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Criminalising Corruption: Criminal Justice (Corruption Offences) Act 2018



Introduction



“[B]ribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.”¹

The commencement of the Criminal Justice (Corruption Offences) Act 2018 represents a landmark in the combatting of bribery and corruption in Irish business in both the public and the private sectors. In this article I will outline key concepts that must be understood in order to navigate the legislation successfully and the principal offences that the 2018 Act enshrines.

¹ Preamble to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>; last accessed 6 July 2019).

Genesis of the 2018 Act

The 2018 Act was signed into law on 5 June 2018 and was commenced by Ministerial Order with effect from **30 July 2018**. It replaces a number of pieces of anti-corruption legislation stretching as far back as 1889 and purports to implement a number of recommendations of the Mahon Tribunal and to give effect to a number of international instruments in the field of anti-corruption.² Enactment of the 2018 Act is also a key aspect of the Government's white-collar crime strategy.³

Key Concepts

Corruptly

A number of provisions of the 2018 Act require the applicable acts or omissions to be committed "corruptly" in order for an offence to be established. Indeed, it will be seen from the discussion of the substantive offences contained in the 2018 Act that proof that the alleged offender has acted "corruptly" will be the catalyst that transforms an otherwise innocent transaction into one that is prohibited.

In the 2018 Act the term "corruptly" is defined broadly and non-exhaustively to include:

"acting with an improper purpose personally or by influencing another person, whether -

- (a) *by means of making a false or misleading statement,*
- (b) *by means of withholding, concealing, altering or destroying a document or other information, or*
- (c) *by other means".*

The definition of "corruptly" in the 2018 Act replicates the definition of that term that was inserted in the Prevention of Corruption Act 1906 by s2 of the Prevention of Corruption (Amendment) Act 2010.⁴ Although the 2018 Act does not limit the definition to acting with an "improper purpose", it is not immediately obvious what types of conduct outside of acting with an improper purpose are intended to be captured by the definition. No guidance on what constitutes an "improper purpose" can be found in the 2018 Act (or in the 2010 Act).⁵ As of yet, there is no reported decision of the Irish Superior Courts in which the definition of "corruptly" in the 2018 Act or in the 2010 Act has been considered. Given the importance of the term "corruptly" to defining the scope of the 2018 Act, the lack of guidance may place an adviser called on to consider a borderline transaction that is not obviously captured by the 2018 Act in a difficult and uncertain position.

Official

A number of the offences provided for in the 2018 Act centre on the "official", whether as the target or as the agent of corruption. An official will be either an "Irish official" or a "foreign official". Lists of categories of person qualifying as an "Irish official" or a "foreign official" are set out in s1. An "Irish official" includes "an officer, director, employee or member of an Irish public body (including a member of a local authority)" and any person "employed by or acting for or on behalf of the public administration of the State". Schedule 1 identifies a number of categories of entity each of which is an "Irish public body". These include "a company a majority of the shares in which are held by or

2 Convention Drawn Up on the Basis of Article K.3(2)(c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, done at Brussels on 26 May 1997, *Official Journal C/2*; OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted at Paris on 21 November 1997 (see n. 1 above); Council of Europe, Criminal Law Convention on Corruption, done at Strasbourg on 27 January 1999 (available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173>; last accessed 6 July 2019); Additional Protocol to the Council of Europe's Criminal Law Convention on Corruption, done at Strasbourg on 15 May 2003 (available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/191>; last accessed 6 July 2019); United Nations Convention Against Corruption, done at New York on 31 October 2003 (available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&lang=en; last accessed 6 July 2019); and (in part) Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law [2017], *Official Journal L* 198/29.

3 *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework* (available at <https://dbei.gov.ie/en/Publications/Publication-files/Measures-Enhance-Irelands-Corporate-Economic-and-Regulatory-Framework.pdf>; last accessed 6 July 2019).

