



■ TALKINGPOINT December 2018

New anti-corruption legislation in Ireland

FW speaks with Muireann Reedy at Dillon Eustace about new anti-corruption legislation in Ireland.



THE RESPONDENT



Muireann Reedy
Senior Associate
Dillon Eustace
T: +353 1 674 1002
E. muireann.reedy@dilloneustace.ie

Muireann Reedy is a senior associate in Dillon Eustace's Regulatory Investigations Unit. She has particular expertise in regulatory investigations by the Central Bank of Ireland and has advised a broad range of regulated entities, as well as senior executives, on various contentious regulatory matters, including voluntary and compulsory interviews, fitness and probity investigations and investigations and settlements under the Central Bank of Ireland's Administrative Sanctions Procedure.

FW: Could you provide some background as to why the Criminal Justice (Corruption Offences) Act 2018 has been introduced in Ireland at this time?

Reedy: The Act was introduced to modernise Ireland's anti-corruption laws and as part of the government's commitment to tackle white-collar crime in Ireland. The Act repealed Ireland's prior anti-corruption framework, which consisted of legislation dating back as far as 1889. It also gives legislative effect to some of the recommendations made by the Tribunal of Inquiry Into Certain Planning Matters and Payments, a public inquiry set up by the government in 1997 to investigate allegations of corruption in the Irish planning process.

FW: What, in your opinion, are the legislation's key provisions?

Reedy: From a corporate's perspective, one of the Act's key provisions is section 18, which introduces a new strict liability offence whereby a company can be criminally liable for corruption offences committed by certain of its personnel, including directors, managers and employees, or parties connected to the firm, such as subsidiaries and agents of the firm, where the act was done with the intention of obtaining business or a business advantage for the firm. A company can defend such a prosecution if it can prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence. Senior managers should also be wary of section 18 as it provides for the personal criminal liability of directors, managers, company secretaries and other company officers,

where a company commits an offence under the Act and it is proved that the offence was committed with consent or connivance, or was attributable to any wilful neglect of a person who was a senior manager or who was purporting to act in that capacity.

FW: How much of a shift does the Act represent in comparison to Ireland's anti-corruption practices prior to the introduction of the new legislation?

Reedy: The Act represents a significant shift from Ireland's prior anti-corruption framework, which was primarily focused on the corruption of individuals who were performing public functions and did not provide for corporate criminal liability where personnel within or connected to a firm committed an offence to benefit the company. The Act applies to corruption in both the public and private sectors, expressly covers both direct and indirect corruption and creates some new offences, including the strict liability offence and an offence of giving a bribe, referred to as a "gift, consideration or advantage", to another person, where the giver knows or ought reasonably to know that it will be used to facilitate the commission of an offence under the Act. It also significantly extends some of the presumptions of corruption which were contained in the now repealed legislation.

FW: What sanctions might non-compliant parties, particularly company officers, face if prosecuted?

Reedy: A person can be fined up to €5000 or be imprisoned for up to a year if convicted, summarily, of one of the main corruption offences under the Act.

If convicted on indictment, a person could receive an unlimited fine or be imprisoned for up to 10 years. In addition, or as an alternative to any of these penalties, an individual could be required to forfeit any benefit obtained in connection with the offence or have land, cash or property of an equivalent value to the benefit obtained as a result of the offence, forfeited. These penalties apply to all individuals convicted for an offence under the Act, including company officers. The only offence which carries a lesser penalty for individuals is the 'trading in influence' offence for which the prison term for a conviction on indictment cannot exceed five years. Companies convicted under section 18 can be liable to a fine of up to €5000 on summary conviction, or an unlimited fine if convicted on indictment.

FW: What policies, procedures and internal controls do you recommend companies implement in order to minimise the corruption risks they face and ensure legislative compliance? How important is it to implement a clear and comprehensive anti-corruption policy?

Reedy: It is vitally important for companies to have a clear and comprehensive anti-bribery and anti-corruption policy in place, as this may assist them in defending a prosecution under section 18. The policy should be reviewed and approved by the company's board and reviewed periodically, particularly where there are changes to the company's business model, such as selling into new overseas jurisdictions with a perceived higher risk of corruption. A senior individual within the firm, such as the head of compliance, should be given

responsibility for overseeing the firm's compliance with its policy and receiving reports of any suspected corrupt activities. In addition, where a company uses a third-party to introduce business or to distribute products on its behalf, for example, it should check that the relevant contract contains an anti-bribery clause. To help identify any potentially corrupt activity, it is recommended that companies keep a register of gifts, either given or received, and of political and charitable donations. Any hospitality offered to clients and third parties should also be recorded in sufficient detail. These registers, and any expense payments, should be audited on a periodic basis by a compliance manager to identify any unusual patterns which give rise to a suspicion of bribery.

FW: To what extent do personnel need to receive training on corporate anti-corruption policies, and how to recognise and respond to suspected corruption?

Reedy: All personnel working for a company should receive training on its anti-corruption policies, including how to respond to suspected corruption. At induction, new personnel should be given a copy of the company's anti-bribery and anti-corruption policy and annual training should then be given to staff on the policy, or at more frequent intervals if material changes are made to the policy in the interim. In order for training to be practical and effective it should be tailored to the specific corruption risks faced by the company's staff. Staff should also know who in the firm is responsible for overseeing compliance with the policy and for receiving reports of any suspected corrupt activity. Staff should

also be advised as to the consequences of breaching the firm's policy.

FW: What options are available to companies seeking to defend against prosecution? Are anti-corruption policies and procedures likely to be a sufficient defence?

Reedy: In Ireland, unlike other jurisdictions, it is not currently possible to enter into a deferred prosecution agreement (DPA), although the Law Reform Commission has recently recommended that a statutory scheme for DPAs should be introduced for certain offences, including offences under the Act. Prosecuting authorities have discretion as to whether to prosecute and according to the Director of Public Prosecution's 'Guidelines for Prosecutors', an aggravating factor which may be taken into account when deciding if there is a public interest in proceeding with a prosecution, is whether there is any element of corruption. However, a factor which can also be taken into account in deciding whether to prosecute is whether an offender is willing to cooperate in the investigation or prosecution of other offenders, or has already done so. If a company cooperates with a corruption investigation, this may be taken into account at sentencing. Anti-corruption policies and procedures may assist a company in defending a charge under section 18 of the Act, but this defence is only likely to prevail if the policies and procedures are sufficiently comprehensive and are complied with, training has been given on them and it is clear that top-level management within the organisation have done all in their power to create a zero-tolerance culture for corruption.

“
IN ORDER FOR TRAINING TO
BE PRACTICAL AND EFFECTIVE
IT SHOULD BE TAILORED TO
THE SPECIFIC CORRUPTION
RISKS FACED BY THE
COMPANY'S STAFF.

MUIREANN REEDY
Dillon Eustace

FW: Going forward, in what ways is the new legislation likely to transform anti-corruption best practice in Ireland?

Reedy: The introduction of the section 18 offence is likely to sharpen companies' focus on having robust anti-bribery and anti-corruption policies and procedures in place. Whereas previously some companies may have viewed such procedures as being in the 'nice to have' but not essential category, the review and implementation of these procedures is now likely to be prioritised, with training rolled out to staff. Companies may also decide to conduct risk assessments to assess the specific corruption risks facing their businesses, so they can put mitigating controls in place to reduce the possibility of the identified risks materialising. ■

This article first appeared in the December 2018 issue of Financier Worldwide magazine. Permission to use this reprint has been granted by the publisher. © 2018 Financier Worldwide Limited.

FINANCIER
WORLDWIDE corporation of finance intelligence