

Anti-Corruption Regulation 2018

Contributing editor
Homer E Moyer Jr



2018

GETTING THE
DEAL THROUGH 

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Homer E Moyer Jr
Miller & Chevalier

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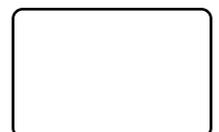


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Preface

Anti-Corruption Regulation 2018

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth 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 Portugal.

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, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
February 2018

Ireland

Claire McLoughlin, Karen Reynolds and Declan Sheehan

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. In contrast with other jurisdictions, the offences provided for under Irish legislation do not generally distinguish between the bribery of persons working in a public or private body. The only exception is the presumption of corruption, detailed below, which only applies to public officials.

Irish laws prohibiting bribery are a combination of common law and statutory law dating back to the late 19th century and are spread across a number of pieces of legislation as set out below. Please see ‘Updates and trends’ for information on upcoming legislative reform.

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 in order 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.

Statutory law

The principal statutory sources of bribery law in Ireland are:

- the Public Bodies Corrupt Practices Act 1889, as amended by the Prevention of Corruption Act 1916 and the Ethics in Public Office Act 1995 (the Public Bodies Act); and
- the Prevention of Corruption Act 1906, as amended by the Prevention of Corruption (Amendment) Act 2001 and the Prevention of Corruption (Amendment) Act 2010 (the Prevention of Corruption Act).

There is a degree of overlap between the offences under the Public Bodies Act and the Prevention of Corruption Act.

The Public Bodies Act

The principal offences under the Public Bodies Act deal with corruption in Irish public office and apply in situations where a corrupt payment is being made to, or for the benefit of, an office-holder, their special adviser, a director, or an employee of an Irish public body. In these cases, it is an offence for a person to corruptly, give, promise or offer, solicit, receive or agree to receive, for himself, or for any other person, any gift, fee, loan, reward or advantage whatsoever as an inducement to, or reward for, one of the specified public officials above, doing or refraining from doing, anything in which the public body is concerned.

The term ‘corruptly’ is not defined in the Public Bodies Act.

The Prevention of Corruption Act

The Prevention of Corruption Act prohibits three offences, the first of which is corruptly accepting a gift. It is an offence for an agent or any other person to corruptly, accept, agree to accept, or agree to obtain, a gift, consideration or advantage, for himself or any other person, as an inducement, reward or on account of the agent doing any act, or making any omission, in relation to the agent’s office or position, or his principal’s affairs or business.

The second offence is corruptly giving a gift. In this case, it is an offence for a person to: corruptly, give, agree to give or offer, a gift, consideration or advantage, to an agent or any other person, as an inducement to, or reward for, or otherwise on account of the agent doing any act, or making any omission, in relation to his office or his principal’s affairs or business.

The third offence is making a false statement. A person will be guilty of an offence if they knowingly give to any agent, or an agent knowingly uses with intent to deceive his or her principal, any receipt, account or other document which contains any statement which is false or erroneous or defective in any way, and which to that person’s knowledge is intended to mislead the principal.

A definition of ‘corruptly’ was introduced in 2011 as:

[A]cting 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 any other means.

The phrase ‘improper purpose’ is not defined.

The term ‘agent’ is broader than the common-law understanding of ‘agent’ and includes domestic and foreign nationals employed by or acting on behalf of both private and public bodies, as follows:

- (i) an employee or person acting for another;
- (ii) an office holder or director in a public body or any other person employed by or acting on behalf of the public administration of the Irish state;
- (iii) a member of the Irish parliament or an Irish elected member of the European Parliament;
- (iv) the Attorney General, the Comptroller and Auditor General, and the Director of Public Prosecutions;
- (v) a judge of the Irish courts;
- (vi) a member of government, or regional or national parliament of any other state;
- (vii) any member of the European Parliament, the Court of Auditors of the European Communities, or the European Commission;
- (viii) a public prosecutor or judge in any other state;
- (ix) a judge of any court established under an international agreement to which Ireland is a party;
- (x) a member of an international organisation to which Ireland is a party;
- (xi) any person employed by or acting on behalf of the public administration of any state; or
- (xii) any member or person employed by an international organisation to which Ireland is not a party.