4 See Imelda Higgins, "The Prevention of Corruption (Amendment) Act 2010: Things Done, but Things Left to Do - Part Two", *Irish Criminal Law Journal*, 22/1 (2012), at pp 2-3, where the learned author provides the background to the insertion of that definition and puts forward some criticisms of it.

5 The UK's Bribery Act 2010 provides some guidance on what constitutes the improper performance of a relevant function.

on behalf of a Minister of the Government” and any “body, organisation or group appointed by the Government or a Minister of the Government”.

The range of persons engaged by the organs of foreign states and international bodies captured by the definition of “foreign official” is similarly wide. It includes any person “employed by or acting on behalf of the public administration of any other state, including a person under the direct or indirect control of the government of such a state”.

Principal Offences under the 2018 Act

Section 5: Active and passive corruption

Section 5 criminalises the donor and recipient parties in a corrupt transaction. Section 5(1) prohibits any person from directly or indirectly, by himself or herself or with another person, corruptly offering, or corruptly giving or agreeing to give, a gift, consideration or advantage to a person as an inducement to, or reward for, or otherwise on account of, any person’s doing an act in relation to his or her office, employment, position or business. Section 5(2) prohibits any person from directly or indirectly, by himself or herself or with another person, corruptly requesting, corruptly accepting or obtaining, or corruptly agreeing to accept, for himself or herself or for any other person, a gift, consideration or advantage as an inducement to, or reward for, or otherwise on account of, any person’s doing an act in relation to his or her office, employment, position or business.

Importantly, the involvement of an official is not necessary for an offence under s5 to be made out. A purely private sector transaction, involving parties none of whom is an official, will fall foul of s5 if the elements of the offences provided for therein are proven.

Example 1

J, head of sales for Company M, pays L, purchasing manager for Company N, a cash sum in exchange for L’s ensuring that Company N awards Company M a lucrative contract. The elements of an offence under s5 are present as regards both J and L. This is so regardless of the fact that they are purely private sector actors and no official is involved in the transaction. J and L’s respective offences will be complete even if Company N does not award Company M the contract, despite L’s best efforts to bring about that outcome.

Take the same factual scenario but replace the cash payment with tickets to the All-Ireland Hurling Final. Complicate matters further and, instead of just L’s being given tickets, imagine that Company M books a corporate box at the All-Ireland Final and invites a number of existing and potential customers, including L as a representative of Company N. Has an offence been committed by any of J, Company M, L or Company N?

Hospitality raises difficult issues for the application of any anti-corruption regime. The terms “gift”, “consideration” and “advantage” are not defined in the 2018 Act. In their joint guidance on the UK Bribery Act 2010 (hereinafter the “Joint Guidance”),⁶ the UK’s Serious Fraud Office and Director of Public Prosecutions advise that the term “financial or other advantage” in the UK Act be left to be determined as a “matter of common sense” by the tribunal of fact and be “understood in its normal everyday meaning”. Hospitality is easily classified as a gift, consideration or advantage within the everyday meaning of those words. However, as noted in section 6 of the Joint Guidance, hospitality can serve a necessary business function:

⁶ “Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions” (available at <https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and/>; last accessed 6 July 2019).

“Hospitality or promotional expenditure which is reasonable, proportionate and made in good faith is an established and important part of doing business. The Act does not seek to penalise such activity.”

There is a line to be drawn, then, between criminalising corruption, on the one hand, and not penalising legitimate business development activity, on the other hand. In the Irish context it is submitted that it is the interpretation of the term “corruptly” that will define that line. If we go back to the examples outlined above, two elements of an offence under s5 are readily established, namely, the giving and the receipt of a gift, consideration or advantage and such gift, consideration or advantage’s having been given to induce an act in relation to the recipient’s employment (i.e. the awarding of business). What distinguishes hospitality that falls within the offence created by s5 from hospitality that falls outside it is the added ingredient of corruption. In the absence of Irish law guidance on the interpretation of the term “corruptly”, the Joint Guidance is helpful. It identifies some common-sense factors that the UK’s Serious Fraud Office and Director of Public Prosecutions take into account in assessing whether an offence has been committed as regards hospitality and promotional expenditure. The more lavish the hospitality or expenditure, the greater the inference that it is intended improperly to reward performance or influence the recipient. However, lavishness is just one factor to be taken into account, and the Joint Guidance requires the full circumstances of the case to be considered. Other factors that may influence the analysis are the fact that the hospitality or expenditure is not clearly connected with legitimate business activity or that it has been concealed.

