

Anti-Corruption Considerations in Private M&A (Ireland)

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A Practice Note on the anti-corruption issues for firms to consider when acquiring an Irish company.

Summary of CJA 2018

- Offences
- Liability of Body Corporates and Officers
- Defences
- Extra-Territorial Effect
- Enforcement
- Penalties

Potential Bribery and Corruption Risks for Buyers

Buyer's Potential Liability for Bribery and Corruption

Purpose of Anti-Corruption Due Diligence

Scope of Anti-Corruption Due Diligence

- Professional Advisers
- Managing the Relationship Between the Parties

Anti-Corruption Due Diligence Process

- Initial Assessment of Corruption Risk
- Anti-Corruption Investigation
- Reporting Corruption
- Limitations on Anti-Corruption Due Diligence
- Anti-Corruption Due Diligence Report

Dealing with Identified Corruption Risks

Contractual Protection

- Anti-Corruption Representations and Warranties
- Anti-Corruption Related Indemnities
- Post-Completion Monitoring

Criminal Procedure Act 2021

This Note gives an overview of the anti-corruption issues to consider in private mergers and acquisitions (Private M&A) in Ireland. It commences by giving an overview of the key piece of legislation in this area, the *Criminal Justice (Corruption Offences) Act 2018* (CJA 2018). The Note considers the main offences under the CJA 2018, the sanctions for breach, the available defences, the extra territorial nature of certain sections of the CJA 2018, how enforcement is handled in Ireland and the obligation to report corruption.

The Note moves on to consider how the regime impacts private M&A in Ireland. It looks at the potential bribery and corruption risks for buyers and potential liability for bribery and corruption. The Note then considers the anti-corruption due diligence process including the factors that influence its scope, who carries it out, questions to be asked and information needed.

Finally, the Note considers what level of post completion monitoring should be undertaken by the buyer and future changes to Irish anti-corruption laws.

Summary of CJA 2018

The criminal law on corruption is mainly set out in the CJA 2018.

The legislation was intended to give effect in Ireland to certain obligations at EU and international level relating to preventing corruption. This includes, for example, the *Organisation for Economic Co-operation and Development* (OECD) Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions, which was adopted on 21 November 1997 and ratified by Ireland in 2003.

Offences

The CJA 2018 contains various corruption offences. These include:

- Active and passive corruption (*section 5(1)-(2), CJA 2018*).
- Active and passive trading in influence (*section 6(1)-(3), CJA 2018*).
- Corruption in relation to an office, employment, position or business (*section 7(1)-(2), CJA 2018*).
- Giving a gift, consideration or advantage that may be used to facilitate an offence (*section 8, CJA 2018*).
- Creating or using false documents (*section 9(1)-(2), CJA 2018*).
- Intimidation (*section 10(1)-(2), CJA 2018*).

Most of the offences are expressed as applying to conduct which is carried out “corruptly”. The CJA 2018 defines “corruptly” broadly. It includes acting with an improper purpose personally or by influencing another person, whether:

- By means of making a false or misleading statement.

- By means of withholding, concealing, altering or destroying a document or other information.
- By other means.

The CJA 2018 also contains several presumptions of corruption once certain facts are established. For example, there is a presumption that a gift, consideration or advantage has been given or received corruptly where an official is tasked with carrying out a certain function and the donor had an interest in the carrying-out of that function (for example, the grant of a licence) or in the failure of the official to carry out that function (for example, the prosecution of an offence).

Active and Passive Corruption

Active corruption means someone who either directly or indirectly, by themselves or with another person, corruptly offers, or corruptly gives or agrees to give, a gift, consideration or advantage to a person as an inducement to, or reward for, or otherwise on account of, any person doing an act in relation to their office, employment, position or business (*section 5(1), CJA 2018*).

Passive corruption means someone who either directly or indirectly, by themselves or with another person, corruptly requests, corruptly accepts or obtains, or corruptly agrees to accept, for themselves or for any other person, a gift, consideration or advantage as an inducement to, or reward for, or otherwise on account of, any person doing an act in relation to his or her office, employment, position or business (*section 5(2), CJA 2018*).

Active and Passive Trading in Influence

Active trading in influence is a person who, either directly or indirectly, by themselves or with another person, corruptly offers, or corruptly gives or agrees to give, a gift, consideration or advantage to induce another person to exert an improper influence over an act of an official in relation to the office, employment, position or business of the official (*section 6(1), CJA 2018*).

