

IRELAND

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Ireland signed the Convention on December 17, 1997. The Prevention of Corruption (Amendment) Act 2001 n^o27 implementing the Convention was signed into law by the President on July 9, 2001. The Act was published in *Iris Oifigiúil* (Official Gazette) on July, 13, 2001¹ and came into force on November 26, 2001. However section 4 (2) c)², which appears to relate to the bribery of Irish Public officials, will be brought into operation when all the relevant sections of the Planning and Development Act 2000 have been commenced³.

The necessary procedures for ratification are underway.

Convention as a Whole

To address its international obligations under the Convention as well as the European Union and the Council of Europe⁴, Ireland has amended its corruption law set out in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts of 1906 and 1916 (1889-1916 Acts) (already amended by the Ethics in Public Office Act 1995), through the Prevention of Corruption (Amendment) Act 2001 (2001 Act). This replaces section 1 of the 1906 Act, which establishes the offence of bribing an “agent” and adds

1. Available on the official Irish website: www.irlgov.ie/oireachtas.

2. Section 4 which introduces a presumption of corruption applies to domestic public office holders in relation to the exercise of certain functions, namely those described in paragraph (2) (c) relating broadly to the planning process; it reads as follows: “*any functions of a Minister or an officer of a Minister or of any other person employed by, acting on behalf of, or a member of a body that is part of the public administration of the State under the Planning and Development Act, 2000.*”

3. Section 10 (3): “*This Act shall come into operation on such day or days as, by order or orders made by the Minister for Justice, Equality and Law Reform under this section, may be fixed therefor either generally or with reference to any particular purpose or provision, and different days may be so fixed for different purposes and different provisions.*”

4. The Convention on the Fight against Corruption by the European Union, concluded in Brussels on May 26, 1997 [OJEC C 391, 15 December 1998] does not limit the offence of corruption to the financial interests of the European Communities, as the First Protocol of the Convention on the Protection of the Financial Interests of the European Communities of July 26, 1995 did [OJEC C 195, 25 June 1997].

The Criminal Law Convention on Corruption of the Council of Europe, concluded in Strasbourg January 27, 1999 is available on the website: <http://conventions.coe.int>

some new provisions⁵, pertaining to the definition of an agent, the presumption of corruption, search warrants, jurisdiction and the application of the Prevention of Corruption Acts, 1889 to 2001, to “officers of bodies corporate”.

The 1889 Act relates only to Irish public officials, the 1906 Act does not expressly apply to non-Irish officials and 1916 Act establishes a limited presumption of corruption in relation to public contracts.

International treaties, including the OECD Convention, do not have direct application in Ireland, but have to be implemented in the domestic legislation. The Irish authorities state that the courts may refer to the general rules of statutory interpretation, namely the Interpretation Act 1937, when any pre-existing common law rule or domestic legislation conflicts with or is deficient with respect to a standard of the Convention. They further state that the domestic legislation has precedence, but that the courts may have regard to the Convention and its commentaries, if there is a conflict or if the legislation is unclear or deficient. Ireland underlines that if a conflict arises between the terms of the Convention and other implementing legislation, it would only be a matter for the Irish Parliament (Oireachtas) to enact the appropriate legislation. It would appear that where implementing legislation is deficient with respect to or conflicts with the relevant treaty or Convention, there is no guarantee that the court would directly apply the requirement in question.

The 1889, 1906 and 1916 Acts which have not been consolidated are identical to those in the UK because before 1922, the UK Parliament legislated for Ireland. Ireland underlines that this legislation was amended by the Ethics in Public Office Act, 1995 and that all the Acts remain in force without any need to explicitly restate the provisions of previous legislation. The resulting framework of interlinked Acts is not unusual in Irish law. The government is considering whether the framework of the Irish Corruption Laws would benefit from being restated as part of a general modernisation process.

The Irish authorities state that, pursuant to Article 50 of the Irish Constitution, the legislation in force prior to the Constitution (1937) will continue to be in force, but without enjoying the presumption of being constitutional, whereas, according to the Supreme Court, all Acts passed by the Parliament (Oireachtas) are presumed to be constitutional, until the contrary is established. They mention that to date none of the Prevention of Corruption Acts 1889 to 2001 have been declared unconstitutional.

Irish common law comprises the English common law prior to 1922 and subsequent judgements of Irish courts. Ireland states that only the decisions of the Supreme Court are binding.

1. ARTICLE 1. THE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

The offence of bribing a foreign public official is set out in the Prevention of Corruption (Amendment) Act 2001, Number 27, as follows:

“Section 2.-The Act of 1906 is hereby amended by the substitution of the following section for section 1

(1) relates to a domestic agent or any other person who accepts any gift, consideration or advantage for acting or omitting to act in relation to his office or position or his principal's affairs or business.

5. *Section 10.-(1) “This Act may be cited as the Prevention of Corruption (Amendment) Act, 2001.*

(2) The Prevention of Corruption Acts, 1889 to 1995, and this Act may be cited together as the Prevention of Corruption Acts, 1889 to 2001, and shall be construed together as one.”

(2) "A person who:

(a) *corruptly gives or agrees to give, or*

(b) *corruptly offers,*

any gift or consideration to an agent or any other person, whether for the benefit of that agent, person or another person, as an inducement to, or reward for, or otherwise on account of, the agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business shall be guilty of an offence".

(3) relates to the conscious use by a person or an agent of any receipt, account or other document which contains any false, erroneous or defective statement in order to mislead the principal of the agent.

(4) "A person guilty of an offence under this section shall be liable-

(a) *on summary conviction to a fine not exceeding £2,362.69 or to imprisonment for a term not exceeding 12 months or to both, or*

(b) *on conviction on indictment to a fine or to imprisonment for a term not exceeding 10 years or to both".*

(5) defines the foreign public official (See point 1.1.6.)

*"consideration' includes valuable consideration of any kind;
'principal' includes an employer".*

Section 9 of the 2001 Act, in respect of offences by a "body corporate", reads as follows:

"(1) Where an offence under the Prevention of Corruption Acts, 1889 to 2001, has been committed by a body corporate 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 person being a director, manager, secretary or other officer of the body corporate, or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence and be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate."

An offence of "active corruption" is established in the Criminal Justice (Theft and Fraud Offences) Act, 2001, which implements, in Part 6, the Convention on the Protection of European Communities' Financial Interests⁶. Section 43 establishes the offence of "active corruption" which incorporates the definition of

6. The Convention on the Protection of the European Communities' Financial Interests was adopted in Brussels on July 26, 1995 [OJEC C 316, 27 November 1995]

The First Protocol was adopted on September 1996, 27 September [OJEC C 313, 23 October 1996].

The Second Protocol was adopted on September 1997, 19 June [OJEC C 221, 19 July 1997].

There are two other Protocols: one on the Interpretation by the Court of Justice of the European Communities adopted on November 1996, 29 [OJEC C 151, 20 May 1997].

“active corruption” in Article 3.1. of the First Protocol as follows: “...*the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute active corruption*”. Pursuant to Article 1.1. of the First Protocol, “official “ means E.U. officials and officials of E.U. Member States⁷. Thus there is an overlap between the two offences to the extent that the public official bribed is covered by the definition in both Acts, and the purpose of the bribe is to obtain an act of the official in a way which damages or is “likely to damage the financial interests of the European Communities”. Moreover, the sanctions for the offence in the Criminal Justice (Theft and Fraud Offences) Act, 2001 are significantly less severe than those under the 2001 Act (i.e. 5 years imprisonment and/or a fine). The Irish authorities confirm that where a particular case triggers the overlapping offences, proceedings would be taken on the basis of the more relevant legislation, i.e. the Criminal Justice (Theft and Fraud Offences) Act 2001, which carries a maximum penalty of 5 years imprisonment and/or a fine. (see also the level of sanctions under 3.1/3.2 and discussion about overlap under 4.2 nationality jurisdiction).

1.1 The Elements of the Offence

Section 2 of the 2001 Act, which establishes the offence of a foreign public official, replaces section 1 of the Prevention of Corruption Act, 1906.

The other one which will be the third Protocol and is not yet adopted relates to money laundering, to the responsibility of legal persons and to the role of the Commission regarding judicial cooperation.

7. Article 1.1. of the First Protocol of the Convention on the Protection of European Communities' financial interests reads as follows: “*For the purposes of this Protocol:*

1. (a) 'official' shall mean any 'Community' or 'national' official, including any national official of another Member State;

(b) the term 'Community official' shall mean:

- any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of employment of other servants of the European Communities,

- any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants.

Members of bodies set up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated as Community officials, inasmuch as the Staff Regulations of the European Communities or the Conditions of employment of other servants of the European Communities do not apply to them;

(c) the term 'national official' shall be understood by reference to the definition of 'official' or 'public officer' in the national law of the Member State in which the person in question performs that function for the purposes of application of the criminal law of that Member State.

Nevertheless, in the case of proceedings involving a Member State's official initiated by another Member State the latter shall not be bound to apply the definition of 'national official' except in so far as that definition is compatible with its national law;

1.1.1 any person

The 2001 Act applies to “a person” as set out by the said section 2 paragraph (2), which provides for the offence of active bribery. The Irish authorities state that a “person” covers natural persons and bodies corporate by referring to section 11(i) of the Interpretation Act 1937 (see below under 2.1.1 legal entities).

1.1.2 intentionally

Under section 2 paragraph 2, an offence is committed where a person “*corruptly*” gives etc. a gift or consideration as an inducement to or reward for the agent doing any act or making any omission.

The term “*corruptly*” is taken from the existing domestic offences of bribery of Irish officials.

The Irish authorities explain that “specific intent is a required proof” and that the question about wilful blindness, which implies some level of reckless behaviour, therefore does not arise. They state that “*corruptly*” does not mean dishonestly, although that may be included in the concept, but rather purposely doing an act which the law forbids as tending to corrupt.

The term “*corruptly*” has been interpreted by the Irish courts as denoting “that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain” [Smith 1960 QB 423], without meaning “that the intention must be that the transaction should go right through and that the offeror should obtain the favour for which he sought “(in Criminal Law--Charleton, McDermott, Bolger, published by Butterworths Ireland Ltd 1999). “Although a judicial definition beyond that quoted has not been attempted, it would seem that corruption involves making use of a public position or a position of employment under the Act 1906, in such a way that a reward or favour, not part of the ordinary or open remuneration of such post, is offered or taken so that the public office or private employment, may be influenced by this secret or extraordinary transaction” (in Criminal Law--Charleton, McDermott, Bolger, published by Butterworths Ireland Ltd 1999, commenting on the case Brown-Ontario Court of Appeal).

Ireland underlines that the defence might argue that local custom existed and hence there was no intention on the part of the accused to act corruptly, however it is not intended that the Irish legislation would provide an exemption from the offence on the grounds of conditions prevailing in another state.

In certain cases set out section 3 and 4, the 2001 Act provides for a presumption of corruption (failure to disclose political donations, granting, refusal, withdrawal or revocation of any licence...). These provisions for the raising of presumptions, which appear to apply only to domestic bribery, represent a departure from the normal requirements under Irish criminal law in which the onus of proving the offence beyond a reasonable doubt rests on the prosecution.

1.1.3 to offer, promise or give

Subsection 2 (2) applies where “*a person*” “(a) *corruptly gives or agrees to give or (b) corruptly offers*” “*any gift or consideration*”.

The terms “*gives or agrees to give or offers*” were already used by the Irish legislator in the national legislation relative to bribery of domestic public officials. The Irish authorities state that the term “*promise*” used by the OECD Convention is covered by the term “*agrees to give*”.

1.1.4 any undue pecuniary or other advantage

Section 2 paragraph (2) of the Prevention of Corruption (Amendment) Act 2001 criminalises the conduct of a person “*who corruptly gives, or agrees to give or offers*” “*any gift or consideration*”.

The term “*any undue pecuniary or other advantage*” has not been used in the 2001 Act and “*gift*” is not defined. Subsection 2 (5) of the Act 2001 provides that “*consideration*” includes “*valuable consideration of any kind*”.

According to the Irish authorities, the term “*gift or consideration*” covers financial or other forms of advantage and encompasses all types of benefit defined under the term “*advantage*” in the Corruption Act 1889, namely any promise or procurement of any gift, loan or reward. The facts of the case would be likely to have a bearing on this matter, in establishing the influence brought to bear on an individual to act in any particular way (including acting improperly). A gift of little value (e.g. a tie, tickets for a show, a dinner) would appear to be included in the concept of a gift.

However, since the scope of the term “*consideration*” is restricted to “*valuable consideration of any kind*”, there is a question whether all kinds of pecuniary and non-pecuniary advantages, tangible and intangible, are covered. The Irish authorities state that the courts would interpret “*valuable consideration*” very widely, to include most forms of practical advantage. However, they admit that there remains some uncertainty as to whether certain types of advantages would be covered, and the use of the term “*advantage*” (which is used for the passive bribery offence in the same Act) would be more certain to ensure a wider scope.

1.1.5 whether directly or through intermediaries

Section 2 (2) of the implementing Act applies where “*a person who corruptly gives*” ... “*any gift*” ... “*to any agent or any other person*”.

The Irish authorities state that the term “*or any other person, whether the benefit of that agent, person or another person*” covers transactions involving intermediaries and third parties.

The language “*or any other person*” was not present in the 1889-1916 Acts. This construction is unusual and might appear to only cover the case of a bribe for the benefit of a third party, not the case where the bribe is made through intermediaries. However, the Irish authorities confirm that even without the term “*to any agent or any other person*”, the notion of bribery through intermediaries would be covered regardless of whether the intermediary is aware of the briber’s intent, referring to case law which has been developed to cover an offence committed through an innocent agent. They explain that the express reference of “*to any agent or any other person*” is made to make it even clearer.

