



IRELAND: PHASE 2

REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

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EXECUTIVE SUMMARY

1. The Phase 2 Report on Ireland by the Working Group on Bribery, which evaluates Ireland's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, concludes that Ireland has not fully met its Phase 2 monitoring obligations. The Working Group notes, however, that the priority of the Convention in Ireland has increased since the Phase 2 on-site visit.

2. The on-site visit in October 2006 was characterised by very low attendance from key government bodies and private sector representatives, in particular the panels on the awareness, prevention and detection of the foreign bribery offence in Ireland. Adequate information regarding implementation of the foreign bribery offence could not be provided. Moreover, Ireland had not undertaken any awareness-raising on the Convention, either internally or targeted at the private sector. The Working Group therefore accepted and welcomed an invitation by Ireland to carry out another two to three day on-site visit within one year, and considered a further on-site visit necessary to effectively assess those issues that could not be dealt with adequately at the first on-site visit.

3. To date, no cases of foreign bribery have been brought before Irish courts. In addition, the statutory framework for implementing the Convention establishes two overlapping offences in two different statutes. The Working Group recommends that Ireland amend the statutory framework in the context of the ongoing preparation of a Prevention of Corruption (Amendment) Bill. Clarifying relevant legislation on the liability of legal persons would also contribute to more effective enforcement of foreign bribery offences.

4. The Working Group also recommends that Ireland promptly establish nationality jurisdiction for foreign bribery offences under the Prevention of Corruption Act 2001, as provided under the Criminal Justice (Theft and Fraud Offences) Act 2001. In addition, the Report notes that non tax deductibility of bribe payments is not explicitly addressed in Irish law, and recommends that the tax legislation be clarified in this respect.

5. The Working Group also highlights certain positive features of the Irish system. Ireland's Proceeds of Crime legislation should facilitate seizure and confiscation of proceeds of bribery. Recent reforms in the area of company law strengthen accounting and auditing standards, and should allow for more effective enforcement of fraudulent accounting offences ancillary to foreign bribery. The intention of the Department of Justice to prepare a Prevention of Corruption (Amendment) Bill, as well as the Government's intention to establish a committee of officials responsible for monitoring Ireland's compliance with the Convention, are positive steps for addressing certain weaknesses in the foreign bribery legislation.

6. The Report and the Recommendations therein, which reflect findings of experts from Estonia and New Zealand, were adopted by the OECD Working Group in March 2007. The Report is based on the laws, regulations and other materials supplied by Ireland, and information obtained by the evaluation team during its five-day on-site visit to Dublin in October 2006, during which the team met with representatives of some Irish government agencies and civil society. The Phase 2 procedures provide for an oral follow-up report by Ireland within one year and a written follow-up report within two years of adoption of the Phase 2 Report by the Working Group.

A. INTRODUCTION

1. The On-Site Visit in October 2006

7. From 16 to 20 October 2006, a team from the OECD Working Group on Bribery in International Business Transactions (WGB) visited Dublin in Ireland, as part of the Phase 2 self- and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation). The purpose of the visit was to examine structures in Ireland for enforcing the laws and rules which implement these OECD instruments, and to assess their application in practice.

8. Prior to the visit, Ireland responded to the Phase 2 Questionnaire and a supplemental questionnaire. As Ireland could not provide the lead examiners with definitive answers to all of the questions that were raised during the on-site visit, subsequent answers were provided to the examination team after the visit. The lead examiners analysed these materials and conducted independent research to obtain additional points of view. The examination team expresses its appreciation of the efforts of the Irish authorities during the examination process. Following the visit, the Irish authorities continued to provide additional information.

9. The lead examiners were very concerned about the low level of attendance in certain panels during the on-site visit. Notably, in the panel regarding awareness raising, prevention and detection in the public sector, only the Office of the Director of Corporate Enforcement was represented, while the major Government departments and public sector bodies did not respond to the invitation to participate. Thus, the examining team was not able to conduct a proper assessment of the level of awareness of the offence among Irish officials, of any preventive efforts to fight bribery of foreign public officials, nor of existing reporting practices concerning suspected criminal offences.¹ The lead examiners were also disappointed at the serious inadequacy of the efforts by the Irish authorities to sensitize the private sector to participate in the on-site visit. Only one company attended the on-site visit. No other Irish company participated in the private sector panels. Without a sufficiently representative sample of businesses, the examining team was unable to assess the awareness of Irish companies of foreign bribery. Finally, in the panel devoted to the perspective of private sector lawyers, no participants were present, which meant that the examining team was not able to get a different perspective from the lawyers acting as corporate counsel or defence, as opposed to the views expressed by the public prosecutors (for further discussion on these issues, see section B.1. below).

2. General Observations

(a) *Economic system*

10. As of 23 April 2006, Ireland (Eire) had a population of approximately 4.23 million². The population of the Greater Dublin is 1.19 million (about the 28% of the country population). The country borders the United Kingdom (Northern Ireland). As of 2004, the total and per capita gross domestic product (GDP) of Ireland ranked 26th and 4th respectively among the 30 OECD countries³. The Irish

¹ See Annex 1 for a list of participants.

² Preliminary 2006 Census of Population.

³ *National Accounts of OECD Countries* (Paris: OECD, 2006. *OECD FactBook 2006*).

economy is small, modern and trade-dependent with GDP growth averaging 7.8% in real terms over the last decade, compared to an average growth rate in the EU during the same period of 2.2%.

11. After expansionary fiscal policies proved disastrous in the late 1970s and early 1980s, due in part by the depression that followed the second oil crisis, Ireland's policy changed. The restoration and maintenance of macroeconomic stability, as well as the implementation of supply-side measures to encourage private investment resulted in Ireland's economic expansion during the 1990s.

12. Some factors that contributed to the 1990s boom were the creation of the EU single market; rising skills levels through heavy investment in education; rapid growth of the labour force; annual transfers from the EU equivalent to as much as 5% of GDP; and high levels of investment in high-growth, high technology sectors including information technology, financial services and chemicals and pharmaceuticals. These sectors, dominated by foreign firms (notably from the US), were attracted to Ireland by its low corporation tax regime, good geographic location, English-speaking well educated-workforce, responsive regulatory environment and its unimpeded access to the EU's single market.⁴

13. By 2001, the rate of economic expansion slowed due to several factors: world stagnation of trade and collapse of investment in the period 2001-03; rapid increase in wage and non-wage costs, exacerbated by appreciation of the Euro between 2002 and 2004; slowdown of private spending. Since 2003 growth has again increased, although domestic demand, not exports, are driving growth since then.

14. The United Kingdom, the United States and Euro area remain the most significant destinations for Irish exports. Ireland's export sector is dominated by foreign-owned multi-nationals, which use Ireland as a production base, with the resulting products either being exported into the EU or US markets. Pharmaceuticals, Organic chemicals and computers are the dominant products exported.

15. The EU (particularly the United Kingdom, France and Germany), the United States and Japan are the main import sources although in recent years steady increases in imports from China have been significant. Computers, electrical machinery, and road vehicles remain the leading products imported.

16. FDI flows into Ireland are of two types: 1) Reflecting the existence of the Global Financial Services Sector, mainly located in the IFSC in Dublin, which like all such centres relies on inflows and outflows of capital; and 2) Reflecting the long standing outward looking nature of Irish industrial policy with the existence of a significant number of foreign owner industrial and service type companies. In 2003, top inflow countries were the Netherlands, Belgium-Luxembourg, France, Germany, Italy, Japan, Canada, the United Kingdom and the United States.

17. Irish outflows of direct investment more than doubled in 2004 in relation to 2003 levels. This trend has continued in 2005 and it reflects the upturn in the Irish economy. A large amount of FDI is accounted for by "greenfield" developments, as opposed to merger and acquisition activity (most common form of FDI in developed countries).⁵ In 2003, top outflow destinations countries were the United Kingdom, the Netherlands, France, Germany and the United States.

18. Small and medium-sized enterprises (SMEs) play a significant role in the Irish economy. Ireland can be described as a country where indigenous private sector economic activity is dominated by small businesses. It is estimated that over 90% of Irish enterprises employ fifty people or less. In terms of employment share, it has been estimated that small enterprises employ approximately 50% of the private sector workforce (Government of Ireland 1994). With regard to sectoral distribution, it is estimated that

⁴ The Economist Intelligence Unit, *Country Profile 2006: Ireland*, p.6.

⁵ The Economist Intelligence Unit, *Country Profile 2006: Ireland*, p.25.

more than 80% of small businesses are in the service sectors, with the remainder being primarily in manufacturing and construction (Government of Ireland 1998)⁶.

(b) Political and legal system

19. Ireland is a Parliamentary democracy.⁷ The National Parliament (Oireachtas) is the sole legislative authority of the State and consists of the President and two Houses: Dáil Éireann (the House of Representatives) and Seanad Éireann (the Senate) whose powers and functions derive from the Constitution of Ireland (1937). The Dáil is by far the dominant tier of the legislature.

20. The President is elected directly by the people and exercises her powers on the advice of the Government. The President appoints the Taoiseach (Prime Minister) on the nomination of Dáil Éireann; and the other members of the Government on the nomination of the Taoiseach after Dáil approval.

21. Irish law is based on English Common Law, substantially modified by indigenous concepts,⁸ the written Constitution of 1937, statute law and judicial decisions. Aside from the Irish Constitution, government legislation is the most important source of Irish law⁹. There are 5 main legislative influences in Irish Law: the statutes of the old Irish Parliament prior to 1800, the statutes of the English parliament (1719-1782), the statutes of the United Kingdom parliament (1800-1922), the statutes enacted by the Irish Free State (1922) and the enactments established by the 1937 Constitution.¹⁰ As a Common Law country, Ireland's reliance on doctrine is only secondary to case law and legislation¹¹.

22. The investigation and prosecution of offences are separate and distinct functions within the Irish criminal justice system. The Director of the Public Prosecutions (DPP), as a general rule, has no investigative function and no power to direct the Garda Síochána or other agencies in their investigations. The Director may advise investigators in relation to the sufficiency of evidence to support nominated charges and the appropriateness of charges or in relation to legal issues arising in the course of investigation.

(c) Implementation of the Convention and the Revised Recommendation

23. Ireland implemented the Convention by amending 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. This replaces section 1 of the 1906 Act, which establishes the offence of bribing an "agent" and adds some new provisions, pertaining to the definition of an agent, the presumption of

⁶ Currently, there are more than 570 US subsidiaries in Ireland, employing approximately 90 000 people and spanning activities from manufacturing of high-tech electronics, computer products, medical supplies, and pharmaceuticals to retailing, banking and finance, and other services.

⁷ www.oireachtas.ie/ViewDoc.asp?fn=/home.asp

⁸ The World Factbook of Criminal Justice Systems, U.S. Department of State www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjire.txt

⁹ Article 73 of the 1922 Constitution carried all previous UK law forward into Irish law, which explains why some pre-1922 UK statutes are still in force in Ireland. A similar provision is found in Article 50 of the 1937 Constitution.

¹⁰ *Id.*

¹¹ For a list of sources to obtain case law: www.ucc.ie/ucc/depts/law/irishlaw/guide/#primary

corruption, search warrants, jurisdiction and the application of the Prevention of Corruption Acts, 1889 to 2001, to “officers of bodies corporate”.

(d) Cases involving the bribery of foreign public officials

24. There have been no prosecutions of foreign bribery in Ireland. During the on-site visit, Garda officers have advised that there are currently five investigations. Three cases relate to the UN Oil-For-Food Programme (see section A.2.e). The fourth case relates to allegations reported by a foreign newspaper in October 2005 concerning a public official of a Middle East country who was found guilty of accepting bribes, misusing job status and cancelling a 2.5 million- riyal fine against a foreign national electricity company and an (unnamed) Irish company¹². Garda officers told the examination team that the allegations were being evaluated but that no criminal behaviour had been uncovered yet. The fifth case generated from a parliamentary inquiry in an OECD member country: it involves allegations that an Irish company made illicit payments to public officials of that country. In this regard, a request of assistance was forwarded by the Garda to the law enforcement authorities of the foreign country. At the time of writing, however, no response had been sent to the Garda.

