interest.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Irish anti-corruption legislation does not take the type of gift, consideration or advantage into account when determining if an offence has been committed, but focuses on whether the elements of the particular offence have been established, including whether the gift has been given corruptly.

Corporate hospitality is not criminalised in so far as the purpose of the hospitality is to maintain good business relations. However, if the purpose of corporate hospitality is corrupt and there is an indictment or reward to exert improper influence over the individual, this will constitute an offence.

The Ethics in Public Office Act 1995 prohibits the retention of gifts that exceed €650 to specified office holders (for example, government ministers, the Attorney General or a Chairman or Deputy Chairman of Dáil Éireann or Seanad Éireann who is chairman of a committee of either House or both Houses).

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

A gift or gratuity that is not given 'corruptly' will fall outside the scope of the Public Bodies Act and Corruption Offences Act and will therefore be permissible.

In respect of disclosure of gifts by public officials, section 15 of the Ethics Act provides that gifts to office-holders that exceed €650 are deemed to be a gift given to the Irish state and must be declared by the recipient as soon as possible after receipt. The Guidelines for Office-Holders require office-holders to surrender such gifts. These provisions do not apply to a gift given by a friend, relative or civil partner for personal reasons or given pursuant to another office, a capacity or position (other than that of office holder).

The SIPO Commission has also published Guidelines for Public Servants that cover a wider range of persons than 'office-holder', who would commonly be considered 'public officials'. These guidelines require that gifts in excess of €650 be disclosed by the recipient, but do not require their surrender.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

There is no distinction drawn for the purposes of the commission of corruption offences in the Corruption Offences Act between persons employed by public and private organisations. However, the presumptions of corruption detailed in question 2 apply only to public officials.

30 Penalties and enforcement**What are the sanctions for individuals and companies violating the domestic bribery rules?**

See question 16. The sanctions for domestic bribery are the same as those in respect of foreign bribery.

31 Facilitating payments**Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?**

There is no distinction drawn in Irish law between facilitation payments and other types of corrupt payments. If the payment was made with a corrupt intent as an inducement to, or reward for, a person doing an act in relation to his or her office, employment, position or business then it will be caught under the Corruption Offences Act.

32 Recent decisions and investigations**Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.**

In *The People (DPP) v Fred Forsey* [2016] IECA 233, in November 2018 the Irish Supreme Court overturned the Court of Appeal's decision and quashed Mr Forsey's conviction on the basis that applying a reverse burden of proof on Mr Forsey to disprove the allegations that payments he received as a public official were corrupt was unconstitutional. This case concerned an appeal by Mr Forsey, a public official, against his conviction for corruption offences under the Prevention of Corruption Act (which has now been replaced by the Corruption Offences Act), for which he had been sentenced to six years' imprisonment. Mr Forsey

was found to have accepted payments from an applicant for planning permission before then attempting to influence fellow councillors to grant the application. On 21 December 2018, the Supreme Court refused the DPP's application for a retrial of the case against Mr Forsey.

To date, a limited amount of domestic bribery law enforcement has taken place. This has focused on domestic public bribery of Irish public officials and public employees for corruption. The Group of States against Corruption (GRECO) published its fourth evaluation report on corruption prevention in Ireland on 21 November 2014. While GRECO praised the transparency of the Irish legislative process and the independence of the judiciary and prosecution service, it highlighted concerns regarding corruption in Ireland and made various recommendations to safeguard against corruption. On 29 June 2017, GRECO published a compliance report relating to the 2014 evaluation. The 2017 compliance report found that Ireland had fully implemented three of the recommendations and partly implemented a further three recommendations. GRECO has concluded that Ireland's low level of compliance with the recommendations is 'globally unsatisfactory' and Ireland was asked to report again on progress by 31 March 2018, which report is still awaited.

Similarly, Transparency International's 11th enforcement review of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) published on 20 August 2015 (the last available report) ranked Ireland as conducting 'little or no enforcement' of the Convention.

On 25 January 2017, Transparency International published its 2016 Corruption Perceptions Index. This measures the perceived levels of public sector corruption in 176 countries. Ireland ranks 19th on the index and its score has slightly worsened from 75 in 2015 to 73 in 2016. However, according to the Index, Ireland continues to be perceived as one of the least corrupt countries in the world.

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