1.1.6 to a foreign public official

With respect to the definition of a foreign public official, paragraph 2-(5) (c) of the 2001 Act states:

In this Act- “agent” includes-

(b) [...](iii) *a member of the European Parliament (other than a person who is a member by virtue of the European Parliament Elections Act, 1997),*

- (c) (i) *a member of the government of any other state,*
(ii) *a member of a parliament, regional or national, of any other state,*

- (iii) a member of the European Parliament (other than a person who is a member by virtue of the European Parliament Elections Act, 1997),
- (iv) a member of the Court of Auditors of the European Communities,
- (v) a member of the Commission of the European Communities,
- (vi) a public prosecutor in any other state,
- (vii) a judge of a court in any other state,
- (viii) a judge of any court established under an international agreement to which the State is a party,
- (ix) a member of, or any other person employed by or acting for or on behalf of, any body established under an international agreement to which the State is a party, and
- (x) any other person employed by or acting on behalf of the public administration of any other state;”

This text extends the meaning of the term "agent", kept by the 2001 Act, previously limited to "any person employed by or acting for another" in Section 1 (2) of the 1906 Act to categories of office holders and officials, both national and foreign, not previously covered.

The 2001 Act has preserved the basic formulation and purpose of the 1889-1916 Acts, which is the bribery of "agents". It therefore appears to continue to address the fiduciary relationship between agent and principal, and thus it appears that exceptions and defences not contemplated by the Convention could be available thereunder. However, the Irish authorities state that the term "agent" does not focus exclusively on protecting the fiduciary relationship, since it includes a judge, who in ordinary parlance, would not be seen as an agent of another. Putting forward that the 2001 Act should be read together with the earlier Prevention of Corruption Acts, including the Ethics in Public Office Act, 1995, they point out that the definitions of an "agent" and a "public holder" contained in the latter⁸ also apply. They maintain that the

8. Section 38 (b) (ii) of the Ethics in Public Office Act 1995 amends the definition of an "agent" of Section 1 (3) of the 1906 Act.

- Section 38 reads as follows: "*The Prevention of Corruption Acts 1889 to 1916, shall be amended as follows:*

(a) *in the Public Bodies Corrupt Practices Act, 1889 [.....]*

(b) *in section 1 of the Prevention of Corruption Act, 1906:*

"[...] (ii) by the substitution of the following subsection for subsection (3):

"(3) In this Act 'agent' also includes an office holder or a director (within the meaning, in each case, of the Public Bodies corrupt Practices Act, 1889, as amended) of, and a person occupying a position of employment in, a public body (within the meaning aforesaid) and a special adviser (within the meaning aforesaid)"

- Section 2 of the same Act defines the term "office holder" as follows:

"(a) a person who is a Minister of the Government or a Minister of State,

(b) a member who holds the office of Attorney General,

(c) a person who is Chairman or Deputy Chairman of Dáil Éireann or Chairman or Deputy Chairman of Seanad Éireann, and

(d) a person who holds -

(i) the office of chairman of a committee of either House, being an office that stands designated for the time being by resolution of that House, or

(ii) the office of chairman of a joint committee of both Houses, being an office that stands designated for the time being by resolution of each House"

positions of an “agent” or a “public holder” would not be regarded as being in a fiduciary relationship. Finally, they underline that the legislation criminalises corruption across both the public and private sectors and therefore goes beyond the requirements of the Convention.

Neither the term “public official” nor “public function” is defined in the offence of bribing a foreign public official. Instead, a list of persons who are “agents” is provided as for domestic “public officials” in this Act⁹. On the domestic level, the term “agent” is used as well as the term “public official”.

Ireland explains the purpose of having two different terms in section 2 concerning the domestic “agent” and section 8 concerning a domestic “public official”, as follows:

-Section 8 of the 2001 Act provides for an offence "corruption in office" which relates only to the role of public official. It is an offence committed without the involvement of another person, and hence it is not envisaged under the OECD Convention.

-Section 2 of the 2001 Act is the section which provides, inter alia, for the offences of accepting or giving a bribe. Accordingly, the language used reflects the scope of those offences in that they relate not only to the public sector, but to the private sector as well.

The definition of the “public function” which was introduced for domestic offences of corruption¹⁰, has not been extended to the offence of bribing a foreign public official.

“Agent” now includes members of the government and of national or regional parliaments of any other state, members of the European Parliament, the European Court of Auditors and the European Commission, foreign public prosecutors and foreign judges as well as judges of any international court established by agreement to which Ireland is a party, and employees of international bodies and foreign administrations.

For Ireland, persons not listed may also be held to be agents depending on the facts of any particular case, because the list is not exhaustive. The Irish authorities confirm, on the other hand, that the definitions of a

9. Section 8- (1) *A public official who does any act in relation to his or her office or position for the purpose of corruptly obtaining a gift, consideration or advantage for himself, herself or any other person, shall be guilty of an offence and shall be liable [...]*-

In section-8 (2) public official “*means a person referred to in subsection (5)(b) of section 1 (inserted by section 2 of this Act) of the Act of 1906*”.

10. Subsection 2 of Section 4 reads as follows:

“(2) This section applies to the following functions:

(a) the granting, refusal, withdrawal or revocation by a Minister or an officer of a Minister or by any other person employed by or acting on behalf of the public administration of the State by or under any statute of any licence, permit, certificate, authorisation or similar permission,

(b) the making of any decision relating to the acquisition or sale of property by a Minister or an officer of a Minister or by any other person employed by or acting on behalf of the public administration of the State,

(c) any functions of a Minister or an officer of a Minister or of any other person employed by, acting on behalf of, or a member of a body that is part of the public administration of the State under the Planning and Development Act, 2000.

(3) In this section:

"functions" includes powers and duties and references to the performance of functions includes as respects powers and duties references to the exercise of functions and the carrying out of duties;”

“*public official*” and of “*functions*” contained in the Act 2001 are limited to the national context, relevant only for those specific categories listed in subsection (5) (b), or specific circumstances or functions.

It seems clear that the first part of the definition of “*foreign public official*” in Article 1.4(a) of the Convention, as far as it concerns a person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected, is covered by the implementing legislation.

The second part of the definition of “*foreign public official*” in the Convention, as far as it concerns “*any person exercising a public function for a foreign country*” is also covered in principle. This is the case in respect of the persons under contract as well as those performing their tasks on behalf of the public administration of any other state. This would appear to cover, in accordance with the Convention, “*a person exercising a public function for a foreign country, including for a public agency*”. However, this part of the definition does not appear broad enough to apply to persons performing such functions for a “*public enterprise*”.

The Irish authorities state that “*public enterprise*” could be considered to be covered by the 2001 Act, because the term “*agent*” includes, as stated in section 2 subsection (5)(c)(x), 2001 Act, “*any other person employed by or acting on behalf of the public administration of any other state*”. Ireland expresses the view that it is reasonable to expect that a court would interpret the term “*public administration*” in its ordinary sense, and be guided by the definition of “*public bodies*” in Schedule 1 of the 1995 Act¹¹ which, according to Ireland, covers bodies, in the national context, that meet the requirements of the concept of “*public enterprise*” in the Convention.

Nevertheless, it remains unclear whether all kinds of foreign public enterprise would be covered, as required by the Convention, since (i) the definition of “*public bodies*” in the 1995 Act is restricted in scope to domestic bodies, and (ii) it does not appear that this definition would necessarily cover indirect foreign control, or the case where the foreign government exercises de facto control over an enterprise, but does not hold in excess of 50 per cent of the shares with the right to vote (See Commentary 14).

The Irish authorities further explain that even if certain foreign public enterprises do not fall within the scope of “*public bodies*”, an employee or agent of a foreign public enterprise could be covered by “*any person employed by or acting for another*” [subsection (5)(a)]. However, since the same definition existed in the 1906 Act, which does not appear to have sufficiently covered employees or agents of a “*foreign*”

11. First Schedule –Public Bodies- of the Ethics in Public Office Act, 1995 provides in Section 1 that: “Each of the following shall be a public body for the purposes of this Act:”

[....]

“(10) a body, organisation or group established

(a) by or under any enactment (other than the Companies Acts, 1963 to 1990), or

(b) under the Companies Acts, 1963 to 1990, in pursuance of powers conferred by or under another enactment, and financed wholly or partly by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government,

(11) a company (within the meaning of the Companies Act, 1963) a majority of the shares in which are held by or on behalf of a Minister of the Government,

(12) any other body, organisation or group appointed by the Government or a Minister of the Government,

(13) any other body, organisation or group financed wholly or partly out of moneys provided by the Oireachtas which stands prescribed for the time being (being a body, organisation or group that, in the opinion of the Minister, ought, in the public interest and having regard to the provisions and spirit of this Act, to be prescribed)”

public enterprise, and since in the 2001 Act, the new concept of “foreign” public official is specifically defined in subsection (5)(c), it might be questioned whether subsection (5)(a) would apply in the foreign context.

Section 2(5) c does not refer to an “*official or agent of a public international organisation*”, or define the term “*public international organisation*”, but refers in subparagraph (ix) to “*a member of, or any other person employed by or acting for or on behalf of, any body established under an international agreement to which the State is a party*”. It seems to limit the scope of application of the Convention by adding the condition that the international organisation is established by international agreement and that Ireland is a party to such agreement. The same requirement applies for international courts. In contrast, Commentary 17 of the Convention states that a “*public international organisation*” includes any international organisation formed by states, governments or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

It would appear that the vast majority of international organisations are established by multilateral agreements. However, Ireland is not a party to all agreements establishing all international organisations.

Ireland confirms that an international agreement, to which Ireland is not a party, would not be binding and explains that, pursuant to Article 29 of the Constitution, the agreement needs to be approved by the “Dáil Éireann” (Lower House of Parliament) and implemented into the domestic law by Parliament (“Oireachtas”). Ireland stresses that it actively negotiates and becomes a party to relevant international agreements, whether as an individual state or a member of the European Communities, and hence the coverage in relation to the bribery offence will continue to widen over time. However, many major international funding organisations (e.g. Asian Development Bank, African Development Bank) may not be caught, and such institutions, which might be potential targets for bribery, operate in countries where Ireland might participate in projects. Please comment.

Finally paragraph 2(5) c would appear to exclude the public officials of an organised foreign area or entity, as it refers to “any other state”, contrary to Commentary 18 of the Convention which does not limit the concept of foreign country to a state. However, the Irish authorities state that, although it is up to the court to decide, it is not the legislator’s intent to exclude foreign public officials of non-state territorial units.

According to the Irish authorities, “*the public administration of any other state*” would include officials of a regional administration within a federal state as well as all levels and subdivisions of government, from national to local. Section 2 (5) (c) (ii) covers “a member of a parliament, regional or national, of any other state” and meets, according to the Irish authorities, the requirement as far as members of parliament are concerned; Section 2 (5) (c) (x) refers to the public administration of any other state which would include a regional administration within a federal state or other regional authority.

1.1.7 for that official or for a third party

The implementing legislation is not limited to “*any gift*” or “*consideration*” given or offered to “an agent” (i.e. a foreign public official), as it applies regardless if the beneficiary is “*that agent, person or another person*”.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

According to subsections 2 (1) and (2), acting and omitting to act are covered by the offence.

Section 2 (2) states that the act or omission of the agent must be in relation to his or her “*office or position or his or her principal’s affairs or business*” which satisfies the requirement under Article 1 paragraph 4 c) of the Convention that acting or refraining from acting in relation with the performance of official duties includes any use of the public official’s position, whether or not within the officials authorised competence.

Since the offence is based on the bribery of an “agent”, the question would arise whether the relationship between agent and principal has any relevance, that is whether an offence would be committed, where the person to whom the advantage is offered, etc, acts with the consent of his/her principal.

Ireland states that the word “agent”, used to ensure consistency with earlier anti-corruption legislation, is wider than the traditional concept of agent, as shown by the list of persons covered by this term, and that the agency relationship is not relevant to whether an offence has been committed. Referring to section 1(2) of the Public Bodies Corrupt Practices Act 1889 as amended by section 38 of the Ethics in Public Office Act 1995¹², the Irish authorities assert that the offence is self-contained, rather than linked to any agency relationship or breach of trust. However, unlike the 1889 Act, which applies to the bribery of “any person”, the 2001 Act applies specifically to the bribery of an “agent”.

1.1.9 in order to obtain or retain business or other improper advantage

The condition set out by Article 1 (1) of the Convention that the bribe has to be offered or given in order to “obtain or retain business” or any improper advantage” is not required by the implementing legislation.

1.1.10 in the conduct of international business

The intention of the person offering or giving the bribe is not confined to the obtaining advantages etc... in the conduct international business.

Defences

In the Irish criminal system, the prosecutor must meet the burden of proof at every stage, proving that the accused is guilty of the offence beyond reasonable doubt.

General defences in common law, such as necessity or duress, can be put forward by a defendant. In necessity, the person acts on the basis of circumstances. In duress, the person’s will is overborne by another party, who threatens his life etc, and who therefore is also potentially to blame for the offence. These will be tested through cross examination and considered by the court in light of the evidence in the case. A mistake of law is not a defence per se.

A specific defence can be created by statute. The Prevention of Corruption Acts, 1889-2001 do so in certain instances e.g. it would be a defence to a charge under section 1 of the 1906 Act as inserted by section 2 of the 2001 Act to show that the alleged giving of any gift etc was not done “corruptly”.

12. Under Section 38, Table (2) of the Ethics in Public Office Act, 1995:

“Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of an office holder or his or her special adviser or a director of, or occupier of a position of employment in, any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such office holder or public body as aforesaid is concerned, shall be guilty of a misdemeanour.”

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Subsection 7 (1) of the Criminal Law Act, 1997 provides that a person who aids, abets, counsels or procures the commission of an indictable offence is punished as a principal offender.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

The Irish authorities state that conspiracy is an offence at common law. No distinction is provided in the legal system between attempt and/or conspiracy to bribe a domestic or a foreign public official.