Section 6: Trading in influence

Section 6(1) prohibits any person from directly or indirectly, by himself or herself or with another person, corruptly offering, or corruptly giving or agreeing to give, a gift, consideration or advantage in order to induce another person to exert an improper influence over an act of an official in relation to his or her office,

employment, position or business. Section 6(2) prohibits any person from directly or indirectly, by himself or herself or with another person, corruptly requesting, corruptly accepting or obtaining, or corruptly agreeing to accept, for himself or herself or for any other person, a gift, consideration or advantage on account of a person’s promising or asserting the ability to improperly influence an official to do an act in relation to his or her office, employment, position or business.

An offence will be committed under s6 even if the promised influence of an official cannot be delivered upon. Section 6(3) provides that it is:

“immaterial whether or not -

- (a) the alleged ability to exert an improper influence existed,*
- (b) the influence is exerted,*
- (c) the supposed influence leads to the intended result, or*
- (d) the intended or actual recipient of the gift, consideration or advantage is the person whom it is intended to induce to exert influence”.*

Example 2

An adviser, B, tells his client, A, that if A pays B a fee of €4,000, B will use his influence on an official, C, to ensure a favourable response to a submission that A will be making to C’s employer.

If the influence that B represents himself as being in a position to exercise over C is “improper” and the payment to B is made “corruptly”, the elements of an offence under s6 are present in respect of both A and B. This will be the case even if B is unsuccessful in influencing C to act in A’s favour or if B is overstating the influence that he has represented himself as capable of exerting over C.

The requirements that the gift, consideration or advantage be given or received corruptly and that the purported influence be improper are distinct elements of the offences provided for

in s6, both of which must be present for those offences to be made out. This suggests that if the influence that is to be exercised is not improper, an offence will not be made out, even if the gift, consideration or advantage is given or received corruptly. It is difficult to envisage a situation in which the influence is improper but the gift, consideration or advantage is not given or received corruptly. This is because the definition of the term “corruptly” includes acting for an improper purpose. If the purpose of a gift, consideration or advantage is related to the exercise of improper influence over an official, it would seem to follow that such gift, consideration or advantage is given for an improper purpose and, consequently, corruptly.

When it comes to “influence” that might be exercised on officials, one can imagine a wide range of possible activity that could be embraced by the term, including the making of submissions in response to a consultation process; paid-for lobbying activity on behalf of individuals, businesses and sectors; personal relationships built up through frequent interactions between officials and a given industry sector that falls within their remit; and outright bribery of officials to produce a favourable outcome. The 2018 Act offers no guidance on what distinguishes legitimate “influence” of an official from “improper influence” capable of criminalisation pursuant to s6.

Section 7: Corruption in relation to office, employment, position or business

Section 7 focusses on corruption on the part of Irish officials. Section 7(1) prohibits an Irish official from directly or indirectly, by himself or herself or with another person, doing an act in relation to his or her office, employment, position or business for the purpose of corruptly obtaining a gift, consideration or advantage for himself or herself or for any other person. Section 7(2) prohibits an Irish official from using “confidential information obtained in the course of his or her office, employment, position or business for the purpose of corruptly obtaining a gift, consideration or advantage for himself or herself or for any other person”.

Example 3

An official, A, enters into an arrangement with an adviser, B, whereby A will inform B in advance of an unannounced inspection of B’s clients in exchange for B’s firm purchasing A’s husband a car.

