



IRELAND AIMS FOR THE “GOLD STANDARD” OF ANTI-BRIBERY LAWS

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Anti-bribery/corruption laws are well established in the UK and US. Recent developments in those jurisdictions have offered timely reminders of the importance of businesses there having a robust anti-bribery framework. Earlier this year the UK's Serious Fraud Office (SFO) secured its first convictions against company directors under the UK's much publicised Bribery Act 2010. This coincided with Alstom, a French company, agreeing to pay the US Department of Justice \$772 million, the largest ever fine for US anti-bribery law violations. The subsequent FIFA investigation has kept anti-bribery laws on the front pages of newspapers worldwide.

Later this year Ireland is due to enact anti-bribery laws similar to those in the UK and US. Overall it appears the Irish government is aiming for the “gold standard” of anti-bribery and corruption legislation. For example, the Irish Criminal Justice (Corruption) Bill (the Bill) refers to businesses taking “all reasonable steps” and performing “all due diligence” in order to avail themselves of the defence to the new corporate bribery offence. This arguably sets an even higher standard than the more flexible concept of “adequate procedures” in the UK's Bribery Act.

Ireland's new laws will place an onus on Irish businesses to take a range of anti-bribery measures, including adopting anti-bribery policies. The above developments overseas would suggest these are not measures that should be taken lightly.

RECENT UK AND US CONVICTIONS

On 5 December 2014 the SFO successfully prosecuted two company directors for several offences, including bribery offences, arising from their role in a £23 million biofuel scam involving “green biofuel” *Jatropha* tree plantations in Cambodia. This followed an investigation by the SFO into the

Sustainable Growth Group and its subsidiary Sustainable AgroEnergy plc (SAE).

One element of the scam allowed the SFO to prosecute under the UK's anti-bribery laws. Gary West, a former director and chief commercial officer of SAE, and Stuart John Stone, a director of SJ Stone Limited, conspired to produce false invoices worth over £3 million from companies owned by Stone to companies in SAE's group (Sustainable Wealth Investments Ltd and Luxuria Ltd). Mr Stone paid Mr West over £189,000 in bribes to induce Mr West to approve the invoices.

Mr West was convicted of two counts of accepting a bribe and sentenced to four years' imprisonment (to run concurrently with a 13-year sentence for other offences). Mr Stone was convicted of two counts of bribery and sentenced to six years' imprisonment (to run concurrently with a six-year sentence for other offences). These penalties illustrate the serious bite of the UK's anti-bribery laws and would be of persuasive authority if an Irish court were to consider sentencing for similar offences.

On 22 December 2014, Alstom, a French power and transportation company, pleaded guilty and agreed to pay the US Department of Justice a record fine of \$772 million for violating the US Foreign Corrupt Practices Act. According to US prosecutors, Alstom paid more than \$75 million in bribes to secure \$4 billion in projects around the world, including the Bahamas, Egypt, Indonesia, Saudi Arabia and Taiwan, generating a profit of approximately \$300 million. This case not only demonstrates the severe corporate penalties that bribery can attract in the US but also highlights the extraterritorial nature of the US anti-bribery laws.

IRISH LEGISLATION

The Bill has not yet been released but is

expected shortly. However, the heads of the Bill are available and suggest our new laws will have significant implications for businesses in Ireland and particularly those operating in developing economies.

New corporate offence of bribery

The Bill introduces a corporate offence of bribery and/or corruption. The offence will be committed by businesses (companies or unincorporated associations) where a director, employee or agent of that business gives or accepts a bribe with the intention of obtaining or retaining business or gaining some advantage for that business. The inclusion of bribes given or taken by an “agent” will place a significant onus on businesses to conduct due diligence on those who could fall within this undefined term.

The Bill provides a defence to a business where it can show that it took all reasonable steps and exercised all due diligence to avoid committing the offence. It remains to be seen whether the Department of Justice and Equality will follow its US and UK counterparts and issue formal guidance on what “reasonable steps” might look like. However, a “one size fits all” approach will not work. Businesses will need to undertake their own assessment of country, sectoral, transaction, business opportunity and business partnership risk in order to determine what due diligence and training procedures are appropriate. As ever, the “tone from the top” will also be vital. However, a starting point for every business in taking the reasonable steps required will be an effective anti-bribery policy.

There is also the potential for criminal liability for senior management, and possibly even shareholders, who are deemed to have been wilfully involved in the commission of the corporate offence. The Bill has sharp teeth, with penalties of up to 10 years' imprisonment and

unlimited fines for those who transgress.

When similar legislation was introduced in the US and UK, businesses there were primarily concerned with what kind of “normal business activity” could be perceived as bribery. Such issues arise particularly in the areas of client entertainment, referral incentives and corporate gifts. In the UK, statutory guidance set out six key principles that should inform a company’s approach to preventing bribery and corruption:

- **Proportionate procedures:** The level of risk organisations face will vary by reference to the type and nature of its business and the jurisdictions and business partners associated with it.
- **Top-level commitment:** Management must foster a culture of compliance in the organisation.
- **Risk assessment:** The procedures adopted should be risk-based; they should be informed by an initial and ongoing assessment of the risks facing the business including risks associated with jurisdictions, sectors, transactions and business partners.
- **Due diligence:** The level of due diligence required when entering transactions or engaging agents should also be risk based.

- **Communication and training:** An anti-corruption policy must be communicated across the business effectively and appropriate training must be rolled out to relevant employees; this may require communication and training with external business partners.
- **Monitoring and review:** Effectiveness of anti-corruption procedures should be assessed on an ongoing basis as the business develops.

These principles are a useful guide for businesses in Ireland pending guidance from the Irish Department of Justice and Equality.

Extraterritorial effect

Like US and UK anti-bribery laws, the Bill also applies to certain bribes given outside of Ireland. Our new offences will be triggered when an Irish citizen, resident or Irish company engages in bribery or corruption outside the state. Irish multinationals operating in developing countries will face the difficult task of imposing a Western anti-bribery framework in countries that do not have a robust anti-bribery culture or legal framework.

Presumption of corruption for certain gifts

The Bill contains a presumption of corruption where a person who gives a gift, consideration or advantage to an Irish public official or a person connected with an Irish public official and receives an interest, undue benefit or advantage. There will also be a presumption of corruption in respect of political donations that are not disclosed to the Public Offices Commission or where an Irish public official’s standard of living is not commensurate with her or his official emoluments or registered interests. Where a company regularly deals with or serves the public sector, it will need to have heightened sensitivity around the potential for a presumption of corruption against it.

The Bill is due to become law later this year. Irish businesses should consider preparing for this now so that their anti-bribery policy and procedures are well established when this important change occurs.