Bribery & Corruption

2017

Fourth Edition

Contributing Editors:
Jonathan Pickworth & Jo Dimmock
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Ireland

Megan Anne Hooper, Imelda Higgins & Heather Mahon
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Introduction

There has been no shortage of corruption scandals in Ireland over the past few years, with various types of political and other corruption continuing to dominate the headlines. There have also been several convictions for corruption, one of which has resulted in a judgment from the Court of Appeal regarding the constitutionality of the reverse burden of proof in certain cases of corruption. Allegations of corruption in Ireland’s police force, the Garda Síochána, were the subject of a Commission of Inquiry which, while identifying serious flaws and failures in criminal investigations, concluded that these were attributable to poor supervision as opposed to corruption. Meanwhile, the Irish Government has announced that a Commission of Investigation will be established to inquire into the sale, by the National Asset Management Agency, of a portfolio of Northern Ireland property-linked debts, following rampant rumours that the sale was tainted by corruption.

On the regulatory side, recent years have also seen the introduction of a number of legislative measures relevant to bribery and corruption. In particular, in 2014, the Government at that time finally introduced pan-sectoral protection for whistleblowers through the Protected Disclosures Act 2014. This was followed two years later by the Regulation of Lobbying Act 2015 which improves transparency over lobbying activities. Other measures include the publication, in December 2015, of the long-awaited Public Sector Standards Bill 2015, which is intended to introduce a more robust framework for identifying, disclosing and managing conflicts of interest in the public sector, and minimising corruption risks. The Government has also indicated that it intends to follow up the General Scheme of the proposed Criminal Justice (Corruption) Bill, published in 2012, with a bill over the course of the coming months. More generally, the Law Reform Commission has launched a public consultation on regulatory enforcement and corporate offences which, among other things, seeks views on whether existing legislation is sufficiently robust to deal with serious corporate wrongdoing.

Brief overview of the law and enforcement regime

Corruption is both a common law and a statutory offence in Ireland. At common law, it is an offence to bribe a public officer to act otherwise than in accordance with his or her duty. Each of the statutory offences criminalise both the offer or giving of a bribe, known as active bribery, as well as the solicitation or receipt of a bribe, frequently referred to as passive bribery. The main statutory offences are set down in the Prevention of Corruption Acts 1889 – 2010 (PCA), and in particular, in the Public Bodies Corrupt Practices Act 1889 (PBCPA) and the Prevention of Corruption Act 1906 (PCA 1906). The Criminal Justice (Theft and Fraud Offences) Act 2001 criminalises bribery which damages EU financial interests.
One of the principal differences between the PBCPA and the PCA 1906 is in terms of their personal scope. While the PBCPA focuses on the bribery of certain public officials, the PCA 1906 is concerned with bribery involving “an agent”, which it defines broadly to include anybody employed by or acting for another. Consequently, while all those falling within the scope of the PBCPA will also fall within the scope of the PCA 1906, the converse is not true. In particular, the PBCPA does not apply to the bribery of Members of the Irish Parliament, foreign public officials or private sector bribery.

With the exception of their scope, the PBCPA and the PCA 1906 share a number of similarities. Both take a broad approach to the concept of a bribe and are likely to encompass not only pecuniary benefits but all benefits which have a material value. Each also covers third party bribery as well as bribery through an intermediary.

The PBCPA and the PCA 1906 both apply to benefits paid in respect of a public official/agent doing or failing to do something within the scope of his or her own functions, as well as doing or failing to do something which he or she is able to do because of his or her position. For example, with respect to the PCA 1906, the Court of Appeal in the recent case of *DPP v Forsey* [2016] IECA 233, held that the appropriate test is “whether the benefit would have been given if the person were not the kind of official he was”. In that case, Mr. Forsey, a member of Dungarvan Urban District Council, had received three payments from a developer relating to a property development in Waterford, within the functional area of another council. While Mr. Forsey argued that the payments did not relate to his functions which were connected to the Dungarvan region (and not Waterford), the Court of Appeal rejected this argument. According to that Court, as the payments were made for the purpose of Mr. Forsey exploiting his access as an elected official, they were made in relation to his office or position notwithstanding that his actions did not concern his specific statutory functions.

