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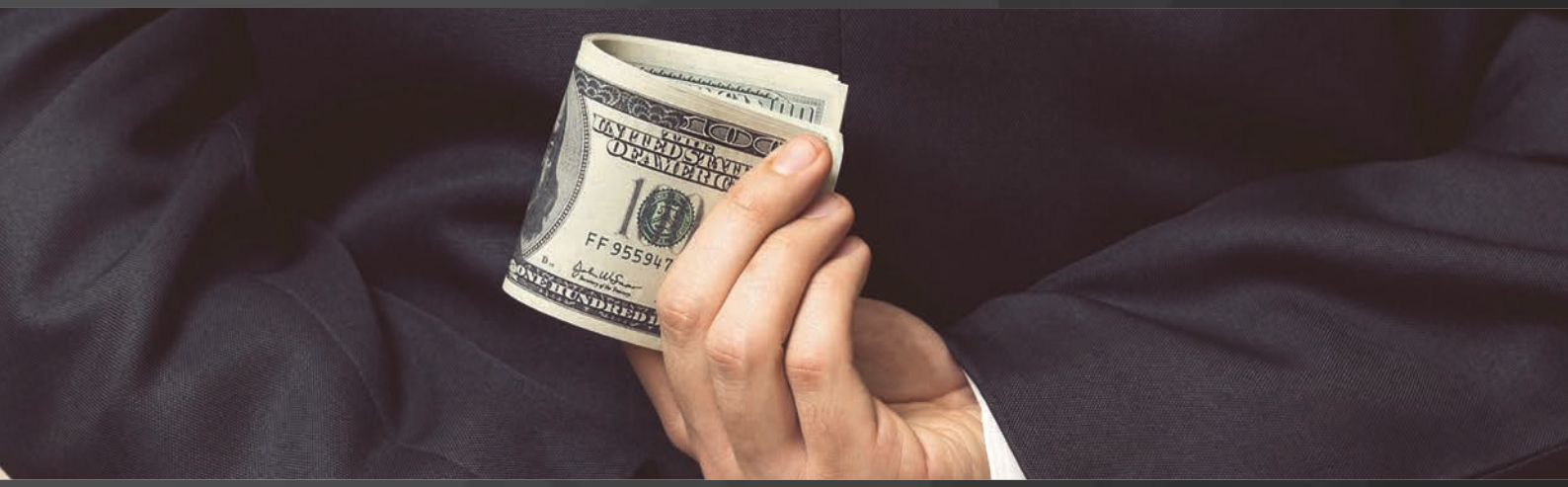

Business Crime 2020

A practical cross-border insight into business crime

10th Edition

Featuring contributions from:

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Under Irish law, offences are divided between summary (minor) offences and indictable (serious) offences. In general, regulatory bodies are authorised to prosecute summary offences along with the Garda Siochána (the Irish police) and the Director of Public Prosecutions (the "**DPP**"). However, the DPP has the sole authority to prosecute offences on indictment (except for a limited category of offences still prosecuted at the suit of the Attorney General). The DPP has no investigative function; in relation to indictable offences, the relevant regulatory or investigating body investigates the matter, prepares a file and submits it to the DPP for consideration. The DPP then makes a decision on whether to prosecute the offence on indictment or not. In addition, there are a number of authorities that prosecute business crimes in Ireland on a summary basis. These include: An Garda Siochána; the Central Bank of Ireland (the "**Central Bank**"); the Office of the Director of Corporate Enforcement (the "**ODCE**"); the Criminal Assets Bureau ("**CAB**"); the Office of the Revenue Commissioners (the "**Revenue Commissioners**"); the Environmental Protection Agency (the "**EPA**"); the Commission for Communications Regulation ("**ComReg**"); Customs and Excise, the Health Products Regulatory Authority, the Health Information and Quality Authority (the "**HIQA**"); the Workplace Relations Commission (the "**WRC**"); the Competition and Consumer Protection Commission (the "**CCPC**"); and the Office of the Data Protection Commission (the "**ODPC**").

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

As mentioned above, only the DPP can prosecute offences on indictment. However, in relation to summary offences, offences are prosecuted by the Irish police or, if there is a specific statutory provision, by the relevant authority (see question 1.3 below).

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Some authorities, such as those mentioned above, are empowered to take civil or administrative action against business crime. In particular:

- the CCPC is empowered to take civil proceedings to enforce breaches of competition law involving anti-competitive agreements and abuse of a dominant position, where the public interest does not require criminal prosecution;
- the Revenue Commissioners can take civil enforcement action in relation to revenue offences and compel compliance with revenue law through insolvency and restitution proceedings; and
- by bringing criminal proceedings for breaches of the Companies Act 2014, the ODCE can bring related civil proceedings for the restriction and disqualification of company directors. Under the General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018 which was published in December 2018, it is proposed that the ODCE will be re-established as an agency, in the form of a commission, which will be known as the Corporate Enforcement Authority (the "**CEA**"). As such it will have greater powers than the ODCE which may involve the appointment of inspectors, the commencement of criminal investigations and the resulting prosecution of summary offences, together with the civil enforcement of obligations, standards and procedures. The Bill also seeks to give the CEA new investigative tools. Then, it provides for the admission of written statements into evidence in certain circumstances and will create a statutory exception to the rule against hearsay. It has enhanced power regarding the searching of electronically held evidence in that the CEA will be permitted to access data under the control of an entity or individual, regardless of where the data is stored and to access it using any means necessary to ensure best compliance with evidence rules and digital forensics principles.

In addition, the Central Bank can impose civil and administrative penalties for breaches of banking regulations. For instance, it can impose on a person or entity: a private/public caution or reprimand; a direction to pay a penalty not exceeding €10 million or 10% of turnover, whichever is the greater or up to €1 million on an individual; and/or a disqualification that prohibits individuals from being involved in any regulated financial service provider for a specified period. Since 2006, it has imposed 129 fines on regulated entities under its Administrative Sanctions Procedure, bringing total fines imposed by the Central Bank to over €90 million.

The Market Abuse Regulation (EU 596/2014) ("**MAR**") together with the Market Abuse Directive on criminal sanctions for market abuse (Directive 2014/57/EU) became applicable in Ireland and the EU on 3 July 2016. MAR provides for fines of up to €5 million for individuals found guilty of insider dealing, unlawful disclosure or market manipulation and fines of up to €15 million or 15% of annual turnover for corporations found guilty of the same conduct.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In June 2018, former Anglo Irish Bank chief executive David Drumm was sentenced to six years' imprisonment for his role in a €7.2 billion fraud perpetrated at the peak of the banking crisis in 2008, in one of the most prominent business crime cases in Ireland to date. Mr. Drumm is the most senior employee of Anglo Irish Bank to be convicted and was found guilty of conspiracy to defraud and false accounting over deposits circulating between Anglo Irish Bank and Irish Life & Permanent that "dishonestly" created the impression that Anglo Irish Bank's deposits were €7.2 billion larger than they actually were.