Subsection 10 (2) of the Criminal Law Act, 1997 provides that an attempt is punished in the same way as the principal offence.

In the Irish criminal system, the creation of an offence automatically implies the criminalisation of an attempt to commit that offence. In attempting a crime, the person must intend to carry out the full offence. The person offering or giving the bribe would be guilty of an attempt to commit such an offence, where a foreign public official did not know of the bribe or does not accept it. In any event, the complete offence of offering a bribe would be made out. If the foreign official was not aware of the bribe it would be a question of fact as to whether the attempt was proximate. For instance putting money in an envelope with the intention of giving it to another is potentially not proximate enough but posting the envelope or leaving it on someone’s desk probably would be.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

Subsection 9 (1) of the 2001 Act¹³ establishes the criminal liability of “bodies corporate” and “a person being a director, manager, secretary or other officer of the body corporate” etc for offences under the 1889-2001 Acts. The Irish authorities explain that the 2001 Act extends liability to include one or more officers of the legal person, where appropriate, where he/she contributed to the commission through consent, connivance or by wilful neglecting their responsibilities. Subsection 2 states that where a body corporate is

13. *Section 9-“(1) Where an offence under the Prevention of Corruption Acts, 1889 to 2001, has been committed by a body corporate 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 person being a director, manager, secretary or other officer of the body corporate, or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence and be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.*

-(2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.”

managed by its members, “*subsection 1 shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.*”

Ireland points out that bodies corporate were already liable to prosecution under the existing legislation and that the effect of section 9 is to extend culpability to officers of the body corporate in certain circumstances, as set out in the section.

The Irish authorities state that previously, where an offence involved a director or official of a “public body” as defined under the First Schedule to the Ethics in Public Office Act, 1995, a prosecution could be taken against that individual.

Section 11 of the Interpretation Act 1937 provides that the term “person” is to be construed as applying to a body corporate etc, as well as an individual. On the other hand, section 9 of the 2001 Act provides for the liability of certain individuals (e.g. officers of a body corporate) as well as the body corporate, where the offence was committed with the connivance etc... of the officers, etc... Section 9 does not create liability for either bodies corporate or officers, etc.--the two subcategories are liable together. Thus a question of interpretation might arise in the courts as to whether section 9 in effect is a substitute for section 11 of the Interpretation Act 1937, with the result that a body corporate can only be liable for the bribery of a foreign public official where an officer, etc is also liable.

Ireland maintains that section 9 of the 2001 does not restrict the liability of bodies corporate in this way and cites other legislation that establishes the liability of legal persons using a similar formulation (e.g. company law, environmental law).

2.1.1 Legal Entities

Section 11(i) of the Interpretation Act 1937 states that “*references to a person in relation to an offence (whether punishable on indictment or on summary conviction) shall, unless the contrary intention appears, be construed as including references to a body corporate.*”

The Irish authorities state that bodies corporate include private, public or statutory companies that are also subject to laws and regulations governing the operation of companies in Ireland. In addition, they state that the term “body corporate” does not denote that a legal person must be comprised of shareholders (see points 3.8 and 8 below).

2.1.2 Standard of Liability

Under subsection 9 (1) of the 2001 Act, two conditions are required to establish the criminal liability of the body corporate: the body corporate has to commit the offence itself, on one hand, and the offence needs to be committed, either with the consent or connivance or with the wilful neglect of a director, a manager, a secretary, or other officer etc of the body corporate. Pursuant thereto any person “purporting to act” in any such capacity is included.

According to subsection 9(2), the same rules apply when the company is managed by its members.

Whether a particular person is “purporting to act in such capacity” would be determined on a case by case basis by the court, according to the Irish authorities. Much would depend on the evidence. A person may act for instance as a director without de jure holding that position. Otherwise a person could avoid legal liability by appointing “men of straw” to the positions but in fact controlling the body corporate’s affairs.

The conduct of an employee may be attributable to his employer, but that depends on the facts. An employee may obviously be guilty of an offence himself, if he has knowledge of what is happening or he may be an innocent conduit. It is doubtful whether a failure alone to implement policies would constitute “wilful neglect”, unless of course the individual had knowledge that bribery was occurring.

Section 9 of the 2001 Act provides that where an offence has been committed by a body corporate and it is proven to have been committed with the consent, etc. of certain persons, then both will be guilty.

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition.

Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or those monetary sanctions of a “comparable effect” are applicable.

Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

The sanctions applicable for bribery of national and foreign public officials (“agents”) are the same. Subsection 2 (4) of the 2001 Act, which implements the OECD Convention as well as two other European conventions on corruption¹⁴, provides for a maximum penalty, on summary conviction, of a fine of £2,362.69 (corresponding to 3,000 Euro) or up to 12 months’ imprisonment or both, or on conviction on indictment of a fine¹⁵ or imprisonment for up to 10 years or both. The summary conviction procedure and the conviction on indictment procedure are examined under point 5 below.

The level of sanctions applicable for bribing is comparable to that set for similar economic offences, like theft, fraud and embezzlement. Pursuant to the Criminal Justice (Theft and Fraud Offences) Act 2001, the penalty for theft, which includes the old offences of larceny and embezzlement, following conviction on indictment, is a fine (see footnote 13) or imprisonment for a term not exceeding 10 years or both. The penalty for dishonestly making a gain or causing a loss to another by inducing the other, by any deception, to do or refrain from doing an act, following conviction on indictment, is a fine (no maximum set) or imprisonment for a term not exceeding 5 years or both. Where these offences are dealt with summarily, the appropriate penalties are a fine of up to £1,500 (1,904 Euro) or up to 12 months imprisonment or both. The fine amount is currently under review.

As mentioned earlier, the sanctions for the offence of “active corruption” under the Criminal Justice (Theft and Fraud Offences) Act, 2001, are significantly less severe than those under the 2001 Act (i.e. five years imprisonment and/or a fine). [Discussion between this offence and the offence in the implementing legislation is contained under 1 and 4.2 of this report].

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14. Convention on the Fight against Corruption by the European Union, concluded in Brussels May 26, 1997
Criminal Law Convention on Corruption of the Council of Europe, concluded in Strasbourg January 27, 1999 (please see footnote 4).
15. The Irish authorities explain that where no amount of a fine is provided, the fine is unlimited.

The Irish authorities have not established in law or policy, guidelines to assist the judge in evaluating the penalties. Sentencing, whether in relation to a fine or penalty of imprisonment, is a matter of judicial discretion, with the legislation setting out only the maximum penalties which may be imposed. There are few instances in Irish law where no discretion is permitted e.g. murder carries a mandatory life sentence. The judiciary takes into account the circumstances of each case when deciding on the penalty, and it is practice for circumstances such as an early guilty plea to be considered as a mitigating factor. The Director of Public Prosecutions (D.P.P.) can seek a review of a sentence imposed following a conviction on indictment where he considers the sentence unduly lenient.

It would appear that there is no case law concerning domestic bribery committed either by natural or legal persons.

3.3 Penalties and Mutual Legal Assistance

Generally, a certain length of imprisonment under the law of Ireland or the requesting state is not required for Ireland to provide mutual legal assistance (MLA). However, with respect to the enforcement of a confiscation/forfeiture order, the offence in question should correspond to an indictable offence under Irish law. With respect to search and seizure, the offence should correspond to an offence under Irish law in respect of which the judge has the power to issue a search warrant; in respect of offences under the implementing legislation, those punishable by imprisonment for 5 years or more. The foreign bribery offence fulfils these requirements.

3.4 Penalties and Extradition

Pursuant to section 10 of the Extradition Act 1965, an extraditable offence is one for which the maximum term of imprisonment is at least 1 year under the law of both the requesting state and Ireland. With respect to extradition to a “convention country” for the purpose of Part 3 of the Extradition (European Union Convention) Act 2001¹⁶ and the United Kingdom, etc. this requirement could be less onerous (see the discussion below in 10.1/10.2 “Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition”).

3.6 Seizure and Confiscation of the Bribe and its Proceeds

(The issue of pre-trial seizure is discussed below in relation to Article 5 of the Convention on enforcement).

Section 9 of the Criminal Justice Act, 1994 provides for the confiscation of the proceeds of a crime following a conviction on indictment. The Proceeds of Crime Act 1996 provides for the civil forfeiture of the proceeds of crime without any such conviction, but is limited to property worth at least £10,000 that represent the proceeds of any crime.

The terms “confiscation” and “forfeiture” are not equivalent in meaning. The Irish authorities explain that in general, confiscation relates to the taking of property through seizure e.g. the proceeds of criminal conduct. Forfeiture refers to the deprivation of a person of his own property as a penalty e.g. property used in the commission of an offence.

16. A “convention country” for the purpose of Part 3 of the Extradition Act 2001, is a country that adopted the Convention relating to Extradition between the Member States of the European Union (1996 Convention) and which by an Order designated as such by the Minister for Foreign Affairs.

Criminal confiscation

Under section 9 of the Criminal Justice Act, 1994¹⁷ which addresses the recovery of the proceeds of offences other than drug trafficking offences, confiscation orders may be issued following the conviction on indictment for an offence. Where a person is convicted of any offence on indictment, the court can, on the application of the Office of the Director of Public Prosecutions (D.P.P.), enquire into whether the person has benefited from the offence and, if it is satisfied that there has been such a benefit, the court may require “*the person concerned to pay such sum as the court thinks fit*”. Confiscation, pursuant to these provisions, involves the payment of a sum, in respect of the value of “property” obtained or equal to the value of a “pecuniary advantage” obtained as a result of or in connection with an offence. The standard of proof for determining whether and to what extent the person benefited from the offence is that applicable to civil proceedings, (i.e. the balance of probabilities). If necessary, the property of the convicted person can be taken into possession and sold to satisfy the confiscation order.

The availability of a confiscation order under section 9 is discretionary and, additionally it is within the discretion of the D.P.P. to decide whether to apply to the Court therefor. (The role of the Public Prosecution Service and its power are examined under point 5 below). Pursuant to section 9 (3), an

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17. *Section 9-“(1) Where a person has been sentenced or otherwise dealt with in respect of an offence, other than a drug trafficking offence, or which he has been convicted on indictment, then, if an application is made, or caused to be made, to the court by the Director of Public Prosecutions the court may, subject to the provisions of this section, make a confiscation order under this section requiring the person concerned to pay such sum as the court thinks fit.*
- (2) An application under this section may be made if it appears to the Director of Public Prosecutions that the person concerned has benefited from the offence of which he is convicted or from that offence taken together with some other offence (not being a drug trafficking offence) of which he is convicted in the same proceedings or which the court has taken into consideration in determining his sentence.*
- (3) An application under subsection (1) of this section may be made at the conclusion of the proceedings at which the person is sentenced or otherwise dealt with or may be made at a later stage.*
- (4) For the purposes of this Act, a person benefits from an offence other than a drug trafficking offence if he obtains property as a result of or in connection with the commission of that offence and his benefit is the value of the property so obtained.*
- (5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this section as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.*
- (6) The amount to be recovered by an order under this section shall not exceed—*
- (a) the amount of the benefit or pecuniary advantage which the court is satisfied that a person has obtained, or*
- (b) the amount appearing to the court to be the amount that might be realised at the time the order is made,*
- whichever is the less.*
- (7) The standard of proof required to determine any question arising under this Act as to—*
- (a) whether a person has benefited as mentioned in subsection (2) of this section, or*
- (b) the amount to be recovered in his case by virtue of this section, shall be that applicable in civil proceedings.*

application for confiscation may be made at the conclusion of the proceedings or at a later stage. The Irish authorities indicated that such an application could be made at any time.

In advance of proceedings being initiated, a conservatory seizure is available. The Director of Public Prosecutions (D.P.P.) may, pursuant to Section 24, Criminal Justice Act, 1994 apply to the High Court for a “restraint order” on an ex parte basis (without notice to the other party). The court may at any time appoint a receiver to take possession of the property. Ireland states that the Act also provides for circumstances of bankruptcy, death of the person etc. and apply equally to legal as to natural persons, but that it should be noted that there is a provision under section 30, Criminal Justice Act 1994 for preserving property which is subject to a restraint order if a company is being wound up.

“Property” includes, pursuant to section 3 (1) of the Criminal Justice Act 1994, money and all other property, real or personal, heritable or moveable, including choses in action and other intangible or incorporeal property. This term is defined similarly in section 1 (1) of the Proceeds of Crime Act 1996 which adds that “references to property shall be construed as including references to any interest in property”. Although the term “pecuniary advantage” which is mentioned in section 9 (5) of the Criminal Justice Act 1994, is not defined, it is clear that it is a form of advantage which could be equated to a sum of money.

Ireland states that the value of these items can be traced if they have changed form pursuant to Section 9 (6) of the Criminal Justice Act 1994¹⁸.

If the bribe sum is still in the hands of the briber, the Irish authorities state that it is unlikely that this could be considered the proceeds of crime as such. The briber, if convicted, would of course be liable to be fined. Section 61 of the Criminal Justice Act 1994 provides that a forfeiture order may be made in respect of property used in the commission, or intended commission, of any offence. It essentially applies to property seized from a person such as would ordinarily constitute an exhibit in a case e.g. the actual bribe handed over.

The assessment of the value of the benefits is dealt with in subsection (4) of section 9 of the Criminal Justice Act 1994. It provides that “a person benefits from an offence if he obtains property as a result of or in connection with the commission of that offence and his benefit is the value of the property so obtained.” Subsection (5) deals with a situation where the person has derived a pecuniary advantage, and provides that that person “is to be treated for the purposes of this section as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.”

