THE LAW ON BRIBERY AND CORRUPTION IN IRELAND

Overview

Corruption is defined in the Department of Justice’s White Paper on White Collar Crime as “the misuse of public entrusted power for private gain”. Bribery, a specific form of corruption, involves the “offering, promising or giving of something in order to improperly influence another in carrying out their duties”.

The boundary line between what is proper and improper in a business context is not always clearly drawn, but the risk to a commercial organisation of falling on the wrong side of the line can potentially result in severe reputational damage, or indeed criminal prosecution.

Although bribery and corruption have been criminalised in Ireland for over 100 years, there have been very few convictions, or indeed prosecutions, pursuant to the Prevention of Corruption Acts 1889 to 2010 (the 1889-2010 Acts). While this may have more to do with the attitude to enforcement of the law, weaknesses in the legislation have made it difficult for investigators to assemble the proofs necessary to sustain successful prosecutions.

Many of the deficiencies in Irish law identified by international organisations, including the OECD, appear to have been addressed in the Prevention of Corruption (Amendment) Act, 2010, and against a backdrop of increased regulatory and enforcement activity in Ireland, it is only a matter of time before the robustness of this new law is tested.

The purpose of this article is to highlight the key features of Ireland’s anti-bribery and anti-corruption regime, and to explain why the implementation of anti-bribery and anti-corruption measures is a topic which should feature prominently at board level.

This article also looks briefly at the new UK Bribery Act 2010 (the 2010 UK Act), which came into force on 1 July 2011. It is important that Irish businesses operating in the UK acquaint themselves with the key provisions of the 2010 UK Act due to its wide territorial reach. The 2010 UK Act also has relevance for Irish businesses taking a proactive approach to the prevention of bribery and corruption. In this regard, the guidance published by the UK government, on what constitutes “adequate” procedures to prevent bribery and corruption, is a useful reference point in the absence of any equivalent Irish guidelines.

Corruption and Bribery: Risk and Relevance

Reporting Obligations

Bribery and corruption are included in the list of offences captured by the new offence of “withholding information” introduced by the Criminal Justice Act, 2011 (the 2011 Act). The stated objective of the Irish government in introducing this new legislation was to speed up the prosecution of white collar crime. Section 19 of the 2011 Act criminalises a failure, without “reasonable excuse”, to disclose information to the police which a person knows or believes may be of “material assistance” in preventing or prosecuting a number of offences, many of which broadly fall under the heading of “white collar crime”. A person is obliged to disclose any relevant information “as soon as practicable”.

To fully assess the impact of the “withholding information” offence on a business, it is useful to have a basic knowledge of Irish law on corruption and bribery, and to gain an understanding of where the boundary line is drawn in Irish law between proper and improper business activity.

The Long Arm of Anti-Bribery and Anti-Corruption Law

For Irish businesses with an international presence, compliance with anti-bribery and anti-corruption laws cannot be treated as a purely domestic issue. Anti-bribery and anti-corruption laws typically have extra-territorial effect. For example, the 2010 UK Act applies to commercial entities which carry on a business (or part of a
business in the UK), regardless of where those entities are incorporated. It is therefore necessary to get to grips with how foreign anti-bribery and anti-corruption laws may affect the way in which one does business with persons or entities outside of Ireland.

**A Snapshot of Irish Law on Bribery and Corruption**

- Irish law on corruption and bribery is contained in a series of statutes dating back to 1889. The fragmented nature of Irish law in this area has been criticised by international organisations, including the OECD Anti-Bribery Group and the Council of Europe Criminal Law Group.

- The principal statutory offence in Irish law is the offence of “corruption of agents”, which provides that it is an offence to “corruptly” give or accept any gift or consideration or advantage, as an inducement to, or reward for, an “agent” doing any act, or making any omission, in relation to his or her office, position, or his or her principal’s affairs or business. An “agent” is “any person employed by or acting for another”.

- There are also a number of common law offences which address corrupt activity, and several statutory offences which are specific to public officials and government office holders.