On 20 June 2018, in *DPP v TN [2018] IECA 52,* the Court of Appeal held that a manager may be prosecuted for company offences where he/she has functional responsibility for a significant part of the company's activities and has direct responsibility for the area in controversy. In this case, the individual, Mr. TN, was charged with offences under the Waste Management Act 1996 concerning waste-related activities. The Court observed that in the modern business environment, responsibilities are distributed in such a way that it is difficult to say that one individual is responsible for the management of the whole of the affairs of a company. A "manager" does not have to be actively involved in every area of the company's business. The individual in this case, Mr. TN, had no involvement in the financial side of the business, but he had direct responsibility for the operation of the facility and for compliance with the terms of its waste licence. This decision has been appealed and is due to be heard before the Supreme Court this year.

In overturning the High Court decision, the Supreme Court in *Sweeney v Ireland, Attorney General and Director of Public Prosecutions [2019] IESC 39,* upheld the constitutionality of section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 (the "**1998 Act**") which has implications for mandatory reporting obligations in respect of certain business crime offences. This decision has implications for section 19 of the Criminal Justice Act 2011 (the "**2011 Act**") which provides that a person is guilty of an offence if he or she fails to report information that they know or believe might be of material assistance in preventing the commission of, or securing the prosecution of, another person of certain listed offences, including many white-collar offences. The wording of section 19(1)(b) of the 2011 Act is identical to that of section 9(1)(b) of the 1998 Act except that the former applies to a 'relevant offence' and the latter applies to a "serious offence". In finding that the provision was sufficiently certain, the Supreme Court held that the 1998 Act was clear in what it obliges witnesses to do – to disclose information pertaining to serious offences which they know will aid in the prosecution of such an offence. Whilst the Supreme Court noted that no comment has been made as to the constitutionality of similar provisions such as section 19(1)(b) of the 2011 Act, it would appear to indicate that such reporting obligations would be likely to withstand a similar legal challenge.

The ODCE has also recently launched high-profile investigations into both Independent News & Media PLC ("**INM**") and the Football Association of Ireland ("**FAI**"). In September 2018, the High Court ruled in favour of an application by the ODCE to allow inspectors to examine INM and investigate whether there may have been alleged unlawful sharing of the company's information. The investigation was commenced subsequent to the FAI's auditors filing a notice to the Companies Registration Office alleging breaches of the Companies Acts on the grounds that financial accounts were not properly maintained. If it is proved that there was a failure to keep proper accounting records, this would result in a breach of sections 281 to 285 of the Companies Act, and a potential conviction of individual board members who could face a fine of up to €50,000 and/or imprisonment of up to five years.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

Offences which are tried summarily are heard before a judge in the District Court (the lowest court). Appeals from the District Court lie to the Circuit Court. Offences tried on indictment are heard before the Circuit Court and the Central Criminal Court (the High Court exercising its criminal jurisdiction), and trials in these courts are heard by a judge and jury. While the Central Criminal Court has full and original jurisdiction to hear all criminal cases, in practice, only those cases which are outside the jurisdiction of the Circuit Court will be brought before the Central Criminal Court at first instance. Appeals from both of these courts lie with the Court of Appeal. Appeals against decisions of the Court of Appeal will be heard by the Supreme Court if the Supreme Court is satisfied that the decision involves a matter of general public importance or, in the interest of justice, it is necessary that there be an appeal to the Supreme Court. The only Criminal Court dedicated to particular crimes is the Special Criminal Court, which deals with terrorism and organised crime.

2.2 Is there a right to a jury in business crime trials?

The Irish Constitution provides that "no person shall be tried on any criminal charge without a jury", save in specified circumstances. One of these circumstances is in relation to a minor offence which is being prosecuted summarily. No distinction is made for business crimes.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

- **Securities fraud**

In accordance with the Prospectus (Directive 2003/71/EC) Regulations 2005 (the "**Prospectus Regulations**"), a prospectus must be published in order to offer securities for sale to the public in a lawful manner. The new Prospectus Regulation (2017/1129), which has taken full effect from 21 July 2019, contains a number of changes regarding the existing exemptions from this publication requirement and its content.

The Companies Act 2014 provides under section 1349 that a person who authorises the issue of a prospectus shall be guilty of an offence where such prospectus includes an untrue statement or omits information required by law to be contained in the prospectus.

- **Accounting fraud**

Irish law provides for the offence of "false accounting" under section 10 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (the "**Theft and Fraud Offences Act**"). A person is guilty of the offence if he:

- dishonestly interferes with any document required for accounting purposes;
- dishonestly fails to make or complete any accounting document; or
- produces any accounting document which he knows to be misleading or false.

Related offences which may also be committed in the process of committing the offence of false accounting include:

- making a gain or causing a loss by deception under section 6 of the Theft and Fraud Offences Act; or
- completing a report or balance sheet which contains information which the accused knew to be false under section 876 of the Companies Act 2014, or other company accounting-related offences considered further under "Company Law Offences" below.

• Insider trading

Insider trading, or dealing, is governed by the Investment Funds, Companies and Miscellaneous Provisions Act 2005, the European Union Market Abuse Regulation (EU 596/2014), and the Market Abuse Directive (Directive 2014/57/EU), which were made part of Irish law by S.I. No. 349/2016 European Union (Market Abuse) Regulations 2016 (the "**Market Abuse Regulations**"). Section 5 of the Market Abuse Regulations 2016 creates the offence of "insider dealing", and prohibits a person who possesses insider information from using that information by acquiring, or disposing of, for the person's own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. Insider information is information that, if it were made public, would likely have a significant effect on the price of financial instruments or on the price of related derivative financial instruments.

• Embezzlement

There is no specific offence of embezzlement under Irish law. Rather, embezzlement is likely to be prosecuted as a theft and fraud offence, under the Theft and Fraud Offences Act. Section 4(1) of the Theft and Fraud Offences Act provides that a person is guilty of theft if he dishonestly appropriates property without the consent of its owner, and with the intention of depriving its owner of it. "Dishonesty" is defined under the Act as appropriating "without a claim of right made in good faith".

• Bribery of government officials

The principal statutory source of anti-bribery law in Ireland is the Criminal Justice (the "**Corruption Offences Act**") 2018. The Corruption Offences Act which commenced on 30 July 2018 consolidated the existing anti-corruption laws and introduced a number of new offences. It is considerably broader in scope than the legislative regime it replaced, insofar as it criminalises both direct and indirect corruption in both the public and private sectors. The Act prohibits both "active" bribery (making a bribe) and "passive" bribery (receiving a bribe). A person is guilty of passive bribery if he corruptly accepts, agrees to accept, or agrees 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 position, or his principal's affairs or business. A person is guilty of active bribery if they 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.

One of the most important developments in the Corruption Offences Act is the corporate liability offence which allows for a corporate body to 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 available to corporates for this offence is demonstrating that the company took "all reasonable steps and exercised all due diligence" to avoid the offence being committed. Therefore, it is very important for all Irish companies to show that they have adequate policies and procedures in place, which includes ensuring that the company has carried out a full risk assessment, has implemented an anti-bribery and corruption policy, provides adequate training to all employees and ensures appropriate language in all third-party contracts.

