



Bribery & Corruption 2020

Seventh Edition

Contributing Editors:
Jonathan Pickworth & Jo Dimmock

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CONTENTS

Preface	Jonathan Pickworth & Jo Dimmock, <i>White & Case LLP</i>	
General chapter		
Asia-Pacific Overview	Phillip Gibson, Dennis Miralis & Rachel Le Bransky, <i>Nyman Gibson Miralis</i>	1
Country chapters		
Australia	Tobin Meagher & Richard Abraham, <i>Clayton Utz</i>	14
Belgium	Hans Van Bavel, <i>Stibbe</i>	30
Brazil	Rogério Fernando Taffarello, <i>Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados</i>	37
China	Hui Xu, Sean Wu & Catherine E. Palmer, <i>Latham & Watkins</i>	48
Czech Republic	Roman Kramářik, Helena Hailichová & Tomáš Beneš, <i>JŠK, advokátní kancelář, s.r.o.</i>	66
France	Ludovic Malgrain, Grégoire Durand & Jean-Pierre Picca, <i>White & Case LLP</i>	74
Germany	Dr. Thomas Helck, <i>White & Case</i>	84
Greece	Ovvdias S. Namias & Vasileios Petropoulos, <i>Ovvdias S. Namias Law Firm</i>	92
Hong Kong	Kareena Teh & Catherine Wong, <i>LC Lawyers LLP</i>	102
India	Aditya Vikram Bhat & Shantanu Singh, <i>AZB & Partners</i>	119
Indonesia	Denny Rahmansyah & Nico Angelo Putra Mooduto, <i>SSEK Indonesian Legal Consultants</i>	130
Ireland	Megan Hooper, Imelda Higgins & Heather Mahon, <i>McCann FitzGerald</i>	138
Italy	Roberto Pisano, <i>Studio Legale Pisano</i>	148
Japan	Catherine E. Palmer & Junyeon Park, <i>Latham & Watkins</i>	159
Mexico	Carlos Chávez, Humberto Pérez-Rocha & Lisandro Herrera, <i>Galicia Abogados, S.C.</i>	170
Netherlands	Jurjan Geertsma & Madelon Stevens, <i>JahaeRaymakers</i>	181
New Zealand	Ben Upton, <i>Simpson Grierson</i>	192
Nigeria	James Okoh, Johnson Agwu & Ogechi Nwobia, <i>Fidelis Oditah & Co</i>	201
Poland	Marcin Kondracki, Adam Domański & Justyna Bartoszek, <i>Kondracki Celej Adwokaci sp. p.</i>	217
Romania	Mihai Mareş, <i>Mareş & Mareş</i>	229
Russia	Hannes Lubitzsch, <i>Noerr OOO</i>	244
Singapore	Jason Chan & Lee May Ling, <i>Allen & Gledhill LLP</i>	257
Slovenia	Uroš Čop, Katarina Mervič & Eva Rop, <i>Law firm Miro Senica and attorneys, Ltd.</i>	263
Switzerland	Marcel Meinhardt & Fadri Lenggenhager, <i>Lenz & Staehelin</i>	277
Ukraine	Dr. Svitlana Kheda, <i>Sayenko Kharenko</i>	287
UAE	Rebecca Kelly, Chris Warren-Smith & Caroline Hibberd, <i>Morgan, Lewis & Bockius LLP</i>	302
United Kingdom	Jonathan Pickworth & Jo Dimmock, <i>White & Case LLP</i>	308
USA	Douglas Jensen & Ashley Williams, <i>White & Case LLP</i>	322

PREFACE

We are pleased to present the seventh edition of *Global Legal Insights – Bribery and Corruption*. This book sets out the legal environment in relation to bribery and corruption enforcement in 28 countries and one region worldwide.

This edition sees the addition of new chapters relating to Belgium, Poland, Hong Kong and the Czech Republic, as well as an Asia-Pacific overview. In addition to addressing the legal position, the authors have sought to identify current trends in enforcement, and anticipated changes to the law and enforcement generally.