(e) Response to the Report of the Independent Inquiry Committee into the UN Oil-For-Food Programme

25. The Independent Inquiry Committee (IIC) was established in April 2004 through the appointment by the UN Secretary-General of an independent, high-level inquiry to investigate and report on the administration and management of the UN Oil-for-food Programme. On 27 October 2005, the IIC published its fifth and final substantive report (“IIC Report”). The IIC Report focused on the transactions between the former Iraqi government and companies and individuals to whom it chose to sell oil and from whom it bought humanitarian goods.

26. The IIC Report documented a complicated and vast network of alleged illicit surcharges paid to the Iraqi government in connection with oil contracts. It also documented the payment of alleged kickbacks in the form of after-sales-service fees and inland transportation fees in relation to contracts for the sale of humanitarian goods to the Iraqi government. Following the publication of the IIC Report, the UN Secretary-General issued a statement calling on national authorities to take steps to prevent the recurrence of the companies’ alleged activities documented in the Report, and take action, where appropriate, against companies falling within their jurisdiction. The IIC Report only describes the alleged activities, and does not presuppose how national laws would apply to them. Companies from many countries are referred to in the IIC Report, although it is not alleged that all the companies mentioned have been involved or implicated in corrupt transactions.¹³

27. Three Irish companies were named in the IIC Oil-for-Food report. During the on-site visit, Garda officers indicated that the cases were being investigated, although they refrained from discussing them in detail. The examiners take note of the current investigations concerning these matters by the Garda. Following the on-site visit, Garda officers clarified that the review commenced in March 2006 when the matter was formally referred to the Garda Bureau of Fraud and Investigation (GBFI). Following their assessment, investigations were commenced in July 2006. The IIC passed on the relevant materials to GBFI in December 2006 and additional files were received from the other Irish departments. A request has been forwarded to the IIC to facilitate a meeting in New York to advance these investigations.

¹² “31 jailed in Oman power fraud case”, Official Portal of Oman Society for Petroleum Services, 10/28/2005, www.opaloman.org/aboutopal/index.asp

¹³ See ‘Response to Report of Independent Inquiry Committee into United Nations Oil-for-food Programme’, OECD [DAF/INV/BR/WD (2005) 25], 5 December 2005, p. 4.

3. Outline of the Report

28. This report is structured as follows. Part B examines the efforts of Ireland to prevent, detect and raise awareness of foreign bribery. Part C looks at the investigation, prosecution and sanctioning of foreign bribery. Part D sets out the recommendations of the WGB and issues for follow-up.

B. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

(a) Government initiatives

29. With the adoption of the Prevention of Corruption (Amendment) Act and the Criminal Justice (Theft and Fraud Offences) Act in 2001, Ireland criminalised bribery of foreign public officials. The Irish authorities did not indicate in their Phase 2 responses that specific action had been undertaken to raise awareness of the foreign bribery offence, and specified that there were “no plans to make [the foreign bribery offence] more widely known than at present”.¹⁴

30. During the on-site visit, representatives of the Department of Justice, Equality and Law Reform (DOJ) confirmed that no awareness raising activities have been undertaken by Government or other public agencies to raise awareness of public officials, notably those who may be dealing with Irish companies operating abroad. With regard to awareness of the foreign bribery offence in the private sector, the DOJ indicated that it had not undertaken awareness raising action targeted at business organisations, corporations or other concerned professionals. The DOJ further explained that it did not, in the normal course of events, interact directly with businesses. When questioned further, representatives of the DOJ explained that there had not been a specific policy decision not to publicise the foreign bribery offence, but that there was, in all likelihood, a general perception that the legislation in place is sufficient. It should be noted that the private sector was not consulted at the time of drafting the Prevention of Corruption (Amendment) Act 2001.

31. Similarly, trade promotion agencies, including Enterprise Ireland,¹⁵ the Industrial Development Authority,¹⁶ and Forfás,¹⁷ have not carried out any awareness-raising targeted at their own staff or the private sector concerning foreign bribery. There are some broad requirements in legal agreements between, for instance, Enterprise Ireland and its clients but these only refer to a general obligation to comply with relevant legislation. These processes do not involve any verification with regard to the possible involvement of applicants in foreign bribery. In its responses to the Phase 2 questionnaire, Enterprise

¹⁴ See Phase 2 responses at 3.2.

¹⁵ Enterprise Ireland is the Irish state development agency focused on transforming Irish industry, including through the provision of advice and support to Irish exporters.

¹⁶ The Industrial Development Agency is an Irish Government agency with responsibility for promoting investment from overseas.

¹⁷ Forfás is the national policy and advisory board for enterprise, trade, science, technology and innovation.

Ireland clearly indicated that it does not consider itself “responsible for raising awareness of [...] the myriad of Government legislation”, a perception confirmed by the agencies present during the on-site visit.

32. The examining team was concerned by the apparent lack of interest from Irish officials in issues relating to the foreign bribery offence and the contribution public sector employees can make to its effective enforcement. Notably, in the panel devoted to awareness raising, prevention and detection in the public sector, only two representatives from the Office of the Director of Corporate Enforcement (ODCE) were present and showed some knowledge of and interest in issues relating to foreign bribery.¹⁸ Representatives from the Department of Foreign Affairs, the Department of Enterprise, Trade and Employment, or the National Contact Point for the OECD Guidelines were notably absent, despite having been specifically invited to participate in this panel, as well as others during the week. Consequently, it was not possible to properly assess the perception and awareness of foreign bribery issues of public officials in key government departments and public bodies, nor to discuss with them their possible activities or lack thereof in terms of raising awareness of the private sector concerning the foreign bribery offence. The lead examiners feel that the lack of attendance raises some doubts as to whether the Irish authorities have taken their obligations under the Convention, and notably under the Phase 2 evaluation mechanism, seriously enough.

(b) Private sector initiatives

33. The Responses to the Phase 2 questionnaires and discussions at the on-site visit indicate that, as of the time of this review, no initiative has been taken either by the Irish authorities or by business organisations to disseminate information regarding the foreign bribery offence and its legal consequences for Irish corporations.

(i) Corporations

34. The on-site visit to Ireland was characterised by very low attendance from Irish corporations, with only one company attending the panel.¹⁹ The level of knowledge of the foreign bribery offence held by the representatives of this corporation was very high, as well as the corporate rules, training and the internal control procedures in place. However, without a sufficiently representative sample of corporations to question, the examining team could not make a proper assessment regarding the level of awareness of the foreign bribery offence in Irish corporations or any other initiatives relating to corporate social responsibility issues. The lead examiners question whether the low level of attendance from corporations is due not only to a limited awareness of, or, perhaps, lack of interest in foreign bribery issues, but also to a lack of diligence on the part of the Irish authorities responsible for organising the on-site visit. Indeed, the

¹⁸ The Company Law Enforcement Act, 2001 established the Office of the Director of Corporate Enforcement (ODCE). Section 12.1 of the Company Law Enforcement Act, 2001 states that:

“The functions of the Director are—

(a) to enforce the Companies Acts, including by the prosecution of offences by way of summary proceedings,

(b) to encourage compliance with the Companies Acts,

(c) to investigate instances of suspected offences under the Companies Acts,

(d) at his or her discretion, to refer cases to the Director of Public Prosecutions where the Director of Corporate Enforcement has reasonable grounds for believing that an indictable offence under the Companies Acts has been committed, ...”

Thus, the role of the ODCE in relation to foreign bribery is limited to the investigation and enforcement of ancillary offences, such as accounting offences (see also section B.5. on accounting and auditing and C.6. on the false accounting offence).

¹⁹ This company is headquartered in London and was also present during the Phase 2 on-site visit to the United Kingdom.

one corporation present during the on-site visit indicated that their letter of invitation was dated 9 October 2006; the on-site visit took place on the week of 16 October 2006.

(ii) *Business organisations*

35. The business organisations interviewed during the on-site visit consider that the level of awareness of the foreign bribery offence among Irish businesses is relatively low, although it varies depending on the size of the company.

36. The Irish Exporters Association²⁰ conducted a quick survey among its members in anticipation of the on-site visit to sound out the level of awareness of companies in relation to foreign bribery as well as corporate behaviour in that respect. Answers to this survey indicate that approximately two-thirds of respondents declare that their employees are “aware of the consequences of illegal transactions overseas”. It is not clear, however, whether “illegal transactions” refers to the payment of bribes to foreign public officials or to other illegal acts abroad. It also highlights that approximately two-thirds of the corporations answering the survey do not have a policy in place to deal with public officials overseas. For reasons of confidentiality, certain data associated with this survey could not be released, including the number of corporations providing answers, as well as the size of the corporations represented (large corporations and/or SMEs). With regard to small and medium size enterprises (SMEs), the Irish Small and Medium Enterprises Association (ISME) confirmed that very few SMEs would be aware of the foreign bribery offence, a view also expressed by the Irish Exporters Association.

37. Discussions with the business organisations at the on-site visit also highlighted a possible lack of awareness on the part of corporations with regard to the payment of bribes through the use of agents. Representatives stated that companies were either less likely to be aware that such payments constitute a foreign bribery offence, or would be wilfully blind as to the final destination of retainer fees paid to agents. This would be particularly true of SMEs, which often rely on agents when doing business abroad, and which would do anything necessary to secure business overseas, said representatives of the business organisations. They also indicated that awareness of the non deductibility of foreign bribe payments was probably quite low, and that such payments would be genuinely considered as marketing expenses by a number of companies.

(iii) *Civil society and trade unions*

38. Academics, as well as representatives from Transparency International (TI)²¹ and the media attended the on-site visit panel devoted to discussions with civil society. There were no representatives from trade unions. No lawyers were present in either this panel or the one devoted to discussions with the legal profession, despite having been invited.

39. Participants stated that there is a generally low level of awareness of the foreign bribery offence among Irish corporations and the public at large. The 2006 TI Progress Report on enforcement of the OECD Anti-Bribery Convention assesses efforts by the Irish government to create public awareness of the foreign bribery offence as “unsatisfactory”. This report is also critical of the lack of whistleblower protection for both public and private sector employees (for further discussion on this issue, see section B.2. below).

²⁰ The Irish Exporters Association represents the whole spectrum of companies within the export industry, including SMEs, multinational corporations, and export service providers. Irish Exporters Association members deliver an estimated 70% of Ireland’s EUR 79.8 billion export total.

²¹ The Irish Chapter of Transparency International was created fairly recently, in December 2004.