- Having received a poor “report card” from the OECD Anti-Bribery Group and the Council of Europe Criminal Law Group, Ireland enacted into law the Prevention of Corruption (Amendment) Act 2010 (the 2010 Act), with a view to increasing the reach and robustness of its laws on bribery and corruption. Key amendments introduced by this recent legislation included:
  - The introduction of a definition of the word “corruptly”.
    For the first time, the word “corruptly” has been comprehensively defined in Irish legislation, which will assist prosecutors in establishing the constituent elements of the offence of corruption of agents. The definition includes “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 information, or by another means”.
  - The reach of the territorial application of the 1889-2010 Acts is extended.
    Thus the 1889-2010 Acts cover corrupt acts committed outside of Ireland by Irish citizens, individuals ordinarily resident in Ireland, companies registered in Ireland, other corporate bodies established under the laws of Ireland, and other relevant agents, in addition to Irish office holders or officials. However, the 2010 Act does not go so far as the 2010 UK Act (see below), and does not extend to non-Irish commercial organisations which carry on part of their business in Ireland.
  - The introduction of whistleblower protection for persons reporting bribery and corruption offences.
    The relevant section provides that a person, who reports an offence under the 1889-2010 Acts to an “appropriate person” shall not be held liable in damages to the person to whom the report relates, unless the report was known to be false, misleading, frivolous or vexatious. The definition of “appropriate person” includes members of the police and employers (or their nominees). The 2010 Act also specifically provides that an employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for making a report.

**Penalties**

- Penalties for breach of Ireland’s corruption and bribery laws include up to 10 years’ imprisonment and an unlimited fine. Where an offence has been committed by a company, and is proved to have been committed with the consent or connivance of, or to be attributable to any wilful neglect on the part of a
director, manager, secretary or other officer of the company, or a person who was purporting to act in any such capacity, that person as well as the company, shall be guilty of an offence.

- Employers found guilty of penalising whistleblowers, are subject to a fine of up to €250,000 or 3 years’ imprisonment, or both. In addition, pursuant to the Proceeds of Crime (Amendment) Act 2005 (the 2005 Act), the Criminal Assets Bureau is empowered to seize suspected bribes or corrupt payments. The 2005 Act also contains provisions on the forfeiture of bribes.

- While there have been few convictions, or prosecutions, pursuant to Irish anti-bribery and anti-corruption laws, this is likely to change with the renewed focus on corruption and bribery law in Ireland, due to the passing of the recent legislation in this area.

**The UK Bribery Act 2010 - The “Corporate Offence”**

Under the 2010 UK Act companies carrying on business, or part of a business, in the UK can potentially be held liable in relation to acts of bribery committed by a person associated with the company, where that person’s actions are intended to obtain or retain business or a business advantage for the company. This is the case even when the company is not incorporated or registered in the UK.

*“Relevant commercial organisations”/*Associated persons*

Under Section 7 of the 2010 UK Act, it is an offence for a “relevant commercial organisation” to fail to prevent a “person associated” with that organisation from bribing another person, with the intention of obtaining or retaining business or a business advantage for the commercial organisation.

- The definition of "relevant commercial organisation" includes companies and partnerships which are "carrying on business in the UK" regardless of where they are incorporated or registered;

- An "associated person" includes persons who perform services on behalf of a company, regardless of the capacity in which they do so.

**Strict Liability Offence**

The new corporate offence is a strict liability offence; in other words, if the prosecution proves that an act of bribery has been committed by a “person associated” with a commercial organisation, that commercial organisation will be found guilty of the offence. The only defence to Section 7 is for a company or organisation to prove that it has in place “adequate procedures” designed to prevent bribery.

**Adequate Procedures**

On 30 March 2011, the UK Government published “Guidance on the 2010 UK Act”, which clarifies to a certain degree what constitutes "adequate procedures". Further detail on the contents of this guidance is set out below. However, a key point to note is that as bribery risks within a company or organisation change over the course of time, it is key that companies and organisations keep such policies and procedures under constant review in order to ensure their continued adequacy.