• Criminal anti-competition

The Competition Acts 2002 – 2017 as amended (the "**Competition Act**") prohibits:

(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in Ireland or any part of Ireland (section 4); and

(b) the abuse of dominant position by one or more undertakings in trade for any goods of services in Ireland or in any part of Ireland (section 5).

There is no express statutory requirement for the prosecution to establish intention or any other particular mental state of the accused, in order to satisfy the Irish Courts that an offence under the Competitions Act has been committed.

• Cartels and other competition offences

The operation of cartels is prohibited at European Union level by Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**"). At European Union level, offences relating to the operation of cartels are investigated by the European Commission. Section 4 of the Competition Act regulates offences relating to the operation of cartels and other competition offences. As stated above, section 4(1) of the Competition Act affirms that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void".

The Competition Act offers express examples of arrangements which contravene cartel regulation, and which include arrangements that:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

An entity may breach section 4(1) by engaging in a concerned practice, or by entering into, or making or implementing a decision, of an agreement prohibited by section 4(1).

The Competition Act's prohibition on cartels applies to arrangements between two or more "undertakings" or involving an association of undertakings. An "undertaking" is defined in the Competition Act as any person, being an individual, a body corporate or an unincorporated body of persons, engaged for gain in the production, supply or distribution of goods or the provision of a service. Any officer of a company who authorises or consents to conduct prohibited under section 4(1) is also guilty of an offence. A breach of section 4 of the Competition Act or Article 101 of the TFEU is a criminal offence under the Competition Act, punishable on prosecution in the Irish Courts by fines and/or imprisonment.

The prohibition against the operation of cartels has extraterritorial effect in Ireland, and the scope of the Competition Act extends to conduct that takes place outside Ireland, but has anti-competitive effects within the State.

• Tax crimes

Irish revenue offences are prosecuted by the DPP under Part 47, Chapter 4 of the Taxes Consolidation Act 1997 (as amended) (the "**TCA**"). Offences under the TCA include the following:

- knowingly, wilfully or recklessly furnishing an incorrect return or other information to the Revenue Commissioners;

- knowingly aiding, abetting or inducing another person to deliver an incorrect return or other information to the Revenue Commissioners;
- deliberately making a false claim for relief from tax;
- failing to make certain tax returns;
- failing without reasonable excuse to comply with revenue law requirements to provide information to the Revenue Commissioners or failing to retain or produce certain tax-related records;
- knowingly, wilfully or recklessly destroying, defacing or concealing information the person is required to retain or produce under Irish tax law; and
- failing to deduct certain withholding taxes.

The *mens rea* of an offence will be of particular importance in the consideration of revenue offences as Ireland operates a self-assessment tax system. It is a requirement for many offences that the accused knowingly, wilfully or recklessly undertakes the particular act; however, certain offences, such as the failure to deduct certain withholding taxes, are strict liability offences.

In addition to the taxpayer offences identified above, a tax adviser or an auditor to a company may commit an offence if they become aware of the commission of a revenue offence by that company and: (a) do not notify the company; (b) continues to act for that company in circumstances where the company fails to rectify the matter or to report it to the Revenue Commissioners; or (c) in some circumstances, if the tax adviser or auditor fails to notify the Revenue Commissioners that they no longer act for the company.

Successful prosecutions under the TCA may result in fines or imprisonment, as well as the publication of the tax defaulter's name, address, occupation and penalty amount.

• Government-contracting fraud

Irish public procurement law governs the award of public contracts and does not make provision for a specific criminal offence of government-contracting fraud.

• Environmental crimes

There are more than 300 pieces of environmental protection legislation in Ireland, including a range of statutes aimed at dealing with pollution. Irish environmental protection legislation includes air pollution acts, water pollution acts (including fisheries acts), noise pollution acts, waste management acts, habitat and species protection legislation, sea pollution legislation, public health acts and many others. There also exists a range of Irish environmental legislation aimed at preventing industrial activities operating without, or contrary to the conditions of, an appropriate environmental licence. Further, Ireland is also subject to a large volume of EU environmental laws.

Polluters may incur liability for criminal offences, fines, clean-up costs and compensation costs under Ireland's environmental legislation. In most cases, directors, managers or other officers of a company may be prosecuted with the company for criminal offences under Irish environmental legislation, where the offence is proved to have been committed by the company with the consent or connivance of the particular individual, or is attributable to any neglect on their part. This may lead to criminal sanctions involving substantial fines and imprisonment.

• Campaign-finance/election law

Under section 24 of the Electoral Act 1997, all members of the Irish Parliament and Irish representatives in the European Parliament in receipt of donations in excess of €625 must submit a donation statement indicating the value of donation received, and the name, description and postal address of the person by or on whose behalf the donation was made. Failure to provide such a statement is an offence, which is liable to a fine and/or, at the discretion of the court, imprisonment for up to three years.

• Market manipulation in connection with the sale of derivatives

The European Union (Market Abuse) Regulations (S.I 349/2016) deal with market manipulation in respect of "financial instruments", a term which is widely defined and includes derivatives. They provide that a person may not engage in market manipulation and sets out four categories of market manipulation, any one of which, if proved, will amount to an offence. The categories are summarised as: effecting transactions or orders to trade that give, or are likely to give, false or misleading impressions; effecting transactions which secure the price at an artificial or abnormal level; employing fictitious devices or any other form of deception or contrivance; or dissemination of information which gives, or is likely to give, false or misleading signals as to financial instruments.

Each category of offence must be considered separately with respect to the requisite mental state of the accused, as each category phrases the mental element differently.

• Money laundering or wire fraud

Under section 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, as amended, a person commits a money laundering offence if the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct: (a) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property; (b) converting, transferring, handling, acquiring, possessing or using the property; or (c) removing the property from, or bringing the property into, the State.

It must be proved that the accused knew, believed, or was reckless as to whether or not the property is the proceeds of criminal conduct.

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 (the "**2018 Act**") came into force on 26 November 2018. The 2018 Act gives effect to the EU Fourth Money Laundering Directive (Directive 2015/849 ("**4AMLD**")) and makes a range of amendments to existing anti-money laundering legislation set out in the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013. Pursuant to the amendments made by the 2018 Act, there is increased responsibility on 'obliged entities' to identify and assess potential risks of money laundering and terrorist financing in their business relationships and transactions. Aside from the requirement to identify individuals holding ultimate beneficial ownership, the most important change it introduces in Irish law is the inclusion of both domestic and foreign politically exposed persons ("**PEPs**") under the new rules. Previously, only foreign PEPs were subject to a mandatory enhanced regime.