The confiscation procedures under the Criminal Justice Act 1994 relate to property in the possession of the convicted person. A third party might be liable to confiscation under this Act provided that he is convicted and has obtained a benefit. However, in the absence of a conviction, proceedings may be taken under the Proceeds of Crime Act, 1996 for confiscation of the proceeds of crime. “Property” cannot be confiscated from a third party, unless he/she is convicted of corruption, on indictment. However, Ireland states that

18. Section 9 (6) Criminal Justice Act 1994 provides that:

“The amount to be recovered by an order under this section shall not exceed-

(a) the amount of the benefit or pecuniary advantage which the court is satisfied that a person has obtained, or

(b) the amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the less.”

proceedings under the Proceeds of Crime Act 1996 could be considered against a so called third party, in appropriate circumstances.

The Irish legislation does not provide for monetary sanctions of a comparable effect when it is impossible for whatever reason to order confiscation or forfeiture.

Civil forfeiture

The Proceeds of Crime Act, 1996 provides for the civil forfeiture of the proceeds of crime, empowering the High Court to freeze and ultimately dispose of property, which it is satisfied, on the balance of probabilities, is the proceeds of crime. Proceeds of crime means “*any property obtained or received at any time by or as a result of or in connection with the commission of an offence*”. Property includes “*money and all other property, real or personal, heritable or moveable, including choses in action and other intangible or incorporeal property and references to property shall be construed as including references to any interest in property*”.

Section 2 (1) empowers the High Court, on ex parte application by a Chief Superintendent of the police force or an official from the Office of the Revenue Commissioners, to make an "interim order" freezing property for 21 days; pursuant to section 2 (2), the High Court can discharge the order if the value of the property is less than £ 10 000.

Section 3 empowers the High Court, on application by a Chief Superintendent of the police force or an official from the Office of the Revenue Commissioners, to make an "interlocutory order" freezing property for up to 7 years. The applicant must make out a case to the court that the property is the proceeds of crime. The onus then shifts to the respondent to show that this is not the case.

Section 4 empowers the High Court, on application by a Chief Superintendent of the police force or an official from the Office of the Revenue Commissioners, to make a "disposal order" once the property have been frozen for 7 years. The court makes the order, unless it is proved that the property does not constitute directly or indirectly the proceeds of crime and was not acquired in whole or part, with or in connection with property that directly or indirectly, constitutes proceeds of crime. The effect of a disposal order is to deprive the respondent of any rights in the property.

The Irish authorities emphasize that the provisions on civil forfeiture in the Proceeds of Crime Act 1996 complement those on criminal confiscation on public policy grounds, rather than as complementary tools in proceedings in relation to the same trial. The *raison d'être* of the civil forfeiture process is to address the problem of the obvious enrichment of certain persons from criminal acts, whether or not a criminal conviction had ever been recorded against them. Where there is a concern that property would be dissipated in advance of a trial, there is provision under section 24, Criminal Justice Act 1994 for a restraint order to be sought from the High Court.

3.7 Sanctions where legal system has no seizure and confiscation provisions

Not applicable.

3.8 Additional civil or administrative sanctions for bribery of foreign public official

Section 160 of the Companies Act, 1990 provides that where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, then during the period of five years from the date of conviction or such other period as the court, on the application of the prosecutor and having regard to the circumstances of the case, may order that he or she may not be appointed or act as an

auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company. In addition, he or she is subject to a disqualification for that period [subsection (1)]. Where the court is satisfied in any proceedings or as a result of an application under the section that a person has been convicted of an offence as described, while a promoter, officer, auditor or otherwise of a company, of an offence such as fraud in relation to the company, involving any breach of duty and that the conduct makes him/her unfit to be involved in the management of a company, the court may of its own motion or as a result of an application, make a disqualification order for such period as it sees fit [subsection (2)]. It is discretionary for the court to decide the disqualification. Further penalties are provided where a person fails to observe such a disqualification order.

Ireland states that, apart from the Company Act 1990, a variety of sanctions can be imposed depending on the circumstances (e.g. where specific provision is made under the Companies Acts 1963 - 2001 or under public procurement procedures).

Ireland explains that the Irish criminal law system provides only criminal sanctions, rather than administrative or civil sanctions. Ireland explains that where non-criminal sanctions, such as a disqualification from holding a directorship, are provided for example by the Companies Acts, their primary purpose is to sanction unlawful behaviour arising under each Act, rather than to provide an additional layer of penalty where there has been a conviction on the basis of a summary offence rather than on indictment under criminal law.

The Irish authorities mention the recent creation of the Office of the Director of Corporate Enforcement (ODCE) under the Company Law Enforcement Act 2001 and the requirement made to auditors to report any suspected indictable offences under the Companies Acts, in addition to their existing reporting requirements to shareholders.

Ireland states that there is no explicit legislative provision stating that a conviction under the Prevention of Corruption Acts 1889-2001 will give rise to the exclusion of contractors or parties from tendering for a contract where they have been found guilty of an offence or a serious misconduct, but upholds that the potential exists for such an exclusion to be sought, in appropriate circumstances.

Ireland states as well that the legislation implementing the existing Directives leaves the discretion in respect of exclusion of tenders on relevant grounds to contracting authorities.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

Section 6 of the 2001 Act, which governs territorial jurisdiction in respect of the foreign bribery offence, states as follows:

A person may be tried in the State for an offence under the Public Bodies Corrupt Practices Act, 1889, or the Act of 1906, if any of the acts alleged to constitute the offence was committed in the State notwithstanding that other acts constituting the offence were committed outside the State.

Pursuant to section 1(2), an “act” includes an omission. In addition, the Irish authorities state that an “act” taking place on board an Irish controlled ship or aircraft is covered. Moreover, the Explanatory

Memorandum on section 6 states that the section clarifies Irish jurisdiction by providing that a person may be tried in Ireland for the offence of corruption if any element of the offence occurred in Ireland. It further states that an “act” of corruption could occur partly in Ireland where, for example, an offer of a bribe is made abroad but received in Ireland. In addition, the Irish authorities state that, for instance, an offer or promise of a bribe, confirmation of a promise or discussion about the details made through a telephone call, fax or e-mail emanating from Ireland would trigger territorial jurisdiction.

Section 6 states that a person “may be tried” where an act was committed in Ireland. This formulation implies discretion in establishing territorial jurisdiction. The Irish authorities state that this formulation is used for offences, which, by their nature, frequently trigger the jurisdiction of more than two states, such as manslaughter and “sexual offences committed abroad” [Sexual Offences (Jurisdiction) Act 1996], and thus, the implication of discretion is merely a matter of dealing in the most effective way with the prosecution process where more than one state may take proceedings.

4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

Pursuant to article 29(8) of the Irish Constitution, Ireland may exercise extraterritorial jurisdiction in accordance with the generally recognised principles of international law. The Irish authorities state that Ireland establishes extraterritorial jurisdiction over specific offences on the basis of public policy priorities, and have agreed in a number of international criminal law agreements to extend jurisdiction, usually where there is an international element or where required due to the serious nature of the crime. The Irish authorities state that under Irish law, nationality jurisdiction has been established over only certain offences, such as murder and manslaughter.

With respect to corruption offences, section 7 of the 2001 Act provides conditions for establishing extraterritorial jurisdiction. Pursuant thereto, jurisdiction is established where a person enumerated in section 2(5)(b) of the Act commits an offence under section 2 of the Act (i.e. section 1 of the 1906 Act, as amended) abroad. Section 2(5)(b) enumerates all domestic public officials that are prescribed as an “agent” for the purpose of the 1906 Act¹⁹ (other than “any person employed by or acting for another”

19. Section 2(5)(b) states as follows:

In this Act—

‘agent’ includes—

(b) (i) an office holder or director (within the meaning, in each case, of the Public Bodies Corrupt Practices Act, 1889, as amended) of, and a person occupying a position of employment in, a public body (within the meaning aforesaid) and a special adviser (within the meaning aforesaid),

(ii) a member of Dáil Éireann or Seanad Éireann,

(iii) a person who is a member of the European Parliament by virtue of the European Parliament Elections Act, 1997,

(iv) an Attorney General (who is not a member of Dáil Éireann or Seanad Éireann),

(v) the Comptroller and Auditor General,

[paragraph (a)], and section 2 of the 2001 Act establishes the offences of active and passive bribery of domestic and foreign public officials. Consequently, whereas extraterritorial jurisdiction is established in most cases in respect of domestic passive bribery, it is established only where the briber is a domestic public official in respect of active bribery (domestic and foreign). Thus, Ireland cannot establish jurisdiction over a national who committed the foreign bribery offence abroad if he/she is not a domestic public official.

In contrast, pursuant to section 45(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001, Ireland establishes jurisdiction over the “active corruption offence” under the same Act (e.g. bribery of certain EU public officials and public officials of EU member states) committed abroad, where the offender is an Irish citizen (nationality jurisdiction), a public official of an EU member state, an EU public official or a Community official working for a European Community institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters within Ireland, or where the public official to whom the offence is directed is an Irish citizen. Section 46(1) states that in such cases, no further proceedings other than a remand in custody or on bail shall be taken except by or with the consent of the Director of Public Prosecutions.

Given that the “active corruption offence” under the Criminal Justice Act 2001 is a comparable offence to the foreign bribery offence under the implementing legislation (i.e. 2001 Act), and that the foreign bribery offence under the 2001 Act indeed contains international elements, there arises a doubt as to whether establishing nationality jurisdiction only for the “active corruption offence” conforms to Article 4.2 and Commentary 26 of the Convention, which require that nationality jurisdiction should be established according to the general principles and conditions in the legal system of each Party, including the selection of the type of offences to which such jurisdiction applies.

Moreover, as mentioned earlier, since there is an overlap between the foreign bribery offence under the 2001 Act and the “active corruption” offence under the Criminal Justice Act 2001²⁰, there could be a risk of discriminatory application of nationality jurisdiction between the cases of bribery of foreign public officials of the EU or EU member states, and that of foreign public officials of non-EU member states, in that nationality jurisdiction cannot be established over the latter (unless the briber is an Irish public official), whereas it can be established over the former if the case involves damages or potential damages to the European Communities’ financial interests.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The Irish authorities state that the necessary procedural arrangements would be made by the Office of the Director of Public Prosecutions.

(vi) the Director of Public Prosecutions,

(vii) a judge of a court in the State,

(viii) any other person employed by or acting on behalf of the public administration of the State

20. Such cases are cases of bribery of foreign public officials that satisfies the conditions of the offence under the 2001 Act, and which involves public officials of EU or EU member states and damages or is likely to damage the European Communities’ financial interests.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

The Irish authorities consider that the entry into force of the 2001 Act is too recent for an effective review.

5. ARTICLE 5. ENFORCEMENT

5.1 Rules and Principles Regarding Investigations and Prosecutions

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

Generally

The Irish authorities state that the rules and principles governing the investigation and prosecution of the bribery of a foreign public official are the same as those for all investigations and prosecutions.

(i) Investigation

In Ireland, the national police force (*An Garda Síochána*) is the primary body for investigating criminal cases. For specific types of crimes, specialised units operate within the national police force to detect and prevent such crimes. As such specialised units, the Garda Bureau of Fraud Investigation²¹ deals with all serious fraud and money laundering cases, and the National Bureau of Criminal Investigation²² investigates serious and organised crime on a national and international basis. Also, the Money Laundering Investigation Unit²³ is responsible for recording, evaluating, analysing and investigating disclosures relating to suspicious financial transactions.

The Irish authorities state that the police force is independent in its conduct of investigations, and subject only to advice from the Office of the Director of Public Prosecutions. Such advice includes legal advice and direction in relation to investigation for making out a *prima facie* case. The Irish authorities state that the police force is independent of the Department of Justice, Equality and Law Reform in relation to any investigation²⁴.

The police have the discretion to initiate an investigation following a complaint from any person, including a victim (i.e. competitor), or from information coming to the notice of the police. To suspend the investigation, the police would refer the matter to the Director of Public Prosecutions (DPP) for direction. Also, the police have the discretion to terminate the investigation without referring to the DPP where no

21. The Garda Bureau of Fraud Investigation was established in 1995.

22. The National Bureau of Criminal Investigation was established in 1997.

23. The Money Laundering Investigation Unit was established in 1995.

24. The Commissioner, the highest ranking police officer, appointed by the Government, is responsible to the Minister for Justice, Equality and Law Reform in relation to policy issues, but is independent in relation to operational matters.

material evidence of an offence emerges. A decision of the police to suspend, terminate, or not to initiate an investigation is appealable to a superior officer of the police force in the first instance. If such a decision is upheld without a good reason, it could be subject to judicial intervention²⁵.

(ii) Prosecution

The criminal justice system in Ireland is based on the principle of discretionary prosecution. All “serious” offences are prosecuted at the suit of the DPP. The Irish authorities state that in practice, almost all criminal prosecutions are brought in the name of the DPP. However, the DPP has authorised the Gardaí (police) to commence prosecutions in his/her name without seeking prior directions. The Irish authorities state that all prosecutions of corruption, including foreign bribery, require the permission of the DPP and are brought in the name of the DPP.

According to the Irish authorities, the decision whether or not to prosecute is approached in two stages. At the first stage, the DPP decides whether or not the evidence submitted establishes a *prima facie* case of guilt in relation to the identified person. If the decision is that it does not exist, the case is terminated in the absence of further evidence at a later time. If the decision is that it does exist, the second stage arises for consideration, and the DPP must decide whether or not the prosecution is in the “public interest”.

A decision whether or not to prosecute is made in accordance with the guidelines issued by the Office of the DPP (*Statement of General Guidelines for Prosecutions*, sections 4.4-4.22). Pursuant thereto, the more serious the offence, and the stronger the evidence to support it, the less likely that some other factor will outweigh the public interest for prosecution. Furthermore, the Statement of General Guidelines for Prosecutions provides an inclusive list of factors that may be considered in determining whether the public interest requires a prosecution. Such factors are aggravating and mitigating factors affecting the seriousness of the offence [e.g. the existence of an element of corruption qualifies as an aggravating factor (section 4.17.i)] and other factors, which include:

- Whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender (section 4.18.d);
- The attitude of the victim or the family of a victim of the alleged offence to a prosecution (section 4.18.e)
- Whether the likely length and expense of a trial would be disproportionate having regard to the seriousness of the alleged offence and the strength of the evidence (section 4.18.g).