Commentary:

The lead examiners are concerned about the absence of a number of key government officials and the low attendance from corporations at the on-site visit. They consider that this raises questions as to the seriousness with which the Irish authorities have taken their obligations under the Convention, and notably under the Phase 2 evaluation mechanism. Consequently, the lead examiners consider that:

- ***they were not able to adequately assess the level of awareness of Irish officials in relation to the foreign bribery offence; and***
- ***it is difficult to adequately evaluate the level of awareness of the foreign bribery offence among Irish businesses, notably small and medium enterprises..***

The lead examiners note that no awareness raising activities in relation to the foreign bribery offence have been undertaken either by the Irish government or by private sector bodies. They are concerned that none of the government departments or public agencies appear to consider it their responsibility to undertake such awareness raising activities. The lead examiners urge the Irish authorities to promptly develop awareness raising programmes:

- ***for public officials, notably those involved with Irish companies operating abroad; and***
- ***for corporations, notably small and medium size enterprises, in cooperation with the professional organisations concerned.***

2. General Sources for Detecting and Reporting Foreign Bribery

(a) Whistleblower protection

40. Ireland has given no consideration to encouraging whistleblowing in respect of criminal offences, including foreign bribery, and developing a comprehensive whistleblower protection, either through legislative measures or encouragement to companies for the development of CSR policies. No whistleblower legislation is in place for the private sector. An attempt to create general whistleblower protection was in the form of the Whistleblowers Protection Bill 1999 (the Bill)²². The Bill, which was modelled on the United Kingdom legislation, was overtaken by dissolution of the Dáil in April 2002. In June 2002, it was restored and placed on the Order Paper of the Dáil thus becoming part of the Irish Government legislative programme. In March 2006, however, due to the legal complexities encountered during the examination of the Bill, the Government announced that a “sectoral approach” (i.e. to proceed on a case by case basis with appropriate whistleblowing provisions) would replace the all-encompassing Bill. Accordingly, the Bill was withdrawn from the Standing Orders of the Dáil²³. An example of the sectoral approach can be found in Section 124 of the Garda Síochána Act, 2005 which provides whistleblower protection to Garda officers: the Minister of Justice, Equality and Law Reform is empowered with regulatory powers for the establishment of “[a] charter containing guidelines and mechanisms to enable members of the Garda or other persons to report in confidence allegations of

²² The Bill provides protection from civil liability to employees who make certain disclosures “reasonably and in good faith” in relation to the conduct of the business and affairs of their employers. The Bill also prohibits penalisation of employees by their employers in such circumstances. It sets out the persons to whom disclosure may be made and the categories of matters in relation to which such disclosure is permissible.

²³ Speech by the Minister for Labour Affairs Mr. Tony Killeen T.D. on the Government Motion on the Whistleblower protection Bill 1999, Dail Eireann, On Tuesday 4th April 2006. debates.oireachtas.ie/DDebate.aspx?F=DAL20060404.xml&Ex=610#N610

corruption and malpractice within the Garda”. So far, no guidelines and mechanisms for the protection of whistleblowers have been adopted by the Minister of Justice.

41. The Standards in Public Office Act 2001 provides immunity to a complainant who, in good faith, makes a complaint concerning a civil or public servant or an office holder to the Standards in Public Office Commission; or a complaint concerning a member of either House of the Oireachts (Parliament) to the Clerk or Select Committee on Members’ Interests of the House. This immunity provides that no action shall lie against the complainant and that no disciplinary action shall lie against him/her regarding the complaint. The legislation also provides for an offence if such disciplinary action is taken. The lead examiners note, however, that the protection provided by the Act is limited in scope as it applies only to complaints made against civil servants and the other “specified persons” indicated by the Act.

(b) *The role of the media*

42. Investigative journalism can play an important role in raising awareness of foreign bribery by reporting allegations of bribery of foreign public officials and monitoring enforcement. This has been the case for instance in articles published in the Irish press and concerning bribery allegations of Irish companies involved in the UN Oil-for-Food Programme (see section A.2.e). However, current defamation and libel laws in Ireland appear fairly harsh, in limiting freedom of the press,²⁴ as argued by Irish journalists.²⁵ The privacy legislation has serious implications for journalists to the extent that the media cannot publish certain documents already in the public domain, journalists at the on-site visit explained. They also pointed out that some important investigative reporting concerning Irish affairs has appeared first in the United Kingdom media. Recent government plans to pass a Defamation Bill (which includes a defence of fair and reasonable publication on a matter of public importance) and a Privacy Bill in conjunction with the establishment of an industry Press Council have triggered much attention and discussion on the part of the media and the law profession²⁶. In this regard, representatives of the civil society interviewed at the on-site visit lamented the chilling effect of Ireland’s defamation laws on media reporting and investigative journalism. They also indicated that the proposed privacy legislation could further curtail investigative reporting and increase the risk of newspapers being exposed to libel suits.

Commentary

The lead examiners recommend that Ireland adopt comprehensive measures to protect public and private whistleblowers in order to encourage those employees to report suspected cases of foreign bribery without fear of retaliation.

²⁴ Provisions in the Defamation Act, 1961 place an important burden on the defendant, in the context of a libel suit, to prove that statements made are true to the legal rather than journalistic standard. Journalists argue that this would create a conflict of interest for journalists seeking to protect confidentiality of their sources, who may be unwilling to appear in court. Furthermore, some journalists were of the view that they would need to establish, beyond the truth of the matter, that publication of the statements was for the public benefit. The plaintiff, on the other hand, need only show that the statements referred to him/her, and were published by the defendant. However, Ireland points out that this reflects a misunderstanding of the law.

²⁵ See, for instance, “Gag Reflex: Ireland’s Libel Laws Muzzle a Free Press”, by Michael Foley at <http://www.cpj.org/attacks96/sreports/ire.html> ; “Libel lawsuits serve only the powerful” by Prof. Colum Kenny, at Sunday Independent 22 Oct. 2006.

²⁶ See, “New press council must be a watchdog with teeth” by Prof. Colum Kenny, at Sunday Independent, 10 December 2006.

Given the important role that investigative journalism can play in reporting allegations of bribery of foreign public officials, the lead examiners recommend that Ireland adopt legislation strengthening freedom of expression for the media and allowing protection of their sources.

(c) Witness protection

43. Witness protection is available in foreign bribery cases. A Witness Security Unit at Garda Headquarters operates a Witness Protection Programme. Decisions in relation to who, and in what circumstances a person, may be admitted to the Programme are made by a non-statutory body under the aegis of the Garda²⁷. Irrespective of whether a witness is the subject of such a programme, a Court may permit witnesses who *are* in fear or subject to intimidation to give evidence via live television link²⁸.

3. Detecting and Reporting by the Public Sector

(a) General reporting procedures

44. According to civil servants interviewed during the on-site visit, there is a general perception in the Irish Administration that suspected foreign bribery instances should be reported. However, given the absence of formal and informal reporting procedures or legislation, as well as of protection from retaliatory action for whistleblowers, the likelihood of reporting from Irish public officials to the law enforcement authorities (added to the lack of awareness of the foreign bribery offence) appear remote.

45. There are no general provisions in Irish law requiring public officials to report offences encountered in the course of their work. The Civil Service Code of Standards and Behaviour, which was drawn up pursuant to section 10(3) of the Standards in Public Office Act 2001, requires civil servants, inter alia to disclose conflicts of interest,²⁹ and states that civil servants should refer matters to their superiors if they have “doubts about the legality of a particular action which they are required to take.”³⁰ This would cover situations where a civil servant is asked to act in breach of the law, but it is doubtful whether this would cover situations where civil servants come across foreign bribery allegations in the course of their duties. With regard to disclosure of information, the Code focuses in fact more on the risks incurred by civil servants who improperly disclose information than on any form of encouragement to report suspect or illegal behaviour (see also below on discussion of the Official Secrets Act provisions).³¹

46. Irish legislation provides for reporting procedures only in specific circumstances, under the Standards in Public Office Act 2001. Under this Act, any person may make complaints but only against a “specified person” (including for acts of corruption) to the Standards in Public Office Commission,³² and may benefit from immunity from disciplinary or other retaliatory action for complaints made in this respect in good faith.³³ A specified person is defined in the Act so as to include all public servants.³⁴ This specific

²⁷ Irish Responses to the Main Questionnaire, page 7.

²⁸ Section 39 of the Criminal Justice Act 1999

²⁹ See section 15 of the Civil Service Code of Standards and Behaviour, available at www.sipo.gov.ie/en/CodesofConduct/CivilServants/File,727,en.pdf.

³⁰ See section 6(2) *ibid*.

³¹ See section 7 *ibid*.

³² Greco Eval (II) Rep (2005), Ireland, Strasbourg, 2005, pag.18.

³³ See sections 4 and 5 of the Standards in Public Office Act, 2001.

³⁴ See section 4(6), *ibid*.

immunity under this Act would not be extended to complaints made concerning illegal behaviour by private natural or legal persons, or if a complaint were made not against a “specified person”.

47. In fact, reporting of official information outside the specific procedures in place under the Standards in Public Office Act 2001 could amount to an offence under section 4 or 5 of the Official Secrets Act 1963 (as referred to in section 7 of the Civil Service Code of Standards and Behaviour). Section 4 of the Act prohibits persons from communicating official information to any other person, unless duly authorised. Section 5 provides for similar prohibitions in respect of confidential information in official contracts. Thus, disclosure in good faith by Irish public officials of suspected foreign bribery which they come across in the course of their work could constitute a breach of the Official Secrets Act 1963 and incur penalties of up to 6 months imprisonment and/or EUR 127.³⁵ Given that no other legislation or guidelines exist to recommend or protect whistleblowing (see section B.2.a. above on whistleblowing), the current Irish context appears to give little encouragement to whistleblowers in the public sector.

Commentary:

The lead examiners consider that public sector officials, especially those employed by government bodies or public and para-public agencies that come into contact with companies operating abroad may play an important role in uncovering and reporting suspected instances of foreign bribery. Consequently, they recommend that Ireland establish procedures to be followed by public sector employees for reporting to the law enforcement authorities credible information about foreign bribery offences that they uncover in the course of performing their duties, and encourage and facilitate such reporting.

(b) Foreign diplomatic representations

48. As indicated earlier in this Report, no representative from the Department of Foreign Affairs attended the on-site visit, despite an invitation sent to the Department.³⁶ Consequently, the examining team was not able to discuss or assess the level of awareness of staff from this Department, nor the reporting practices in place. Based on responses to the Phase 2 questionnaires, and discussions with other participants in the on-site visit, it does not appear that any action has been undertaken by the Department to either raise awareness of its staff, and/or provide advice and assistance to Irish corporations abroad. Following the on-site visit, the Department of Foreign Affairs explained that it does not have primary responsibility for the promotion of foreign earnings, although it also acknowledged that Ireland’s diplomatic missions support the activities of State Agencies and Government Departments active in this area and also, on occasion, provide direct support to Irish companies. The Department of Foreign Affairs indicated that it has compiled a Fraud Policy Statement which deals with issues of bribery, although only where there is an actual or potential loss to the Department, whether in Ireland or abroad, which would thus probably not cover issues of foreign bribery by Irish individuals or companies. The Department further informed the examining team following the on-site visit that it had undertaken to circulate guidelines to its staff on the Convention and would bring this Report to their attention. The Department also indicated its intention to provide future training programmes and specific guidance for staff abroad on the issue.

³⁵ Section 13, Official Secrets Act, 1963.

³⁶ A representative from the Development Cooperation Directorate, a Division of the Department of Foreign Affairs, did attend the on-site visit panel devoted to official development assistance issues. However, this person is responsible for administering the Irish Aid programme (see section B.3.d.), and could not provide answers with respect to awareness and activity in foreign diplomatic representations.

49. With regard to reporting procedures, there are no specific procedures in place for the reporting by staff in foreign diplomatic representations of suspected foreign bribery instances, other than those under the general Civil Service Code of Standards and Behaviour mentioned above.

Commentary:

The lead examiners are concerned about the absence of representatives from the Department of Foreign Affairs at the on-site visit. Consequently, they consider that they were not able to adequately assess the level of awareness and training of staff in Irish foreign diplomatic representations in relation to the foreign bribery offence. They note however that no awareness raising activities or training appear to have been undertaken by the Department of Foreign Affairs, and that there are apparently no procedures in place for the reporting of suspected foreign bribery instances.