Passive trading in influence is a person who, either directly or indirectly, by themselves or with another person, corruptly requests, corruptly accepts or obtains, or corruptly agrees to accept, for himself or herself or for any other person, a gift, consideration or advantage on account of a person promising or asserting the ability to improperly influence an official to do an act in relation to the office, employment, position or business of the official (*section 6(2), CJA 2018*).

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.
- The intended or actual recipient of the gift, consideration or advantage is the person whom it is intended to induce to exert influence.

(*Section 6(3), CJA 2018*.)

Corruption in Relation to Office, Employment, Position or Business

This means an Irish official who:

- Either directly or indirectly, by themselves or with another person, does an act in relation to his or her office, employment, position or business for the purpose of corruptly obtaining a gift, consideration or advantage for himself or herself or for any other person.
- Uses 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 for any other person.

(Section 7, CJA 2018.)

Giving a Gift, Consideration or Advantage That May Be Used to Facilitate Offence Under CJA 2018

This offence is committed if a person who gives a gift, consideration or advantage to another person where the first-mentioned person knows, or ought reasonably to know, that the gift, consideration or advantage, or a part of it, will be used to facilitate the commission of an offence under the CJA 2018 (*section 8, CJA 2018*).

Creating or Using False Documents

This offence is committed where person who, either directly or indirectly, by themselves or with another person, corruptly creates or uses a document, that the person knows or believes to contain a statement which is false or misleading in a material particular, with the intention of inducing another person to do an act in relation to his or her office, employment, position or business to the prejudice of the last-mentioned person or another person (*section 9, CJA 2018*).

Document is widely drafted and is a non-exhaustive definition including the following:

- A book, record or other written or printed material in any form (including in any electronic device).
- A map, plan or drawing.
- A disc, tape or other mechanical or electronic device in which data other than visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the disc, tape or other device.
- A film, disc, tape or other mechanical or electronic device in which visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape or other device.
- A copy of any of the above.

An electronic device includes any device which uses any electrical, digital, magnetic, optical, electromagnetic, biometric or photonic means, or other forms of related technology, or any combination thereof, to store or transmit data or both to store and transmit data.

(Section 9(1), CJA 2018.)

Intimidation

This occurs if a person, either directly or indirectly, by themselves or with others threatens harm to a person with the intention of corruptly influencing that person or another person to do an act in relation to the person's office, employment, position or business (*section 10, CJA 2018*).

Harm includes loss, disadvantage or injury of any kind.

Liability of Body Corporates and Officers

A body corporate will also be guilty of an offence if an offence under the CJA is committed with the intention of obtaining or retaining business for the body corporate, or an advantage in the conduct of its business by:

- A director, manager, secretary or other officer.
- A person purporting to act in that capacity.
- A shadow director.
- An employee, agent or subsidiary of the body corporate.

(*Section 18(1), CJA 2018*.)

This is a strict liability offence and liability is not restricted to cases where the natural person(s) involved are prosecuted or convicted.

Where a body corporate commits an offence under the CJA 2018 and it is proved that the offence was committed with the consent or connivance, or was attributable to any wilful neglect, of any director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, that person will also be guilty of an offence (*section 18(3), CJA 2018*).

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

Defences

Under section 18(2) of the CJA 2018, it is a defence for a body corporate to prove that it "took all reasonable steps and exercised all due diligence to avoid the commission of the offence" (*section 18(2), CJA 2018*). There is no guidance in the CJA 2018 as to how the requirements of this subsection might be satisfied. However, the Irish offence is similar to the "failure to prevent" offence in section 7 of the UK Bribery Act 2010.

Irish companies may need to go further than their UK counterparts as the UK requirement to have "adequate procedures" is designed to prevent persons associated with a commercial organisation from undertaking such conduct. This is arguably an easier standard to meet than the dual requirement set out in the Irish legislation, which requires that a body corporate "took all reasonable steps and exercised all due diligence to avoid the commission of the offence".

Extra-Territorial Effect

The CJA 2018 has extra-territorial effect. For instance, a person may be tried in Ireland for an offence under the CJA 2018 if any one or more of the acts alleged to constitute the offence were committed in Ireland or on board an Irish ship or on an aircraft registered in Ireland (*section 11, CJA 2018*). This is notwithstanding that the other acts alleged to constitute the offence were committed outside Ireland.