A decision of the DPP not to prosecute is appealable to the courts, effectively only on the grounds of *mala fides*.

A private person can initiate a criminal prosecution of a summary nature. However, with respect to corruption offences, all prosecutions must be taken in the name of the DPP.

The Irish authorities state that prosecutorial decisions must be taken with absolute impartiality. They further state that all persons must be accorded precisely the same measure of justice in arriving at a prosecutorial decision and that in particular, no one should be prosecuted solely because of any anticipated public reaction to a decision to the opposite effect.

25. In addition, there are general provisions to address complaints arising from the conduct of members of the police force, such as the Minister for Justice, Equality and Law Reform’s recent proposals for a Garda Inspectorate.

There is no statutory provision for plea-bargaining. However, the Irish authorities state that immunity from prosecution can be granted by the DPP in circumstances in addition to those enumerated under the Constitution and law²⁶. For instance, the DPP may grant immunity from prosecution to an essential witness or suspect who is prepared to give evidence on behalf of the State. The Irish authorities state that the granting of such immunity is rare in Ireland. They also state that in the case of persons who are co-accused, where one is willing to give evidence against another, either the person should have pleaded guilty, or the DPP have made a decision not to charge him/her or the proceedings should have been concluded, before that person gives evidence²⁷.

Distinction between Summary Offences and Indictable Offences

The foreign bribery offence under the 2001 Act could be tried either as a summary offence or an indictable offence. It appears that whether or not the offence is considered an indictable offence makes a difference in the procedure, sanctions, confiscation, statute of limitations, etc. Such differences in respect of specific issues are discussed in this review wherever relevant.

The Irish authorities state that the procedure in respect of investigation and prosecution *per se* does not differ between summary and indictable offences. When the investigation is complete, the DPP decides whether to proceed with the case on a summary or indictable basis, taking into account such factors as the scale of the crime, evidence available, the accused's previous convictions, etc. The Irish authorities state that the aggravating and mitigating factors mentioned in the Statement of General Guidelines for Prosecutions (see the discussion above) are also considered in determining whether a case should be dealt with as a summary or indictable offence. The Irish authorities confirm that, in principle, foreign bribery cases would be prosecuted on indictment. They state that, however, very minor cases (e.g. payment of a bribe to expedite customs clearance), could be dealt with as summary offences depending on the circumstances (e.g. amount of bribe, amount and nature of the benefit).

Where an accused is willing to plead guilty to an indictable offence, the District Court judge may, with the consent of the DPP, decide to deal with the offence summarily on the basis of the facts before him/her²⁸. The Irish authorities confirm that, if there are proceeds derived from the offence, and it is intended that an application be made for a confiscation order, the DPP would not give consent to the court.

The preliminary hearing in all prosecutions is heard at the District Court level. Summary offences are tried at the District Court level before a judge sitting without a jury. Indictable offences are tried at the Circuit Court level before a judge and jury, and may also be tried at the District Court level on a guilty plea of the defendant if the DPP, defendant and the judge agree.

Once the decision is made, no transposition between a summary offence and an indictable offence is made. However, in sentencing a person in respect of an indictable offence before a District Court, it is open to the judge to impose a penalty of an amount or a duration (within the statutory range for the offence) that could have been imposed in a hearing before the District Court.

26. Under the Irish Constitution or law, immunities are afforded to certain persons under limited circumstances (e.g. the President, in relation to the performance of his/her official functions, members of Parliaments for the utterance in each House, diplomats).

27. Such immunity is granted in accordance with section 4.18.h of the Statement of General Guidelines for Prosecutions, which indicates that "whether the offender is willing to co-operate in the investigation or prosecution of other offenders, or has already done so" is one of the factors that may be considered when determining whether the public interest requires a prosecution.

28. In such a case, the case is dealt with as an indictable offence, resulting in a summary conviction. Thus, the statute of limitations for summary offences would not apply.

Search and Seizure

Pursuant to section 5 of the 2001 Act, with respect to an offence under the 1889-2001 Acts punishable by imprisonment for a term of 5 years or more, a District Court judge and a member of *An Garda Síochána* not below the rank of superintendent may issue a search warrant, which authorises the police to enter and search a certain place and persons in that place, and seize and retain evidence of or relating to the commission of the offence found there, where he/she is satisfied that there are reasonable grounds for suspecting that such things is to be found in the place. For a member of *An Garda Síochána* to issue a search warrant, circumstances of urgency, etc.²⁹ are required. The Irish authorities confirm that the offences in respect of which a search warrant may be issued include the foreign bribery offence, and that at the stage of granting a search warrant, consideration of whether the case would proceed summarily is irrelevant. Moreover, the search warrants under this section have effect for 1 month, if issued by a judge, and for 24 hours, if issued by a member of *An Garda Síochána*.

Subsection (7) of section 5 states that “the power to issue a warrant under this section 5 is without prejudice to any other power conferred by statute for the issue of a warrant for the search of any place or person”. According to the Irish authorities, there is no general statutory power of search³⁰, and the process of search and seizure for the foreign bribery offence is carried out under section 5 of the 2001 Act. However, where the investigation of foreign bribery involves an investigation of other offences, the provisions for search and seizure for such offences could also apply. The Irish authorities point out that, in general, other statutory provisions do not include the possibility for a search warrant to be issued other than by a judge, and thus, section 5 of the 2001 Act is particularly flexible, and goes beyond the general principles under Irish law.

5.2 Considerations such as National Economic Interest

The Irish authorities state that prosecutorial decisions must be taken with absolute impartiality. In addition, they state that investigations and prosecutions in Ireland have never been influenced by considerations of national economic interest, the potential effect upon relations with another State or identity of the natural or legal persons involved, and are of the opinion that it is difficult to foresee such a situation arising in the future.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

29. Pursuant to subsection (2), a member of *An Garda Síochána* not below the rank of superintendent shall not issue a search warrant unless he/she is satisfied that the search warrant is necessary for the proper investigation of an offence and that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court for the issue of the warrant.

30. The Explanatory Memorandum on section 5 of the 2001 Act states that it is proposed that a general provision regarding the issue of search warrants in connection with the investigation of serious offences will be included in future legislation (the Criminal Justice Bill). The Irish authorities add that as the Bill is still in the drafting stage, section 5 of the 2001 Act is provided to ensure adequate powers to fully investigate suspicion of corruption in the meantime.

The Irish authorities state that there is no statute of limitations in respect of indictable offences, and the statute of limitations for summary conviction offences is six months (The distinction between indictable and summary conviction offences is discussed above in relation to Article 5 of the Convention on enforcement).

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

Money Laundering Offence

The money laundering offences are prescribed in section 31 of the Criminal Justice Act 1994, as recently amended by section 21 of the Criminal Justice (Theft and Fraud Offence) Act 2001³¹.

Under section 31 of the Criminal Justice Act 1994, as amended, “criminal conduct” qualifies as a predicate offence. It covers conduct that constitutes an indictable offence, or that constitutes an offence in the place of commission (dual criminality) and if committed in Ireland would constitute an indictable offence under Irish law, as well as participation in such conduct. Thus, both domestic and foreign bribery qualify as predicate offences as far as they are, or correspond to indictable offences. The Irish authorities confirm that the term “indictable offence” is applied under the Criminal Justice Act to predicate offences that are purely indictable as well as “hybrid” offences (i.e. offences which can be tried summarily or on indictment), including domestic and foreign bribery. They also state that it is irrelevant whether an indictment describes the bribery offence as indictable or summary.

The Irish authorities confirm that the requirement of dual criminality is deemed to be met where the act constitutes an offence in the place of commission even if under a different criminal statute.

The Irish authorities confirm that a conviction for the predicate offence is not necessary to pursue the money laundering offence.

The money laundering offences under section 31, as amended, apply to “property” that in whole or in part, directly or indirectly represents the proceeds of the predicate offence. The Irish authorities confirm that both the bribe and its proceeds are covered in respect of active bribery. In addition, section 2 of the Criminal Justice Act 2001 defines the term “property” to cover money and all other property, real or personal, including things in action and other intangible property.

Furthermore, pursuant to section 31(6), as amended, the money laundering offences apply irrespective of whether the predicate offence is committed before or after the commencement of the Act, or the predicate offence is attributable to the perpetrator of money laundering. Thus, the offences cover both the acts of laundering one’s own proceeds (“self-laundering”) and a third person’s proceeds.

Pursuant to section 31(1), as amended, a person is liable for money laundering if knowing, believing or being reckless³² that the property is, or in whole or in part directly or indirectly represents the proceeds of a predicate offence, and “without lawful authority or excuse”, he/she commits one of the following acts:

31. This law was enacted on 19 December, 2001. The relevant Commencement Order (S.I. No. 252 of 2002) has been made, and was effective from 1 August 2002.

1. Converts, transfers or handles the property, or removes it from Ireland, with the intention of (i) concealing or disguising its true nature, source, location, disposition, movement or ownership or any rights with respect to it, (ii) assisting another person to avoid prosecution for the criminal conduct concerned, or (iii) avoiding the making of a confiscation order or a confiscation co-operation order or frustrating its enforcement against that person or another person [subsection (1)(a), as amended]. Pursuant to subsection (4), as amended, such intent [(i) to (iii)] is presumed to exist where there are circumstances that it is reasonable to conclude that the act was done with such an intention. Thus, it does not expressly cover an act of converting, etc. property with the intention of avoiding prosecution against that person. It would be covered as long as there is an intent specified in (i);
2. Conceals or disguises its true nature, source, location, disposition, movement or ownership or any rights with respect to it [subsection (1)(b), as amended];
3. Acquires, possesses or uses the property [subsection (1), as amended].

Pursuant to subsection (7)(b), as amended, “handling” property means without a claim of right made in good faith, receiving property, undertaking or assisting in its retention, removal, disposal or realisation by or for the benefit of another person, or arranging to do any of such things. Pursuant to subsection (7)(a)(iii), as amended, “converting”, “transferring”, “handling” or “removing” property includes the provision of any advice or assistance in relation to converting, transferring, handling or removing it.

In addition, the Irish authorities state that moving “property” from one place to another within Ireland and removing “property” from another country to Ireland are implicitly covered by “converting” or “transferring” property, or “concealing” or “disguising” its true nature, etc.

As regards the state of mind of the perpetrator, subsection (3), as amended, states that where the perpetrator committed the act in the circumstances that it is reasonable to conclude that he/she knew, believed or was reckless that the property was or represented the proceeds of a predicate offence, he/she shall be taken to have so known or believed or to have been so reckless unless the court/jury is satisfied that there is a reasonable doubt as to whether he/she so knew, believed or was reckless. Moreover, pursuant to subsection (7)(a)(iv), as amended, “believing” that the property is, etc. the proceeds of a predicate offence includes thinking that it was “probably” (or “probably” represented) such proceeds. The Irish authorities state that such knowledge, belief or recklessness need not be of the specific offence (i.e. the foreign bribery offence). Furthermore, they confirm that whether or not the person has known, believed, etc. that the predicate act of bribery is (or corresponds to) “indictable” is irrelevant.

There are two exceptions which are newly introduced by the amendment. Firstly, the money laundering offences require that the act should be committed “without lawful authority or excuse” [subsection (1), as amended]. Subsection (1) states that the defendant bears the onus of proving that he/she had “lawful authority or excuse”. Secondly, the offence does not apply in respect of anything done by the person “in connection with the enforcement of any law” [subsection (5), as amended]. Due to the vagueness of these languages, a question could be raised that the exceptions may admit a broad interpretation by the court. For instance, as regards the exception under subsection (5), providing a service of transferring, etc. properties by a bank could be construed as enforcement of contracting law, etc.

32. Pursuant to section 31(7)(a)(ii) of the Criminal Justice Act 1994, as amended and section 16(2) of the Criminal Justice Act 2001, a person is “reckless” if he/she disregards a “substantial risk” that the property is or represents the proceeds of a predicate offence. A “substantial risk” is defined as a risk of such a nature and degree that, having regard to the circumstances in which the person acquired the property and the extent of the information then available to him/her, its disregard involves culpability of a high degree.

The Irish authorities state that the element of “without lawful authority or excuse” [subsection (1)] is intended to provide a guideline for the court where the defendant argues that it was impossible for him/her to recognise that his/her act constitutes a money laundering transaction--not creating an additional exception but would function to relax the burden of the prosecutors in proving *mens rea* elements (i.e. knowledge, belief and recklessness). Furthermore, they state that the exception for acts done “in connection with the enforcement of any law” [subsection (5)] is intended by the legislator to apply specifically where a designated body (e.g. financial institution) having made a “suspicious transactions report” (section 57, Criminal Justice Act) to *An Garda Síochána*, acting on the instructions of a third party, subsequently transferred or removed the property that is the subject of the suspicious transactions report from Ireland. They further explain that this exception is established to ensure that the acts under such a specific situation are not prosecuted, even if there could be a case where the exception of “lawful authority or excuse” does not apply. However, the legislator’s intent to restrict the application of this exception is not mentioned in the Explanatory Memorandum.

The sanctions for these offences are imprisonment for a term not exceeding 12 months and/or a fine not exceeding € 1,500³³ on summary conviction, and imprisonment for a term not exceeding 14 years and/or an unlimited fine on conviction on indictment [subsection (9)].

