

TRAINING & DEVELOPMENT PROGRAMME

Knowledge Network

Webinar Series

Investigations in a time of COVID-19

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Seán Barton
Partner
+353 1 607 1219
Sean.Barton
@mccannfitzgerald.com



Clare Carroll
Senior Associate
+353 1 511 1502
Clare.Carroll
@mccannfitzgerald.com

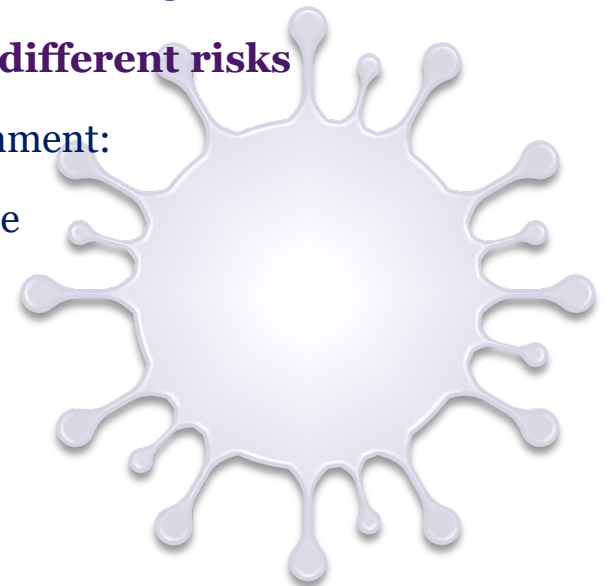
Welcome

HOW MUCH HAS COVID-19 CHANGED EVERYTHING?

- Time of astonishing **disruption** leading to working in different ways
- Moving from **short-term crisis** (where important but not urgent could be deferred) to a **longer-term changed environment**
- **Risks** which can give rise to investigations have altered and controls and policies need to respond accordingly

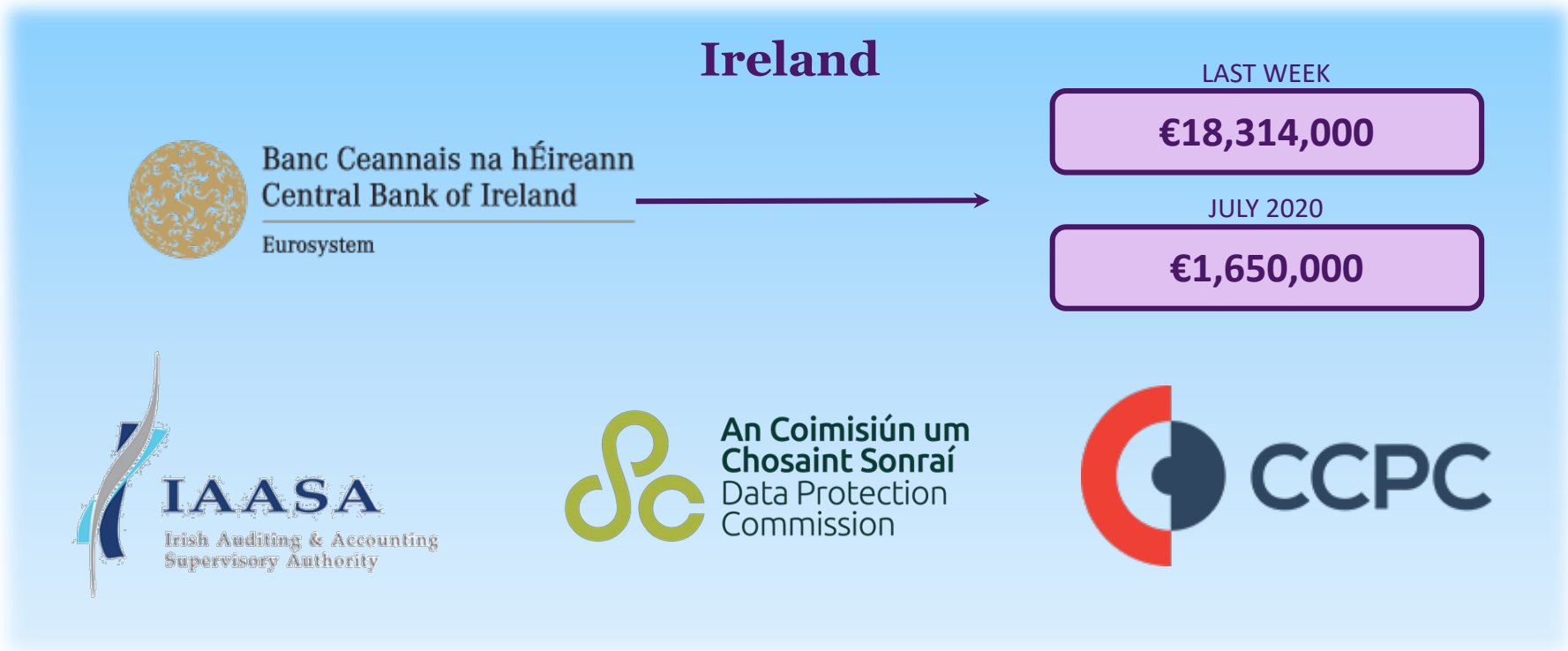
WHAT HAS COVID-19 NOT CHANGED?