Under both the PBCPA and the PCA 1906, the benefit must be given or received “corruptly”. This term is defined in the Prevention of Corruption (Amendment) Act 2010 to “include acting with an improper purpose or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or other information, or by any other means”.

In addition to the bribery offences, the Prevention of Corruption (Amendment) Act 2001 (PC(A)A 2001) also criminalises corruption in office, which occurs where a public official does any act in relation to his or her office or position for the purpose of corruptly obtaining a gift, consideration or advantage for himself, herself or for any other person. In contrast to the bribery offences, the offence of corruption in office deals with a situation where an official acts corruptly for his or her own ends, without any other person’s involvement.

A person guilty of an offence under the PBCPA or the PCA 1906 is liable to a fine and imprisonment. The term of imprisonment will vary depending on the nature of the offence, from under 12 months to 10 years. In the case of certain offences, the convicted person may in addition be ordered to pay the amount of any value or any benefit received in connection with the offence. Further, if such person is an officer or servant in the employment of any public body upon such conviction, the Court has discretion to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.

Under the European Union (Award of Public Authority Contracts) Regulations 2016 and the European Union (Award of Contracts by Utility Undertakings) Regulations 2016, a conviction for corruption will result in an economic operator being excluded from participation in a procurement procedure.
Ireland does not have a specialised institution for anti-corruption law enforcement. The 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 Bureau of Fraud Investigations, which, among other things, is responsible for investigating foreign bribery. Prosecutions are normally taken on the basis of the statutory offences. 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.

Other relevant measures

The corruption offences are bolstered by a number of other measures including account offences and measures which are designed to enhance transparency over official actions. Regarding account offences, section 10 of the Criminal Justice (Theft and Fraud Offences) Act 2001 criminalises the intentional falsification of books and records. The Companies Act 2014 also contains offences in relation to the falsification of company books and documents. Measures designed to enhance transparency over official actions include, in particular, the Freedom of Information Act 2014, the Protected Disclosures Act 2014 and the Regulation of Lobbying Act 2015.

The Freedom of Information Act 2014 replaces the earlier framework governing freedom of information set out in the Freedom of Information Acts 1997 and 2003. Among other things, it 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 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 jobseekers.

The Regulation of Lobbying Act 2015 introduces 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.

Overview of enforcement activity and policy during the last year

The last year has seen a number of corruption cases reaching the courts. In March 2016, a clerical officer, Barry Kindregan, was jailed for two years for processing five passports for foreign nationals who were not entitled to them, in return for €12,500. In December 2015, Frank O’Toole, a former Town Clerk of Wicklow, was convicted of furnishing a letter to a Wicklow town-based solicitor and property developer, asserting that development levies of €64,840 had been paid, when this was not the case. Mr. O’Toole was subsequently given an 18-month suspended sentence and fined €10,000 for the offence. In this respect, it was significant that Mr. O’Toole had not derived any personal benefit from furnishing the letter.

There are also a number of ongoing investigations into allegations of corruption. According to newspaper reports, the Garda fraud squad has launched a full investigation into allegations made in an undercover sting operation conducted by Prime Time Investigates and broadcast on television that showed two county councillors allegedly asking for money to lobby on behalf of a wind farm operator.

Claims of corruption in the Garda Síochána were the subject of a Commission of Inquiry led by Mr. Justice Kevin O’Higgins. The Commission stemmed from allegations made by a Garda whistleblower regarding malpractice and corruption in the Cavan-Monaghan division of the Gardaí. The Commission ultimately highlighted serious flaws in policing in that division but found no evidence to support claims of Garda corruption.
Concerns about corruption at the heart of a £1.3 billion Northern Irish property deal have also dominated the headlines over the last year. The ‘Project Eagle’ deal at the centre of the scandal saw Ireland’s National Asset Management Agency (NAMA) sell a property portfolio to US equity fund Cerberus in 2014. The portfolio, which consisted of £4.3 billion worth of toxic loans, was sold to the equity fund for £1.241 billion. After the sale, it emerged that Frank Cushnahan, a former member of NAMA’s Northern Ireland advisory committee, was advising one of the bidders, US firm Pimco, in return for a success fee. In September 2016, the Auditor and Comptroller General published a report in which it stated that the State lost around £190 million (€220 million) as a result of the sale. The Public Accounts Committee has started an examination of that report. In addition, on 5 October 2016, the Government announced that it would set up a Commission of Investigation to inquire into the sale.