Incidents of bribery and corruption often involve conduct and actors in several different jurisdictions. As enforcement activity increases around the world, attention is being focused on particular problems companies face when they seek to resolve cross-border issues.

Coordinating with multiple government agencies can be challenging at the best of times, and can be even more difficult when dealing with bribery and corruption laws that have been amended or have just entered into force. Sometimes a settlement in one jurisdiction can trigger a further investigation in another. Stewarding a company through these sorts of crises involves not only dealing with today's challenges, but thinking about the next day, the next week, the next month, and beyond, on a global stage.

We are very grateful to each of the authors for the contributions they have made. We hope that the book provides a helpful insight into what has become one of the hottest enforcement topics of current times.

Jonathan Pickworth & Jo Dimmock
White & Case LLP
November 2019

Ireland

Megan Hooper, Imelda Higgins & Heather Mahon
McCann FitzGerald

Brief overview of the law and enforcement regime

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

The CJCOA contains several corruption offences, namely:

- active and passive corruption;
- active and passive trading in influence;
- corruption in relation to office, employment, position or business;
- giving a gift, consideration or advantage that may be used to facilitate an offence;
- creating or using a false document; and
- intimidation.

The CJCOA also defines “corruptly” broadly, to include acting with an improper purpose personally or by influencing another person, whether:

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

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

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

In addition to the offences set out in the CJCOA:

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

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

- Freedom of Information Act 2014 – This Act gives every person the right to access information held by public bodies and to obtain reasons for decisions affecting that person;
- Protected Disclosures Act 2014 – This Act provides a general suite of employment protections and legal immunities to whistleblowers, including not only employees but consultants, contractors, trainees, volunteers, temporary workers, former employees and job seekers; and
- Regulation of Lobbying Act 2015 – This Act sets out mandatory registration and disclosure requirements for all those carrying out lobbying activities, and applies not only to professional lobbyists but also any business with more than 10 employees.

As a member of the European Union, Ireland is also subject to EU legislation on the internal market, including the anti-money-laundering and counter-terrorist financing framework.

No one agency has overall responsibility for the prevention, investigation and prosecution of corruption in Ireland. Instead, it is shared across a variety of public bodies, including *An Garda Síochána* (the Irish police force), and the Office of the Director of Public Prosecutions. The Standards in Public Office Commission oversees compliance with the Regulation of Lobbying Act 2015 as well as legislation regulating political financing and the conduct of public officials.

An Anti-Corruption Unit within *An Garda Síochána* was established in 2017. This is a section of the Garda National Economic Crime Bureau (GNECB) which is a specialist bureau that investigates fraud-related crime involving complex issues of criminal law or procedure. In September 2018, the Anti-Corruption Unit launched the Bribery and Corruption Confidential Reporting Line. The system is message-based and enables the caller to leave a confidential voicemail which will be evaluated by staff attached to the Garda Anti-Corruption Unit. However, a 2019 evaluation by the implementation review group of Ireland's implementation of aspects of the United Nations Convention Against Corruption (UNCAC), pointed to the low staffing levels of this unit and stated that its corruption prevention mandate was not sufficiently clear. It recommended that these issues be addressed.

Overview of enforcement activity and policy during the last year

Corruption within *An Garda Síochána* itself remained in focus in 2019, with the Disclosures Tribunal continuing its public hearings. This tribunal was set up in February 2017 to investigate allegations that Sergeant Maurice McCabe had been smeared by various individuals or agencies for having made complaints of serious corruption within *An Garda Síochána*. In its 2018 Third Interim Report, the Disclosures Tribunal found that Sergeant McCabe was a “genuine person” who was “repulsively denigrated for being no more than a good citizen and police officer”.