- **‘Stop it before it starts’**: avoid investigations through culture and governance
- **Fundamental principles are unchanged**, but apply to **different risks**
- **Key requirements**, including in a more distanced environment:
 - **Immediate priorities** when credible suspicions arise
 - Investigation **governance**
 - Gathering **evidence reliably**
 - **Fair procedures** in conducting investigations



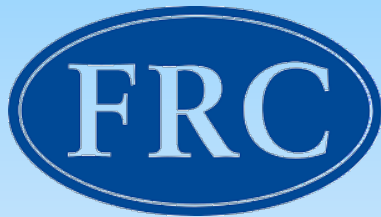
Current Regulatory Environment

- Enforcement agencies **continuing** with their supervisory, investigative and enforcement activities



Current Regulatory Environment *cont'd*

United Kingdom



£200,000



£15,000,000



SFO

- Standards required and legal obligations **unchanged**, but **recognition** of the practical and operational difficulties being experienced universally

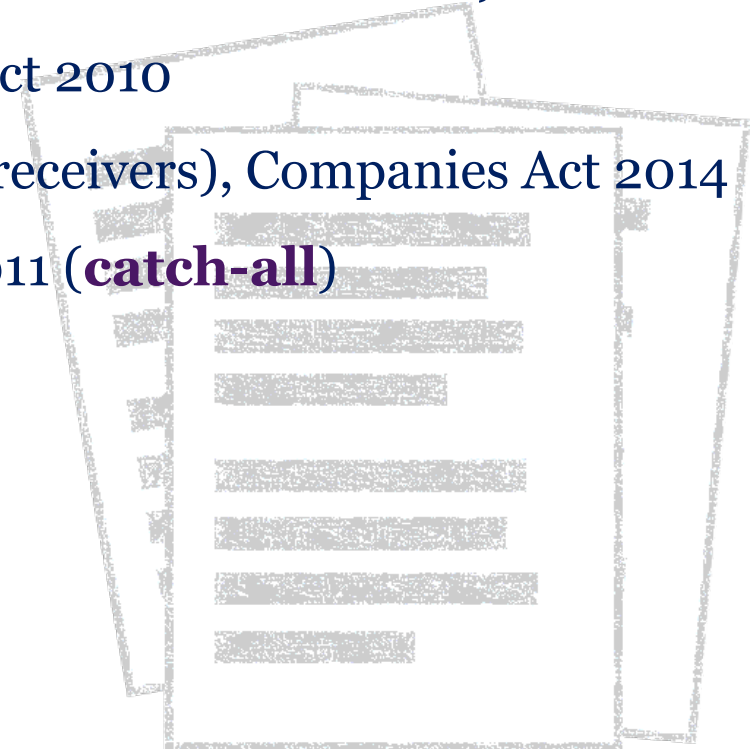
Immediate Priorities

- Develop sense of **scale of issue** and of **potential outcome** (e.g. administrative fine, criminal prosecution, reputational damage)
- Consider **delaying**
- **Lawyers**
- Check **insurance** position
- Mandatory **reporting** obligations
- **Documents** – location and preservation
- **Whistleblower protection**
- Need to **secure** assets? (civil or other action?)