Section 8: Facilitation

Section 8 criminalises the facilitation of an offence under the 2018 Act. In particular, it shall be an offence for a person to give a gift, consideration or advantage to another person where the first-mentioned person knows, or ought reasonably to know, that the gift, consideration or advantage, or a part of it, will be used to facilitate the commission of an offence under the 2018 Act.

Section 9: Creating or using a false document

Section 9 prohibits any person from directly or indirectly, by himself or herself or with another person, corruptly creating or using a document that the person knows or believes to contain a statement that is false or misleading in a material particular with the intention of inducing another person to do an act in relation to his or her office, employment, position or business to the prejudice of the last-mentioned person or another person. For the purposes of s9, a document includes material in electronic form. Section 9 is not limited in its application to documents submitted to public bodies. The requirements that the document be created or used corruptly and with the intention of inducing another person to do a prejudicial act are distinct elements of the offence provided for in s9, both of which must be present for that offence to be made out. This suggests that if the document is not created or used “corruptly”, an offence will not be made out, even if the document is created or used with the intention of inducing a prejudicial act. However, in practical terms, it is difficult to envisage any circumstances in which a document which is created or used with the intention of inducing a prejudicial act will not be created or used corruptly, because the term “corruptly” includes acting for an improper purpose.

Section 10: Intimidation

Section 10 criminalises the threatening of harm to a person “with the intention of corruptly influencing that person or another person to do an act in relation to the person’s office, employment, position or business”. Harm, for the purposes of s10, includes loss, disadvantage or injury of any kind.

Position of Bodies Corporate

Liable for acts of human agents

As references in the offences outlined above to a “person” must be read so as to include a body corporate, bodies corporate may themselves commit an offence under the 2018 Act. In addition, a body corporate may inherit criminal liability from its human agents, even where the body corporate itself has not committed an offence. Section 18(1) of the 2018 Act provides that an offence will be deemed to have been committed by a body corporate if an offence under the 2018 Act is committed by any director, manager, secretary, officer, person purporting to act in any of the foregoing capacities, shadow director, employee, agent or subsidiary of that body corporate where such person has the intention of obtaining or retaining business for the body corporate or an advantage in the conduct of business for the body corporate.

The 2018 Act provides for one defence to an offence under s18(1). The body corporate will have a defence where it proves that it took reasonable steps and exercised all due diligence to avoid the commission of the offence. Although the 2018 Act does not oblige bodies corporate to put in place policies and procedures to prevent and police potential bribery and corruption in the organisation, a body corporate would be well advised to do so as it is likely to find it difficult to establish a defence to an alleged deemed offence under s18(1) without them.

In the absence of official guidance from the Irish State on the application of the 2018 Act, organisations might have regard to the guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from engaging in bribery issued by the UK’s Ministry for Justice in 2011 (the “2011 Guidelines”).⁷ Although elements of the offences provided for in the UK’s Bribery Act 2010 differ from the offences provided for in the 2018 Act, the 2011 Guidelines should serve as a useful starting point for an organisation in framing its own policies and procedures.

The 2011 Guidelines enshrine six guiding principles:

- Proportionate procedures: Putting in place procedures that are proportionate to the bribery risks faced by the organisation and to the nature, scale and complexity of the commercial organisation’s activities.
- Top-level commitment: Top-level management of the organisation is committed to preventing bribery by persons associated with it and fostering a culture within the organisation in which bribery is never acceptable.
- Risk assessment: Periodic, informed and documented assessment of the nature and extent of the organisation’s exposure to potential external and internal risks of bribery on its behalf by persons associated with it, which might include country risks, sectoral risks, transaction risks, business opportunity risks and business partnership risks.
- Due diligence: Application of due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, to mitigate identified bribery risks.
- Communication (including training): Ensuring that the organisation’s bribery prevention policies and procedures are

⁷ “Bribery Act 2010: Guidance about Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010)” (available at <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>; last accessed 6 July 2019).

embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks faced by the organisation.

- Monitoring and review: Monitoring and review by the organisation of its anti-bribery and anti-corruption procedures and the improvement of same where necessary.

A total of 11 case studies on the application of the principles set out above accompany the 2011 Guidelines.

