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Briefing

Corporate Liability for Corruption Offences: Reminder

INSTITUTE OF DIRECTORS IN IRELAND

This briefing was produced by the Institute of Directors in association with McCann FitzGerald for use in Ireland. McCann FitzGerald is one of Ireland's premier law firms, providing a full range of legal services to many of Ireland's leading businesses. Clients include international organisations, major domestic concerns, emerging Irish companies and clients in the State and semi-State sectors.

The Criminal Justice (Corruption Offences) Act 2018 (the "**Act**") entered into force in July 2018 and overhauled Ireland's anti-corruption legislation. Significantly, the Act broadened the circumstances in which a corporate will be held liable for corruption offences. This factsheet looks at how companies and their officers can reduce the risk of such liability arising.

The Offence

The Act introduced a new failure to supervise type of offence by providing, under section 18(1), that a "body corporate" will be guilty of an offence under the Act if it is committed by one of the following persons:

- a director, manager, secretary or other officer of the body corporate;
- a person purporting to act in that capacity (so, a *de facto* director);
- a shadow director; or
- an employee, agent or subsidiary of the body corporate.

In each case, the offence must be committed by the person with the intention of obtaining or retaining either (i) business for the body corporate, or (ii) an advantage in the conduct of business for the body corporate.

Corporate Liability

To establish corporate liability under section 18(1) there must, as a precondition, be proof of an offence by another person under the Act. However, this does not require the conviction of another person as a precondition to the imposition of the corporate liability. So, the fact that the other person may ultimately escape conviction, for whatever reason, does not mean that the corporate cannot be prosecuted.

The Defence

The broad basis for liability in section 18(1) is limited by section 18(2) which provides a defence for the body corporate if it proves that it "took all reasonable steps and exercised all due diligence to avoid the commission of the offence". The concepts of "all reasonable steps", and "all due diligence" are not explained in the Act, nor has that aspect of the Act been interpreted by the Irish courts but such steps should include drafting and implementing an effective anti-corruption compliance programme.

Guidance

In terms of further guidance, section 7 of the UK Bribery Act 2010 sets out the offence of failure of commercial organisations to prevent bribery. Under that section, it is a defence for the organisation to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct. While the language here does differ, if anything it seems that an Irish corporate could be held to a higher standard, it is likely that similar factors will be taken into account in both cases in deciding whether a defendant has met the requisite requirements.

In the UK, the Ministry of Justice has published guidelines on how organisations there can be best placed to rely on the defence under UK law. The guidelines, which follow six principles, can be of use to corporates in Ireland and focus on:

- procedures that are proportionate to the risk of bribery involved and to the type, size and complexity of the business activities;
- commitment from management at the highest level to prevent bribery and to create a corporate culture in which bribery is not tolerated;
- ongoing, informed and documented assessments of the type and extent of the exposure to potential bribery risks, with an awareness that risks can vary depending on the nation, industry and transaction involved;
- due diligence procedures to be carried out for any parties performing services on behalf of the organisation which are risk based and proportionate;
- communication and understanding of policies and procedures through training and clear processes for confidential reporting of suspected corruption; and
- ongoing monitoring and evaluation of anti-corruption policies and procedures to ensure compliance and efficacy.

The anti-corruption compliance programme should be approved by senior management and/or the board of directors of the corporate. The board should appoint a manager, who is given responsibility to implement and report on the programme and, who has sufficient independence and resources to effectively escalate any issues of concern to senior management and/or the board of directors.

Liability

A body corporate found guilty of an offence under section 18(1) is liable, on summary conviction, to a maximum fine of €5,000 but on conviction on indictment, to an unlimited fine.

Further Information

Publications that address some of the areas referred to in this briefing are available on the Institute of Directors website and include the Directors' Handbook.

Further information is available from

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