In 2016, the Irish courts awarded the first interim order under the Protected Disclosures Act 2014. Under that Act, where an employee satisfies a Court that he or she has substantial grounds for contending that his or her dismissal was wholly or mainly due to the fact that he or she made a protected disclosure, the employee can apply to Court for an interim order pending the determination of a claim in the Workplace Relations Commission (WRC). In *Clarke & Dougan v Lifeline Ambulance Service Ltd*, the two plaintiffs claimed that they had been dismissed by the defendant as a result of having made a protected disclosure to the Revenue Commissioners in January 2016 alleging that the defendant paid their staff expenses in place of taxable pay. The Court ordered the defendant to pay the plaintiffs their salaries until their unfair dismissal claims are heard by the WRC on the basis that the defendant was unwilling to reinstate the former employees.

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

Irish corruption law does not distinguish between facilitation payments and other types of bribes. Specifically, it is clear from the terms of the various bribery offences that there is no explicit requirement for a benefit to be of a specified size. This is not to say that the size of the benefit is irrelevant, but rather that it goes to the issue of intent. In other words, where a benefit is of minor value, then it is less likely to have been paid as a corrupt inducement.

Irish corruption law also clearly covers payments made to a public official or agent to do something that that official/agent was already required to do. The PCA contains two specific provisions which reverse the burden of proof in a corruption case, including where a public official has received a gift in specified circumstances. Under section 2 of the Prevention of Corruption Act 1916, a presumption of corruption arises where any money, gift or other consideration has been paid, given or received by a certain type of public official, by or from a person holding or seeking to obtain a contract from a Government Minister or a public body. In such cases, the relevant consideration is deemed to be a bribe under the PBCPA and/or under the PCA 1906 unless the defendant proves the contrary. Under section 4 of the PC(A)A 2001, once a gift, consideration or advantage is given to a specified public official in circumstances where the donor had an interest in the relevant official’s discharge of certain specified functions, then it is deemed to have been given corruptly unless the contrary is proved. Section 4 applies generally to a variety of functions concerned with the public administration of the State. In the recent case of *DPP v Forsey*, the Court of Appeal held that section 4 reverses the legal burden of proof and upheld both its constitutionality and its compatibility with Article 6 of the European Convention of Human Rights.
The acceptance of hospitality, including gifts and entertainment, is governed by the Ethics in Public Office Acts 1995 and 2001 (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 at 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 which might interfere with the honest and impartial exercise of official duties.

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

A number of provisions impose reporting obligations in relation to corruption offences. Most notably, section 19 of the Criminal Justice Act 2011 sets out a general reporting obligation. In addition, auditors are subject to reporting obligations, including under the Criminal Justice (Theft and Fraud Offences) Act 2001 and under the Criminal Justice Act 2011.

Section 19 of the Criminal Justice Act 2011 imposes a reporting obligation in relation to certain “relevant offences”, including bribery under the PCA 1906. Section 19 makes it an offence for a person to fail, without reasonable excuse, to disclose information to the Gardaí 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.

Under section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001, the auditor of a company or other entity must report to the 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 should lead to an increase in whistleblowing in the coming years. In this respect, it is significant that the Protected Disclosures Act 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. We expect these reports to be a useful source of information regarding the prevalence of whistleblowing in Ireland.

2016 also saw the adoption of the Proceeds of Crime (Amendment) Act 2016. The Proceeds of Crime Act 1996 and 2005 provide for the civil forfeiture of property which is the proceeds of crime. The 2016 amendments reduce the value of the property which can be pursued through civil forfeiture from EUR 13,000 to EUR 5,000. It also allows the Criminal Assets Bureau to seize property which it suspects to be the proceeds of crime for up to 21 days.