In addition, section 12 of the CJA 2018 has extra-territorial effect where:

- A person does an act outside of Ireland that, if done in Ireland, would constitute an offence under specific sections of the CJA 2018 and the act is committed on board an Irish ship or aircraft and the person concerned is an Irish official acting in their capacity as such, an Irish citizen or resident, or an Irish company or other body corporate.
- An EU official working for an EU institution or other body set up under the EU treaties and headquartered in Ireland, does an act abroad that, if done in Ireland, would be an offence under section 5 of the CJA 2018.
- A person does an act abroad that, if done in Ireland, would be an offence under section 5(1) of the CJA 2018 and involves certain specified individuals.

In each case, the particular act must also be an offence in the place where it was done. A guilty party will be exposed to the same penalty as if the act had been done in Ireland.

In summary, section 11 refers to corruption where some elements of the offence occur partly outside Ireland and section 12 refers to an offence carried out just outside Ireland in particular circumstances.

Enforcement

Ireland does not have a specialised institution for anti-corruption law enforcement. Ireland's national police service, *An Garda Síochána*, has primary responsibility for investigating suspected incidences of bribery and corruption. Corruption and bribery may be investigated by local divisions or by the Garda National Economic Crime Bureau, which, among other things, is responsible for investigating foreign bribery.

The Criminal Assets Bureau may also investigate instances of bribery or corruption when exercising its powers to seize the proceeds of crime on a civil basis. The Garda Síochána prosecutes offences at summary level and the Director of Public Prosecutions prosecutes offences on indictment.

Penalties

The penalties on conviction for an offence under the CJA 2018 can include a fine, imprisonment, forfeiture of property or of an office, position or employment as well as a prohibition on holding office for a specified period. The severity of the penalty will depend on the nature of the specific offence. The CJA 2018 also provides for seizure and forfeiture of a suspected bribe.

In addition to the offences set out in the CJA 2018, section 10 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* (CJ(TFO)A 2001) criminalises false accounting. The *Companies Act 2014* (CA 2014) contains various offences relating to falsifying of company books and documents.

Ireland has also adopted several other measures designed to promote transparency, particularly in public life. These include:

- The *Freedom of Information Act 2014*. This gives every person the right to access information held by public bodies and to obtain reasons for decisions affecting that person.
- The *Protected Disclosures Act 2014* (PDA 2014). This provides a general suite of employment protections and legal immunities to whistleblowers.
- The *Regulation of Lobbying Act 2015*. This sets out mandatory registration and disclosure requirements in respect of lobbying of public officials.

As a member of the EU, Ireland is also subject to EU legislation, including the anti-money-laundering and counter-terrorist financing framework. For more on this, see *Practice Note, Fourth Money Laundering Directive (MLD4)* (UK) and *Anti-money laundering toolkit: EU AML resources* (UK).

Potential Bribery and Corruption Risks for Buyers

There are several potentially significant legal, financial and reputational risks involved in a buyer acquiring a target company or business which is or has been involved in bribery and corruption. These risks include:

- **Criminal investigation and civil recovery.** It is possible that following the acquisition, the target, its subsidiaries or its senior officers could be prosecuted under the applicable anti-corruption law(s) for bribery and corruption that took place before the acquisition. This could result in a criminal conviction and/or fine. Where a prosecution is brought, in addition to the cost of meeting any financial sanctions that are ultimately levied, there will also be an inevitable diversion of valuable management time in dealing with the proceedings, which has the potential to undermine the value and stability of the acquired company or business(es).

Contracts and licences obtained through improper payments may be lost. Alternatively, if a contract was won through corrupt practices, any payments from the contract may amount to the proceeds of crime.

The gross revenue from any contract or asset obtained as a result of corruption could be confiscated by the relevant authority.

Depending on the advisers hired by the buyer to carry out the due diligence and whether they are regulated by any professional body or authority, additional investigations may be initiated in the home jurisdictions in which the relevant professional authority or body is located.

- **Target's value may be distorted.** The financial information relating to the target company or business that the buyer has relied on in determining the acquisition price may be distorted as a result of bribery and corruption. Consequently, the financial information relating to the target or its business will be affected. For example, figures may have been falsified or sales results inflated by contracts obtained through bribery.