The Prevention of Corruption Act also includes a discrete offence relating to corruption in office which prohibits a public official carrying out a particular act with a view to later receiving a gift, consideration or advantage for themselves or someone else. 'Public official' in this context includes only the domestic public officials set out at (ii) to (v) in the definition of 'agent' above and so does not apply to foreign public officials.

As stated above, draft legislation has been published that proposes to remove, reinstate and broaden the Prevention of Corruption Act. This is considered in more detail in 'Updates and trends'.

Other legislation

The Criminal Justice (Theft and Fraud Offences) Act 2001 (the Theft and Fraud Act) enshrines in Irish law the offences of active and passive corruption as set out in the First Protocol to the EU Convention of the Protection of European Communities Financial Interests. While in many ways similar to the offences outlined above, these apply solely to active and passive corruption of officials of the European Communities or member states that damages the EU's financial interests.

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 Public Bodies Act, the Prevention of Corruption 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 Prevention of Corruption Act and the person who gave the gift or advantage had an interest in the public official granting or refusing a licence or authorisation, making a decision relating to the acquisition or sale of property, or exercising any function under the Planning and Development Act 2000; 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.

The constitutionality of the presumption of corruption was recently upheld by the Irish Court of Appeal. See further question 32.

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 Prevention of Corruption Act and the Theft and Fraud 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 either the Public Bodies Act or the Prevention of Corruption Act if any of the acts constituting the offence were partly committed in the state and partly committed outside Ireland.

Theft and Fraud Act

The Theft and Fraud Act also contains provision for extraterritorial effect where:

- the offender is an Irish citizen or an official working for an EU institution that has its headquarters in Ireland; or
- active corruption is committed against an official who is an Irish citizen or directed against an Irish citizen who is a member of the European Commission or Parliament, the Court of Justice of the European Communities or the Court of Auditors of the European Communities.

4 Definition of a foreign public official

How does your law define a foreign public official?

Prevention of Corruption Act

The definition of 'foreign public official' is contained within the definition of 'agent' contained in the Prevention of Corruption Act, as set out in question 2, specifically those at (vi) to (xii). In particular, (xi) refers to any other person employed by or acting on behalf of the public administration of any other state.

Theft and Fraud Act

The definition of 'official' under the Theft and Fraud Act is much broader than in the Prevention of Corruption Act and includes 'community officials', to include officials, contracted employees and secondees of the European Communities, and 'national officials', which is defined by reference to the definition of national official in each individual member state of the European Communities. However, the elements of the corruption offences under the Theft and Fraud Act are narrower than those in the Prevention of Corruption Act, as set out in question 2.

Other legislation

The Public Bodies Act does not apply in respect of foreign public officials, as it is directed at the bribery of domestic public officials.

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 Prevention of Corruption Act and the Theft and Fraud Act do not take the value or type of gift, consideration or advantage into account

when determining if 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 Public Bodies Act, Prevention of Corruption Act and the Theft and Fraud Act clearly envisage the payment, or receipt, of corrupt payments through intermediaries. It is therefore immaterial whether the payment is made to an intermediary 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.

In addition, under the Prevention of Corruption Act, an officer of a company that commits an offence under that legislation will also be guilty of an offence, if the offence is proved to have been committed with the consent, connivance or approval of the officer, or is attributable to the neglect of the company's officers. However, to date, there are no recorded prosecutions of companies or their officers under Irish anti-corruption legislation.

The draft scheme of the proposed Corruption Bill contains a number of measures relating to the liability of companies for the bribery of an official and this is discussed further in 'Updates and trends'.

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 Irish legislation set out in question 2 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.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The following bodies can investigate alleged offences under Irish bribery law, relating to both foreign and domestic public officials:

- Garda National Economic Crime Bureau (this is an office of the Irish police force);
- the Revenue Commissioners;
- the Criminal Assets Bureau; and
- the Office of the Director of Corporate Enforcement.

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.

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.

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.

14 Patterns in enforcement

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

In summary, there has been no enforcement of Irish foreign bribery rules as yet. See further question 10.