As mentioned, the Garda Síochána has primary responsibility for investigating bribery and corruption offences. However two reports published by the Garda Inspectorate over the past two years highlight a number of deficiencies in the investigative process specifically, and in the Garda Síochána more generally. In October 2014, the Garda Inspectorate published a report entitled Crime Investigation, in which it identified serious failings, among other things, in the recording, classification and reclassification of crime incidents by the Gardaí. This was followed by a second report published in November 2015, Changing Policing in Ireland, which made a number of recommendations aimed at improving the structure and culture of policing in Ireland. Among other things, that second report criticised the Garda Bureau of Fraud Investigation in a number of respects and recommended that it be
replaced by the establishment of a new Serious and Organised Crime Unit including agile, multidisciplinary investigation teams.

**Overview of cross-border issues**

Ireland has jurisdiction over a corruption offence under the PBCPA or the PCA 1906, provided “any of the acts alleged to constitute an offence was committed in the State notwithstanding that other acts constituting the offence were committed outside the State”. 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, under the PCA 1906, the State may also exercise jurisdiction in certain cases based on the nationality of the accused, including where he or she is: an Irish citizen, an individual who is ordinarily resident in the State, an Irish company as well as domestic public officials who are listed as Agents in the PCA 1906.

Despite these powers, there is little to suggest that Ireland is regularly engaging with corruption on a cross-border basis. There have been no foreign bribery prosecutions to date. Annex 1 of the OECD’s recent *Phase 3 Written Follow Up Report,* published in February 2016, lists four foreign bribery cases with a possible territorial connection with Ireland. According to Annex 1, investigations into three of those cases have not identified a credible allegation with territorial links to Ireland. Investigations are continuing into allegations regarding a company which is a subsidiary of a foreign company and Mutual Legal Assistance requests have been made in connection with the case.

It is also noteworthy that it is possible for a person in Ireland to be subject to foreign anti-corruption legislation. Specifically, the extensive extra-territorial application of both the UK Bribery Act 2010 and the US Foreign Corrupt Practices Act 1977 means that offences contained in those Acts may have implications for persons operating within this jurisdiction and persons could be subject to concurrent scrutiny by the UK and US authorities.

**Corporate liability for bribery and corruption offences**

It is generally accepted that corporations can be held criminally liable; however, the precise model for imposing liability has not been conclusively determined by the Irish courts. Broadly speaking, the preferred model appears to be the identification model. In particular, there are a number of civil cases which refer to companies being liable for the actions of a person who is their directing mind and will. However, it is not clear at what level a person must be in a corporation before his or her intention can be attributed to it.

In general, the fact that a corporate entity has its own independent personality means that a director, officer (or employee) of that company is not personally liable for its acts or omissions. However, in some circumstances, directors and officers may be held personally liable at common law for their participation in corporate crime, including by virtue of inchoate liability and/or secondary liability.

In addition, the PC(A)A 2001, as amended, explicitly provides for the direct liability of directors and corporate officers in situations where the corporate entity itself commits bribery. According to the relevant provision, where a corporate entity commits bribery contrary to the PCA, and that entity is itself guilty of bribery, an officer of that company may also be convicted of that same offence if that bribery is “proved to have been committed with the consent or connivance of or to be attributable to any neglect” on the part of that
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 prove that the corporate entity has committed that offence.  

Significantly, the general scheme of a proposed Criminal Justice (Corruption) Bill, published in 2012, includes a new offence whereby an incorporate and unincorporated body may be held criminally liable where a person acting on its behalf, including an employee or agent, commits bribery in order to obtain or retain business, or to retain an advantage in the conduct of business.  It is a defence for the relevant body to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

**Proposed reforms / The year ahead**

Three proposed reforms will have major implications for corruption and bribery law, namely:

- the proposed consolidation and reform of the existing bribery and corruption offences set out in the PCA;
- the reform of the Ethics in Public Office Acts; and
- the transposition of the fourth Money Laundering Directive.