Given the important role that foreign diplomatic representations may play in interacting with Irish companies operating abroad, both in terms of awareness-raising as well as reporting of suspicions of foreign bribery, the lead examiners urge Ireland to:

- *carry out awareness raising activities, for instance through circulars, newsletters, seminars and training, for staff in overseas posts, notably those posted in sensitive geographic areas, on the foreign bribery offence;*
- *ensure that foreign diplomatic representations, in their contacts with Irish businesses operating overseas, (i) disseminate information on the corruption risks in their country of operation and the legal consequences of a foreign bribery offence under Irish law, and (ii) encourage Irish businesses and individuals to report suspected instances of foreign bribery to appropriate authorities;*
- *establish procedures to be followed by employees of foreign representations for reporting to the law enforcement authorities credible information about foreign bribery offences that they uncover in the course of performing their duties, and encourage and facilitate such reporting.*

(c) Officially supported export credits

50. Ireland is a member of the OECD Working Party on Export Credits and Credit Guarantees. However, as of the time of this review, Ireland does not have any official export credit programme, and thus does not provide official export credit support. Other forms of support, such as carrying out market research and gathering information, are provided to Irish exporters by trade promotion agencies, notably by Enterprise Ireland (for activities by such agencies, see section B.1. on Awareness above).

(d) Official development assistance

51. Ireland's official development assistance (ODA), Ireland Aid, has risen dramatically over the past decade from EUR 142 million in 1996 to an estimated EUR 813 million (or 0.5% of its GNI) in 2007, and is expected to continue growing with Ireland aiming to spend EUR 1.6 billion (or 0.7% of GNI) on ODA by 2012.³⁷ Over half of Irish ODA is devoted to least-developed countries. Since its inception in 1974, the Irish Aid programme has had a strong geographic focus on Sub-Saharan Africa (notably Ethiopia, Lesotho, Mozambique, Tanzania, Uganda, Zambia) as well as Timor Leste and Vietnam. Irish Aid's programme has always been completely untied.

³⁷ See the OECD Development Assistance Committee's recommendations as Ireland prepares for a USD1 billion development co-operation programme, at www.oecd.org/document/41/0,2340,en_2649_34603_19758249_1_1_1_1,00.html

(i) *Awareness raising efforts*

52. Irish Aid, a Division of the Department of Foreign Affairs, is responsible for the administration of Ireland's ODA. Irish Aid has not engaged in any specific training or awareness-raising with regard to foreign bribery among its staff or clients. A standard and broadly-worded anti-corruption clause is however included in aid procurement contracts, under which the tenderer must disclose any prior conviction for corruption, but only where those convictions are in relation to contracts with Irish Aid (see also discussions under section C.4.b).

53. The White Paper on Irish Aid published in September 2006 focuses notably on corruption and governance issues. It mentions several initiatives, notably the United Nations Convention Against Corruption, and initiatives by the African Union and the New Economic Partnership for African Development. The OECD Convention and the Irish legislation on bribery of foreign public officials are not mentioned. Given that representatives of Irish Aid present at the on-site visit had only been made aware of the criminalisation of foreign bribery in Ireland upon invitation to the on-site visit, and taking also into account the absence of any efforts to disseminate information in this respect, it is a concern that the lack of reference to foreign bribery issues in the White Paper (or, for that matter, on any other part of the Irish Aid website) may simply be due to a lack of awareness of the Convention and its implementing legislation.

(ii) *Detection and reporting of foreign bribery*

54. As indicated above, there are no general reporting obligations for Irish public sector employees. Irish Aid, as a division of the Department of Foreign Affairs, does not differ in this respect, and there is no obligation or specific policy for Irish Aid staff to report suspicions of bribery to the law enforcement authorities. There are no specific procedures which could allow for detection of suspected foreign bribery instances. As pointed out by the OECD Development Assistance Committee's 2003 Peer Review, beyond the inclusion of a general anti-corruption clause in its contracts, Irish Aid needs to follow this up "by ensuring it has in place reliable means for detecting the offence and adequate sanctions and enforcement measures" (see also section C.4.b. below on sanctions which may be imposed by Irish Aid).³⁸ No progress appears to have been made in this regard as of the time of this review.

Commentary:

The lead examiners recommend that Irish Aid promptly undertake awareness raising activities, both internally and with regard to potential contractors, to inform and prevent occurrences of foreign bribery in aid funded procurement contracts.

The lead examiners welcome the inclusion of anti-corruption clauses in Irish Aid's contracts. However, they recommend that Irish Aid take further action to put in place effective means for detecting the offence, establish procedures to be followed by its employees for reporting to the law enforcement authorities credible information about foreign bribery offences that they uncover in the course of performing their duties, and encourage and facilitate such reporting.

4. Tax Authorities

(a) *Non-deductibility of bribes*

55. The non-deductibility of bribe payments is not explicitly addressed by Irish law. Officials from the Department of Finance indicated during the on-site visit that Ireland would not allow deductions for

³⁸ See the DAC Peer Review 2003 of Ireland at www.oecd.org/dataoecd/25/43/21651179.pdf, p.52 et seq.

bribe payments to foreign public officials. In this regard, they stated that the conditions under the Irish Tax Acts for deductibility of expenses could never be met in the case of bribes paid to foreign officials and that such bribe payments would not be tax deductible “*on public policy grounds*”. No case law was provided in support of this proposition³⁹. Furthermore, the Revenue Commissioners has not issued any specific guidelines on the tax deductibility of bribes to foreign officials. At the on-site visit, the Irish authorities also indicated that proceeding with the introduction in the Irish Tax Acts of an express denial of tax deductibility of bribe payments was not necessary as in their view the non-deductibility of bribes was adequately addressed by existing tax legislation under Section 81 of the Taxes Consolidation Act 1997.

56. Tax auditors are guided by the provisions of the Taxes Consolidation Act 1997 (the 1997 Act) in relation to the deductibility of expenses and chargeability of profits. Section 81 of the 1997 Act is the general section which disallows certain types of deductions. Expenses including commissions are deductible only if they are wholly and exclusively laid out or expended for the purpose of the trade or profession⁴⁰. Allowable expenses must be revenue expenses (i.e. not of a capital nature) and not prohibited under any other specific section of the 1997 Act (e.g. section 840 of the Act which prohibits the deduction of business entertainment expenses)⁴¹. Furthermore, section 58(1) of the 1997 Act specifically charges to tax the profits or gains from unlawful sources⁴².

57. The lead examiners are concerned about the possible impact of the 1997 Act on the deductibility of bribes paid to foreign officials. Section 81 of the 1997 Act does not expressly prohibit a payment which is part of a criminal act. The payment of a bribe to a foreign public official, for instance, could be paid wholly and exclusively for the purposes of trade or business. If this is the case in calculating the profit the Revenue Commissioners would be obliged to allow the bribe payment as a deductible expense. In the absence of case law or specific guidelines which can support Ireland’s statement that bribe payments to foreign officials are not tax deductible, there is the risk that sections 58 and 81 of the 1997 Act could be interpreted broadly as permitting the deduction of bribes -as any other business expense. Thus the lead examiners consider that the current provisions of the Irish tax law are not fully compliant with the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.

³⁹ Ireland provided case law which supports 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].

⁴⁰ Section 81(2) of the Taxes Consolidation Act 1997:
(2) Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of—
(a) any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession;

⁴¹ Section 840 (2) of the Taxes Consolidation Act 1997
(2) In respect of any expenses incurred in providing business entertainment, no sum shall be—
(a) deducted in computing the amount of profits or gains chargeable to tax under Schedule D,

⁴² Section 58(1) of the Taxes Consolidation Act 1997:
(1) Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made-
(a) the source from which those profits or gains arose was not known to the inspector,
(b) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or
(c) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity,
and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains.

(b) Awareness, training and detection

(i) Awareness-raising and training

58. All tax auditors receive training on the admissibility or otherwise of the various claims and deductions in the accounts and returns, including an awareness of the possibility of false invoices being used to mask disallowable expenses. However, no specific training (e.g. guidelines, tax manuals, training programmes) has been delivered to tax auditors on how to identify suspicious payments. Similarly, the Irish tax officials have not undertaken any awareness-raising initiatives specifically targeted on the non-deductibility of bribe payments to foreign public officials. At the time of the on-site visit, the OECD Bribery Awareness Handbook for Tax Examiners had not been circulated to tax auditors⁴³.

(ii) Detection of foreign bribery

59. Irish tax examiners have never discovered a domestic or foreign bribery cases through a tax audit, even though the number of audits is fairly high. In 2005, 14,000 audits were conducted. The failure to detect bribery cases is not for a lack of investigative powers. Irish tax auditors have a range of investigative tools at their disposal, including powers to obtain bank information⁴⁴. Financial institutions are obliged to provide financial information where requested by the tax auditors for tax purposes. Application is made by the Revenue Commissioners to the High Court under the provisions of section 908 of the Taxes Consolidation Act 1997. If the Court grants the application, then the financial institution must provide this information⁴⁵.

(c) Sharing of information and duty to report foreign bribery

60. The Revenue Commissioners can disclose information 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 section 63A (2) of the Criminal Justice Act (CJA) (1994), as amended by the Disclosure of Certain Information for Taxation and Other Purposes Act 1996, Revenue shall disclose to a member of Garda 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. No case law was provided on the definition of the term “public interest” to disclosure. On this issue, however, an official from the Department of Finance indicated that any allegation which was “criminal in nature” would trigger the reporting obligation under section 63A (2) of the CJA (1994). The Revenue also indicated that if they encountered evidence of bribery during an investigation, it would be the policy to report this to the Garda⁴⁶.

⁴³ Following the on-site visit, Ireland indicated that the OECD Bribery Awareness handbook was referred to Revenue Training Branch for examination and possible inclusion in future audit training programmes.

⁴⁴ The Revenue Commissioners have indicated that the details of the report of the Independent Inquiry Committee (IIC) into the UN Oil-For-Food Programme concerning the three Irish companies allegedly involved in illegal payments in Iraq have been forwarded for investigation to regional offices in August 2006. The cases are currently under inquiry.

⁴⁵ The Revenue Commissioners must have reasonable grounds for suspecting that a taxpayer has been involved in serious tax evasion and that the financial institution has information relevant to the proper assessment of the taxpayer.

⁴⁶ There is no provision, however, for a Garda officer to disclose information to the Revenue.

61. Information may be exchanged with the tax authorities of other countries in accordance with the relevant provisions of the Double Taxation Conventions and in accordance with the provisions of the EC Mutual Assistance Directive 77/799⁴⁷. Information sharing with foreign law enforcement authorities requires a MLA request.

62. Since 2004, the Revenue Commissioners have made 464 disclosures to the Criminal Asset Bureau (CAB) and 18 referrals to the Office of Director of Corporate Enforcement (ODCE). None of the said disclosures related to bribery offences. Furthermore, the Revenue do not hold statistical information on referrals of bribery allegations to the Garda⁴⁸.

63. Article 26 of the OECD Model Tax Convention deals with the exchange of information between contracting states. The Commentary to the new Article 26(2) allows contracting states, if they wish to do so, “to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g. corruption) when the information exchanged may be used for such high priority matters under the laws of both States and the competent authority of the supplying State authorises such use.”⁴⁹ Following the on-site visit, Ireland indicated that it has never been asked by a treaty partner to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters. However, if a treaty partner were to make such a request it would then be actively considered in that bilateral context.

Commentary

In the absence of case law supporting the Irish authorities’ view that bribe payments are not tax deductible, the lead examiners are concerned that the absence of an express denial of the tax deductibility of bribe payments, and the broad wording of the provisions in the tax law describing deductible expenses, could result in the allowability of tax deductions for bribes to foreign public officials. Thus the lead examiners recommend that Ireland amends its tax legislation to clarify that bribes to foreign public officials are not tax-deductible, and welcome Ireland’s expressed intention to examine this matter. They also recommend that Ireland expressly communicates to tax examiners the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, through the issuance of guidelines or manuals, and training programmes. The lead examiners also recommend that the Irish authorities bring the OECD Bribery Awareness Handbook for Tax Examiners to the attention of the Revenue Commissioners.

⁴⁷ Ireland has in place 44 Taxation agreements with other countries. This type of information may be exchanged either on request or spontaneously (e.g. where the Irish tax authority has obtained information on a suspicious bribery transaction(s) in the course of administering its own tax laws and which it believes would be of importance to one of its treaty partners and passes on this information without the latter having asked for it).