Mandatory Reporting

- **Section 42**, Criminal Justice (Money Laundering and Terrorist Financing) Act 2010
- **Section 59**, Criminal Justice (Theft and Fraud Offences) 2001
- **Section 21**, Central Bank Reform Act 2010
- **Sections 393** (auditors) and **447** (receivers), Companies Act 2014
- **Section 19**, Criminal Justice Act 2011 (**catch-all**)



Section 19

Criminal Justice Act 2011

- Creates offence of failing *without reasonable excuse* to disclose *as soon as it is practicable* to a member of the Garda Síochána information which he or she *knows or believes* might be of material assistance in—
 - (i) preventing the commission by any other person of a *relevant offence*
 - or
 - (ii) securing the apprehension, prosecution or conviction of any other person for a *relevant offence*
- *Sweeney v. Ireland* [2019] IESC 39 settles constitutionality doubts

Relevant Offences

Criminal Justice Act 2011, Schedule 1

**Bribery and
Corruption**

Forgery

Computer Crime

Theft and Fraud

Insider Trading

**Copyright
Infringement**

**Money Laundering
and Terrorist Financing**

Competition Offences

Whistleblower Protection

Protected Disclosures Act 2014

- Comprehensive suite of employment and immunity **protections** to whistleblower **“workers”**
- Applies to disclosures of **“relevant wrongdoing”**:
 - *Baranya v. Rosderra Irish Meat Group* [2020] IEHC 56
- Employee’s **obligation to address** relevant wrongdoing anyway as part of his ordinary duties is relevant:
 - *Cullen v. Kilternan Cemetery Park Limited* [2020] IECC 2
- **Substance not form** of disclosure is relevant:
 - *Clarke v. CGI Food Services Ltd* [2020] IEHC 368
- Investigation largely proceeds normally, but important to ensure **whistleblower is protected and kept informed** confidentially on progress

Action to secure threatened assets

Civil law options

- ***In rem* or proprietary injunction** to secure assets
- **Mareva injunction**
- **European Account Preservation Order** (SI 655/2014)
- **Specialist remedies** for e.g. IP infringements
- **Proceeds of Crime Act** application

Criminal law options (still relatively rare in Ireland)

- **property freezing order**: section 32, Criminal Justice (Mutual Assistance) Act 2008
- **Mutual recognition** available throughout EU on both civil and criminal side

Governance

- Set up **team**
- Assess **externally** who is required, e.g. in an internal investigation:
 - Do you need an investigator?
 - Terms of reference
 - PR issues
- **Expectation of privacy**, e.g.:
 - *ZXC v. Bloomberg LP* [2019] EWHC 970



Privilege



- General principles
- Privilege in investigations:
 - **Litigation** privilege
 - *Quinn v. IBRC* [2015] IEHC 315
 - *DCE v. Buckley* [2018] IEHC 51
 - *SFO v. ENRC* [2018] EWCA Civ 2006 (UK position)
 - **Legal advice** privilege
 - **Limited waiver** (*Fyffes v. DCC* [2005] 1 IR 59)

Privilege *cont'd*

PRACTICAL TIPS

- **Avoid uncontrolled communications**
- **Minute** matters related to investigation **separately**
- **Label privileged material** as such (although not determinative)
- Document when “**litigation contemplated**” or a cut-off point to engage litigation privilege

Conducting an Investigation

INFORMATION/EVIDENCE GATHERING

- **Documents and witnesses**
- **Fair procedures**



Conducting an Investigation *cont'd*

DOCUMENTARY EVIDENCE

- Understanding your organisation's **data universe**
- **Data preservation**
- **Data collection**
- Issues with **mixed relevance sources, BYOD**:
 - *Phones 4U Ltd (In Administration) v. EE Ltd* [2020] EWHC 1921

Conducting an Investigation *cont'd*

DOCUMENTARY EVIDENCE – PRACTICAL STEPS

- Review **relevant policies**
- Engage an **independent IT specialist**, if appropriate
- Consider **scope** at planning stage
- **Document** all steps and decisions taken