Furthermore, the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (the "**2019 Regulations**") came into force on 22 March 2019. The aim of the 2019 Regulations is to bring Ireland's beneficial ownership regulations in line with 4AMLD. Therefore, the 2019 Regulations establish that the New Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies is to be created as of 22 June 2019 and require relevant entities to transmit beneficial ownership information to the Central Register. The regulations further require relevant entities to provide beneficial ownership information on request to certain authorities which include the Revenue Commissioners and An Garda Siochána.

• Cybersecurity and data protection law

The Criminal Justice (Offences Relating to Information Systems) Act 2017 (the "**2017 Act**") was enacted on 24 May 2017 and gives effect to provisions of EU Directive 2013/40/EU on attacks against information systems.

The 2017 Act creates new offences relating to:

- unauthorised access of information systems;
- interference with information systems or with data on such systems;
- interception of transmission of data to or from information systems; and
- the use of tools to facilitate the commission of these offences.

The 2017 Act also makes provision for wide ranging, technologically specific warrants in respect of entry, search and seizure to assist in investigations of the commission of the new cybercrime offences.

Under the General Data Protection Regulation (the "**GDPR**") and the Data Protection Acts 1988 to 2018 (the "**DP Acts**"), there are a number of duties on controllers of personal data, including an obligation to process personal data lawfully, fairly and transparently, under the meaning of the GDPR and the DP Acts, for personal data to be kept accurate and up to date and to ensure appropriate security for the protection of personal data. Appropriate security measures must be taken against unauthorised access to, or unauthorised alteration, disclosure or destruction of, the personal data, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. Certain breaches of the GDPR and the DP Acts can amount to criminal offences under the DP Acts.

The offence of damaging property created by section 2 of the Criminal Damage Act 1991, includes, in relation to data, adding to, altering, corrupting, erasing or moving to another storage medium or to a different location in the storage medium in which they are kept (whether or not property other than data is damaged thereby), or doing any act that contributes towards causing such addition, alteration, corruption, erasure or movement of data.

Under section 9 of the Criminal Justice (Theft and Fraud Offences) Act 2001, a person who dishonestly, whether within or outside the State, operates or causes to be operated a computer within the State with the intention of making a gain for himself or herself or another, or of causing loss to another, is guilty of an offence.

• Trade sanctions and export control violations

The Department of Business, Enterprise and Innovation co-ordinates the implementation of the various UN and EU measures which have been accepted concerning trade.

The Central Bank, Department of Business, Enterprise and Innovation and the Department of Foreign Affairs and Trade are the competent authorities for UN and EU financial sanctions and are responsible for their administration, supervision and enforcement in Ireland.

The primary legislation which governs export controls in Ireland is the Control of Exports Act 2008 (the "**2008 Act**"). The 2008 Act includes provisions on the export of "intangibles" (e.g., exportation of software and technology through electronic means), goods imported into Ireland for exportation and brokering activities. Any breach of the provisions included in the 2008 Act may result in penalties on summary conviction of a fine of up to €5,000 and/or six months' imprisonment, or penalties on indictment of a fine of up to €10,000,000 or three times the value of the goods/technology concerned and/or up to five years' imprisonment. However, the Department of Business Enterprise and Innovation ("**DBEI**") is calling for submissions in relation to an update to the primary export control law in Ireland which may see the penalties revised upwards.

The Financial Transfer Act 1992 imposes certain legislative restrictions on financial transfers from Ireland to other countries. Provisions included in the act may result in penalties on summary conviction of a fine up to €2,500 and/or up to 12 months' imprisonment, or penalties on indictment of a fine of up to approximately €12 million or twice the amount of the value in respect of which the offence was committed (whichever is greater) and/or up to 10 years' imprisonment.

• Any other crime of particular interest in your jurisdiction

There are a number of business-related offences proscribed under the Companies Act 2014 that may be classified as "Company Law Offences". These are enforced by the ODCE. An outline of the main types of offences is set out below. These offences are generally punishable by a fine of up to €50,000, five years' imprisonment, or both, unless otherwise stated.

1. **Failing to keep adequate accounting records**
   Section 286 of the Companies Act 2014 obliges company directors to take all reasonable steps to ensure the company complies with its obligation to keep adequate accounting records. Large-scale breaches which result in an accounting discrepancy exceeding €1 million or 10% of the company's net assets may result in a fine of up to €500,000 or 10 years' imprisonment, or both.
2. **Making a false or misleading statement to a statutory auditor**
   Pursuant to section 389 of the Companies Act 2014, it is an offence for an officer of a company to knowingly or recklessly make any statement to a statutory auditor which is "misleading or false in a material particular".
3. **Providing a false statement in purported compliance with the Companies Act 2014**
   In accordance with section 876 of the Companies Act 2014, an offence is committed by any person (which includes both corporate and natural persons) who "in purported compliance with a provision of [the Companies Act 2014], answers a question, provides an explanation, makes a statement or completes, signs, produces, lodges or delivers any return, report, certificate, balance sheet or other document that is false in a material particular" and knows or is reckless to the fact that it is false in a material particular.
4. **Destruction, mutilation or falsification of a book or document**
   Section 877 of the Companies Act 2014 stipulates that any officer who does, or is party to doing, anything which has the effect of destroying, mutilating or falsifying any book or document relating to the property or affairs of the company, is guilty of an offence.
5. **Fraudulently parting with, altering or making an omission in a book or document**
   Pursuant to section 878 of the Companies Act 2014, any company officer who fraudulently parts with, alters or makes an omission in any book or document relating to the property or affairs of the company, or who is party to such acts, is guilty of an offence.
6. **Intentionally making a statement known to be false**
   Section 406 of the Companies Act 2014 provides that it is an offence for a company officer to intentionally make a statement which he/she knows to be false, in any return, statement, financial statement or other document required to ensure compliance with the obligation to keep adequate books of account.

3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Ireland has substantial jurisprudence on inchoate liability. A person may be guilty of an offence where he intentionally attempts to commit a criminal offence by carrying out an act, which is not merely preparatory, with respect to the commission of the offence. To establish liability, the attempted crime need not be completed, but the act itself must be proximate to the conduct prohibited by law. For instance, under section 4 of the Competition Act, it is an offence to attempt to enter into anti-competitive agreements. Similarly, attempting to commit a money laundering offence is prohibited under section 7(2) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 as amended.

Further, where a person incites or solicits another to commit an offence, even though the actual offence is neither committed nor attempted, he will be guilty of an offence under common law. The person encouraging or suggesting to another to carry out the offence must intend the other to commit the offence.

Where two persons agree to commit a "serious offence" (an offence liable to a term of imprisonment of four years or more), those persons are guilty of conspiracy pursuant to section 71(1) of the Criminal Justice Act 2006, irrespective of whether or not the act actually takes place.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

A company itself can be found vicariously liable for the criminal acts of its officers.

The state of mind of an employee can be attributed to the company in circumstances where the human agent is the "directing mind and will" of the company, or when an individual's conduct can be attributed to the company under the particular rule under construction.

A company can, depending on the particular statute, 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 or corruption offences.