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 Prevention of Corruption 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.

16 Sanctions**What are the sanctions for individuals and companies violating the foreign bribery rules?****Criminal sanctions*****Prevention of Corruption Act***

Offences under the Prevention of Corruption 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 Prevention of Corruption Act, is liable to a small fine or imprisonment or both. At the upper limit, a person convicted under the Prevention of Corruption Act is liable to an unlimited fine or imprisonment for a term not exceeding 10 years or both.

An employer summarily convicted of an offence under the whistleblower protection in the Prevention of Corruption Act can be fined up to €5,000 and imprisoned for up to 12 months. Upon conviction on indictment, an employer can be fined up to €250,000 and imprisoned for up to three years.

Theft and Fraud Act

Any person or official who is convicted on indictment of committing either active or passive corruption under the Theft and Fraud Act can be subject to an unlimited fine or imprisonment for a term of up to five years, or both.

An auditor who fails to report an indication of corruption under the Theft and Fraud Act to the Irish police will be guilty of an offence and will be liable on summary conviction to a fine of €2,500 or imprisonment to a term not exceeding 12 months.

Seizure of proceeds of crime

The DPP can obtain an order of forfeiture of a gift or consideration under the Criminal Justice Act 1994, 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 Prevention of Corruption 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 Prevention of Corruption Act. The gift or consideration can only be detained for 48 hours unless a circuit court order is obtained 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

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.

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 which relates 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 contain 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

A provision for whistle-blower protection was inserted into the Prevention of Corruption Act in 2010. This protects individuals who report suspected violations of the Prevention of Corruption Act and prohibits an employer from penalising the reporting employee.

Additional whistle-blower protection was introduced in the Criminal Justice Act 2011 along much the same terms as those inserted in 2010 to the Prevention of Corruption Act, and applies to those offences covered by the Prevention of Corruption Act.

The Protected Disclosures Act 2014, which applies to all 'workers', including employees, contractors and trainees, provides similar protections to that under the Irish anti-corruption legislation, although the motivation for making the disclosure is irrelevant as to whether it is a 'protected' disclosure.

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 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 fulfils 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 which 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 question 2. The Public Bodies Act, the Prevention of Corruption Act, the Theft and Fraud Act and the Ethics Act all apply 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?

Prevention of Corruption Act

There is a non-exhaustive list of public officials set out in section 1 of the Prevention of Corruption Act. See question 2.

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 which 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.

Theft and Fraud Act

The Theft and Fraud Act defines public officials as either:

- an official of the European Community, itself defined as including an official or contracted employee of the European Communities or a secondeed to the European Communities; or
- a national official, including any national official of another member state; this is generally understood as being a national official as defined by the national law of the member state in which the official resides.

Updates and trends

The government-sponsored Criminal Justice (Corruption Offences) Bill 2017 was presented on 31 October 2017. It aims to consolidate and reform Ireland's anti-corruption and bribery laws.

The bill provides for the offences of both active (bribe-giving) and passive (bribe-taking) bribery, which criminalises both giving and receiving a bribe in return for a person doing an act in relation to their office, employment, position or business, and applies without distinction to the public and private sectors.

The term 'corruptly' is defined as acting with an improper purpose personally or by influencing another person, whether by:

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

The bill creates a new offence of active and passive trading in influence, which prohibits the active and passive bribery of a person who may be in a position to exert an improper influence over an act of a public official. For the purposes of this offence, it is immaterial, whether or not:

- the alleged ability to exert an improper influence existed;
- the influence is exerted;
- the supposed influence leads to the intended result; or
- the intended or actual recipient of the gift, consideration or advantage is the person whom it is intended to induce to exert influence.

The bill criminalises the use, by an Irish official, of confidential information obtained in the course of his or her office, employment, position or business for the purpose of corruptly obtaining a gift, consideration or advantage for himself or herself or any other person.

The bill also creates the offences of:

- giving a gift, consideration or advantage for the purposes of facilitating a corruption offence;
- creating or using a false document with the intention of inducing another person to do an act in relation to his or her office, employment position or business to their prejudice or the prejudice of another; and
- intimidation by threatening harm with the intention of corruptly influencing a person in relation to his or her office, employment position or business.

