

Criminal Justice (Theft and Fraud Offences) (Amendment) Bill 2020

There is currently a clear impetus at EU level to prevent and prosecute fraud involving EU funds, which is estimated to cost the EU approximately €5bn per annum, of which €1bn is linked to VAT fraud.

The Criminal Justice (Theft and Fraud Offences) (Amendment) Bill 2020 (the **Bill**) is intended to give further effect to the 'PIF Directive' (EU 2017/1371). This provides for minimum rules that EU Member States must enact to prosecute and sanction offences against the EU's financial interests, including fraud, corruption, the misappropriation of funds and money laundering. In 2018, Ireland transposed the provisions of the PIF Directive relating to corruption into Irish law in the Criminal Justice (Corruption Offences) Act, 2018 (the **2018 Corruption Act**). This new Bill will implement the fraud and other aspects of the Directive.

The Bill serves as a useful reminder to companies to ensure that their systems and controls for preventing and detecting fraud and corruption are sufficiently robust. Although Ireland will not participate in the European Public Prosecutor's Office (**EPPO**) - whose activities are expected to ramp up in 2021 - the increased focus on these offences at EU level may result in the referral of suspected offences to Irish law enforcement agencies for investigation.

Speedread

A. Key points

The Bill will have significant ramifications for companies in Ireland, particularly those with business operations in Europe or which operate in industries which attract EU funding. One of the most important aspects of the legislation is the introduction of a new specific offence of fraud affecting the financial interests of the EU.

The concept of fraud against the EU's financial interests can encompass anything from VAT fraud to procurement fraud where EU funds are involved.

Companies will be liable for offences committed by their directors, employees, agents or subsidiaries where there was a failure by the company to exercise the requisite supervision or control over the person who has committed it.

Similar to the 2018 Corruption Act, a defence will be available to companies to show they took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

Analysis

B. New offences

- **The offence of fraud against the EU's financial interests.** This covers a broad range of conduct including presenting false or incomplete documents, withholding information or the misapplication of funds or benefits granted where such conduct damages the EU's financial interests. It specifically includes procurement fraud and certain large scale VAT frauds as described in further detail below. Any person who intentionally commits this offence is liable on conviction on indictment to a term of imprisonment of up to five years or a fine, or both.
- **Offence of misappropriation by a public official.** This covers public officials who may be directly or indirectly entrusted with the management of funds or assets and disburses funds or uses the assets contrary to the purpose for which they were intended in a way which damages the EU's financial interests. This offence can therefore be characterised more fully as misappropriation of public funds contrary to the EU's financial interests. Any person who commits this offence is liable on conviction to a term of imprisonment of up to five years or a fine, or both.
- **Inciting, aiding, abetting or attempting the commission of the above offences** is also an offence, punishable by a term of imprisonment of up to five years or a fine, or both.

C. Corporate liability : a comparison with the corporate liability framework contained in the 2018 Act

The Bill provides that a company shall be guilty of an offence where:

- » one of the above new offences is committed by a director, employee, agent or subsidiary of a company, for the benefit of a company, and
- » it is attributable to the failure, by a director or other officer of the company, to exercise the requisite degree of supervision or control over the person who committed the offence.

The Bill is narrower in scope than the corporate offence in the 2018 Corruption Act, which does not require the prosecution to establish a failure to supervise or control the person who committed the offence.

The Bill also provides that this "failure to prevent" offence will be confined to offences related to the PIF Directive and fraud against the EU's financial interests, and does not apply to the theft and fraud offences in the 2001 Act more generally. The attribution of corporate criminal liability for other offences under the 2001 Act will continue to be governed by the common law identification or "controlling mind" doctrine. This stands in contrast to the 2018 Corruption Act, which extends a "failure to prevent" corporate liability model to all of the major corruption offences.

D. Extra-territorial effect

Liability for the proposed new offences will extend to acts committed overseas by Irish citizens or persons who have had their residence in the State in the 12 months before the commission of the offence.

This will permit individuals and companies to be prosecuted in Ireland for certain offences committed outside Ireland, such as fraud affecting the interests of the EU, misappropriation of EU funds, or the failure by a company to prevent the commission of a fraud offence.

E. How will the Bill affect the existing public procurement landscape?

The Bill creates additional deterrents in the EU's fight against corruption and fraud in public procurement. The EU Procurement Directives already facilitate mandatory exclusion from procurement processes for companies convicted of corruption and fraud. They also contain tools to support fraud detection including reporting obligations and retention of records. However, the Bill now places a sharp focus on criminal liability for procurement fraud which covers conduct both at the tendering stage and the post- contract award stage.

The offence of procurement fraud encompasses any act or omission related to:

- » the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the EU budget
- » non-disclosure of information in violation of a specific obligation, with the same effect, or
- » the misapplication of such funds or assets for purposes other than those for which they were originally granted which damages the EU's financial interests.