The Garda Commissioner fully accepted the findings of the Disclosures Tribunal and committed to ensuring that *An Garda Síochána* is a safe environment for people to raise issues or concerns. In late 2019, the tribunal hearings focused on a similar complaint from another *Garda* that he was previously targeted or discredited with the knowledge or acquiescence of senior members of *An Garda Síochána* following the making of a protected disclosure about alleged wrongdoing in the force.

It was also announced earlier this year that a dedicated Garda anti-corruption unit would be established by the end of 2019 to investigate allegations of corruption within the force. The new unit will investigate allegations around drug use, the flow of information outside of the organisation, and inappropriate associations with criminals. A Chief Superintendent has been appointed to run the unit with responsibility for the development of policies, procedures and legislative provisions. During late 2019, a significant investigation into Garda corruption in the south of the country was ongoing. Moreover, according to newspaper reports, in February 2019, a detective *Garda* (a police officer) was charged with a corruption offence for revealing confidential information in exchange for a monetary gift.

While there have been no reported prosecutions of corporates under the new corporate bribery offence, the past year has seen an increased focus by corporates on the implementation of appropriate risk management procedures.

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

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

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

The acceptance of hospitality, including gifts and entertainment, is governed by the Ethics Acts, by Part 15 of the Local Government Act 2001, as well as by codes of conduct. Generally, a public official must disclose all gifts given to him or her in excess of a certain amount (€650), subject to a number of exceptions. Where an officeholder receives a gift valued in excess of €650, the gift is deemed to be a gift given to the State and vests in the Minister for Finance. Generally, the codes of conduct go further than the Ethics Acts and prohibit the acceptance of gifts, or at least those that may pose a conflict of interest or interfere with the honest and impartial exercise of official duties.

The 2019 evaluation of Ireland's implementation of aspects of UNCAC recommended that Ireland consider lowering the limits in relation to gifts to public officials that are subject to mandatory declaration and refusal or remittance.

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

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

- (a) that a gift, consideration or advantage has been given or received corruptly where an official is tasked with carrying out a certain function and the donor had an interest in the carrying-out of that function (e.g. the grant of a licence) or in the failure of the official to carry out that function (e.g. the prosecution of an offence);
- (b) that a political donation over a specific sum, or of a specific type, is given or received corruptly where there has been a failure to comply with applicable reporting and remitting procedures and the donor had an interest in the person concerned doing an act in relation to his or her office, employment, position or business; or
- (c) of corrupt enrichment, where interests in land or other property have not been disclosed

by an Irish official in accordance with applicable legislation: this presumption applies to certain corruption offences.¹

In *DPP v Forsey*,² the accused was convicted of corruption under section 1 of the Prevention of Corruption Act 1906, (PCA) one of the Acts repealed by the CJCOA. When in force, this law provided that an agent or any other person who corruptly accepted any gift, consideration or advantage as an inducement to doing any act in relation to his office or position, was guilty of an offence.

The prosecution relied on the presumption of corruption in section 4 of the PCA against a holder of a public office, where it was proved that he received any gift, consideration or advantage from someone having an interest in the discharge by the office holder of specified functions. The benefit was deemed to have been received – and given – as an inducement or reward “unless the contrary is proved”.

However, the Defendant appealed his conviction on the basis that the trial judge had misdirected the jury upon the correct interpretation of section 4. It was argued that this provision imposed a legal burden of proof on the defendant instead of an evidential burden of proof.

The Supreme Court said that section 4 should be interpreted as shifting the evidential burden of proof to the defendant, rather than the legal burden of proof. In giving judgment, O'Malley J said that if an accused bore the legal burden of proof and had to prove that the payments were not received corruptly on the balance of probabilities, he or she would have to persuade the jury that, at least, it was more likely than not that the money was not received corruptly. Since corrupt receipt was an essential element of the offence, this meant that the accused would have to disprove that element. In other words, the accused would have to affirmatively prove innocence. That would be a clear inroad on the presumption of innocence.