Part 3 of the bill provides for extraterritorial jurisdiction in relation to corruption occurring outside Ireland where the acts are committed by Irish persons or entities, or take place, at least partially, in Ireland.

Part 4 of the bill provides for various presumptions of corruption in respect of certain corruption offences to include where:

- A gift, consideration or advantage has been given to an official or a connected person of an official by a person who had an

interest in the discharge by the official of any of a number of prescribed functions:

- A gift, consideration or advantage has been given to an official or a connected person of an official and the official performed, or omitted to perform, any of a number of prescribed functions giving rise to an undue advantage or benefit to the person who gave the gift, consideration or advantage or on whose behalf it was given.
- A political donation that is of a type prohibited by law or in excess of the statutory threshold is made to certain categories of public office holders and is not returned to the donor or notified to the Standards in Public Office Commission, as necessary, and where the donor had an interest in the public office holder carrying out or refraining from doing any act related to their office or position.
- An Irish public official or office holder has property that should but has not been declared in a statement of registerable interests, it shall be presumed, unless the contrary is proved, that the property concerned derives from a gift, consideration or advantage received in return for the person doing an act in relation to his office, employment, position or business.

In an important development, the bill proposes a new criminal offence under which a company shall be held liable for the corrupt actions committed for the benefit of the company by a director, manager, secretary, employee, agent or subsidiary. The bill provides for a defence, where the body corporate took all reasonable steps and exercised all due diligence to avoid the commission of the offence. As a result, companies will need to ensure that they have robust anti-bribery and corruption policies and procedures in place.

The bill sets out a range of penalties for these offences. All summary offences are subject to imprisonment of up to 12 months and Class A fines. Indictable offences (with limited exceptions) are subject to unlimited fines and imprisonment of up to 10 years. In addition, the bill includes a provision for the forfeiture of office held by an Irish official following conviction on indictment where the court is satisfied that to do so would be in the interests of justice and in the interests of maintaining or restoring public confidence in the public administration of the state. The court may also prohibit such a person from seeking to hold or occupy certain public offices for a specified period up to 10 years. The bill also includes a facility for the seizure of bribes and forfeiture of suspected bribes.

An order has been made for the bill to go to the second stage of the legislative process and it is not expected to be enacted until the second half of 2018. Accordingly, we can expect to see changes to the provisions as it passes through each stage.

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, which 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 gifts, 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.

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 Prevention of Corruption 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 Prevention of Corruption 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?

The Prevention of Corruption Act sets out the sanctions applicable to individuals and companies in respect of violations of domestic bribery rules. The Public Bodies Act sets out the sanctions applicable to public officials who are guilty of corruption in Irish public office.

Prevention of Corruption Act and Theft and Fraud Act

The sanctions for domestic bribery under these Acts are the same as those set out in question 16 in respect of foreign bribery.

Public Bodies Act

Offences under the Public Bodies Act are triable both summarily and on indictment. An individual convicted under the Public Bodies Act is liable to a fine or a term of imprisonment.

The court can also direct the convicted person to pay to his or her employer the amount or value of any gift, loan, fee or reward received by him or her. An employee or officer of a public body may also be liable to forfeit his or her right and claim to any compensation or pension to which he or she would otherwise have been entitled.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or ‘grease’ payments?

See question 6.

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, the Irish Court of Appeal upheld the constitutionality of the presumption of corruption that applies to public officials (see question 2). This case concerned an appeal by a public official against his conviction for corruption offences under the Prevention of Corruption Act, for which he had been sentenced to six years’ imprisonment. The Court upheld the constitutionality of the conviction, which had been grounded on the presumption of corruption applicable to public officials. The public official concerned was found to have accepted payments from an applicant for planning permission before then attempting to influence fellow councillors to grant the application. On 26 April 2017, the Supreme Court granted leave for Mr Forsey to appeal this finding. The Court of Criminal Appeal granted Mr Forsey legal aid for his Supreme Court appeal on 3 November 2017. It is anticipated that the Supreme Court will hear this case in early 2018.

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 has been asked to report again on progress by 31 March 2018.

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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