- **Loss of public sector contracts.** The target or its subsidiaries could be prevented from doing business with public sector bodies (for further information, see *Standard Clause, Anti-corruption warranties: Cross-border: Drafting note: 1.5 Public contracts (Optional)*).
- **Loss of key officers or employees.** The senior officers of the target could face prosecution and personal liability under the CJA 2018. As a result, they may be prevented from acting as director of the target.
- **Reputational damage.** As well as damage to the reputation of the target or its business, the buyer may also face damage to its own reputation by association. If the buyer is a publicly listed company, this could have a material adverse effect on the buyer's share price.
- **Substantial remedial costs.** The buyer may end up incurring significant costs in remedying corrupt practices and implementing new anti-corruption procedures after completing the acquisition.

Buyer's Potential Liability for Bribery and Corruption

Although a buyer may be unlikely to acquire primary liability for historic, concluded bribery taking place within the target group before completion, the buyer may commit an offence if bribery continues to take place after completion. For example, the buyer may be at risk of prosecution for failing to prevent bribery under section 18 of the CJA 2018 if it fails to identify bribery due to inadequacies in its due diligence (or it fails to take appropriate steps to remedy identified bribery following completion) and an associated person of the buyer continues the bribery post-completion (see *Offences*).

The likelihood of such liability arising will depend on the circumstances. This includes considering factors such as the nature of relationship between the entity involved in the bribery and the buyer (for example, whether it is performing services for the buyer) and whether any bribe is paid for the buyer's benefit. The buyer's liability will also be subject to the "took all reasonable steps and exercised all due diligence" to the extent this is available (see *Defences*). The nature and extent of the buyer's due diligence investigation is likely to be instrumental in establishing the adequacy of its procedures for the purposes of this defence.

In some circumstances, the buyer may also be at risk of prosecution or investigation under the CJA 2018 as a result of bribery (both historical and current) carried out by the target. This might arise where, for example, the target has a revenue generating contract or asset that has been acquired as a result of bribery or corruption. If, following completion, the buyer receives the benefit of income arising from the tainted asset or contract, this could give rise to liability for a money laundering offence under the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010-2021.

Purpose of Anti-Corruption Due Diligence

Given the potentially significant risks to a buyer in acquiring a company or business that has been involved in bribery and corruption, in most acquisitions the buyer should carry out some form of anti-corruption investigation (see *Potential Bribery and Corruption Risks for Buyers*).

Anti-corruption due diligence aims to effectively identify, counter and manage the investment risk of acquiring a company or business. Accordingly, the level of anti-corruption due diligence that is appropriate to a particular transaction will vary depending on the circumstances and should be

proportionate and risk based. For example, if the buyer will be entering new markets or doing business in new countries following the acquisition, it should undertake a proper risk assessment of the local markets and local laws. This particularly applies if the buyer intends to rely on agents and other intermediaries in those markets.

Scope of Anti-Corruption Due Diligence

The scope of anti-corruption due diligence can be influenced by a variety of factors. These include:

- The transaction timetable.
- The parties' bargaining position.
- The level of information available (or that the seller is willing to provide) concerning the target company or business.
- The extent of the buyer's resources and its appetite for risk.
- Whether it is a public or private transaction.
- The nature of the transaction, size of the stake the buyer is acquiring, the applicable anti-corruption laws and regulatory environment.
- The structure of the transaction (for example, whether it is a bilateral or an auction sale).
- The jurisdiction(s) and industry sectors in which the company or business operates.

Professional Advisers

Professional advisers, such as accountants and lawyers, advising the buyer will usually conduct anti-corruption due diligence as part of general due diligence. In high risk or high value acquisitions, anti-corruption due diligence may be delegated to advisers with specific competence in this area.

Managing the Relationship Between the Parties

Anti-corruption due diligence may present challenging aspects. These include:

- Cultural sensitivities in requesting certain types of information.
- A duty to report corruption under the applicable anti-corruption laws.
- Attitudes to materiality vs zero tolerance with regard to reporting obligations.

Besides recommending the appropriate scope of anti-corruption due diligence, the professional advisers will also be able to help manage the relationship between the buyer(s) and the seller(s), particularly in responding to sensitive information (such as evidence of corruption in payments and transactions).

Anti-Corruption Due Diligence Process

Initial Assessment of Corruption Risk

To be able to determine the appropriate level of anti-corruption due diligence, the buyer should perform an initial assessment of the corruption risk.