Reporting Requirements for Financial Institutions

Under section 57 of the Criminal Justice Act 1994, financial institutions and their directors, employees and officers shall report suspected money laundering transactions, etc. to *An Garda Síochána* (i.e. national police force). Financial institutions that are subject to the reporting requirement are enumerated in section 32 (1), and include: a body licensed to carry on banking business under the Central Bank Act 1971 or authorised to carry on such business under regulations made under the European Communities Act 1972; *An Post* (i.e. the national Post Office Service); a person providing a service in relation to buying and selling stocks, shares and other securities; a person providing foreign currency exchange services; and a person or body prescribed in regulations made by the Minister for Justice, Equality and Law Reform. For the purpose of this reporting requirement, the relevant subdivision of *An Garda Síochána* is the Money Laundering Investigation Unit, whose role it is to record, evaluate, analyse and investigate disclosures relating to suspicious financial transactions under the Criminal Justice Act 1994. An Interdepartmental Steering Committee on Anti Money Laundering Measures³⁴ provides guidelines on the application of the legislation, including what may constitute a suspicious transaction.

Moreover, through the amendment by section 23 of the Criminal Justice Act 2001, section 57A is added to the Criminal Justice Act 1994 to extend the reporting requirements for financial institutions and their employees, etc.³⁵ Pursuant thereto, the financial institutions and their employees, etc. are obliged to report “any transaction” connected with a designated state or territorial unit (designation is made by an Order)³⁶ which does not have in place adequate procedures for the detection of money laundering to *An Garda Síochána*. According to the Irish authorities, such an Order can only be made after the law’s entry into

33. 1 Irish Punt is valued at 1.27 Euro.

34. This Committee is chaired by the Department of Finance and consists of representatives of relevant Government Departments, the Central Bank of Ireland, *An Garda Síochána* and of the representative associations of the finance and credit institutions.

35. This amendment is made to comply with counter-measures being imposed by the Financial Action Task Force (FATF) in relation to Non-Cooperative Countries and Territories (NCCTs).

36. The Minister for Justice, Equality and Law Reform may designate a state or territorial unit by an Order (after the consultation with the Minister for Finance) where he/she is of the opinion that the state, etc. does not have in place adequate procedures for the detection of money laundering.

force, and the preparation for the first Order is underway. A violation of this requirement is punishable by imprisonment not exceeding 12 months and/or a fine not exceeding £1,000 on summary conviction, and imprisonment not exceeding 5 years and/or a fine on conviction on indictment.

Thus, Irish law does not require that financial institutions report transactions over a certain amount or large transborder transactions (i.e. in and out of Ireland) unless they are suspicious transactions.

In addition, section 32 of the Criminal Justice Act 1994 provides requirements for financial institutions of customer identification and record keeping. Pursuant thereto, financial institutions shall take measures to establish the identity of customers to whom the institution provides service on a continuing basis, in respect of transaction(s) the total of which is at least £10,000 or the amount prescribed under the regulation by the Minister for Justice, Equality and Law Reform, and in respect of suspected money laundering transactions. Financial institutions shall also keep documents relating to such transactions for at least 5 years following the transaction, and a copy of all materials used to identify the customer for at least 5 years after the relationship with him/her has ended. A violation of customer identification/record keeping requirements is punishable by imprisonment not exceeding 12 months and/or a fine not exceeding £1,000 on summary conviction, and imprisonment not exceeding 5 years and/or a fine on conviction on indictment.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2 Accounting and Auditing Requirements/Companies Subject to Requirements

Accounting Standards

Irish company law does not contain accounting prohibitions that specifically apply in relation to bribing foreign public officials or hiding such bribery. However, the Companies Act 1990 provides relevant requirements in respect of books of accounts. Pursuant to section 202(1) of the Act, every company shall keep proper books of account, whether in the form of documents or otherwise, that:

- correctly record and explain the transactions of the company;
- will at any time enable the financial position of the company to be determined with reasonable accuracy;
- will enable the directors to ensure that any balance sheet, profit and loss account or income and expenditure account of the company complies with the requirements of the Companies Acts³⁷; and
- will enable the accounts of the company to be readily and properly audited.

37. The Companies (Amendment) Act 1986 sets out the format in which the balance sheet and profit and loss account should be prepared. Also, section 158 of the Companies Act 1963, as amended by the Company Law Enforcement Act 2001 (section 90), requires that a director's report, which shall include measures taken by directors to ensure that the requirements of section 202 are complied with, to be attached to every balance sheet.

Pursuant to section 202(2), such books must be kept on a continuous and consistent basis, requiring that, the entries therein shall be made in a timely manner to be consistent from one year to the next.

Pursuant to section 202(3), books of account shall contain the following:

- (a) entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;
- (b) a record of the assets and liabilities of the company;
- (c) if the company's business involves dealing with goods, (i) a record of all goods purchased, and of all goods sold (except those sold for cash by way of ordinary retail trade), showing the goods and the sellers and buyers in sufficient detail to enable the goods and the sellers and buyers to be identified and a record of all the invoices relating to such purchases and sales, and (ii) statements of stock held by the company at the end of each financial year and all records of stocktakings from which any such statement of stock has been, or is to be, prepared;
- (d) if the company's business involves the provision of services, a record of the services provided and of all the invoices relating thereto.

Furthermore, section 202(4) states that "proper books of account" shall be deemed to be kept if they comply with the aforementioned requirements under subsections (1) to (3), give a true and fair view of the state of affairs of the company and explain its transactions.

In addition, pursuant to section 202(6), if the books of account are kept outside Ireland, the accounts and returns relating to the business shall be sent to and kept at a place in Ireland and be at all reasonable times open to inspection by the directors.

A failure to comply with the requirement under section 202 of the Companies Act constitutes an offence (see the discussion below in 8.3 "Penalties").

Thus, under the Companies Act 1990, the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents are prohibited.

Auditing Requirements

All companies except small private limited companies are required to have external audits. Pursuant to section 32 of the Companies (Amendment) (No.2) Act 1999, such exemption applies to companies which fulfil all of the prescribed conditions including the following: the turnover does not exceed £250,000; the balance sheet total does not exceed £1.5 million; the average number of employees does not exceed 50; and the company is not a parent or subsidiary undertaking, a holder of a licence under section 9 of the Central Bank Act 1971, etc.

Currently there are no provisions in company law relating to internal audits³⁸.

Auditing Standards (SASs) in Ireland, which do not have the force of law, are those developed by a UK body (the Auditing Practices Board) and are promulgated in Ireland by the Institute of Chartered Accountants (ICAI), a professional accountancy body. They contain basic principles and procedures with which auditors are required to comply when carrying out an audit of financial statements.

38. However, it is envisaged that the Audit Bill will contain certain provisions relating to internal auditors for public interest companies.

Also, the Companies Acts provide for relevant requirements. Pursuant to section 193 of the Companies Act 1990, an auditor shall examine and make a report on the accounts and on every balance sheet and profit and loss account, and all group accounts of the company. Every auditor shall have the right of access at reasonable times to the books, accounts and vouchers of the company and shall be entitled to require the officers of the company to provide necessary information. In addition, the auditor's report shall be read at the annual general meeting of the company and shall be open to inspection by any member. Moreover, the auditor's report must, with the exception of certain companies pursuant to section 128(6) of the Companies Act 1963 and section 2 (1) of the Companies (Amendment) Act 1986 (e.g. unlimited companies, companies not trading for the acquisition of gain)³⁹, be filed in the Registrar of Companies Office where it is open for public inspection.

Section 187(2) in respect of the independence of auditors, prohibits the appointment of certain categories of persons as an auditor of a company. Prohibited persons include an officer (i.e. directors and secretaries) or servant of the company; a person who was an officer or servant of the company within a period in respect of which accounts would fall to be audited by him/her if appointed as an auditor of the company; a parent, spouse, brother, sister or child of an officer of the company; a person who is a partner of, or in the employment of an officer of the company; and a body corporate. However, the law does not appear to prohibit Board Members, shareholders, their spouses, etc., former partners, former shareholders, former Board Members and shareholders of affiliates, from acting as an auditor.

Pursuant to section 194 of the Companies Act 1990, as amended by the Company Law Enforcement Act 2001, where auditors form the opinion that proper books of account are not being or have not been kept as required in subsections (1) to (2) of section 202 (e.g. keep the books of account that correctly record and explain the transactions of the company), they must serve a notice of their opinion on the company, and within 7 days after serving the company, notify the Registrar of Companies⁴⁰. The Registrar shall forthwith forward a copy of the notice to the Director of Corporate Enforcement, which is designated to investigate offences under the Companies Acts. Moreover, section 194(6), as amended, obliges auditors to report suspicions of indictable offences under the Companies Acts to the Director of Corporate Enforcement. An auditor is liable for an offence if he/she failed to comply with this requirement. The sanctions are imprisonment not exceeding 12 months and/or a fine not exceeding £1,500 on summary conviction, and imprisonment not exceeding 5 years and/or a fine not exceeding £10,000 on conviction on indictment.

In addition, section 59 of the Criminal Justice (Theft and Fraud) Act 2001 obliges auditors, etc. of a partnership, a corporate or unincorporated body or a self-employed individual to report a suspicion of an offence under the same Act (e.g. money laundering) to a member of *An Garda Síochána*.

8.3 Penalties

Pursuant to section 202(10), an offence is committed: (i) in respect of a company where it contravenes the requirements under section 202; (ii) in respect of a director of a company, where he/she fails to take all reasonable steps to secure compliance by the company with the requirements under section 202, or has, by his/her own wilful act, been the cause of any default by the company thereunder.

39. A draft work for an amendment to oblige these exempted companies to submit their audits reports to the Registrar of Companies Office is currently underway.

40. However, notice need not be given in respect of a minor or immaterial contravention, or of a contravention that occurred in the past, if the directors have subsequently taken necessary steps to ensure the proper keeping of the books.

Pursuant to section 243(1), an officer of a company or body corporate⁴¹ mentioned in paragraphs (a) to (e) of section 19(1)⁴² is liable for an offence where he/she destroys, mutilates or falsifies, or is privy to the destruction, mutilation or falsification of any book or document affecting or relating to the property or affairs of the body, or makes or is privy to the making of a false entry therein, unless he/she proves that he had no intention to defeat the law. Pursuant to section 243(2), such a person is liable for an offence where he/she fraudulently parts with, alters or makes an omission in any book or document, or where he/she is privy to such acts or omissions. A company or body corporate cannot be sanctioned for such an act of an officer.

Pursuant to section 240, sanctions for these offences are imprisonment not exceeding 12 months and/or a fine not exceeding £1,500 on summary conviction, and imprisonment not exceeding 5 years and/or a fine not exceeding £10,000 on conviction on indictment.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. Pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

Ireland may provide MLA to Parties in accordance with multilateral (the 1959 Convention on Mutual Assistance in Criminal Matters, its Additional and Second Protocols) and bilateral⁴³ treaties, to which Ireland is a party. Moreover, Ireland may provide mutual legal assistance under Part VII of the Criminal Justice Act 1994. Pursuant thereto, Ireland is able to provide a wide range of mutual legal assistance in criminal matters. The different types of assistance available and the requirements for providing each type are summarised as follows:

1. Confiscation co-operation order and forfeiture co-operation order. Pursuant to sections 46 and 47, the Government may by Order designate countries as countries in whose case orders may be made for the confiscation (“confiscation co-operation order”) or forfeiture (“forfeiture co-operation order”) in accordance with Irish law, in relation to an order made by a court of another country (“external confiscation order”/“external forfeiture order”). Thus, for the purpose of providing a confiscation co-operation order or forfeiture co-operation order, there must have been an overall designation in respect

41. Pursuant to section 2 of the Companies Act 1963, an “officer” in relation to a body corporate includes a director or secretary.

42. These are: a company formed and registered under the Companies Acts [paragraph (a)], an existing company within the meaning of the Companies Acts [paragraph (b)], a company to which the Companies Act 1963 applies or which is registered under the same Act [paragraph (c)], a body corporate incorporated in, and having a principal place of business in Ireland and to which the provisions of the Companies Acts apply with respect to prospectuses and allotments [paragraph (d)] and a body corporate incorporated outside Ireland which is carrying, or has carried on business therein.

43. Negotiations with the U.K. and the U.S.A. are underway.

of the requesting state before Ireland being able to respond to such requests⁴⁴. An external confiscation order is one which is for the purpose of recovering property obtained as a result of or in connection with conduct corresponding to an indictable offence, etc. under Irish law (including foreign bribery)⁴⁵ or the value thereof, or of depriving a person of a pecuniary advantage as a result of or in connection with such a conduct. An external forfeiture order is one which is made for forfeiting anything in respect of which an offence corresponding to an indictable offence, etc., under Irish law (including foreign bribery)⁴⁶ has been committed, or which was used or intended to be used in connection with the commission of such an offence. The Irish authorities state that whether an offence corresponds to an indictable offence would be determined on the basis of the requesting country's law and not the facts of a particular case, and thus, such assistance would be provided in respect of foreign bribery and money laundering.

The High Court may make a confiscation co-operation order or a forfeiture co-operation order upon an application by or on behalf of the government of a designated country with the consent of the Minister for Justice, Equality and Law Reform, if the court is satisfied that the following conditions are satisfied: (i) at the time of the order, the external confiscation/forfeiture order is in force and not subject to appeal; (ii) the person against whom the order was made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and (iii) the confiscation/forfeiture co-operation order would not be contrary to the interests of justice.