⁴⁸ All indictable cases are referred by the Revenue Solicitors office to the DPP. There have been 43 successful prosecutions carried out by Revenue since 1997.

⁴⁹ For an explanation of Article 26, see OECD, “Article 26 of the OECD Model Tax Convention on Income and Capital”, OECD, Paris (www.oecd.org/document/53/0,2340,en_2649_33747_33614197_1_1_1_1,00.html) and OECD (2004), OECD, 2004, “Changes to the Model Tax Convention”, OECD, Paris (www.oecd.org/dataoecd/28/4/33614065.pdf)

5. Accounting and Auditing

(a) Awareness raising efforts

64. Representatives of the accounting and auditing profession indicated that they have not engaged in any specific awareness-raising with regard to the issue of foreign bribery and the role of accountants and auditors in the fight against foreign bribery. For example, none of the six officially Recognised Accountancy Bodies (see section 5.c. below) have produced any training materials, newsletters or other documents that specifically address foreign bribery. The Office of the Director of Corporate Enforcement (ODCE) while it does produce guidance on a number of issues related to the auditing of accounts and reporting obligations of auditors, does not address foreign bribery issues. As explained by ODCE representatives, this is due to its statutory role, which is concerned with the enforcement of the Companies Acts and the encouragement of compliance with the Companies Acts, and not any other legislation.

(b) Accounting and auditing standards

(i) Accounting standards

65. Section 202(1) of the Companies Act 1990 requires every company to keep accounts. Section 202 also prescribes the requirements such books of account must meet. The Phase 1 Report detailed these accounting requirements and acknowledged that they meet the requirements under Article 8(1) of the Convention.⁵⁰

66. Penalties are applicable in respect of the company and director of the company for failing to comply with section 202 requirements. As per section 240, sanctions for these offences are imprisonment not exceeding 12 months and/or a fine not exceeding EUR 1 905 on summary conviction, and imprisonment not exceeding 5 years and/or a fine not exceeding EUR 12 697 on indictment. As indicated earlier, the ODCE is legally responsible for encouraging compliance with the Companies Act 1963-2005 and investigating and enforcing suspected breaches of the legislation (for more detailed discussions on enforcement and penalties for failure to keep proper accounts, see also section C.5. below on the false accounting offence).

67. Where a company is a parent or holding company (in the sense that it has subsidiaries) Section 150(1) of the Companies Act 1963⁵¹ provides that it must prepare consolidated or group accounts. So far as the audit of those group accounts is concerned, and the statutory powers of auditors in this regard, if the subsidiary is incorporated in Ireland, it is up to the subsidiary and its auditors to provide information to the holding company's auditors.⁵² For subsidiaries incorporated abroad, the Irish holding company is required "to take all such steps as are reasonably open to it to obtain from the subsidiary" such information and explanations as the holding company's auditors require.⁵³ However in either case Section 193(4B) of the Companies Act 1990 requires the holding company's auditors to state in their audit report whether they have obtained all the information and explanations which, to the best of their knowledge and belief, were necessary for the purposes of their audit.

⁵⁰ See Phase 1 Report at pp. 29-30.

⁵¹ As amended by Regulation 4 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

⁵² Section 196(1)(a) of the Companies Act 1990.

⁵³ Section 196 of the Companies Act 1990.

68. As provided under EU rules, from 2005, all companies listed on a regulated market in Ireland (as in the rest of the European Union) should prepare their consolidated accounts based on International Financial Reporting Standards (IFRS) and not, as previously, on the basis of the United Kingdom/Ireland accounting standards issued by the Accounting Standards Board (ASB).

(ii) *Auditing standards*

69. As indicated in Phase 1, section 32 of the Companies (Amendment) (No.2) Act 1999 specifies which companies may be exempt from auditing. Such exemptions apply to companies which fulfil all of the prescribed conditions including the following: the turnover does not exceed EUR 1.5 million; the balance sheet total does not exceed EUR 1.905 million; the average number of employees does not exceed 50; and the company is not a parent or subsidiary undertaking, or a certain type of company as defined under specific acts. The Irish authorities indicate that there are no authoritative figures in relation to the number of companies currently eligible for and availing themselves of the audit exemption. The Consultative Committee of Accountancy Bodies-Ireland indicated that, under section 9 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006, effective 24 December 2006, the turnover threshold for audit exemption had been increased to EUR 7.3 million, and the balance sheet total to EUR 3.65 million. As indicated by the ODCE, EU figures suggest that some 93.7% of Irish companies would be eligible for audit exemption if the new thresholds apply. While this follows the maximum limit set by the EU, this significant increase raises issues as to whether it remains sufficient in practice to trigger external audit of companies with substantial overseas operations.

70. The Phase 1 Report specified that the auditing standards in force in Ireland were the Auditing Standards (SASs) developed by the United Kingdom Auditing Practices Board (APB). In December 2004, the APB issued International Standards on Auditing (the United Kingdom and Ireland) (ISAs (the United Kingdom and Ireland)) to apply to audits of financial statements for accounting periods commencing on or after 15 December 2004. ISAs (the United Kingdom and Ireland) are now the relevant standards for use in Ireland. ISA 240 specifically deals with auditors responsibilities to consider fraud in an audit of financial statements (see below on reporting obligations of auditors).

(iii) *Internal company controls*

71. Requirements for internal company controls have essentially been introduced by the Companies (Auditing and Accounting) Act 2003. However, as of the time of this review, the ODCE indicated that the relevant provisions have not yet been commenced.

72. Section 42 of the 2003 Act requires public limited companies to establish an audit committee.⁵⁴ The audit committee is notably required to review the company's accounts and recommend to the board whether they should be approved, to determine whether the company has kept proper books of account in accordance with section 202 requirements, and to monitor the performance and quality of the auditor's work and independence. The ODCE indicated that it hopes the Minister for Enterprise, Trade and Employment will commence this provision in the near future. Following the on-site visit, Ireland indicated that it proposes to address this matter in the context of the transposition into Irish law of the amended EU 8th Company Law Directive (the deadline for its transposition is June 2008). Ireland further pointed out that listed companies are also required under the Combined Code of Corporate Governance as operated by the Stock Exchange to have audit committees in place, or explain why if this not the case.

⁵⁴ Section 42 of the Companies (Auditing and Accounting) Act 2003, introducing a new section 205B in the Companies Act 1990.

73. Section 45 of the Companies (Auditing and Accounting) Act 2003 also introduced a requirement for directors of every public limited company and certain major private companies to include in their annual report statements of compliance with the company's "relevant obligations" under the Companies (Auditing and Accounting) Act 2003, tax law, and "any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements". In addition, auditors would be required to certify in their reports that directors' compliance statements are "fair and reasonable". Ireland indicated that this provision of the 2003 Act has not yet been commenced, and that, following recommendations in 2005 by the Company Law Review Group, a less prescriptive provision is envisaged with regard to compliance statements, which would notably remove auditor certification in this respect.

74. This, and other issues relating to materiality in accounts, raises questions on the definition of materiality. No definition is provided in Irish company law, and the subject has not been considered to date by the Courts in the context of accounting offences. Nevertheless, the ODCE does provide some guidance to company directors on determining materiality in the context of compliance reporting. The ODCE states that a breach of the law which would, notably, "constitute a significant risk to [the company's] reputation as a responsible corporate citizen [...] would be material. Such breaches may include those that carry a criminal penalty or involve dishonesty or misuse of assets."⁵⁵ In the view of ODCE representatives, a bribe payment could therefore be considered material and should consequently form part of the "relevant obligations" with which companies should comply. This has not been confirmed by case law to date. ODCE representatives added that, while materiality may be an appropriate concept for determining the overall validity of a company's financial records, the ODCE would not consider that it should be applied to offences like bribery and corruption, and would regard any payment for such purposes, even if it constitutes an inconsequential amount in the context of a company's overall financial activity, as unacceptable. However, following the on-site visit, the ODCE pointed out that the less prescriptive provision envisaged to replace proposed section 45 of the Companies (Auditing and Accounting) Act 2003 defines a company's "relevant obligations" as extending only to the company's obligations under the Companies Acts and tax law. Accordingly the statement that a bribe payment could therefore be considered material and should consequently form part of the 'relevant obligations' with which companies should comply becomes more hypothetical since the less prescriptive provisions intended to replace section 45 will not require the directors of a company to deal in their compliance statement with issues other than those under the Companies Acts or tax law.

(c) Detection and reporting by external auditors

(i) Auditor qualification

75. Independence of external auditors has been reinforced with the enactment of the Companies (Auditing and Accounting) Act 2003. Ireland ensures the independence of external auditors notably by requiring external auditors to meet criteria (including independence criteria) laid down by law, to comply with auditing standards, and to be regulated by relevant professional bodies, and by providing that the professional bodies are, in turn, supervised by an independent oversight body.

76. To undertake statutory auditing activities in Ireland, an auditor must be a member of one of the six Recognised Body of Accountants under the Companies Acts 1963-2005.⁵⁶ Each Recognised Body of

⁵⁵ Extract from the ODCE's Revised Guidance on Directors' Compliance Statements, available at www.odce.ie/_fileupload/publications/Revised_Guidance_on_Directors_Compliance_Statements_Final.doc, p.25 et seq.

⁵⁶ The six recognised bodies are the Institute of Chartered Accountants in Ireland (ICAI); the Institute of Certified Public Accountants in Ireland (ICPAI); the Association of Chartered Certified Accountants

Accountants is responsible for regulating its members and for ensuring that they comply with all relevant statutory and non-statutory requirements in their auditing activities. Where non-compliance with law and/or accounting and auditing standards is detected, depending on the magnitude of the breach, the finding may result in, for example, follow up inspections, regulatory sanctions (e.g. suspension of practicing rights) and/or disciplinary action. The Irish Auditing and Accounting Supervisory Authority (IAASA), created under the Companies (Auditing and Accounting) Act 2003, supervises how each Recognised Accountancy Body monitors its members. The IAASA supervises the Recognised bodies' regulatory activities by, inter alia, performing on site inspections of those bodies and by examining their relevant files.

77. Section 187 of the Companies Act 1990 also specifies certain requirements to be met by auditors. The ODCE indicates that it has taken a number of criminal proceedings against unqualified persons and against auditors and audit firms who have acted as auditors of companies while disqualified from doing so. The recognised accountancy bodies are also required by law to report to the ODCE any cases of their members acting in breach of the requirements of the Companies Acts. The Bodies also report situations where unqualified persons have acted as company auditors in breach of company law requirements.⁵⁷ These complaints, together with breaches detected through the ODCE's own enquiries, have led to some 35 convictions in respect of nine persons for breaches of section 187 of the Companies Act 1990 in the period between 2001 and 2005. Subject to one exception, all of the persons in question were fined by the Courts. In the exceptional case, the individual received a suspended three months' sentence.

(ii) *Reporting obligations*

78. There are a number of reporting obligations on auditors in Ireland, although none expressly covers reporting of offences under the Prevention of Corruption Act 2001.

79. Section 194(1) of the Companies Act 1990 requires auditors to report contraventions of accounting obligations to (1) the company in the first instance, and (2) the Registrar of Companies, except if the directors have taken the necessary steps to correct the contravention. This reporting obligation does not concern immaterial contraventions.⁵⁸ Any such notification made to the Registrar is copied to the ODCE who is empowered to acquire details of the indicated offence for the purpose of the institution of possible enforcement action. The ODCE's guidance on the definition of materiality (see above) is helpful, as it would tend to consider any criminal offence as material. Nevertheless, there is concern that the lack of awareness of the foreign bribery offence among the accounting and auditing profession would in practice mean that no specific attention would be given to the issue, and detection through this channel would be unlikely.