Example 4

To go back to Example 1 above, if J has committed offences under s5, Company M will be criminally liable under s18, unless it took reasonable steps and exercised all due diligence to avoid the commission by J of an offence under s5. The same is true of Company N, as regards the commission by J of an offence under s5.

Personal liability for acts of body corporate

Directors, managers, officers, secretaries and persons purporting to act in any of those capacities may be personally liable for the offences of a body corporate under the 2018 Act where such offences were committed with the consent or connivance, or were attributable to the wilful neglect, of such persons. Where the affairs of a body corporate are managed by its members, a member may be similarly criminally liable in relation to his or her acts and defaults in connection with his or her functions of management as if he or she were a director or manager of the body corporate.

Extraterritorial Aspects

The 2018 Act criminalises acts committed outside of the Irish State. The commission of an act outside of the Irish State by an Irish official acting in that capacity, an Irish citizen, an individual who has had his or her principal residence in Ireland for the period of 12 months immediately preceding the alleged commission of the offence concerned, an Irish-registered

company or a body corporate established under the laws of Ireland that would constitute an offence under ss5, 6, 7, 8 or 18(1) of the 2018 Act, or s9 of the 2018 Act concerning the creation or use of a false accounting, auditing or financial document, is subject to the same penalty as if that act had been done within the Irish State. However, this is subject to the impugned act's also constituting an offence under the laws of the place where it was committed.

Presumptions

Presumptions provided for in ss14, 15 and 16 of the 2018 Act make the task of those prosecuting alleged corruption easier and consequently that of persons defending alleged corruption more difficult. For instance, s14(1) provides that a gift, consideration or advantage that it is proven was given to or received by, an official or a person connected with him or her by or from or on behalf of a person with an interest in the discharge by such official of any of the functions listed in s14(3) shall be presumed to have been given and received corruptly as an inducement to, or reward for, or otherwise on account of, that official's doing an act in relation to the performance of any of those functions, unless the contrary is proved. A like presumption arises under s14(2), where it is proven that a gift, consideration or advantage was given to or received by an official or a person connected with him or her who performed or omitted to perform any of the functions listed in s14(3) so as to give rise to an undue benefit or advantage for the person who gave such gift, consideration or advantage or on whose behalf it was given. The list of functions in s14(3) is comprehensive and includes the grant or award of a contract, tender or licence and planning decisions.

The law of evidence distinguishes between legal presumptions and evidential presumptions. McGrath describes a legal presumption as follows:



“In the case of a mandatory legal presumption, once a party proves the basic fact, the tribunal of fact is required to infer the existence of the presumed

fact unless the opposing party disproves the existence of the presumed fact, i.e. it places a legal burden of proof on the opposing party to disprove the existence of the presumed fact. Where a mandatory legal presumption applies, it can be said that the burden of proof has shifted from one party to another in respect of the presumed fact.”⁸

An evidential presumption is less onerous on the accused:

““In the case of a mandatory evidential presumption, it suffices to defeat the operation of the presumption if the party against whom the presumption operates adduces evidence as to the non-existence of the presumed fact, i.e. it merely places an evidential burden on the opposing party to adduce some evidence that the presumed fact does not exist.”⁹

Are the presumptions contained in s14 of the 2018 Act outlined above legal or evidential in nature? The recent decision of the Supreme Court in *DPP v Forsey*¹⁰ suggests that these presumptions will be considered evidential in nature. In *Forsey* a majority of the Supreme Court allowed the appellant’s appeal against his conviction for corruption contrary to s1(1) of the Prevention of Corruption Act 1906 arising from payments made to him in the aggregate amount of €80,000. One of the appellant’s grounds of appeal was an alleged misdirection by the trial judge to the jury in relation to a presumption provided for in s4 of the Prevention of Corruption (Amendment) Act 2001. Section 4 of the 2001 Act deemed a gift, consideration or advantage given by a person with an interest in the discharge by an accused of specified functions to have been given and received corruptly. At trial the judge directed the jury that the foregoing presumption placed an

onus on the appellant to establish that on the balance of probabilities (i.e. it was more likely than not) the impugned payments had not been received with a corrupt intention. The Supreme Court rejected this characterisation of the burden that the presumption placed on the defendant and instead characterised said burden as evidential in nature. O’Malley J, giving judgment for the majority, outlined the way in which the jury should have been directed:

““The jury in a case of this nature should therefore be instructed clearly as to the elements of the offence. They should then be told that the prosecution has the burden of proving beyond reasonable doubt all of the elements, with the exception of the component that is the subject of the presumption – the corrupt intention. They should be told that if the prosecution has satisfied them beyond reasonable doubt of the matters it has to prove, they are to take corrupt intention as having been proved, regardless of whether the prosecution has given evidence in relation to it or not, or has given only weak evidence, unless there is something in the evidence that makes them doubt that the accused had a corrupt motive. The overriding consideration is that a jury should not convict if left in doubt as to guilt.”¹¹

The obvious similarities between the presumption in s4 of the 2001 Act and the presumptions in s14 of the 2018 Act suggest that the latter will be regarded as evidential in nature.

Penalties

Subject to certain exceptions, conviction on indictment of an offence under ss5, 7, 8, 9 or 10 may result in the loss of office, position or employment as an Irish official or prohibition from seeking to hold or occupy said position.

8 Declan McGrath, *Evidence* (Dublin: Thomson Reuters, 2nd ed., 2014), at para. 2-163.

9 *Ibid.* at para. 2-166.

10 [2018] IESC 55.

11 *Ibid.* at para. 145.

Table 1: Penalties for conviction under the 2018 Act.

Offence	Summary conviction	Conviction on indictment
Section 6: Trading in influence	Any one of, or a combination of, a class A fine (at present, a fine not exceeding €5,000), imprisonment for a term not exceeding 12 months and the forfeiture of “any gift, consideration or advantage accepted or obtained in connection with the offence or, in the alternative, the forfeiture of land, cash or other property of an equivalent value to such gift, consideration or advantage”	Any one of, or a combination of, a fine, imprisonment for a term not exceeding five years and the forfeiture of “any gift, consideration or advantage accepted or obtained in connection with the offence or, in the alternative, the forfeiture of land, cash or other property of an equivalent value to such gift, consideration or advantage”
Section 18(1): Body corporate for acts of human agents	A class A fine (at present, up to €5,000)	A fine
Other offences	Any one of, or a combination of, a class A fine (at present, not exceeding €5,000), imprisonment for a term not exceeding 12 months and the forfeiture of “any gift, consideration or advantage accepted or obtained in connection with the offence or, in the alternative, the forfeiture of land, cash or other property of an equivalent value to such gift, consideration or advantage”	Any one of, or a combination of, a fine, imprisonment for a term not exceeding ten years and the forfeiture of “any gift, consideration or advantage accepted or obtained in connection with the offence or, in the alternative, the forfeiture of land, cash or other property of an equivalent value to such gift, consideration or advantage”

Conclusion

The implications of the 2018 Act for both the public and the private sector are significant, and the legislation merits careful attention at all levels of management within businesses and public bodies. Although there are key aspects of the legislation in respect of which further guidance would be welcome, this is no excuse for inaction. If an organisation does not have an anti-corruption and anti-bribery policy, it should now put in place a policy that is tailored to the particular risks to which the organisation and the sector in which it operates are exposed. Where an organisation has an anti-corruption and

anti-bribery policy, that policy should now be reviewed and revised as necessary to bring it into line with the demands of the 2018 Act. Finally, those engaged in the management of organisations must ensure that a commitment to preventing corruption flows through all levels of the organisation, including in its interactions with third parties. In this regard the organisation should ensure that all persons who are engaged by, or who represent the organisation (including agents and outsourced service providers) are educated on the content of the organisation’s anti-corruption and anti-bribery policy and are contractually obliged to comply with it.