The Criminal Justice (Corruption Offences) Act 2018 has introduced a new strict liability offence whereby companies may be held liable for the actions of directors, managers, employees or agents who commit an offence under the act for the benefit of the company, unless the company can demonstrate that it took all reasonable measures and exercised due diligence to avoid the commission of an offence. This provision has resulted in an increased focus on the part of companies towards having formal, internal anti-corruption policies in place.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

A large number of statutes concerning the regulation of companies in Ireland expressly provide for the criminal liability of directors/officers. Legislation often provides that if the offence is committed with the "consent, connivance, or wilful neglect" of a director, manager, secretary or other officer of the body corporate, that person, as well as the body corporate, shall be guilty of an offence and liable to be prosecuted and punished as if they committed the offence. Significantly, it is not necessary that the company be convicted of the relevant offence before the director or manager can be found guilty of the offence; the prosecution need only prove that the company committed the offence. In this regard, the Court of Appeal held in *DPP v TN [2018] IECA 52* that a manager may be prosecuted for company offences where he/she has functional responsibility for a significant part of the company's activities and has direct responsibility for the area in controversy.

Liability of managers, officers and directors can also arise in the context of general accessorial liability. For example, Section 7(1) of the Criminal Law Act 1997 provides that any person who aids, abets, counsels or procures the commission of an indictable offence may be tried and punished as the principal offender. The Petty Sessions (Ireland) Act 1851 provides for an equivalent regime in respect of aiding, abetting, counselling or procuring the commission of a summary offence.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

Cases are decided on a case-by-case basis.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

In a merger or acquisition context, successor liability can apply to the successor entity. Under section 501 of the Companies Act 2014, where the liability of the transferor company has not been assigned under the terms of the contract between the parties or if it is not possible, by reference to an interpretation of those terms, to determine the manner in which it is to be allocated, the liability shall become, jointly and severally, the liability of the successor companies.

In a cross-border merger, regulation 19 of the European Communities (Cross-Border Mergers) Regulations 2008 provides that, if all of the assets and liabilities of the transferor companies are transferred to the successor company, all legal proceedings pending by or against any transferor company shall be continued with the substitution, for the transferor companies, of the successor company as a party. Further, every contract, agreement or instrument to which a transferor company is a party becomes a contract, agreement or instrument between the successor company and the counterparty with the same rights, and subject to the same obligations, liabilities and incidents (including rights of set-off).

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

The prosecution of summary (minor) offences must be initiated within six months from the date of the commission of the offence. However, certain statutes provide separate time limits for the prosecution of summary offences based on the complexity of the offences in question. For example, summary offences under the Companies Act 2014 may be prosecuted at any time within three years from the date on which the offence was alleged to have been committed.

There is no statutory time limit for the prosecution of indictable (serious) offences. Nevertheless, the Irish Constitution affords every accused the right to an expeditious trial. If there is inordinate or unconstitutional delay in the prosecution of a serious offence to the extent that there is a real risk of an unfair trial, an accused may take judicial review proceedings to restrain prosecution.

There are special time limits for certain types of offences, for example, revenue offences, customs offences, which are set out in the specific legislation.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

As mentioned above, time limits run from the date of the commission of the offence and the making of the complaint stops time from running. However, for continuing or ongoing offences, the time starts on the last day on which the offence is alleged to have been committed. In some cases, the time limit is linked to a specified period after evidence of the offence comes to light or other specified event occurs. There is no time limit on the prosecution of offences in indictment, although the legislature could impose a time limit on individual offences or on such offences generally.

5.3 Can the limitations period be tolled? If so, how?

In Ireland, limitations periods in respect of civil proceedings can be tolled or suspended. For instance, limitations periods are extended in certain circumstances where the plaintiff is under a disability, e.g. a minor or person of unsound mind. However, the tolling of limitations periods for criminal proceedings is not generally recognised.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Section 12 of the Criminal Justice (Corruption Offences) Act 2018 prohibits any act exercised outside Ireland which would constitute a corruption or bribery-related offence within Ireland. Similarly, section 11 of the act addresses corruption occurring partly in the State. These extraterritorial provisions apply to Irish citizens or persons or companies resident, registered or established in Ireland, and to the relevant agents of such persons. There has been no extraterritorial enforcement action taken by Irish authorities in respect of bribery offences occurring outside Ireland.

As stated earlier at question 3.1, the CCPC may prosecute cartel-related conduct that takes place outside Ireland, but which has anti-competitive effects within the State. The CCPC has not apparently exercised this power to date.

While CAB does not have any express powers to seize the proceeds of crime located outside Ireland, they hold membership in the Camden Assets Recovery Interagency Network ("**CARIN**"), which facilitates the seizure of transnational proceeds of crime. Extraterritorial enforcement actions by CARIN agencies are rare. CAB has a further extraterritorial dimension through its ability to seize the proceeds of crime committed outside the State, which are located in Ireland.

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Depending on the specific statutory power, investigations are typically initiated by a relevant body following a complaint alleging an offence has been committed, or where the relevant body suspects that an offence has been committed. The relevant body is often the Irish police or the relevant regulatory body such as the ODCE, CAB, the Revenue Commissioners, the CCPC, the ODPC or the Central Bank. The Garda Bureau of Fraud Investigation ("**GBFI**"), a division of the Irish police, is tasked with investigating serious cases of corporate fraud. These relevant bodies may commence an investigation pursuant to, and in accordance with, the powers of investigation at their disposal under the relevant legislation.

Under the General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018 which was published in December 2018, it is proposed that the ODCE will be re-established as an agency, in the form of a commission, which will be known as the Corporate Enforcement Authority (the "**CEA**"). The CEA will be established as an independent company law compliance and enforcement agency and will have greater powers than the ODCE. The CEA will operate independently of any government department in order to provide more independence in addressing company law breaches. The establishment of the CEA is regarded as a fundamental element of the government's commitment to enhance Ireland's ability to combat white-collar crime. The primary function of the CEA will be to encourage compliance with the Companies Act 2014. As such, its role will be to investigate instances of suspected offences or non-compliance with the Companies Act 2014. This may involve the appointment of inspectors, the commencement of criminal investigations and the resulting prosecution of summary offences, together with the civil enforcement of obligations, standards and procedures. The bill seeks to give the CEA new, more extensive investigative tools. Specifically, the bill provides for the admission of written statements into evidence in certain circumstances and will create a statutory exception to the rule against hearsay. In addition, the bill sets out enhanced powers regarding the searching of electronically held evidence in that the CEA will be permitted to access data under the control of an entity or individual, regardless of where the data is stored and to access it using any means necessary to ensure best compliance with evidence rules and digital forensics principles.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Irish law enforcement and regulatory bodies are known to cooperate with their foreign counterparts on both a formal and informal basis. Informally, the extent of the engagement will depend on the relationship between the particular bodies.