As a starting point for assessing this risk, a buyer may carry out preliminary analysis using publicly available information. This includes news service providers, the financial press and internet search engines, as well as other commercial providers specialised in corporate information. This should help the buyer to identify any red flag issues and tailor its due diligence exercise accordingly.

Key corporate information relevant to the anti-corruption due diligence is likely to be available from:

- **Statutory books.** The statutory books of a company (such as the company's constitutional documents, register of charges and minutes of shareholders' meetings) may be available for inspection at its registered office.
- **Public registers.** Companies are often required to file certain information which will become publicly available once the filing process is complete.
- **Searches.** Information regarding the winding-up or insolvency procedures that may have been initiated against the seller or target may be available from online law searches.
- **Regulators.** If the target is carrying on a regulated activity (for example, financial services, healthcare and medicinal products), there should be public information on the relevant regulator's website or registers.

Factors that may be relevant when assessing the extent of the initial assessment include the following:

- **High risk jurisdictions.** Whether the target operates in a jurisdiction where corruption is perceived to be high.
- **Nature of business and industry.** The nature of the target business and the industry in which it operates. Some sectors or industries, such as the construction and oil and gas industries, are generally considered to be more susceptible to corruption. *Transparency International* provides some helpful, industry specific risk guidance on the topic pages of its website.
- **Use of intermediaries and agents.** Whether the target business is of a type which is likely to have been conducted through agents, intermediaries, consultants or other third parties or joint venture parties. If so, the risk of corruption could be higher.
- **Public sector contracts.** Whether the target business includes contracts with public sector bodies. Where public contracts have been obtained because of corruption, it is possible that the target could be prevented under applicable law from being party to any such contracts for a specified period.
- **Competitors' corrupt practices.** Whether the target's competitors are suspected of actively bribing to secure contracts within the target's market.

Anti-Corruption Investigation

The aim of an anti-corruption investigation is to get to know the target and its business, and procure the disclosure of all material and relevant information from the seller and the target. This enables the buyer to make an informed judgement that the target is adequately managing corruption risk and not engaging in corrupt practices.

A typical anti-corruption due diligence exercise will focus on eliciting information that is necessary to assess the following key issues:

- Has the target been involved in corrupt practices in the past?
- Is it likely that corruption is currently taking place and, if so, how widespread is it within the target business?
- Does the target have an adequate anti-corruption programme in place?
- If corruption has taken, or is taking, place within the target, what is the likely impact of this on its overall business?

In assessing the adequacy of target's current anti-corruption policies and procedures, a prospective buyer should:

- Request information on the target's general approach to reducing bribery and corruption risks.
- Obtain copies of any compliance policies, training materials, audits and reports.
- Request copies of any policies concerning facilitation payments and those relating to hospitality and gifts.
- Ask what procedures have been put in place to prevent bribery.
- Assess the nature and extent of the approach to compliance and corruption risks within the target, including how far senior management are engaged in embedding and enforcing existing anti-bribery policies. Relevant issues to consider include:
 - is there a commitment to zero tolerance on bribery and corruption;
 - who is involved in bribery and corruption prevention procedures; and
 - to what extent are senior management involved in developing anti-corruption procedures?
- Where third party agents or intermediaries are used, ask for information to establish how they are selected, what checks are carried out in relation to the agent's identity and ownership structure and what ongoing monitoring is conducted in relation to their activities and services provided.
- If particular bribery or corruption issues have been identified, the buyer should ask how these have been addressed and what has been put in place to stop these issues recurring.

A prospective buyer should also ensure that any accountancy and legal professionals engaged in the due diligence process do not detect any suspect payments or contracts.

There are also some corruption indicators to consider when conducting due diligence. These include:

- Evidence of abnormal cash payments.
- Lavish gifts being received.
- Missing documents or records.
- Unusual payment patterns.
- The payment of unusually high commissions.
- Overly complicated transactions or corporate structures.

For a list of sample anti-corruption due diligence questions, which also aim to assist in assessing the adequacy of the target's current anti-corruption policies and procedures and its general approach to reducing corruption risks, see [Due diligence checklist: Cross-border: Anti-corruption](#).

Reporting Corruption

Several provisions impose reporting obligations in relation to corruption offences. Most notably, section 19 of the Criminal Justice Act 2011 imposes a reporting obligation in relation to certain "relevant offences" as defined in that Act. These include offences under sections 5 to 10 of the CJA 2018 (see [Offences](#)).