According to the Supreme Court, in cases where the prosecution relied on section 4, the trial court should instruct the jury clearly as to the elements of the offence and tell the jury that the prosecution had the burden of proving beyond reasonable doubt all of the elements, with the exception of the corrupt intention. The jury should then be told that if the prosecution had satisfied them beyond reasonable doubt of the matters it had to prove, they were to take corrupt intention as having been proved, regardless of whether the prosecution had given evidence in relation to it or not, or had only given weak evidence, unless there was something in the evidence that made them doubt that the accused had a corrupt motive. The overriding consideration was that a jury should not convict if left in doubt as to guilt.

Although this judgment concerned the repealed corruption legislation, the CJCOA has reproduced the presumption contained in the PCA as well as providing for additional presumptions of corruption, as set out above. The Supreme Court's judgment in *DPP v Forsey* clarifies that each of these presumptions should be read as shifting the evidential burden of proof rather than the legal burden of proof. While on the one hand this clearly makes the prosecution's job more difficult, on the other hand it acknowledges the fundamental importance of the presumption of innocence in our criminal justice system.

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

Pursuant to section 19 of the Criminal Justice Act 2011, it is an offence for a person to fail,

without reasonable excuse, to disclose information to *An Garda Síochána* that he knows or believes might be of material assistance in: (a) preventing the commission of a relevant offence; or (b) securing the apprehension, prosecution, or conviction of any other person for a relevant offence. The maximum penalty for the offence of withholding information is an unlimited fine and imprisonment for up to five years, or both.

However, in *Sweeney v Ireland*,⁴ the constitutionality of a similar provision had been called into question in relation to an almost identical provision in the Offences Against the State (Amendment) Act 1998 (1998 Act).

In that case, Sweeney had been questioned in relation to a murder in which he was originally a suspect. He was not charged in relation to that murder but faced prosecution under section 9(1)(b) of the 1998 Act for failing to disclose, without reasonable excuse, information which he knew or believed might be of material assistance in securing the apprehension, prosecution or conviction of another person for the offence.

The High Court upheld his challenge to the constitutionality of that section. The decision in *Sweeney* therefore cast doubt on the constitutionality of section 19. However, this High Court decision was reversed by the Supreme Court on appeal in 2019.

In the High Court, Mr Sweeney had argued that the section 9(1)(b) offence breached his constitutional right to silence and had the effect that an accused might be prosecuted for exercising this right. He also argued that the offence was impermissibly and unconstitutionally vague and uncertain. In the High Court, Baker J agreed. However, on appeal by the State, these arguments were rejected by the Supreme Court.

In giving judgment for the court, Charleton J looked in detail at the ingredients of the section 9(1)(b) offence. He made the point that witnessing a crime is not an offence. He was satisfied that section 9(1)(b) only applied to those who had information about the commission of a serious offence. Those who had such information and who knew or believed that disclosing it to the police might be of material assistance to securing the apprehension, prosecution or conviction of any other person were obliged to so.

He concluded that the crime was clearly defined and consequently did not infringe the constitutional prohibition against vagueness. There was no question of an inconsistent application of the section and it was not likely to lead to arbitrary enforcement. The right to silence was protected for any person who did not wish to speak about their own involvement in a crime and thereby incriminate themselves.

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

The enhanced protection for whistleblowers under the Protected Disclosures Act 2014 aims to encourage whistleblowing. The Protected Disclosures Act also requires public bodies to compile and make public reports on the operation of the Act, including the number of disclosures received on an annual basis. For example, the Central Bank of Ireland reports that it received 128 protected disclosures in the 12 months to December 2018. This compared to 93 in the previous year. It has reported a steady increase in these numbers year on year, beginning with one report of whistleblowing in the first year following the enactment of the legislation. These reports help to shed light on the prevalence of whistleblowing in Ireland and the success of the operation of the Protected Disclosures Act.