4. Service of process issued outside Ireland. Pursuant to section 49, the Minister for Justice, Equality and Law Reform (i) may cause a summons from outside Ireland to be served on a person in Ireland requiring that person to appear as a defendant or a witness, or (ii) may cause a document issued by, or recording of a decision of, a court outside Ireland to be served on a person in Ireland. Service by virtue of this provision does not impose any obligation under the law of Ireland to comply with it. The Minister for Justice, Equality and Law Reform shall not cause a summons, etc. described in (i) unless provision is made under the law of the requesting state or by the arrangement with the appropriate authority thereof, that the person will not be proceeded against, sentenced, detained, etc. in that country in respect of any offences committed before his/her departure from Ireland (in the case of defendant, other than the offence specified in the summons or process) as far as he/she leaves the state within a certain period and does not return to it.
5. Taking of evidence to be used outside Ireland. Pursuant to section 51, the Minister for Justice, Equality and Law Reform may, if he/she thinks fit, upon a request from outside Ireland for assistance in obtaining evidence (i.e. documents and other articles) inside Ireland, nominate a judge of the District Court to receive such of the evidence to which the request relates as appears appropriate. For the Minister for Justice, Equality and Law Reform to be able to nominate a judge as described, the request must have been made by the appropriate authority for making such requests⁴⁷. In addition, the Minister for Justice, Equality and Law

44. Designated countries include all Parties to the Convention.

45. Pursuant to section 46(1), the relevant offences are drug trafficking and an offence in respect of which a confiscation order could be made under section 9 of the same Act. Under section 9, a confiscation order is made where a person has been convicted on indictment.

46. Pursuant to section 47(4), the relevant offences are an offence under the misuse of Drugs Act 1977, drug trafficking and an offence in respect of which a confiscation order could be made under section 9 of the same Act.

47. Pursuant to section 51(1), this could be a court or tribunal exercising criminal jurisdiction, a prosecuting authority or any other authority that appears to have the function of making such requests.

Reform must be satisfied that an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed, and that an investigation or proceedings in respect of that offence has been instituted. The Minister for Justice, Equality and Law Reform shall not nominate a judge unless provision is made by the law of the requesting state or by the arrangement with the appropriate authority thereof, that any evidence that may be furnished in response to the request will not be used for any purpose other than that specified in the request without his/her consent.

6. Transfer of a prisoner in Ireland to give evidence or assist investigation outside Ireland. Pursuant to section 53, the Minister for Justice, Equality and Law Reform may, if he/she thinks fit, issue a warrant for a prisoner serving a sentence in Ireland to be transferred outside Ireland to give evidence or assist in proceedings or the investigation of an offence. The prisoner must consent to being transferred in order for a warrant to be issued under this section. The Minister for Justice, Equality and Law Reform shall not issue a warrant unless provision is made by the law of the requesting state or by the arrangement with the appropriate authority thereof, that the prisoner will not be proceeded against, sentenced, detained, etc. in that country in respect of any offences committed before his/her departure from Ireland.
7. Search and seizure for material relevant to investigation outside Ireland. Pursuant to section 55, the Government may by Order designate countries in relation to the issuance of a search warrant. Thus, for the purpose of providing assistance involving search and seizure, there must have been an overall designation in respect of the requesting state before Ireland being able to respond to such requests⁴⁸. The Minister for Justice, Equality and Law Reform may give a direction for an application for a search warrant authorising entry, search and seizure, in response to a request which must have been made by the appropriate authority for making such requests⁴⁹. He/she shall not give the direction unless provision is made by the law of the requesting state or by the arrangement with the appropriate authority thereof, that any evidence that may be furnished in response to the request will not be used without his/her consent for any purpose other than that specified in the request and that when the evidence is no longer required for that purpose, etc., it will be returned to him/her.

Furthermore, pursuant to section 55, upon an application by the Director of Public Prosecutions or a member of *An Garda Síochána* not below the rank of superintendent made in pursuance of the direction given by the Minister for Justice, Equality and Law Reform, a judge of the District Court may issue a search warrant, if he/she is satisfied that (i) there are reasonable grounds for believing that an offence under the law of the requesting state, which is a designated country by an Order, has been committed, and (ii) the conduct would constitute an offence in respect of which the judge would have power to issue a search warrant in relation to any place if it had occurred in Ireland.

Pursuant to section 5 of the 2001 Act, the offences under the 1889 to 2001 Acts punishable by imprisonment for 5 years or more, including the offence of foreign bribery, qualify as an offence in respect of which the judge have power to issue a search warrant. The Irish authorities state that for the issuance of a search warrant for the purpose of providing MLA in respect of foreign bribery, the conditions under section 5 of the 2001 Act are not required. However, they state that the request may be refused where the circumstances would not permit an order for search and seizure to be obtained, if the case were investigated in Ireland.

48. Designated countries include all Parties to the Convention. [..]

49. Pursuant to section 55 (4), this could be a court or tribunal exercising criminal jurisdiction, a prosecuting authority or any other authority that appears to have the function of making such requests.

In addition to these conditions for each type of assistance, there are some general grounds upon which assistance may be refused. According to the Irish authorities, assistance may be refused on political, security or national interest grounds. Also, assistance would be refused where the proceedings would result in double jeopardy for the person concerned or where the execution of the request for assistance would be contrary to the Irish Constitution.

With respect to all of the different forms of MLA available in Ireland, the Minister for Justice, Equality and Law Reform has the discretion to refuse assistance even where the prescribed conditions under the relevant sections of the Criminal Justice Act 1994 are satisfied. The Irish authorities state that the Minister's discretion to refuse assistance would be exercised if the assistance could endanger the sovereignty or the security of Ireland.

Ireland states that any decision by the Minister for Justice, Equality and Law Reform is appealable to the High Court by the way of judicial review. A decision by the High Court to refuse assistance may be appealed on a point of law to the Supreme Court.

MLA can be provided in relation to criminal proceedings against legal persons. It is provided under the same conditions and procedure in relation to natural persons.

9.1.2 Non-Criminal Matters

Ireland may provide MLA in relation to non-criminal proceedings, including those against a legal person under the Foreign Tribunals Evidence Act 1856, in a more restrictive way than in relation to criminal matters.

9.2 Dual Criminality

Generally, mutual legal assistance is not dependent on dual criminality. However, it is required for assistance involving search and seizure and confiscation/forfeiture co-operation order, as mentioned above.

The Irish authorities confirm that the condition of dual criminality is deemed to be fulfilled if the offence for which MLA is sought is within the scope of the Convention. They further state that the condition of dual criminality does not require that the alleged act of foreign bribery must have been committed after the entry into force of the implementing legislation.

9.3 Bank Secrecy

The Irish authorities state that section 7(A) of the Bankers Books Evidence Act 1879, as amended by the Disclosure of Certain Information for taxation and Other Purposes Act 1996, provides that the police may apply to the Court for an order to inspect and copy records of financial institutions, etc. for the purpose of gathering evidence. The provision does not provide any other specific condition for the court to issue such an order. However, the Irish authorities state that some conditions may be imposed at the discretion of the court. They also state that the purpose of providing MLA would not impose additional conditions for the issuance of an order.

10. ARTICLE 10. EXTRADITION

10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party

that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

The Extradition Acts 1965-2001 govern the conditions and procedures for extradition to another country. The Extradition Act 1965 gives effect to the 1957 Council of Europe Convention on Extradition. The principles in the 1957 Convention as reflected in the Act also provide the basis for Ireland’s extradition arrangements with non-Council of Europe states.

The Extradition Acts was most recently amended by the Extradition (European Union Conventions) Act 2001⁵⁰. This Act gives effect in Ireland to the Convention on Simplified Extradition Procedures between Member States of the European Union (1995 Convention) and to the Convention on Extradition between the Member States of the European Union (1996 Convention) and introduces a number of changes to Ireland’s general law and procedure in extradition matters. The content of the amendments is discussed below wherever relevant.

Pursuant to section 8 of the Extradition Act 1965, Ireland may provide extradition to countries in respect of which the Government makes an Order to apply Part II (sections 8-40) of the Act. According to the Irish authorities, such an Order may be made where one of the following conditions are fulfilled: (i) the country has concluded a bilateral extradition treaty or agreement with Ireland; (ii) the country is a Party to a multilateral treaty or agreement to which Ireland is a Party, and where such treaty or agreement makes provision for extradition between Parties for the purposes of that treaty or agreement; or (iii) where the Government is satisfied that reciprocal arrangements are in place with that country⁵¹. The Irish authorities confirm that Ireland considers the Convention as a multilateral treaty which fulfils (ii) mentioned above, and in addition, all the Parties to the Convention are designated by the Order to apply Part II of the Act.

Extradition treaties and agreements as well as Orders (in relation to countries in respect of which there is no arrangement) have legal force subject to the provisions of the Extradition Act.

In addition, pursuant to the Extradition Act 2001, the Minister for Foreign Affairs may by Order designate a country that has adopted the 1995 Convention [“convention (1995) country”] [section 4(1)], or the 1996 Convention [“convention (1996) country”] [section 10(1)], for the purpose of applying special conditions for the request from parties to each convention.

A request for extradition shall be communicated by a diplomatic agent of the requesting state, in accordance with the relevant provisions in the extradition arrangement, or in the case of EU Member States, following the entry into force throughout the EU of the 1995 and 1996 Conventions, by secure facsimile transmission from the Central authority, to the Minister for Justice, Equality and Law Reform.

50. This Act was commenced on 20 March 2002. Also, on 26 June 2002, Ireland notified the General Secretariat of the Council of the European Union of (1) its adoption of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to Extradition between the Member States of the European Union, subject to the Declarations annexed thereto, and (2) its ratification of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Simplified Extradition Procedure between the Member States of the European Union, subject to the Declarations annexed thereto. Although these conventions have not yet come into force, pending completion by all EU Member States of the process, the general amendments of the Extradition (European Union Conventions) Act 2001 are in force since the commencement date (20 March 2002).

51. Ireland is party to the 1957 Council of Europe Convention on Extradition. It has concluded bilateral extradition treaties with Australia and the United States.

Following the arrest of the person in question, the High Court⁵² decides whether to make an order granting extradition pursuant to the conditions set by Part II of the Extradition Act 1965. The Court's order is subject to the Minister for Justice, Equality and Law Reform making, in accordance with the conditions set out in the Act, an order directing that the person be extradited. The grounds under which extradition may be refused are specified in sections 11 to 22 (see the discussion below).

The Extradition Act 2001 allows an appeal on a point of law from the High Court to the Supreme Court. The ministerial decision on surrender is potentially open to judicial review.

Pursuant to section 10(1) of the Extradition Act 1965, extradition shall be granted only in respect of an offence which is punishable by imprisonment for a maximum period of at least 1 year in both Ireland and the requesting state (dual criminality)⁵³, or where a sentence of at least 4 months has been imposed. The threshold will be reduced in the case of convention (1996) countries (i.e. EU Member States) once the 1996 Convention enters into force throughout the EU. At that point, a threshold of at least 1 year in the requesting state and 6 months in Ireland will apply [section 10(1A), as amended]. Thus, the offence of bribery of a foreign public official is an extraditable offence.

Pursuant to sections 11 to 22 of the Extradition Act, extradition shall not be granted, for instance, if:

- The offence for which the extradition is sought was committed in Ireland (section 15). The Irish authorities confirm that this ground applies exclusively to specific conduct committed in Ireland. For instance, where a bribe was offered in Ireland but was given abroad, there would be no obstacle to extradite the offender for the offence of “giving a bribe”, as Ireland deems the act of offering a bribe as a separate offence therefrom committed in Ireland. Moreover, they confirm that where extradition is refused solely on this ground, the case would be submitted to the competent prosecutorial authority in Ireland;
- The offence for which extradition is sought is a political offence, an offence connected with a political offence [section 11(1)]. The Irish authorities confirm that the bribery of a foreign public official who holds a political office, or which is intended for political motives or purposes would not be construed as a “political offence” or an “offence connected with a political offence”;
- There are substantial grounds to believe that the request is made for the purpose of prosecuting or punishing a persons on account of his/her race, religion, political opinions, etc. [section 11(2)];
- The offence for which the extradition is sought is an offence under military law and which is not an offence under ordinary criminal law (section 12);
- The offence for which the extradition is sought is a “revenue offence”, which means an offence in connection with taxes, duties, customs or exchange control, unless relevant extradition provisions otherwise provide. (section 13)⁵⁴. The Irish authorities state that even in the event where the court construes a particular case of foreign bribery as a “revenue offence” (e.g. the bribery of a foreign public official who performs a duty connected with taxes, duties, customs or exchange control, or

52. Prior to the amendment under the Extradition Act 2001, the competent authority was the District Court.

53. This 1 year requirement in respect of the penalty under Irish law is lowered to 6 months where the extradition request is from parties to the Convention relating to Extradition between the Member States of the European Union.

54. Pursuant to section 3, as amended, this does not include an offence involving the use or threat of force or perjury or the forging of a document issued under statutory authority, an offence alleged to have been committed by an officer of the revenue of the country or place in his/her official capacity, or an offence within the scope of Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances done at Vienna on the 20th day of December, 1988.

which is intended to obtain a favourable treatment in relation to these fields), a separable offence of foreign bribery is extraditable;

- The prosecution against the person is pending in Ireland (section 16);
- The final judgement has been passed upon the person in Ireland or a third country in respect of the same offence [section 17(1)]. In addition, extradition may be refused by the Minister for Justice, Equality and Law Reform where the Attorney General (i.e. the DPP, after the creation of the Office of the DPP) has decided either not to institute or to terminate proceedings against the person in respect of the same offence [section 17(2)]. The Irish authorities state that these refusal grounds refer to the *non bis in idem* rule;
- The person for whom the extradition is sought has become immune by reason of a lapse of time from prosecution or punishment according to the law of either the requesting state or Ireland (section 18) [Note that the statute of limitations does not apply to the foreign bribery offence where it is indictable];
- The offence for which the extradition is sought is punishable by death penalty under the requesting state's law but is of a category for which the death penalty is not provided for by Irish law or is not generally carried out, and the requesting state does not give an assurance which the Minister for Justice, Equality and Law Reform considers sufficient that the death penalty will not be carried out (section 19).

In addition, section 14, as amended, states that, extradition shall not be granted where the person is a citizen of Ireland, unless the relevant extradition provisions or the Extradition Act provides otherwise (see below).