Under section 19 of the Criminal Justice Act 2011, it is an offence for a person to fail, without reasonable excuse, to disclose information to An Garda Síochána that they know, or believe, might be of material assistance in:

- Preventing the commission of a relevant offence.
- Securing the apprehension, prosecution, or conviction of any other person for a relevant offence.

The maximum penalty for the offence of withholding information is an unlimited fine and imprisonment for up to five years, or both.

Limitations on Anti-Corruption Due Diligence

There will often be practical limitations on the buyer's ability to carry out effective anti-corruption due diligence before acquiring the target. In particular:

- Instances of corruption are unlikely to be documented and may not be immediately apparent from a due diligence review of the available information.
- Accounting records may be manipulated and transactions given descriptions which hide the true nature of a payment (see [Contractual Protection](#)).
- The seller's or target's management team may be reluctant to incriminate themselves by providing complete or entirely truthful responses to due diligence concerning involvement in corrupt practices.

- The information that is necessary to properly investigate corruption risk is likely to be of a confidential nature and the recipient may be under a binding obligation not to disclose it in accordance with a confidentiality agreement that the parties usually enter into before starting the due diligence process. However, this limitation is often overcome by inserting in the confidentiality agreement a "carve out" provision allowing disclosure of confidential information to comply with applicable laws (for an example of such provision, see *Standard Document, Confidentiality agreement (private company acquisitions): Cross-border: clause 5*).

In the light of these limitations, it will be important for the buyer to seek contractual protections through anti-corruption representations and warranties, and in some instances, indemnities, in the share purchase agreement or asset purchase agreement or other acquisition documents (see *Contractual Protection*). For an example of contractual protection, see *Standard Clause, Anti-corruption warranties: Cross-border*.

Anti-Corruption Due Diligence Report

Part of the key to successful anti-corruption due diligence is to effectively communicate the results to those responsible for negotiating the proposed acquisition and making the decisions. The due diligence review is usually carried out alongside the negotiation of the acquisition agreement. Any significant information which might affect negotiations and the drafting of the agreements should be communicated immediately to the buyer's negotiating team, even before the anti-corruption due diligence is complete.

Any problematic issues which come to light can then be raised within the buyer so that it can properly consider any relevant issues (for instance, at a board of directors' meeting) before approving the acquisition.

Once the due diligence is finalised, an anti-corruption due diligence report is likely to be produced as part of an overall integrated due diligence report. If there are reasonable grounds to suspect that corruption has occurred, the report may recommend a strategy to exit from the negotiations or to mitigate the corruption risk by recommending remedial actions (for instance, by asking the seller to implement steps to address identified corrupt practices) or by seeking specific contractual protection (see *Contractual Protection*).

The decision that a prospective buyer may take in the light of the results highlighted in the report will be determined by various factors; see *Dealing with Identified Corruption Risks*.

Dealing with Identified Corruption Risks

Where corruption risks are identified during the due diligence process, the prospective buyer will need to decide how the relevant issue affects the proposed transaction. Making this assessment will usually demand an exploration of how the identified risks might be mitigated. Depending on the circumstances, the options available to a prospective buyer could include:

- **Seeking a price adjustment.** Potential liabilities may be difficult to quantify. This is particularly (in the context of a share purchase) in the light of the unlimited fines that can be incurred for bribery and corruption offences, and the inherent challenges of evaluating the likely

financial consequences of reputational damage and business disruption that could flow from a bribery investigation or prosecution.

- **Requiring remedial action.** The buyer may require the seller to implement steps to resolve identified corrupt practices or risks before completion, as a condition to the sale and purchase agreement. However, this approach is likely to have a significant impact on the transaction timetable and may be impractical as a result. This is particularly likely to be the case in a competitive auction situation.
- **Excluding tainted assets.** It may be possible to restructure the transaction to exclude "tainted" assets. For instance, by restructuring a share purchase as an asset purchase, a buyer could exclude contracts obtained through bribery and only acquire those parts of the target business which have not been similarly affected.
- **Obtaining contractual protection.** The buyer may try to negotiate an indemnity in the sale and purchase agreement aimed at ensuring the seller ultimately bears the financial consequences of the identified bribery risk (see *Anti-Corruption Related Indemnities*).