Overview of cross-border issues

The CJCOA has extra-territorial effect. Under section 11, a person may be tried in Ireland for an offence under the CJCOA if any one or more of the acts alleged to constitute the offence were committed in Ireland, on board an Irish ship or on an aircraft registered in Ireland, notwithstanding that the other acts alleged to constitute the offence were committed outside Ireland. This is more liberal than the traditional common law position whereby the State has jurisdiction over offences where the last act necessary for the completion of the offence occurs on Irish territory.

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

- (a) a person does an act outside of Ireland that, if done in Ireland, would constitute an offence under specific sections of the CJCOA,⁵ and the act is committed on board an Irish ship or aircraft, and the person concerned is an Irish official acting in his or her capacity as such, an Irish citizen or resident, or an Irish company or other body corporate;
- (b) a European Union official working for an EU institution or other body set up under the EU treaties and headquartered in Ireland, does an act abroad that if done in Ireland, would be an offence under section 5;⁶ or
- (c) a person does an act abroad that if done in Ireland, would be an offence under section 5(1),⁷ and this involves certain specified individuals.⁸

In all cases, the act in question must be an offence under the law of the place where it was done. Also, in each case, a guilty party will be exposed to the same penalty as if the act had been done in Ireland.

Towards the end of 2018, the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 was amended so as to extend the definition of money laundering to cover conduct involving a foreign official committed outside of Ireland which would be an offence under the CJCOA if it were to occur in Ireland, irrespective of whether the relevant conduct is also an offence in the place in which it is carried out.

In 2019, it was reported in the media that the GNECB had raised concerns with the Department of Justice about the dual criminality requirement under the Irish legislation, pointing out that if Irish persons or companies operated in a jurisdiction where anti-corruption legislation was weak or non-existent, then no offence would occur. This appeared to go against the ethos of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

In its October 2019 report on Ireland, the OECD Working Group on Bribery was satisfied that the CJCOA fully implemented its earlier recommendation to consolidate and harmonise two overlapping foreign bribery offences that were previously contained in two separate statutes, and to remove the concept of the bribery of an “agent”, previously used in one of the statutes. However, it said that given the legislative techniques used, it was still unclear how effective these provisions would be in practice and that this would be kept under review.

Corporate liability for bribery and corruption offences

Under current Irish law, corporations can be held criminally liable; however, the precise model for imposing liability has not been conclusively determined by the Irish courts. The Law Reform Commission has made certain recommendations in relation to the reform of the law in this area and these are detailed below.

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

- (a) a director, manager, secretary or other officer;
- (b) a person purporting to act in that capacity;
- (c) a shadow director; or
- (d) an employee, agent or subsidiary of the body corporate,

with the intention of obtaining or retaining business for the body corporate, or an advantage in the conduct of its business.⁹

This is a strict liability offence and the liability is not restricted to cases where the natural person(s) involved are prosecuted or convicted. However, it will be a defence for a body corporate to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

Section 18(3) provides that where a body corporate commits an offence under the CJCOA and it is proved that the offence was committed with the consent or connivance, or was attributable to any wilful neglect, of any director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, that person will also be guilty of an offence. In order for the prosecution to rely on this provision, it is not necessary that the corporate entity itself be convicted of bribery: it is sufficient if the prosecution proves that the corporate entity has committed that offence.¹⁰

Finally, where the affairs of a body corporate are managed by its members, the same will apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.

Proposed reforms / The year ahead

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

In November 2017, the Irish Government published a suite of measures aimed at enhancing corporate governance, increasing transparency and strengthening Ireland's response to White Collar Crime. This included a commitment to review Ireland's anti-corruption and anti-fraud structures and procedures in criminal law enforcement. The review will assess the extent to which the various State bodies involved in the prevention, detection, investigation and prosecution of fraud and corruption are working effectively together, and identify any gaps or impediments in this regard. The review group is due to report in 2019.

The Judicial Council Act 2019 was signed into law on 29 July 2019. Aspects of the Act were commenced on 10 September 2019. The Judicial Council will be an independent body and will promote and maintain excellence and high standards of conduct by judges. It will also provide a means of investigating allegations of judicial misconduct.