80. The Company Law Enforcement Act 2001 inserted an additional sub-paragraph 5 to section 194 of the Companies Act 1990, which requires auditors to report any suspected indictable offence under the Companies Acts to the Director of Corporate Enforcement, where the information in question comes to their attention during the course of an audit. In 2005, the ODCE received a total of approximately 2 000 auditor reports under this section (up from 1 500 in 2004), concerning notably defaults to file annual returns (approximately 80%), excessive use of company assets for personal purposes by directors (approximately 14%), and failure to keep proper books of account (approximately 2.5%). Based on figure

(ACCA); the Institute of Incorporated Public Accountants (IIPA); the Institute of Chartered Accountants in England and Wales (ICAEW); and the Institute of Chartered Accountants of Scotland (ICAS).

⁵⁷ As prescribed under section 192(6) of the Companies Act 1990.

⁵⁸ Section 194(3), Companies Act, 1990.

available in the annual reports of the ODCE, there have been no legal proceedings against auditors for breach of reporting obligations under section 194.

81. As previously mentioned, ISAs have been developed by the auditing profession and apply to auditing professionals in Ireland. With specific regard to reporting by auditors, ISA 240 contemplates possible reporting obligations under national law, but does not itself require any reporting by auditors to regulatory and enforcement authorities unless national law so provides.⁵⁹ However, as revised in 2004, it requires the auditor to direct more focused efforts on areas where there is a risk of material misstatement of financial statements due to fraud, including management fraud. Auditors are required to design and perform audit procedures responsive to the identified risks of material misstatement due to fraud, including procedures to address the risk of management override of controls.

82. More generally, there is no overall statutory obligation on auditors in Ireland to disclose suspected illegal behaviour. There is, however, a specific obligation concerning offences in the Criminal Justice (Theft and Fraud Offences) Act 2001: under section 59, auditors are obliged to report suspicions of offences contained therein. This notably includes a specific type of foreign bribery offences, but only where they concern bribery of an EU public official affecting the EU's financial interests (see discussion under section C.2. below on overlapping foreign bribery offences in Irish legislation). However, representatives of the auditing profession at the on-site visit did not appear to be aware that they have an obligation in this respect. This may reflect the more general lack of awareness of the profession with regard to the foreign bribery offence. In any case, foreign bribery offences contained in the Prevention of Corruption Act 2001 (i.e. bribery of a non EU foreign public official, and/or not affecting the EU's financial interests) are not the subject of any reporting obligation by auditors, thus creating differential treatment between the two foreign bribery offences.

Commentary

The lead examiners welcome the adoption in recent years of legislation enhancing accounting and auditing standards, including the creation of supervisory bodies such as the Irish Auditing and Accounting Supervisory Authority and the Office of the Director of Corporate Enforcement, and the increase in effective enforcement of accounting offences and reporting obligations this is likely to induce.

With respect to awareness-raising, the lead examiners recommend that the Irish authorities take steps to improve the detection of foreign bribery by accountants and auditors, including encouraging the profession to include specific training on foreign bribery in the framework of their professional education and training.

With respect to auditing standards, the lead examiners recommend that Ireland reconsider whether the threshold for external audit requirements is adequate in practice to trigger external audit of all companies with substantial overseas operations. With respect to internal company controls, the lead examiners encourage the Irish authorities to promptly implement provisions in the Companies (Auditing and Accounting) Act 2003 not yet in force relating to the establishment of audit committees and directors' compliance statements.

⁵⁹ See ISA 240 – The Auditor's Responsibility to Consider Fraud and Error in an Audit of Financial Statements, paragraph 68 (stating that an auditor's professional duty of confidentiality "ordinarily precludes reporting fraud and error to a party outside the client entity", but that the duty may be overridden by national law).

With respect to reporting by auditors, the lead examiners recommend that the Irish authorities (1) take all necessary measures to require external auditors to report all suspicions of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, regardless of whether or not the suspected bribery would have a material impact on the financial statements, and of whether the suspected offence falls under the Prevention of Corruption Act or the Criminal Justice (Theft and Fraud Offences) Act; and (2) consider requiring external auditors, in the face of inaction after appropriate disclosure within the company, to report such suspicions to the competent law enforcement authorities.

6. Money Laundering Reporting

83. An effective system designed to detect and deter money laundering may uncover underlying predicate offences like foreign bribery. In Ireland money laundering was criminalized in 1994, and applied to indictable offences under section 31 of the Criminal Justice Act 1994. This section was substituted by a new section in the Criminal Justice (Theft and Fraud Offences) Act 2001, which broadened the offence, in particular providing that a person may be guilty of money laundering if he or she is reckless as to whether the property is or represents the proceeds of crime. Penalties under the CJA 1994 apply to both natural and legal persons under s.59 of the Act⁶⁰.

(a) Suspicious transaction reporting

84. All relevant Irish financial institutions are subject to Anti-money Laundering/and Combating the Financing of Terrorism (AML/CFT) obligations. They are classified as “designated bodies” under the CJA Act and are obliged to identify customers, to retain records in relation to customers and transactions, to adopt measures to prevent and detect money laundering and the financing of terrorism – including training employees and detecting and reporting suspicious transactions⁶¹. Accountants, dealers in high value goods, solicitors and auctioneers and estate agents are also subject to suspicious transaction reporting requirements under sections 31, 32, 57 and 59 of the CJA (1994).

85. Any transaction giving rise to a suspicion of money laundering must be reported to the Garda Financial Intelligence Unit (FIU) and the Revenue Commissioners, regardless of the amount⁶². By agreement with the FIU, the Revenue Commissioners pursue Suspicious Transaction Reports (STRs) that are indicative of tax and customs fraud⁶³. Therefore, Revenue will not be involved in pursuing any bribery cases. If there is overlap in interest for either investigation or intelligence building, the FIU has priority. The FIU and the Revenue Commissioners also hold regular meetings to organise the allocation of STRs.

86. A person or body charged by law with the supervision of designated bodies must report to the Garda and the Revenue Commissioners where it suspects that an offence has been or is being committed under s.31 or s.32 of the CJA (1994) (identification, recordkeeping, training, procedures). Furthermore,

⁶⁰ In June/July 2005, the Irish Anti-money Laundering legislation was evaluated by the OECD Financial Action Task Force (FATF). The Third Mutual Evaluation/Detailed Assessment Report on Ireland was approved by the FATF in February 2006 and is available at <http://www.fatf-gafi.org/dataoecd/63/29/36336845.pdf>

⁶¹ Sections 32 (1) and (2) of the CJA (1994).

⁶² Section 57(1) of the CJA (1994).

⁶³ Approximately 80% of the STRs submitted to the FIU and Suspicious Transaction Report Office (STRO) are indicative of tax offences and are currently being investigated by the Revenue Commissioners STRO. Financial Action Task Force, Third Mutual Evaluation Report, Anti-money Laundering and Combating The Financing of Terrorism, Ireland, February 2006, pag.58.

pursuant to Section 33 AK(3) of the Central Bank Act (1942) (as inserted by section 26 of the Central Bank and Financial Services Authority of Ireland Act (2003)) on disclosure of information, the Irish Financial Services Regulatory Agency (the Financial Regulator) must report to the Garda and Revenue Commissioners any information that leads them to suspect that a criminal offence may have been committed by a supervised entity or that a supervised entity may have contravened a provision of an Act to which subparagraph(vi) of that section relates⁶⁴.

(b) Typologies, guidelines and feedback

87. Pursuant to section 57(3) of the CJA (1994), designated bodies are required to define the internal procedures to be followed by its employees in order to file STRs internally.

88. A series of guidance notes for individual financial sectors provide direction to designated bodies⁶⁵ and complement the anti-money laundering obligations set out under the CJA (1994)⁶⁶. Guidance notes have been issued for credit institutions (revised in May 2003)⁶⁷, other financial institutions (revised in June 2003)⁶⁸, life insurance companies and intermediaries (revised in February 2004) and stockbrokers (revised in February 2004). The Registrar of Credit Unions issued its own guidance notes in April 1995 (updated in September 2004), as did the Funds Industry Association (the May 2005 updated version of the latter document was provided during the evaluation).

89. The guidance notes “*are recommendations as to good practice but do not constitute a legal interpretation of the [Criminal Justice] Act*”⁶⁹. The guidance notes provide financial institutions with a thorough explanation of how they could apply appropriate anti-money laundering controls. The guidance notes are used by the Financial Regulator to assess the adequacy of financial institution’s procedure to counter money laundering. However, the guidance notes do not impose mandatory requirements, are not directly enforceable and are not subject to an adequate range of administrative sanctions. Examples of typologies on money laundering can be found in the guidance notes for credit institutions where a suspicious transaction is broadly defined as “[one] transaction which is inconsistent with a customer’s known, legitimate business or personal activities or with the normal business for that type of account. [...] the first key to recognition is knowing enough about the customer’s business to recognize that a transaction, or series of transactions, is unusual”⁷⁰. The guidance notes for the credit institutions provide

⁶⁴ Section 57(2) of the CJA (1994). Since its establishment in 2003, the Financial Regulator has forwarded 24 reports to the Garda/Revenue under this Section. See also Financial Action Task Force, Third Mutual Evaluation Report, Anti-money Laundering and Combating The Financing of Terrorism, Ireland, February 2006, pag.94. More information on the Financial Regulator) can also be found under para 87 of this report.

⁶⁵ The guidance notes are prepared and approved by the Money Laundering Steering Committee (MLSC) which is made up of different government agencies and private sector bodies.

⁶⁶ Section 57(6) of the CJA (1994) states that, in determining whether a person has complied with requirements on reporting, a court may take account of any relevant supervisory or regulatory guidance issued which applies to that person or any other relevant guidance issued by a body that regulates, or is representative of, any trade, profession, business or employment carried on by that person.

⁶⁷ www.finance.gov.ie/documents/publications/other/monlaun.rtf

⁶⁸ www.ifsra.ie/data/in_aml_files/Financial_Institutions.pdf#search=%22guidance%20notes%20for%20credit%20institutions%20ireland%22

⁶⁹ Quoted on the front page of guidance notes for credit institutions.

⁷⁰ Section 95 of the guidance notes for credit institutions.

further examples of suspicious transactions⁷¹. However, none of these typologies specifically refers to bribery.

90. The FIU and Revenue organise training activities and seminars on ML with the financial sector and other designated bodies. Furthermore, in the past 3 years Garda officers of the Money Laundering Investigation Unit (MLIU) have participated in 24 training sessions with various designated bodies⁷².

91. No regulatory provision obliges competent authorities to provide specific feedback to designated bodies. The guidance notes for financial institutions set up a framework for the provision of case-by-case feedback by the FIU, which is given on a six-month basis, or where new developments emerge that may affect reporting. Feedback issues and money laundering typologies are regularly discussed in meetings between the FIU and the designated bodies. In 2006, three such meetings were held in the context of the Third EU Money Laundering Directive where the issue of Politically Exposed Persons (PEPs) and associated due diligence was discussed⁷³. Feedback to each designated body is also provided by Revenue. However, due to confidentiality constraints, Revenue are not able to give case-by-case feedback and the outcome of the STRs filed by a designated body are outlined only in general terms⁷⁴.

(c) Enforcement of reporting obligations

92. Established in 1995 within the Garda Bureau of Fraud Investigation (GBFI), the Financial Intelligence Unit (FIU)⁷⁵ receives and assesses STRs that are then disseminated to financial investigation units within the Garda for further investigation where suspected offences may be involved. The FIU has received 3,040 STRs in 2001, 5,491 in 2004, and 10,735 in 2005. Given the increasing numbers of STRs received by the FIU, the lead examiners consider that the Irish authorities should further increase the FIU's human and financial resources available to adequately deal with these reports and forward them in due time to the investigative and prosecutorial authorities⁷⁶.