Additionally, with respect to the United Kingdom (Northern Ireland, England and Wales and Scotland) and certain dependencies (the Isle of Man and the Channel Islands), a simplified procedure granting extradition through the endorsement of an arrest warrant issued by the requesting state's judicial authority (Part III of the Act) may apply, and less restrictive conditions are required thereunder⁵⁵. This simplified procedure applies for the arrest of a person accused or convicted of an indictable offence⁵⁶ or a summary offence punishable on conviction by a period of at least 6 months imprisonment. A warrant from the U.K. with respect to a request relating to a summary offence (which may or may not also be an indictable offence) shall not be endorsed and pursued by the Irish authorities unless one of the following conditions is fulfilled: (i) the person has failed to appear for trial in the U.K. for the offence and provided that within 14 days prior to the summons to attend, he/she was notified of the hearing by either the U.K. authorities or the Gardai; (ii) having been out on bail in relation to that offence, he fails to appear; or (iii) having appeared for part of the trial, he/she fails to appear on the dates to which it was adjourned.

10.3/10.4 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

55. For instance, it is sufficient that at the time of the request, the offence corresponds to an indictable offence or a summary offence punishable by imprisonment for a maximum period of at least 6 months under Irish law. Also, the circumstances such as the offence in question is a political offence, an offence connected with a political offence or an offence under military law are the discretionary grounds for refusal. Furthermore, the nationality of the person in question (e.g. Irish citizen) does not constitute a ground for refusal.

56. For instance, under the U.K.'s law, the bribery offences are not purely indictable.

Under the Extradition Act 1965, as amended, the extradition of Irish citizens shall not be granted unless there is a treaty, etc. providing otherwise, or in the case of a request from a convention (1995) country, where the person in question and the Minister for Justice, Equality and Law Reform agree to the extradition (section 29A, as amended). The Irish authorities explain that, in effect, Ireland extradites its nationals on a reciprocal basis only, subject to the terms of the relevant extradition treaty.

The Irish authorities state that where extradition is refused solely on the ground of nationality, Ireland would submit the matter to its competent authorities at the request of the requesting state for the purposes of prosecution in Ireland if it is considered appropriate.

However, there is a question of to what extent Ireland can guarantee that the case would be submitted to the competent prosecutorial authorities if the request was for the foreign bribery offence committed abroad, as Ireland does not establish nationality jurisdiction over the foreign bribery offence, in principle. Section 38 of the Extradition Act 1965 may enable Ireland to establish jurisdiction in such cases under certain conditions. Pursuant to section 38(1), where an Irish citizen does an act outside Ireland which constitutes an offence for which he/she would be “liable to extradition” but for the fact that he is a citizen of Ireland, he/she shall be guilty of the “like offence” and be liable on conviction to the “like punishment” as if the act were done in Ireland. The Irish authorities state that in order to apply this provision, (i) there has to be an extradition request from the country in which the act was committed, and (ii) the case has to fulfil all the conditions for extradition (i.e. no mandatory refusal grounds are applicable).

Pursuant to section 38(2), the proceedings against the person are taken only where the direction of the Attorney General (i.e. the DPP, after the creation of the Office of the DPP) is given, following an extradition request made by the country in which the act is alleged to have been committed. The Irish authorities state that the DPP, following an evaluation of the evidence provided by the requesting state, will decide whether to proceed, considering issues such as the availability of evidence and witnesses, etc. There are no specific guidelines for the exercise of the discretion of the DPP to take the proceedings against the Irish citizen in question. However, the Irish authorities confirm that the discretion would be exercised on the same grounds as the normal prosecutorial discretion.

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

As mentioned above, extradition is conditional upon dual criminality. The Irish authorities confirm that the condition of dual criminality is deemed to be fulfilled if the offence for which extradition is sought is within the scope of the Convention.

Pursuant to section 10(3)(a) and 10(4) of the Extradition Act 1965, as amended, it is sufficient if the act in question would constitute an offence if it was committed in Ireland on the day of the extradition request, and if it constituted an offence in the requesting state on the day of the commission and the request.

However, section 10(3)(b) states that, if any part of the act was committed in Ireland, it has to be an offence under Irish law on the day of the commission. The Irish authorities state that this ground for refusal covers the situation where an element of the act was committed in Ireland in a manner which does not trigger Irish territorial jurisdiction⁵⁷. They state that this requirement was introduced in order to be

57. If the act was committed in whole or in part in Ireland in the manner which triggers territorial jurisdiction, extradition shall be refused pursuant to section 15 of the Extradition Acts.

consistent with the constitutional requirement that a person may not be punished for something which was not an offence at the time it was done. However, given that the implementing legislation of the other Parties was for the most part in force before the entry into force of the 2001 Act, this requirement could be an obstacle to extradition to another Party where the offence for which extradition is requested was committed in Ireland before the entry into force of the 2001 Act, but after the entry into force of the implementing legislation of the requesting state.

In addition, Ireland signed the European Arrest Warrant, and thereunder, the law in the requested state will not be a relevant consideration for corruption offences among the signatory countries.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

Ireland has not notified the Secretary-General of the responsible authorities. The notification will be made following Ireland's ratification of the Convention.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The Irish authorities state that, in Ireland, bribes paid to foreign public officials would not be tax deductible on public policy grounds. Therefore, the non-deductibility of bribe payments is not explicitly addressed by law (legislation/common law). The Irish authorities also state that the conditions in the Irish Tax Acts for deductibility of expenses could never be met in the case of bribes paid to foreign officials, and expenses including commissions are deductible only if they are wholly and exclusively laid out or expended for the purpose of the trade or profession. Furthermore, section 840 of the Taxes Consolidation Act 1997 does not allow the deduction of business entertainment expenses. However, it appears that there is no case law which directly addresses the issue of the non-tax deductibility of bribes⁵⁸.

In addition, the Irish authorities state that deduction of a bribe payment from a legal person's income is prohibited where its employee paid a bribe from the legal person's assets irrespective of whether the bribing act of the employee triggers the criminal liability of the legal person.

Also, according to the Irish authorities, the tax authorities can deny deduction of a suspected bribe payment if the taxpayer, on whom the burden of proof rests, does not submit sufficient proof on the balance of probabilities. A criminal conviction of the natural or legal person would not be required.

The Irish authorities state that the Revenue Commissioners can disclose information on their files to the prosecutorial authorities in cases where it is considered that a crime, including foreign bribery, has been committed and the information would be relevant to its investigation and prosecution. Furthermore, under

58. The Irish authorities state that there is case law to the effect that fines imposed by the courts are disallowable. Also, case law is provided which supports Ireland's long established authority that agreements which serve to corrupt public officials are unlawful [Duggan v Hayes 1938, Lord Mayor of Dublin v Hayes 1876, Lemenda Trading Company Limited v African Middle East Petroleum Company Ltd 1988 (1) AER 513].

section 63A (2) of the Criminal Justice Act 1994, as amended by the Disclosure of Certain Information for Taxation and Other Purposes Act 1996, the Revenue Commissioners shall disclose to a member of *An Garda Síochána* at the level of Chief Superintendent any information in their possession which is likely to be of value to a relevant investigation (which includes the investigation of any indictable offence) and where it is in the public interest to disclose it.

EVALUATION OF IRELAND

General Remarks

The Working Group commends the Irish authorities for their co-operation and openness during the examination process and recognises their effort in providing an understanding of their laws.

Ireland implemented the Convention through amendments to the Prevention of Corruption Act 1906 (1906 Act), which extend the scope of the offence of bribery of “agents” to include bribery of foreign public officials.

The Working Group considers that the Irish implementing legislation overall conforms to the requirements of the Convention, with the exception of certain issues (including nationality jurisdiction) noted below. Other aspects, as noted below, need to be followed up in Phase 2. Furthermore, the Working Group urges Ireland to speed up ratification of the Convention, which is under parliamentary process.

Specific Issues

1. Definition of foreign public official

The 1906 Act offence applies to the bribery of any “agent”. The term “agent” is defined very broadly in section 1, as amended, as including: “any person employed by or acting for another”. However, the definition of a foreign public official in that section does not expressly refer to employees of a public enterprise including those under indirect control of a foreign government. Moreover, it may exclude officials of an organised area or entity, by requiring that the agent belongs to “any other state”. Furthermore, it applies to an agent of an international organisation only where Ireland is a party thereto.

Ireland recognises that there might be a constitutional difficulty in regarding the law as enabling to prosecute a case involving an official of an international organisation if Ireland is not a member of this organisation. Nevertheless, even in the absence of case law, Ireland maintains, that the definition of an agent, which includes the private sector, is broad enough to cover some of these situations, especially because the list of the categories set forth is not exhaustive.

The Working Group considers that the definition of “agent” in the Irish legislation as it applies to officials of international organisations is more restrictive than the definition in the Convention. In addition, there may be a gap in relation to officials of territorial units other than states. Therefore, the Group recommends that Ireland consider expanding the definition to include these categories.

2. Undue Pecuniary or Non-pecuniary Advantages

The bribe is defined in the active bribery provision of the 1906 Act as “any gift or consideration” and “consideration includes valuable consideration of any kind”.

However, in the passive bribery provision of the 1906 Act [section 1(1)], a bribe is defined as “any gift, consideration or advantage”.

The Irish authorities state that the courts would interpret “valuable consideration” very widely, to include most forms of practical advantage. However, they accept that it is not entirely clear that all types of advantages would be covered, and the use of the term “advantage” would be more certain to ensure a wider scope.

The Working Group recommends that the Irish authorities consider amending section 1(2) of the 1906 Act accordingly.

3. Discrepancy in Sanctions

The general offence of bribing a foreign public official is contained in the new section 1 of the 1906 Act [inserted by the Prevention of Corruption (Amendment) Act 2001]. It provides a maximum penalty of 10 years imprisonment and/or an unlimited fine. In section 43 of the Criminal Justice (Theft and Fraud) Act 2001, there is a specific offence of “active corruption” which covers the bribery of an EU official (or EU Member State official) in a case where damage to the EU’s financial interests is involved. This offence carries a maximum penalty of 5 years imprisonment and/or an unlimited fine. Under Irish law, where the same behaviour could constitute two different offences, the court would apply the lower maximum penalty.

In the view of the Irish authorities, this discrepancy would not create any problem, as the “active corruption” offence only applies to a very specific situation where the EU budget is concerned. They add that since the court has discretion to determine the sanctions within the full range of statutory limit, such discrepancy would not create any difficulties in imposing appropriate sanctions.

The Working Group agrees that this is not an issue of non-compliance with Article 3.1 of the Convention. However, the Group is of the opinion that this issue should be followed up in Phase 2 in order to assess the application in practice.

4. Confiscation

Confiscation orders are not mandatory but only available upon the discretionary application by the Director of Public Prosecutions (DPP), under a separate procedure, after the conviction.

Ireland’s authorities state that when a person has been convicted on indictment of an offence such as bribery then the DPP may apply, at any time, after the date of the conviction, for an order, confiscating the benefit derived from the offence. Confiscation and restraint orders are provided for in Criminal Justice Act 1994. The High Court has jurisdiction to make a restraint order to freeze a person’s assets so as to ensure they are available to satisfy a confiscation order if ultimately made. If criminal confiscation is not possible, for example, when there is insufficient evidence to warrant the commencement of a criminal case, it may still be possible for the matter to be dealt with civilly under the Proceeds of Crime Act 1996.

The Group took note of these explanations and recommends that this issue should be monitored in Phase 2.

5. Nationality Jurisdiction

(i) Establishment of Nationality Jurisdiction

Ireland has not established nationality jurisdiction over the foreign bribery offence under the 1906 Act, as amended (1906 Act offence). In contrast, the less severe offence of “active corruption” under the Criminal

Justice (Theft and Fraud) Act 2001 establishes extraterritorial jurisdiction involving nationality jurisdiction. Article 4.2 of the Convention requires that each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the principles under which it asserts such jurisdiction (see Commentaries on the Convention, paragraph 26, last sentence). The Irish authorities emphasise that under Irish legal system, extraterritorial jurisdiction is extraordinary and Ireland will only assert it exceptionally, where it is under the obligation of international treaties. The Irish authorities add that it is difficult to establish nationality jurisdiction for the foreign bribery offence, as opposed to the “active corruption” offence, because the offence under the 1906 Act encompasses both private and public bribery, domestic and foreign. In the view of the Irish authorities, this choice is consistent with the obligations of the Convention and with its Commentaries.

The Working Group notes that Ireland was able to take nationality jurisdiction over corruption offences in the Criminal Justice (Theft and Fraud) Act 2001, and requests the Irish authorities to take nationality jurisdiction over the 1906 Act offence.

(ii) Related Issue

Ireland grants extradition of its nationals upon reciprocity. Where Ireland refuses extradition of an Irish citizen who committed an offence abroad solely on the ground of nationality, an exceptional jurisdiction exists under the Extradition Act 1965. Prosecution would depend upon the discretionary decision of the Director of Public Prosecutions (DPP). There are no specific guidelines for the exercise of such discretion. However, Ireland explains that the discretion would be exercised on the same grounds as the normal prosecutorial discretion.

The Working Group took note of the explanation by the Irish authorities and recommends that this issue be followed up in Phase 2 in order to see how the discretion is applied in practice.

6. Extradition and Dual Criminality

Extradition is conditional upon dual criminality. Where the act was committed wholly or partly in Ireland, the condition of dual criminality is considered to exist if the conduct is punishable under Irish law at the time of the commission. Since Ireland is one of the last Parties to implement the Convention, there is a concern that this requirement might be an obstacle to extradition in the case where the offence was committed before the entry into force of the Irish implementing legislation.

The Working Group recommends that this issue be followed-up in Phase 2 in order to see whether this condition could be an obstacle to extradition in practice.