Conducting an Investigation *cont'd*

WITNESS/ORAL EVIDENCE

- Area of evidence-gathering most impacted by Covid-19
- Consider:
 - **Delaying**
 - **Alternatives** to oral evidence, e.g. written statement
 - **Remote interviews** – good substitute for pure “fact-finding interview”, especially if subject agrees

Conducting an Investigation *cont'd*

REMOTE INTERVIEWS – MATTERS TO CONSIDER

- Choose **technology** – security and functionality
- How to ensure **confidentiality**
- **Stenography/Recording**
- **Dry run** is essential
- Handling **documents**
- Separate “**privileged**” **channel** for lawyer/client discussions
- **Technical support**



Conducting an Investigation *cont'd*

WITNESS/ORAL EVIDENCE

- Civil and Criminal Law (Miscellaneous Provisions) Act 2020
- Remote interviews **may not** be suitable for:
 - interviews where **consequences for interviewee** may be severe (e.g. criminal prosecution)
 - “**contentious**” **investigative interviews** involving cross-examination and/or multiple parties

Conducting an Investigation *cont'd*

DAWN RAIDS & ON-SITE INSPECTIONS

- **Practical difficulties**
 - Many businesses carried on in employees' homes
 - Inviolable under the Constitution, except with search warrant
- Fewer dawn raids for **records evidence**
 - Agencies will use **powers to compel** information and documents
 - Difficulties in **assembling records** will shift back to businesses
- More likely when deciding whether **to close or not to close** (e.g. public health requirements)

Conducting an Investigation *cont'd*

CONSTITUTIONAL FAIR PROCEDURES

- **Potential obligation to adhere to published policy/procedure**
- **Re Haughey rights** [1971] IR 217 are key, but:
 - “*not a ritual or formula requiring a slavish adherence*”
 - Depend on context and extent to which reputational or other rights at risk
- **Prior notice** of information (no ambush):
 - *O'Brien v. Garda Commissioner* (High Court, Kelly J, 19 August 1996)
- **Reasonably available steps** to resolve conflicts of fact or test inculpatory evidence (if cross-examination unavailable):
 - *Kiely v. Minister for Social Welfare (No. 2)* [1977] IR 267
- Opportunity to submit **supporting or exculpatory evidence**
- Opportunity to make a **statement or submission**
- **Duty to warn** when rights at risk, when becomes adversarial



Conducting an Investigation *cont'd*

RIGHT TO BE LEGALLY REPRESENTED?

- *McKelvey v. Iarnród Éireann* [2019] IESC 79 – overarching principle is:

“it is only in those cases where legal representation is **necessary to achieve a fair hearing** that any implied entitlement to such representation can be said to exist”

- **Relevant criteria** include:
 - seriousness of allegation
 - potential penalty
 - whether points of law likely to arise
 - capacity of employee to present own case
 - need for speed in adjudicating
 - procedural difficulty
 - need for fairness between parties



Conducting an Investigation *cont'd*

IN UNUSUAL AND DIFFICULT CIRCUMSTANCES,
THE BEST ACHIEVABLE IS GOOD ENOUGH

- *LSM (a minor suing through her mother and next friend KM) v. Child and Family Agency* [2018] IEHC 500; [2018] IECA 385:

“where circumstances are such that the full operation of conventional fair procedures is **simply impractical**, due in particular to the decision-maker running out of time, a practical and pragmatic solution whereby a **curtailed or modified form of fair procedures** is applied is not in itself a breach of the principle.”

In summary, even in a socially distant environment...

- Reduce need for investigations through **culture and governance**
- In the changed Covid world, how do risks we might have to address through investigations, and the **controls and policies** we have honed to address them in the workplace, look?
- **Regulators and agencies** will continue to fulfil their statutory mandates where businesses continue to do business, though perhaps with fewer dawn raids and more remote compulsion
- **Rights and interests** to be constantly balanced as investigations evolve
- **Fundamental fair procedures** requirements remain the same, but nobody expected to do impossible and **best available is good enough**, so where common sense decisions on how to proceed are reasoned, they are defensible

“Adapt yourselves to the things among which your lot has been cast and love sincerely the fellow creatures with whom destiny has ordained that you shall live.”

Questions?



Seán Barton
Partner
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