Companies tendering for public contracts will need to be particularly vigilant in ensuring that robust systems are in place to prevent and detect procurement fraud.

Public officials entrusted with the management of funds or assets will also need to be mindful of the new offence of 'misappropriation' prescribed under the Bill. The offence applies to any public official who intentionally commits, disburses funds, appropriates or uses assets contrary to the purpose for which they were intended which damages the EU's financial interests. The definition of 'public official' covers not only persons in public office holding formal positions but also private persons involved in the management of EU funds (e.g. third party contractors).

F. VAT fraud offence

The Bill provides that the offence of fraud affecting the EU's financial interests is to include certain cross-border large scale VAT frauds involving damage to the EU budget exceeding €10m and involving two or more EU Member States. The offence refers to any act or omission committed in cross-border VAT fraudulent schemes involving:

- » the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the EU budget
- » non-disclosure of VAT-related information in violation of a specific obligation, with the same effect or
- » the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

The legislation is therefore focused on serious VAT fraud offences, in particular carousel fraud, VAT fraud through missing traders or other high value schemes involving multiple EU jurisdictions.

The current domestic Irish legislation is relatively comprehensive in providing for both civil and criminal penalties in the event of perpetration of VAT fraud (i.e. Section 1078 Taxes Consolidation Act 1997 and Section 108C Irish VAT Act 2010). Although the Bill does not define the level of fines (which could conceivably exceed those fines provided for in Section 1078 TCA 1997), the imprisonment terms under domestic tax legislation and the Bill are similarly at the higher end.

Aside from the civil measures available to the Irish Revenue Commissioners to punish VAT fraud (which should continue to subsist), the new criminal offence of VAT fraud affecting the EU's financial interests goes further in the following ways:

- The Bill extends liability to acts committed overseas by Irish citizens or certain residents, thereby permitting individuals and companies to be tried in Ireland for certain VAT fraud offences committed outside Ireland (e.g. schemes involving non/under-payment of non-Irish EU VAT).
- The Bill provides for corporate liability where a company fails to prevent the perpetration of the VAT fraud. This introduces a need for companies to have in place robust mechanisms to ensure their management prevent directors, managers, officers, employees, agents or subsidiaries committing qualifying VAT fraud offences. The Bill as currently drafted is not entirely clear as to whether this offence would apply to a party other than the party to which the benefit of the fraud accrues (similar to the UK offence of failure to prevent the facilitation of tax evasion). We hope that this will be clarified when the Bill moves through the remainder of the legislative process.

G. What do companies need to do?

Preparation is key

Every company should conduct its own risk assessment, specifically tailored to its business and the specific markets in which it operates, identifying risk factors and exposures that may make it more likely to be exposed to the offences to be introduced by this legislation. These might include, for example, performing public contracts, work on EU-funded projects or business models/products susceptible to cross-border VAT fraudulent schemes. Where these risk factors apply, companies should take concrete action to be able to show that they took 'all reasonable steps' and exercise 'all due diligence' to avoid the commission of an offence, including making sure that their employees, agents and subsidiaries are subject to adequate supervision.

From a VAT perspective, although companies may already be applying due diligence processes in light of obligations under current domestic tax legislation, it is worthwhile considering again given the scope of the new offences introduced by the Bill.

If you have already undertaken a corruption risk assessment and put in place prevention/detection systems or policies following the enactment of the 2018 Act, then these can be updated to encompass these new offences.

By carrying out the following steps businesses can start to ensure that their systems and controls are ready for the implementation of this legislation:

- » Complete a risk assessment or questionnaire focused on the new offences, engaging with all levels of the business.
- » Design and/or update current policies and procedures to ensure that the correct systems are in place to detect and prevent the commission of the offences.
- » Ensure that adequate training is in place for employees and agents so that they are aware of the offences and of the steps they need to take to prevent their commission. In particular, managers and supervisors should be aware of their responsibilities under the new legislation in terms of monitoring subordinates' actions.
- » Ensure ongoing monitoring of relevant policies and procedures to confirm their effectiveness.
- » Be prepared that counterparties may ask probing questions in the context of bids, deals or joint ventures that the business may be involved in. Representations and warranties may also be sought in relation to any of the offences outlined above.
- » Ensure that ongoing monitoring and compliance oversight are features of board meetings on a regular basis.

Our experienced teams are on hand to guide you through this new legislation and to advise on how you can best tailor your company's response to ensure that it is prepared for these new requirements when they are implemented in the coming months.

For more information on this topic please contact [Louise Byrne](#), Partner, [Katie O'Connor](#), Partner, [Anna Marie Curran](#), Partner or [Bryan Hughes](#), Associate.

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