As mentioned, in June 2012, the Department of Justice published the General Scheme of the Criminal Justice (Corruption) Bill 2012 (draft Bill). Among other things, that draft Bill will consolidate the bribery offences set out in the PCA. The Bill itself is expected to be published shortly: the current Government has identified it as a priority Bill in its Legislative Programme, published on 27 September 2016.

The draft Bill aims at consolidating the corruption offences set out in the PCA. In addition, it makes “renewed provision for the main requirements of a number of international agreements relating to corruption to which Ireland is a party”. In fulfilling these aims, the draft Bill provides for a number of new offences, including, in particular, three bribery offences: an active and passive general bribery offence and an active foreign bribery offence. It also provides for a new offence of corporate bribery as well as an offence of bribing through an intermediary.

The Public Sector Standards Bill 2015 was published on 23 December 2015. This Bill consolidates the current legislative framework governing the ethical obligations of public officials and gives effect to the recommendations of several Tribunals of Inquiry. The purpose of the Bill is to significantly enhance the existing framework for identifying, disclosing and managing conflicts of interest and minimising corruption risks, while also achieving a shift towards a more dynamic and risk-based system of compliance and ensuring that the institutional framework for oversight, investigation and enforcement is robust and effective. Key reforms proposed in the Bill include:

- the introduction of a new Public Sector Standards Commissioner to oversee a reformed complaints and investigations process;
- the establishment in legislation of a set of integrity principles for all public officials;
- the strengthening of the legal obligation for public officials to disclose, as a matter of routine, actual and potential conflicts of interest, reinforced by a significant extension of the personal and material scope of disclosures for public officials and graduated disclosure requirements;
- the establishment of a more effective (IT-based) process for the submission of periodic statements of interests;
• the imposition of statutory prohibitions on the use of insider information, on the seeking by public officials of benefits to further their private interests, and on local elected representatives from dealing professionally with land in certain circumstances; and
• the establishment of a new statutory board to address potential conflicts of interest as public officials take up roles in the private sector.

The existing framework for combatting money laundering is set out in the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 and 2013. In its September Legislative Programme, the Government has indicated that it intends to bring forward a bill to transpose the EU’s fourth Money-Laundering Directive into Irish law as soon as possible. Under EU law, the Directive must be implemented before June 2017. The Minister for Finance has consulted publicly on whether there should be public access to the beneficial ownership register which will be established under the forthcoming Act.

***

Endnotes

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Megan is an experienced commercial litigation solicitor and has, since February 2009, been the lead adviser to two financial institutions in respect of regulatory and criminal investigations arising from legacy issues. She advises companies and financial institutions on corporate disputes, regulatory investigations and inquiries and dispute resolution through Commercial Court litigation and mediation. She is knowledgeable about the procedures of the Director of Public Prosecutions and regulatory bodies such as the Office of the Director of Corporate Enforcement. She has experience responding to orders and statutory requests under legislative frameworks such as the Companies Acts and has experience dealing with data protection and customer confidentiality issues.

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Imelda is a Senior Associate in McCann FitzGerald’s Banking and Financial Services Department where she specialises in regulatory developments in banking and financial services law, including in relation to compliance and enforcement issues. Prior to joining McCann FitzGerald, Imelda practised as a barrister for a number of years, during which she acted as Independent Counsel for a Tribunal of Inquiry investigating allegations of political corruption. She has also spent several years working for and with EU institutions, including in particular the Court of Justice of the European Union. Imelda is a very experienced public speaker and was engaged as an Adjunct Assistant Professor of Law by Trinity College Dublin for a number of years, in which capacity she set up the first postgraduate course on corruption law in Ireland. Imelda has also lectured for University College Dublin and the Honorable Society of King’s Inns and has spoken widely at conferences and seminars both in Ireland and abroad on corruption as well as on other topics. Imelda is the author of “Corruption Law”, the first (and only) book on Irish corruption law. She has also published several chapters in edited publications as well as a number of articles in legal journals on corruption law as well as on other topical legal issues. Imelda’s Ph.D. thesis was on the topic of bribery. Imelda is a member of the European Commission’s national network of anti-corruption specialists.

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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 currently a Senior Associate with McCann FitzGerald.

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