However, if the identified risks are significant and they cannot be adequately mitigated to the buyer's satisfaction, it may decide to withdraw from the acquisition. This is an extreme outcome, which is likely to lead to wasted costs, but may be unavoidable in some circumstances.

Contractual Protection

Instances of bribery and corruption may not become apparent from a traditional due diligence review of the available information. It will therefore be important for a prospective buyer to seek contractual protections through warranties and indemnities in the sale and purchase agreement in addition to carrying out due diligence. While such warranties and indemnities may be subject to negotiated limitations, if there is evidence to support a claim that there was any kind of fraud or wilful concealment or any instances of bribery and corruption, the sale and purchase agreement should provide that such limitations be set aside in the circumstances.

Anti-Corruption Representations and Warranties

The purpose of appropriately framed anti-bribery and corruption representations and warranties is to:

- Encourage the seller to disclose any known corruption risks before signing.
- Give the buyer legal recourse against the seller post-completion if any of the warranties are breached.

These warranties may typically focus on areas such as unlawful activity including bribery, exposure to litigation and regulatory investigation and sanctions.

One of the most contentious warranties is likely to be whether there are adequate procedures in place to prevent bribery in line with the defence of "took all reasonable steps and exercised all due diligence" set out by the relevant anti-corruption law (*section 18(2), CJA 2018*). The seller is likely to push for the buyer to make its own assessment as to what is adequate based on its investigations of the policies

and procedures disclosed by the seller. However, the buyer will argue that the seller is better placed to evaluate this as it knows all the relevant facts and circumstances.

The warranties in a sale and purchase agreement may be qualified by reference to the seller's knowledge, by materiality or by time. Depending on the perceived level of corruption risk, the buyer may want to ensure that the anti-corruption warranties are not subject to any such qualifications.

The parties may also agree in the acquisition agreement that part of the purchase price will be paid into a retention account (also known as an escrow account) at completion to secure for a defined period of time the seller's potential liabilities under the warranties (see *Standard Clause, Retention (warranty claims): Cross-border*).

The buyer may also wish to consider whether it requires any additional clauses to reflect the specific industry or sector in which the seller or the target operates.

A general representation of compliance with the law is also usually included in share purchase or asset purchase agreements.

Anti-Corruption Related Indemnities

If specific bribery and corruption risks are identified during the due diligence process or through disclosure against the warranties, the buyer may require an indemnity to ensure that the seller ultimately bears any financial consequences resulting from the relevant risk.

However, an indemnity for bribery and corruption risks needs to be carefully drafted to avoid public policy issues that may arise depending on the applicable governing law. For instance, Irish courts may not enforce a cause of action where the claim arises from the illegal or immoral conduct of the claimant (this is known as the principle of *ex turpi causa*). Therefore, to be enforceable, an indemnity from the seller against bribery related issues would need to be given to the buyer rather than the target company (on the basis that the buyer is not the wrongdoer) and exclude losses incurred by the buyer as a result of any bribery offences it may commit after completion (for example, committing the offence under section 18 of the CJA 2018 of failing to prevent bribery following completion).

Post-Completion Monitoring

Following completion of an acquisition, the buyer should act promptly in taking any remedial action necessary to address any bribery and corruption risks that were identified during the due diligence process and which have not already been remedied.

The buyer should also monitor the seller's representations, warranties and, if any, indemnities so that all potential remedies and claims can be assessed before the expiry of the retention (escrow) account (if any) and/or of any warranty or indemnity claim limitation period.

To reduce bribery risk going forward, the buyer should ensure any identified shortcomings in the target's anti-corruption policies, monitoring and training are addressed. This is to ensure that there is compliance with Irish law and existing policies are harmonised with the buyer's own anti-corruption programme (see *Post-closing checklist: Cross-border: Anti-corruption*).

Criminal Procedure Act 2021

The *Criminal Procedure Act 2021* (CPA 2021) was recently passed into law and awaits commencement. No date has yet been specified for commencement and the CPA 2021 could be commenced in stages. The CPA 2021 is likely to be supplemented by court rules. The CPA 2021 makes several significant changes to criminal procedure including the introduction of preliminary trial hearings and the wider provision of documentation to juries to assist them with their deliberations. In particular, the CPA 2021 will assist in the prosecution of white-collar offences such as corruption. These changes are just one step in a series of promised reforms to strengthen Ireland's capacity to prevent and prosecute corruption and other types of wrongdoing.

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