(d) Sanctions for failure to report

93. Under section 51(5) of the CJA (1994), failure to report suspicious transactions is punishable, on summary conviction, by a fine not exceeding EUR 1000, or by imprisonment for a term not exceeding 12 month or both; on conviction on indictment, by a fine or imprisonment for a term not exceeding 5 years or to both.

94. The Financial Regulator supervises and monitors financial institutions for compliance with Anti-money Laundering (AML) legislation and the relevant sectoral guidance notes. The Financial Regulator has limited powers to directly apply administrative sanctions for failure to comply money laundering

⁷¹ Appendix F of the guidance notes for credit institutions.

⁷² Financial Action Task Force, Third Mutual Evaluation Report, Anti-money Laundering and Combating The Financing of Terrorism, Ireland, February 2006, pag.58 ss.

⁷³ The Third Directive defines a PEP as a natural person holding a prominent public position and that corruption is included in the definition of serious crimes.

⁷⁴ Financial Action Task Force, Third Mutual Evaluation Report, Anti-money Laundering and Combating The Financing of Terrorism, Ireland, February 2006, pag.96.

⁷⁵ The Irish FIU is located within the Garda ML Investigation Unit (MLIU) and has an establishment of 17 police officers and 2 clerical staff.

⁷⁶ The FIU interacts with the DPP on a case by case basis, where investigation files have been forwarded to the Law Officers for directions as to the institution of criminal proceedings. In addition, the FIU can seek legal advice from the DPP as appropriate.

obligations, and is unable to use its general powers of sanction for specific breaches of the CJA (1994) unless the matter otherwise constitutes a contravention subject to sanction⁷⁷ or affects the fitness of a firm to remain authorised. Self-Regulatory Organisations (SRO) are responsible for the implementation of AML obligations for some of the designated non-financial sectors. They also prepare sectoral guidance notes⁷⁸. Regulatory authorities and/or SROs have not been empowered to apply sanctions for non-financial sector for non compliance with AML requirements and are not sufficiently resourced to provide adequate oversight for AML compliance⁷⁹.

Commentary

Given the increasing numbers of STRs received by the FIU, the lead examiners recommend that Ireland ensure that the necessary human and financial resources are made available to the FIU for adequately dealing with these reports and forwarding them in due time to the investigative authorities.

The lead examiners also recommend that Ireland (1) improve the flow of information and feedback to entities that are required to report suspicious transactions, (2) provide better guidance to these entities, for instance, by providing up-to-date typologies on money laundering where the predicate offence is bribery, (3) maintain statistics on suspicious transaction reports that result in or support bribery investigations, prosecutions and convictions, and (4) ensure that the necessary resources are made available to the Irish Financial Regulator and Self-Regulatory Organisations (non-financial sector) for an adequate enforcement of sanctions for non compliance with AML laws and regulations.

C. INVESTIGATION, PROSECUTION AND SANCTIONING OF FOREIGN BRIBERY AND RELATED OFFENCES

1. Investigation and Prosecution of Foreign Bribery

(a) Law enforcement authorities

(i) The Garda Síochána

95. *An Garda Síochána* (“The Guardians of the Peace”, hereinafter the Garda) as the Irish national police force, exercises all police functions in the country⁸⁰. The Garda has competency to investigate

⁷⁷ For example in the case of a licensed bank a failure to have requisite systems and controls or a breach of a relevant condition of a licence imposed under the Central Bank Act, 1971.

⁷⁸ However, guidance regarding internal controls and the reporting of STRs appears limited with only 1% of all disclosures received in 2004 having been made by the non-financial sector.

⁷⁹ Financial Action Task Force, Third Mutual Evaluation Report, Anti-money Laundering and Combating The Financing of Terrorism, Ireland, February 2006, pag.11.

⁸⁰ <http://www.garda.ie>

offences involving bribery of public officials⁸¹. The general direction, management and control of the Garda is the responsibility of the Commissioner, who is appointed by the Government. He is responsible to the Minister for Justice, Equality & Law Reform who in turn is accountable to the Irish Legislature for the performance of the Garda⁸².

96. The Garda Bureau of Fraud Investigation (GBFI) was established in April 1995⁸³. Its remit involves the investigation of fraud on a national basis principally dealing with the more complex of cases, including foreign bribery. The Bureau is headed by a Chief Superintendent who reports directly to Assistant Commissioner, National Support Services. Five different sections are contained within the Bureau, namely the Assessment Unit, the Commercial Fraud Unit, the Money Laundering Unit, the Card Fraud Unit and the Computer Unit.

97. Other specialised investigating authorities are also the Competition Authority in relation to offences against the Competition Acts; the investigation branch of the Revenue Commissioners in relation to revenue offences; the Health and Safety Authority in relation to offences relating to safety and welfare at work; and the Office of Director of Corporate Enforcement (ODCE) which deals with offences against company law.

(ii) *The Revenue Commissioners' Investigations and Prosecutions Division*

98. The Office of the Revenue Commissioners was established in 1923. There are 100 Revenue offices countrywide with a staff complement of over 7000 approx. The core business of the Office is the assessment and collection of taxes and duties. The Revenue's Investigations and Prosecutions Division, manages and co-ordinates all of Revenue's prosecution activity, particularly for serious cases of fraud and evasion. In addition, the Revenue Solicitor's Division provides comprehensive legal support services, including the conduct of litigation and appeals and the prosecution of criminal offences.

(iii) *The Office of the Director of Corporate Enforcement*

99. The Company Law Enforcement Act, 2001 established the Office of the Director of Corporate Enforcement (ODCE)⁸⁴. Under the Act, the Director of Corporate Enforcement is legally responsible for encouraging compliance with company law and investigating and enforcing suspected breaches of the legislation. In the case of suspected breaches of the Companies Acts, the Director has three main options available to him: (i) invite the persons in default to pay an administrative fine in lieu of facing a summary prosecution before the courts,⁸⁵ (ii) initiate a summary prosecution for a suspected breach of the

⁸¹ In 2005, the strength of the service was 12,265, which includes 1,700 detectives and 1,140 civilian support staff.

⁸² For policing purposes Ireland is divided into six Regions, each of which is commanded by a Regional Assistant Commissioner. These regions are sub-divided into divisions and districts. The Dublin Metropolitan Region is made up primarily of the City and the County of Dublin with a population of over 1 million people. Each of the 25 divisions has its own financial investigators.

⁸³ Currently, the staff allocated to the GBFI consists of one detective Chief Superintendent, 56 Detectives and two forensic accountants. One sergeant and nine clerical officers provide clerical and administrative support to the Bureau.

⁸⁴ The staff complement of the ODCE consists of 30 together with 6 Garda officers seconded from the GBFI to provide investigative support.

⁸⁵ Ireland clarified that this provision has not yet been commenced.

Companies Acts, or (iii) refer a case to the Director of Public Prosecutions for decision as to whether a prosecution on indictment should be commenced⁸⁶.

(iv) *Resources, awareness and training*

100. As the Garda is the main body responsible for investigating offences in Ireland, it is essential that police officers responsible for potential foreign bribery investigations receive adequate training, notably because of the inherent difficulties of foreign bribery cases (difficulty in detecting the foreign bribery offence, complex corporate structures, need to rely on mutual legal assistance, etc.). In this regard, the Garda Training College trains police officers and also provides training in court practice and procedure with the assistance of staff from the DPP's Office, as well as former judges and other experts.

101. Since 2005, the GBFI have developed a Regional Fraud Investigation Course. The course, which is run twice a year⁸⁷, entails a two week classroom session followed by a one week specialised course on basic high tech crime investigation. The course has a specific training session on bribery and corruption, including foreign bribery (see also section C.2.a.iii below)⁸⁸. Furthermore, as part of cross border co-operation against serious and organised crime the GBFI have established a cross border forum with the Economic Crime Bureau of the Police Service of Northern Ireland. Serious economic and financial crime in this context includes foreign bribery.

102. The allocation of resources in respect of the Garda is an operational matter for the Garda Commissioner. The Commissioner is provided with a budget every year in which he is required to operate. This budget is in turn allocated in proportion to the various sections of the organisation under the direction of the Director of Finance and Deputy Commissioner Strategic and Resource Management. The total Garda Budget for 2005 was EUR 1,140 million. The total Garda budget for 2006 is EUR 1275 million.

Commentary

The lead examiners recommend that Ireland ensure the continuation of provision of intensified training of police officers and recruits on foreign bribery, including the practical aspects of such investigations and the application of foreign bribery to legal persons.

(b) *The conduct of investigations*

(i) *Commencement of proceedings*

103. In the Irish criminal justice system the investigation of criminal offences is the function of the Garda⁸⁹. The Garda can initiate an investigation following a complaint from any person, including a victim (i.e. competitor), or from information coming to the notice of the Garda. To suspend the investigation, the police would refer the matter to the Director of Public Prosecutions (DPP) for direction. Also, the Garda

⁸⁶ Section 12.1 of the Company Law Enforcement Act.

⁸⁷ An average of thirty detectives from Dublin and all of the country regions are being trained on this programme yearly.

⁸⁸ Following the three week class room session, students are then allocated on secondment to the various units at GBFI where they are assigned a GBFI mentor. On return to their regions the students may refer to their mentors at GBFI for advice, guidance and support in conducting investigations at local level.

⁸⁹ Except for certain duties which arise under the Garda (Complaints) Act, 1986 where an investigation is being carried out into an alleged offence by a member of the Garda, the Director of Public Prosecutions has no investigative function.

have the discretion to terminate the investigation without referring to the DPP where no material evidence of an offence emerges⁹⁰.

(ii) *Investigative Techniques and Bank Secrecy*

104. The Garda and the Revenue Commissioners have the ability to use special investigative techniques such as undercover operations, informants, video-surveillance and controlled deliveries. The interception of telecommunications is allowed only for the purpose of criminal investigation into serious offences punishable by imprisonment for a term of 5 years or more, including corruption offences.⁹¹

105. Sections 63 and 64 of the CJA (1994) as amended by section 39 of the Criminal Justice (Terrorist Offences) Act (2005) allow the Garda to serve a court order to compel the production of material, search premises and obtain information in relation to police investigations. The material that can be obtained includes bank account records, customer identification records, and other records maintained by financial institutions, excluding items subject to legal privilege from entities or persons as necessary to conduct investigations of money laundering and other predicate offences.

106. A production order is served on a financial institution, requiring them to produce the material specified in the order for possible use in a criminal inquiry. An order from a judge can only be obtained by a serving member of the Garda on application. There are additional powers under CJA (1976) to inspect and obtain material.

(c) *Prosecutors and the judiciary*

(i) *Organisation of the Public Prosecutor's Office and the Judiciary*

107. The overall legal framework for the prosecution system in Ireland is contained in the 1937 Constitution⁹² and statute law, notably the Prosecution of Offences Act, 1974 (the 1974 Act)⁹³, which established the Office of Director of Public Prosecutions⁹⁴.

108. Pursuant to the 1974 Act⁹⁵, the Director of Public Prosecutions (DPP) is an officer authorised in accordance with law to act for the purpose of prosecuting in the name of the People as provided for in

⁹⁰ 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 intervention.

⁹¹ The powers are contained under Sections 1, 4 and 5 of Interception of Postal Packets and Telecommunications Messages (Regulation) Act (1993).

⁹² Article 30.3 of the Constitution of Ireland provides as follows:
“All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose.”

⁹³ The Prosecution of Offences Act, 1974 (the 1974 Act) is available at www.irishstatutebook.ie

⁹⁴ www.dppireland.ie

⁹⁵ Section 3(1) of the 1974 Act provides as follows:
“Subject to the provisions of this Act, the Director shall perform all the functions capable of being performed in relation to criminal matters and in relation to election petitions and referendum petitions by the Attorney General immediately before the commencement of this section and references to the Attorney General in any statute or statutory instrument in force immediately before such commencement shall be construed accordingly.”

Article 30.3 of the Constitution. The 1974 Act also confers on the DPP the function of prosecuting both on indictment and summarily.