In terms of formal cooperation mechanisms, for example, the Criminal Justice (Mutual Assistance) Act 2008 gives effect to 12 international agreements that establish the existing legislative framework for the provision of mutual legal assistance. The Criminal Justice (Mutual Assistance) (Amendment) Act 2015 gave effect to a further six international instruments not previously provided for by the 2008 Act. Giving effect to these additional international instruments enhances cooperation between Ireland and other EU Member States in fighting crime.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The detection and investigation of crime is a core function of the Irish police force. An Garda Síochana officers have the power to compel persons to answer questions, furnish information and produce documents to an investigation, and may apply to the District Court to procure search and arrest warrants in connection with an investigation.

Regulatory bodies such as the Central Bank, the CAB, the ODCE, the Revenue Commissioners and the CCPC are given investigatory powers under legislation. In the course of an investigation, these regulatory bodies have general powers such as, search and seizure, and, as mentioned above at question 1.1, the power to prosecute cases summarily.

Some of those bodies, for example, the ODCE and Revenue Commissioners, have the power to demand information from suspects and order the production of documents.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Section 52 of the Theft and Fraud Offences Act 2001 empowers the District Court to make orders to produce evidential material in relation to all arrestable offences, i.e., an offence which is punishable by imprisonment for a term of five years or more. On an application to the District Court by An Garda Siochana , if the judge is satisfied that a person has possession or control of a particular material relating to the commission of the offence, the judge may order the person to produce the material to a member of An Garda Siochana. This provision is frequently invoked by the Garda Bureau of Fraud Investigation in the investigation of business offences.

In addition, under sections 778, 779 and 780 of the Companies Act 2014, the ODCE may require companies, directors and other persons to produce for examination specified books and documents, where circumstances suggest that certain corporate offences may have occurred.

Regulatory bodies such as the ODCE, the Office of the Data Protection Commission ("**ODPC**"), the Central Bank, the Irish police and the CCPC are empowered by various pieces of legislation to search premises and seize evidence. These powers of entry and search are often exercised unannounced and, often, early in the morning, so-called "dawn raids". In most instances, the regulatory bodies are required to obtain and produce a search warrant before proceeding. However, the Revenue Commissioners are not required to have a warrant to enter a business premises in the investigation of revenue and customs offences. Similarly, the ODPC need only produce their officer's authorisation before conducting a dawn raid on a business premises.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

As a matter of common law, companies can assert privilege against the production or seizure of documents. There are various types of privilege recognised by Irish law. The most commonly claimed is legal professional privilege, of which there are two forms. Legal advice privilege protects confidential communications between lawyer and client that are created for the sole or dominant purpose of giving or seeking legal advice. Litigation privilege is broader as it protects confidential communications between a lawyer and client made for the dominant purpose of use in connection with existing or contemplated litigation. In addition to the general common law provisions, specific statutes such as the Companies Act 2014 and the Central Bank (Supervision and Enforcement) Act 2013 provide for the protection of privileged information during investigations by the ODCE and the Central Bank. It should be noted in the context of the investigation of competition breaches that the European Commission does not regard advice from in-house lawyers as legally privileged.

There are no distinct labour laws which protect the personal documents of employees. As regards other laws that may be applicable in these circumstances, the DP Acts and the GDPR prevent the disclosure of any information which constitutes personal data unless there is a lawful basis for such disclosure. One of the lawful bases listed in Article 6 of the GDPR is where processing, including disclosure, is necessary for compliance with a legal obligation to which the controller is subject or the performance of a contract to which the data subject is a party (such as an employment contract).

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

The General Data Protection Regulation (the "**GDPR**") which came into effect on 25 May 2018 is operative in Ireland (being directly effective in each EU Member State). The GDPR requires that the collection, processing and transfer of employees' personal data complies with requirements relating to the fairness, transparency and accountability of the processing of that personal data. For example, in respect of employee monitoring, it would be important that it is performed in a transparent fashion, such that employees are on notice of such monitoring and the purposes for such monitoring and are aware of their rights in respect of any personal data collected.

The GDPR also imposes certain restrictions on the international transfer of personal data, including employee's personal data, to countries outside the European Economic Area where the country in question is not subject to an adequacy decision or other safeguards approved under the GDPR have not been put in place. However, more generally, cross-border disclosure is not impeded by Irish legislation and the legislation in place is in line with EU regulation.

7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

The Irish police and regulatory bodies can demand that a company employee produce documents in the same manner as mentioned at question 7.2 above. Save where consent is given by the occupier of a dwelling to the regulatory body to enter a dwelling to conduct a search and to seize documents, a search warrant from the District Court must be obtained by the investigating regulatory body pursuant to the relevant section of the legislation concerned. In order to obtain such a warrant, there is a general requirement to show that there is some nexus between the investigation by the regulatory body of the offence in question and the dwelling in question; e.g., in investigations by the ODCE under the Companies Act 2014, the District Court judge may only issue a warrant to a designated officer if he is satisfied that there are reasonable grounds for suspecting that any material information is to be found on the premises. Whether or not a warrant is required to search the office, as opposed to the dwelling, of an employee will depend on the legislation pursuant to which the search is being conducted, e.g., under the DP Acts, officers conducting the search of a business premises need only produce their officers' authorisation. Searches conducted in breach of a requirement to obtain a search warrant will be unlawful, and evidence seized during such an unlawful search will be inadmissible at any subsequent trial save in extraordinary excusing circumstances.

In general, the Irish police have a limited power to enter a dwelling without consent or a warrant in circumstances such as the perceived imminent destruction within the dwelling of vital evidence.

7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

An Garda Siochana and other regulatory bodies can demand that a third person produce documents in the same manner as mentioned at question 7.2 above. There is generally a requirement in legislative provisions providing for the production of materials that there be reasonable grounds for suspecting that the material constitutes evidence of, or relating to the commission of, the offence being investigated by the body seeking production. The general standard of reasonable grounds of suspicion would likely be more difficult to satisfy in respect of seeking the production of documents from a third person as opposed to a person or entity directly involved or connected to the offence being investigated.

An Garda Siochana and regulatory bodies can search the home or office of a third person and seize documents in the same manner as mentioned at question 7.5 above. Again, in order to obtain a search warrant, the regulatory body would likely need to satisfy the court that there are reasonable grounds for suspecting that any material information is to be found on the premises. As noted above, it would likely be more difficult to satisfy this standard where the premises involved are those of a third person as opposed to the premises of a person or entity directly involved or connected to the offence being investigated.

There are, however, specific legislative protections afforded to third parties. For example, section 782 of the Companies Act 2014 provides that in advance of exercising its power requiring a third party to produce documents, the ODCE is required to notify the third party and consider any response submitted by the third party within 21 days of notification.

Questioning of Individuals:

7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

An Garda Siochana have the power to arrest and interview individuals suspected of committing a criminal offence. This questioning generally takes place in police stations.

Regulatory bodies such as those mentioned at question 7.1 above may, in certain circumstances, obtain an order compelling any person, such as an officer, director or employee of a company, to furnish information or submit to questioning in relation to an ongoing investigation. There is no defined forum for this questioning.