In October 2018, the Law Reform Commission published its Report on Regulatory Powers and Corporate Offences. The Report considered the current law in Ireland concerning the attribution of criminal liability for corporate crime and made a number of recommendations for its reform. It noted that there is uncertainty in Ireland about the correct test to apply to determine the criminal liability of corporate bodies, and that this uncertainty may have

contributed to a lack of prosecutions in Ireland of corporate bodies, for subjective fault-based offences in particular, which include offences that would be used to target commercial or economic wrongdoing, such as theft, fraud and bribery offences.

It recommended that the long-established but often criticised common law identification doctrine should be replaced. The identification doctrine attributes liability to a corporate body by requiring that the fault and conduct elements of the offence must be identified in a single natural person who operates high within its managerial structure, and is taken to have acted as the corporate body in committing the offence. The Commission noted that this model has been subject to significant criticism, as it works best in cases where it is needed least (small businesses where a single person can often be identified as the key decision-maker) and works worst in cases where it is needed most (large businesses where decision-making is necessarily delegated to many persons).

The Commission recommended a new test to reflect the reality of how modern corporate bodies, especially large ones, actually operate; that is, by delegating corporate policy-making not just to one senior manager but to many managers. This new test of attribution should involve a “tracking” approach, which requires that the fault element of the secondary offender, whether a single senior manager or more than one senior manager, should track that of the principal offender, the corporate body. It said that the precise calibration of this model would depend on the nature of the fault element of an offence; that is, whether it was a subjective fault offence, an objective fault offence, or a no-fault offence.

The Commission also concluded that the complicity of managerial agents in corporate offending was at risk of under-criminalisation in certain circumstances, and recommended the introduction of a new statutory scheme to target the complicity of certain managerial agents, who exercise a defined level of control or authority over the conduct of the corporate body and its agents. Where that control and authority operates in a manner that culpably contributes to corporate offending, this new scheme allows for the imposition of derivative criminal liability.

In February 2019, the Oireachtas (Irish Parliament) Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach discussed the Report and its recommendations. The recommendations await implementation.

* * *

Endnotes

1. “Irish official” is also a widely defined term under section 2 CJCOA, including such diverse persons as a member of parliament and a member of a jury in court proceedings.
2. *DPP v Forsey* [2018] IESC 55.
3. Namely, active and passive corruption; active and passive trading in influence; corruption in relation to an office, employment, position or business; giving a gift, consideration or advantage that may be used to facilitate an offence under the CJCOA; creating or using a false document; and intimidation.
4. [2017] IEHC 702 (High Court); [2019] IESC 39 (Supreme Court).
5. These are sections 5 (active and passive corruption); 6 (active and passive trading in influence); 7 (corruption in relation to office, employment, position or business); 8 (giving a gift, consideration or advantage that may be used to facilitate an offence under the CJCOA); 18(1) (offence by a body corporate); or section 9 concerning the creation or use of a false accounting, auditing or financial document.

6. Section 5 deals with the offences of active and passive corruption.
7. 5. (1) A person who, either directly or indirectly, by himself or herself or with another person—
 - (a) corruptly offers, or
 - (b) corruptly gives or agrees to give,
a gift, consideration or advantage to a person as an inducement to, or reward for, or otherwise on account of, any person doing an act in relation to his or her office, employment, position or business shall be guilty of an offence.
8. Those specified persons are: an Irish citizen; a national official of a Member State or an Irish official, or a member of—
 - the European Commission,
 - the European Parliament,
 - the Court of Justice of the European Union, or
 - the Court of Auditors of the European Union.
9. This provision is without prejudice to any circumstances under the general law, whereby acts of a natural person are attributed to a body corporate resulting in criminal liability of that body corporate for those acts. It also does not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories in an offence under this Act.
10. *DPP v Hegarty* [2011] IESC 32.



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

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