**Liability of senior officers**

If a body corporate commits an offence, with the consent or connivance of a senior officer, or a person purporting to act in that capacity, the senior officer (as well as the body corporate) is guilty of the offence.

**Territoriality**

The UK Courts will have jurisdiction where the offence is committed outside the UK, provided that the person committing the offence has a “close connection” with the UK.
Penalties

The criminal penalties for commercial organisations under the 2010 UK Act include a fine of up to £5,000 on summary conviction, or an unlimited fine on indictment. An individual is liable, on summary conviction to imprisonment for up to 12 months (6 months in Northern Ireland), or a fine of up to £5,000, or both. On conviction on indictment, an individual is liable to imprisonment for up to 10 years, or to an unlimited fine, or to both. Notably, the Crown Prosecution Service announced the first prosecution under the 2010 UK Act on 31 August 2011. The prosecution was taken against a London Magistrate's court employee, and related to a charge of requesting and receiving a bribe contrary to Section 2 of the 2010 UK Act.

Using the UK Guidance on “Adequate Procedures” as a Reference Point

While the Irish Standards in Public Office Commission has drawn up a number of Codes of Conduct which apply to government office holders and civil servants, there are, as of yet, no published guidelines to which private businesses operating in Ireland can refer, in order to understand where the legal boundary lines are drawn between what is proper or legitimate, and what may be (or may be perceived to be) “corrupt”.

In the absence of Irish guidelines, the guidance published by the UK Government in March 2011 is an obvious reference point for Irish businesses which are putting in place anti-bribery and anti-corruption policies and procedures.

The Six Guiding Principles

The theme which is threaded through the UK guidance is that what is required will vary from organisation to organisation, and that “combating the risks of bribery is largely about common sense, not burdensome procedures”.

Overall, the guidance endorses a risk based approach, and outlines six guiding principles to be followed by organisations in drawing up their own version of the procedures required to prevent bribery and corruption.

These six principles are as follows:

1. Proportionate procedures – the guidance acknowledges that the level of risk organisations face will vary by reference to the type and nature of persons associated with it;

2. Top-level commitment – it is incumbent on management to foster a culture in their organisation that bribery is never acceptable;

3. Risk assessment – an organisation’s approach to preventing bribery should be risk based. In terms of categorising the types of risk which may arise, these can broken into country risks; sectoral risks; transactional risks; business opportunity risks; business partnership risks;

4. Due diligence – the level of due diligence required for certain transactions will be greater than others, and this should be reflected in an organisation’s anti-bribery and anti-corruption policy;

5. Communication and training – an important part of having adequate procedures in place is to enhance awareness and understanding of the organisation’s anti-bribery prevention policies and procedures. In this regard, an organisation should consider communicating its bribery prevention policies externally, to the persons and companies with whom it does business;

6. Monitoring and review – implementing adequate procedures should not simply be seen as a box ticking exercise; the effectiveness of bribery prevention procedures should be monitored and evaluated and procedures should be adapted where necessary.
Future Outlook

In November 2011, Minister for Justice, Alan Shatter, TD, announced that he intends to consolidate all of the legislation cited as the 1889-2010 Acts into a single statute, to be called the Criminal Justice Corruption (Consolidation) Bill. The announcement was made in conjunction with Ireland’s ratification of the UN Convention on Corruption. While consolidation is a welcome initiative which will assist lawyers and businesses in accessing and understanding this complex area of the law, it remains to be seen whether Ireland will follow in the footsteps of the UK, by introducing a similar strict liability "corporate offence".

Whatever action the Minister takes on foot of his announcement, it is certainly the case that “prevention is better than cure” in the sphere of anti-bribery and anti-corruption law. The prudent approach is a proactive one; an organisation should put in place policies and procedures which define and document its approach to ensuring that the organisation does not tolerate corrupt practices or indeed permit the environment to develop, in which such practices can easily occur.

Should you have any query on any aspect of this note at any time, please do not hesitate to contact Joe Kelly at jkelly@algoodbody.com or Katie Byrne at kbyrne@algoodbody.com, or your usual contact at A&L Goodbody.