7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

Orders for the furnishing of information can be made against third parties, as mentioned at question 7.6.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

The Irish Constitution recognises a right to silence/the privilege against self-incrimination. Arrested suspects are brought into police custody for questioning "under caution". The suspect should be cautioned that they have the right to maintain silence, and anything they say may be used in evidence. However, it should be noted that under the Criminal Justice Act 1984 (as amended), in the case of arrestable offences, inferences can be drawn at trial from an accused's silence. The right to silence can be abridged by statute, most often in the context of regulatory investigations. Section 881 of the Companies Act 2014 provides that answers given by persons in the context of certain types of investigations under the Companies Act 2014 may be used in evidence. However, this has been interpreted by the courts to mean that statements given under statutory compulsion cannot be used in subsequent criminal proceedings, whereas voluntary statements can be used in evidence.

There is no general right under Irish law to be represented by an attorney during questioning. In *DPP v Gormley [2014] IESC 17*, the Supreme Court identified that an arrested and detained person has a right to legal advice before being questioned in a police station in circumstances where they positively assert such a right.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

There are two methods of initiating a criminal case. The first is by way of a summons served by the Irish police on a defendant directing the attendance of that person before the District Court on a certain date to answer the allegations. Section 1 of the Courts (No. 3) Act 1986, as amended by section 49(3) of the Civil Liability and Courts Act 2004, provides that an application for the issue of such a summons may be made to the appropriate office by, or on behalf of, the Attorney General, the DPP, a member of the Irish police or any person authorised by any enactment to bring and prosecute proceedings for the offence concerned (for example, a regulatory authority as discussed at question 1.1 above). This procedure is referred to as the "making of a complaint".

The second method of initiating criminal proceedings and securing the attendance of a person before a court is by way of arrest and charge. Once a person is arrested, he is to be charged "as soon as reasonably practicable" with the offence for which the arrest was implemented, and must then be brought before a court to answer the charge.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

The DPP's "Guidelines for Prosecutors" was first published in 2001, and aims to set out, in general terms, the principles to guide the initiation and conduct of prosecutions in Ireland. The document, which is now in its fourth edition as published in 2016, is intended to give general guidance to prosecutors so that a fair, reasoned and consistent policy underlies the prosecution process. According to the Statement of General Guidelines for Prosecutors, some of the factors which will be taken into account include:

- the scale and gravity of the issues involved;
- the strength of the available admissible evidence;
- the potential impact of the apparent misconduct;
- the degree of culpability, responsibility and experience of the alleged offender;

- the cooperation of the alleged offender and the potential for further misbehaviour;
- the need for deterrence, both personal and general, in relation to particular offences; and
- public interest considerations.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pre-trial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

In Ireland, neither pre-trial diversion agreements nor deferred prosecution agreements are available. However, the Law Reform Commission (the "**LRC**") has recommended in its Report on Regulatory Powers and Corporate Offences which was published on 23 October 2018 that Deferred Prosecution Agreements (a "**DPA**") be introduced. They recommended that such DPAs would be based on the UK model, which are subject to court approval. In the UK, the court must be satisfied that (a) the terms of the DPA are fair and proportionate, and (b) the approval of the DPA is in the interests of justice before any DPA is approved. Whilst any recommendations of the LRC are not always followed or implemented, they are usually given serious consideration by the Irish government.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

See above at question 8.3.

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

In addition to a criminal prosecution being instituted against a defendant, that defendant may also, or alternatively, be subject to civil proceedings arising out of the same set of circumstances. In Ireland, there is no absolute obligation to adjourn the civil proceedings pending the completion of the criminal proceedings, but rather the onus rests upon the party seeking a stay of the civil proceedings to establish the grounds necessary to enable the court to do so.

Notwithstanding this, the courts do recognise the interaction of criminal and civil proceedings in certain respects; for instance, a conviction in a criminal prosecution is admissible as *prima facie* evidence of the offending act in civil proceedings arising out of the same circumstances.

In relation to the imposition of civil penalties instead of criminal disposition of an investigation, in some circumstances, regulatory bodies have a choice in terms of the approach taken. For example, the Central Bank has the power to pursue criminal or civil proceedings in relation to breaches of regulatory requirements by regulated entities. In deciding whether to pursue criminal proceedings, the Central Bank will exercise its discretion, having regard to the DPP's "Guidelines for Prosecutors".

Interestingly, CAB has the power to seize assets which are suspected to be the proceeds of a crime, even where no criminal conviction has been secured.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

In criminal cases, the prosecution bears the legal burden of proof at all times, but at times, the defence may bear an evidential burden of proof. In respect of an affirmative defence, the evidential burden of proof rests with the defence. For example, self-defence is an affirmative defence where the onus is on the defendant to satisfy the judge that the defence is a live issue which should be left to the jury to determine. Once this evidential burden is satisfied, the legal burden is then on the prosecution to prove the offence and that the defence of self-defence does not apply.

In some circumstances, statutes governing business crime offences provide for evidential presumptions. For instance, under section 6(2) of the Competition Act in proceedings for breach of competition law, it is presumed that price-fixing agreements have as their object or effect the prevention, restriction or distortion of competition. Once the prosecution proves the existence of the agreement "beyond a reasonable doubt", the presumption applies and, in order to rebut the presumption, the defendant must prove, on the "balance of probabilities", that the agreement did not have the presumed objective.

In addition, in some circumstances, business crime offences are "strict liability" offences. In these circumstances, conviction is not dependent on the prosecution proving the mental element of criminal intent; it is sufficient for the purposes of imposing liability that the unlawful act was committed.

9.2 What is the standard of proof that the party with the burden must satisfy?

Where the burden of proof lies on the prosecution, the standard of proof in a criminal trial is "beyond a reasonable doubt". Any affirmative defence raised by a defendant must be proven on the "balance of probabilities". As mentioned at question 9.1, the standard imposed on the defendant to rebut an evidential presumption is the "balance of probabilities". The burden of proof in civil matters is the "balance of probabilities".

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

Certain minor offences can be prosecuted on a summary basis, which means that no jury is present and the arbiter of fact is the trial judge. The trial judge also determines whether the burden of proof has been met. If the offence is prosecuted on indictment, in the presence of a jury, the arbiter of fact is the jury. In a jury trial, the jury will, with the directions of the trial judge, determine whether the respective parties have discharged the burden of proof.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

As mentioned at question 3.2, where two persons agree to commit a "serious offence" (any offence liable to a term of imprisonment

of four years or more), those persons are guilty of conspiracy pursuant to section 71(1) of the Criminal Justice Act 2006, irrespective of whether or not the act actually takes place. Under Irish legislation, a person charged with conspiracy is liable to be indicted, tried and punished as a principal offender. Therefore, a person who is convicted of conspiracy under section 71 is subject to the same penalties available on conviction of the "serious offence".

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Unless a crime is defined by statute as one of strict or absolute liability, a defendant cannot be found guilty of a crime unless they possess the requisite "*mens rea*" – a guilty mind. The burden of proof in all criminal cases lies with the prosecution and the threshold is "beyond all reasonable doubt".

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

It is not a defence to a criminal charge that a defendant is ignorant of the law. Irish criminal law employs the common law principle that ignorance of the law is no excuse.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

A genuine mistake of fact may entitle a defendant to be acquitted where, for example, the mistake prevents him from possessing the relevant state of mind required for the offence. For example, it is a defence to an allegation of theft if the defendant can satisfy the court that he honestly believed that he had a legal right to the property. If the issue is raised by the defendant, the onus of proving that the defendant did not make a mistake generally lies on the prosecution.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

There are a number of legislative provisions that impose a positive obligation on persons or entities to report a wrongdoing in certain circumstances. Most significantly, section 19 of the Criminal Justice Act 2011 provides that a person is guilty of an offence where they fail to report information which they know or believe might be of "material assistance" in preventing the commission or securing the prosecution of another person of certain listed offences, including many corporate crime offences. The disclosure must be made "as soon as practicable", and a person who fails to disclose such information to the Irish police may be liable to a fine and/or imprisonment of up to five years.

Other mandatory reporting obligations to either or both the Irish police and/or individual regulators include:

- duty on persons with a "pre-approved control function" to report breaches of financial services legislation to the Central Bank of Ireland;
- duty on designated persons (e.g. auditors, financial institutions, solicitors) to report money laundering offences;
- duty on auditors to report a belief that an indictable offence has been committed;
- duty on auditors/persons preparing accounts to report theft and fraud offences; and
- duty on all persons to report any offence committed against a child.

In respect of the ability to receive leniency or "credit" for voluntary disclosure, please see the response to question 13.1 below.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?

No express provision for immunity, leniency or "credit" in prosecution is afforded by legislation; however, self-reporting may be considered a mitigating factor. Unlike other jurisdictions, Ireland does not make statutory provision for deferred prosecution agreements. However, as noted at question 8.3 above, the LRC has recommended in its Report on Regulatory Powers and Corporate Offences that DPAs be introduced in Ireland.

The DPP has a general discretion whether or not to prosecute in any case, having regard to the public interest. Within that discretion is the power to grant immunity in any case. Any such grant of immunity will generally be conditional on the veracity of information provided and an agreement to give evidence in any prosecution against other bodies or individuals.

There are no specific guidelines governing the grant of immunity in general. However, in the realm of competition law, the CCPC, in conjunction with the DPP, operates a Cartel Immunity Programme (the "**CIP**"). A person applying for immunity under the CIP must come forward as soon as possible, and must not alert any remaining members of the cartel to their application. In addition, the applicant must not have incited any other party to enter or participate in the cartel prior to approaching the CCPC. Immunity under the CIP is only available to the first member of a given cartel that satisfies these requirements.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

See question 13.1.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

Irish law does not recognise plea bargaining. The decision to prosecute is at the discretion of the DPP.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

As mentioned above, Irish law does not provide for plea bargaining.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

Under the Irish Constitution, sentencing is the sole remit of the judiciary. Unlike other jurisdictions, such as the United Kingdom, the Irish legislature has not prescribed rules or guidelines for the judiciary to consider when passing sentence.

A judge's discretion in sentencing can be influenced in limited circumstances. Section 13(2)(a) of the Criminal Procedure Act 1967, as amended by the Criminal Justice Act 1999, provides that, if at any time, a person charged with an indictable (serious) offence wishes to plead guilty and the court is satisfied that he understands the nature of the offence and the facts alleged, the court may, with the consent of the DPP, deal with the offence summarily, meaning the accused is liable to a fine of up to €5,000 and/or imprisonment of up to 12 months. This procedure is invoked in many regulatory statutes, including the Consumer Protection Act 2007 and certain revenue offences.

Whether an accused pleads guilty or is found guilty after a trial, he is entitled to make, or have made on his behalf, a "plea in mitigation" before the sentence is passed. This plea sets out the mitigating factors to be considered in sentencing the offender, and is an attempt to persuade the court to adopt a more lenient sentence. After the plea in mitigation is made, the judge will often reduce the sentence in consideration of the factors set out by the defendant's legal counsel.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

The Irish Supreme Court has recognised (*State (Healy) v Donoghue* [1986] IR 325) that sentences must be proportionate to the gravity of the offence committed and must bear in mind the personal circumstances of the offender.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

A guilty verdict can be appealed by the defendant.

A non-guilty verdict is generally not appealable. However, the Criminal Procedure Act 2010, as amended by the Court of Appeal Act 2014 permits a re-trial following a non-guilty verdict for "relevant offences" where "new and compelling" evidence later emerges. "Relevant offences" include serious crimes such as murder, but also include offences against the State and organised crime. The DPP may make only one such application for a re-trial and a re-trial must be in the public interest. The DPP may also make an application for re-trial where the previous acquittal was tainted by the commission of an offence against the administration of justice. In addition, under section 23(1) of the Criminal Procedure Act 2010, as amended, the DPP or the Attorney General may appeal to the Supreme Court on a "with prejudice" basis on a point of law regarding a direction of the Court of Appeal or the exclusion of evidence.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

A criminal sentence following a guilty verdict is appealable by the defendant.

The DPP can appeal a criminal sentence handed down in the Circuit, Central Criminal or Special Criminal Court where it considers it to be "unduly lenient", but cannot appeal a sentence of the District Court. The burden of proving that the sentence was "unduly lenient" rests with the DPP.

16.3 What is the appellate court's standard of review?

An appeal from the District Court to the Circuit Court is a *de novo* appeal. As such, questions of both law and fact are open to review and new evidence may be introduced by either party.

If the accused is tried in the Circuit Court or Central Criminal Court, the accused may appeal against their conviction and/or sentence to the Court of Appeal. The Court of Appeal reviews the decision of the trial judge but does not re-hear the case. No new evidence can be introduced in the Court of Appeal. Appeals against decisions of the Court of Appeal will be heard by the Supreme Court if the Supreme Court is satisfied that the decision involves a matter of general public importance, or if, in the interests of justice, it is necessary that there be an appeal to the Supreme Court. The Supreme Court reviews the decision handed down in the Court of Appeal but does not re-hear the case.

When considering an appeal of a criminal sentence, the Court will review the record of the trial and assess the trial judge's reasons for giving a particular sentence. The Court will consider a sentence "unduly lenient" only if it believes the trial judge erred on a point of law. The Court of Appeal will not change a sentence if it is of the view that the sentence was too light or because it would have given a different sentence.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

Section 9 of the Criminal Procedure Act 1993 provides that a person whose conviction has been quashed as a miscarriage of justice, or who has been acquitted on a re-trial, may apply for a certificate to enable him to claim monetary compensation from the Irish government. Alternatively, the person may institute an action for damages.

A person applying to the Minister for Justice for such a certificate must establish that a newly discovered fact demonstrates that there has been a miscarriage of justice at trial. The compensation amount is decided by the Minister for Justice, and this decision can be appealed to the High Court.

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