109. The 1974 Act provides that the DPP shall be independent in the performance of his functions. He directs and supervises public prosecutions on indictment in the courts and gives general direction and advice to the Garda in relation to summary cases and specific direction in such cases where requested. The DPP may be removed by the government, but only on consideration of a report into the Director's health or conduct made by a committee comprising the Chief Justice, a judge of the High Court and the Attorney General. The Office of the DPP consists of two legal divisions, the Directing Division and the Solicitors Division, and the Administration Division⁹⁶.

110. The present structure of Irish courts was established by the Courts (Establishment and Constitution) Act 1961 pursuant to Article 34 of the Irish Constitution 1937. The court system comprises the Supreme Court, the Court of Criminal Appeal, and courts of first instance which include a High Court with full jurisdiction in all criminal and civil matters and courts of limited jurisdiction, the Circuit Court (8) and the District Court (23) organized on a regional basis. The Constitution also provides for the creation of "special courts" to handle cases which cannot be adequately managed by the ordinary court system⁹⁷.

111. The Courts Service Act 1998 transferred responsibility for the day-to-day management of the courts to the Courts Service⁹⁸. The Service must have regard to any policy or objective of the Government or a Minister that may affect or relate to the functions of the Service. The Minister of Justice, Equality and Law Reform is responsible for legislation in relation to the administration of the courts. The Minister remains politically accountable to the Oireachtas for the Court's overall performance.

(ii) *Resources, awareness and training of the Prosecutor's Office and the Judiciary*

112. The Judicial Studies Institute (the JSI) was set up in 1996 to provide for the training and for the on-going education of the Judiciary. Initial funds for the purpose of these sections were provided by the Minister for Justice, Equality & Law Reform. The function of the JSI is to organise conferences, seminars and lectures for members of the judiciary. To date the Institute has not provided formal induction courses for new judges. A mentoring system is in place at District level where a new judge sits in Court with an experienced judge for a period of time. The JSI nominates judges to attend external conferences on legal topics where relevant⁹⁹. In 2005, the JSI has organised various seminars on legal subjects and a number of judges have also attended international judicial courses. However, none of the said activities dealt with foreign bribery.

113. The office of the DPP is responsible for its own training by means of a dedicated Training Unit. The two legal divisions of the DPP (the Directing Division and the Solicitors Division) have a legal

⁹⁶ The Directing Division consists of barristers and solicitors who examine criminal investigation files and decide whether or not a prosecution should be taken. Solicitors Division consists of solicitors and legal executives who prepare and conduct cases on behalf of the DPP in all courts sitting in Dublin. The Administration Division provides the organisational, infrastructural, administrative and information services required by the Office and also provides support to both the Directing and Solicitors Divisions.

⁹⁷ The establishment of special courts is dealt with under paragraph 23 of this report.

⁹⁸ www.courts.ie

⁹⁹ To date the Institute has not provided formal induction courses for new judges. A mentoring system is in place at District Court level whereby a new judge sits in Court with an experienced judge for a period of time.

training adviser whose function it is to advise the Training Unit on the legal training requirements of their respective Division. The Office has also established a Legal Training Steering Group, which meets on a regular basis to progress training needs within both Divisions¹⁰⁰. All lawyers employed by this office are expected to have a good working knowledge of criminal law and procedure including the Proceeds of Crime (the CJA 1994 as amended). Topics such as money laundering and corruption are confined generally to those units specialising in them or to those who have identified a need for such training in their Personal Training Plan. The Office also sends staff to both international and national conferences and seminars regularly.

Commentary

The lead examiners recommend that Ireland ensure the continuation of provision of intensified training to prosecutors and judges on foreign bribery, including the application of foreign bribery to legal persons.

(d) Principles of prosecution

(i) Prosecution of summary and indictable offences

114. Criminal cases are divided into two types: indictable offences and summary offences. Indictable offences are the more serious cases which are heard by a judge and jury in the Circuit Criminal Court or the Central Criminal Court. The indictable offences carry the most serious penalties if the court convicts the accused. They can sometimes be dealt with in the Special Criminal Court by three judges sitting without a jury and be subject to appeal to the Court of Criminal Appeal. Summary offences are less serious offences which are heard by a judge without a jury in the District Court and on appeal in the Circuit Court. Summary offences cannot be subject to a maximum prison sentence of more than 12 months for any one offence.

115. Most summary prosecutions brought in the District Court are brought in the name of the Director. In practice, the great majority are presented by officers of the Garda without specific reference to the Director's Office except in cases where the Garda are required to seek a direction from the Director or where for some other reason they seek instructions¹⁰¹. Bribery of foreign public officials can be prosecuted either summarily or on indictment. However, charges in cases involving bribery of foreign public officials should not be preferred without the prior directions of the Office of the Director of Public Prosecutions¹⁰².

116. The procedure in respect of investigation and prosecution does not differ between summary and indictable offences. The Irish authorities indicated that, in principle, foreign bribery cases would be prosecuted on indictment. However, very minor cases (e.g. payment of a bribe to expedite customs

¹⁰⁰ Each member of staff is required to set out his/her needs training needs to their Line Manager in Personal Training and Development Plans at the beginning of each year. A further meeting is held mid-year to ascertain whether these needs are being met. The information gathered through the PTDPs are brought to the LTSG to decide on the type of training needed, and the form it should take e.g. explanatory briefs, in-house briefing sessions or guests speakers where expertise is not available in-house

¹⁰¹ Under section 8 of the Garda Síochána Act 2005, members of the Garda who prosecute summarily in the course of their official duties must do so in the name of the Director of Public Prosecutions and must comply with any directions given by the Director, whether of a general or specific nature. The Director may assume the conduct of a prosecution instituted by a Garda at any time.

¹⁰² The Guidelines for Prosecutors (2006), paragraph 7.5.

clearance) could be dealt with as summary offences depending on the circumstances (e.g. amount of bribe, amount and nature of the benefit)¹⁰³.

117. Like some other common law jurisdictions, proceedings pending on indictment may be stayed by the entry of a *nolle prosequi*. The *nolle prosequi* may be entered only on the direction of the DPP or professional officers of the DPP. Depending on circumstances (e.g. unavailability of a witness to attend the trial), the entry of a *nolle prosequi* can be used by prosecutors to halt proceedings which they consider ought not to be continued¹⁰⁴. The Irish authorities have indicated that the *nolle prosequi* stays the prosecution but does not in all circumstances operate as a bar to further proceedings and the accused may be re-indicted where this does not amount to an abuse of process¹⁰⁵. No statistical information was available on the use of the *nolle prosequi* in practice.

(ii) *The decision whether to prosecute*

118. In Ireland the decision to commence a prosecution is discretionary. Prosecutors are, however, guided in their prosecutorial decision-making by the “Guidelines for Prosecutors” issued by the Office of the DPP. Those guidelines (first published in 2001 and revised in 2006) set out general principles which assist in determining whether to initiate a prosecution in any given case¹⁰⁶. As in other common law jurisdictions, the Irish guidelines provide two fundamental tests in deciding whether to prosecute: namely (1) whether there is sufficiency of evidence to support a prosecution, and (2) whether a prosecution is in the public interest. Each of these points is discussed below.

119. Prosecutors approach each case first by asking whether the evidence is sufficiently strong to justify prosecuting. A prosecution should not be instituted unless there is a *prima facie* case against the suspect. The evidence must be such that a jury, properly instructed on the relevant law, could conclude “beyond a reasonable doubt” that the accused was guilty of the offence charged. In considering the strength of the evidence the existence of a bare *prima facie* case is not enough. Once it is established that there is a *prima facie* case it is then necessary to give consideration to the prospects of conviction. In evaluating the prospects of a conviction, the prosecutor has to assess the admissibility, sufficiency and strength of the evidence which will be presented at the trial¹⁰⁷.

120. Once the prosecutor is satisfied that there is sufficient evidence to justify the institution or continuance of a prosecution, the next consideration is whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. The Guidelines for Prosecutions provide an inclusive list of factors that may be considered in determining

¹⁰³ 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 aggravating and mitigating factors mentioned in the Guidelines for Prosecutions are also considered in determining whether a case should be dealt with as a summary or indictable offence.

¹⁰⁴ In Ireland, the statute of limitations does not apply to the prosecution of indictable offences.

¹⁰⁵ On the use of the *nolle prosequi* see also the Guidelines for Prosecutors, Office of the Director of Public Prosecutions, June 2006, pag.22.

¹⁰⁶ The Guidelines for Prosecutors, Office of the Director of Public Prosecutions, June 2006. See also www.dppireland.ie. The principal changes introduced in the 2006 text are the incorporation of a Code of Ethics for Prosecutors, more detailed guidelines on the disclosure of evidence and accomplice evidence, the granting of immunity from prosecution and new guidelines on forfeiture and confiscation of assets. The Guidelines make no reference to the strength of the evidence in bribery cases.

¹⁰⁷ The Guidelines for Prosecutors, Office of the Director of Public Prosecutions, June 2006, pagg.16-20.

whether the public interest requires a prosecution¹⁰⁸. The first factor to consider in assessing where the public interest lies is the seriousness of the alleged offence and whether there are any aggravating or mitigating circumstances. In this regard, the Guidelines provide that the presence of “any element of corruption” in the offence increases the seriousness of the offence and the likelihood that the public interest will require a prosecution¹⁰⁹. Of note is that the Guidelines do not provide that issues of national economic interest or the possible effect of a prosecution on relations with another State are prohibited factors in making a prosecution decision. The guidelines also do not prohibit a decision taking into account the identity of a particular person.

Commentary

The lead examiners recommend that Ireland ensure that considerations of national economic interest, the potential effect on relations with another State and the identity of the person involved shall not influence investigation and prosecution of foreign bribery cases. They also recommend that the Working Group monitor this issue as cases develop.

(e) Mutual legal assistance and extradition

(i) Mutual legal assistance

121. The Criminal Justice Act 1994 covers provision of mutual legal assistance (MLA). Sections 46 and 47 cover the execution of confiscation and forfeiture orders for certain countries.¹¹⁰ Section 51 provides for the taking of evidence to be used outside Ireland. Section 53 concerns the transfer of prisoner to give evidence abroad. Section 55 covers mutual legal assistance in relation to search and seizure for material relevant to investigation abroad, and is available only for certain countries.¹¹¹

122. The Mutual Assistance and Extradition Division in the Department of Justice, Equality and Law Reform is the Central Authority for the receipt of international requests. Any request received by an authority other than the Central Authority will be transmitted directly to the Central Authority for execution. The Central Authority is staffed by 4 persons, and receives approximately 400 MLA requests per year. The Central Authority coordinates the execution of requests for mutual assistance in co-operation with the various other agencies and offices with responsibilities in this area (e.g. the Attorney General’s Office, the Chief State Solicitor’s Office, the Office of the Director of Public Prosecutions, the Garda Síochána, the Revenue Commissioners and the Courts). A Guide to Irish Law and Procedures in relation to Mutual Assistance in Criminal Matters is available from the Department for use by practitioners, in English, Spanish, French, German and Italian. Ireland indicates that it has not received any request for MLA in relation to the foreign bribery offence, as of the time of this review.

¹⁰⁸ *Id.*

¹⁰⁹ In Phase 1, the Irish authorities stated that prosecutorial decisions were taken with absolute impartiality and that investigations and prosecutions in Ireland were never 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 were of the opinion that it was difficult to foresee such a situation arising in the future.

¹¹⁰ This would include all countries party to the OECD Anti-Bribery Convention, as specified in Phase 1. The Irish authorities point out that, as countries become party to certain international conventions which provide for international co-operation in relation to criminal matters, they are designated for the purposes of sections 46, 47 and 55 of the Criminal Justice Act 1994. The list of relevant conventions does not however include the OECD Anti-Bribery Convention.

¹¹¹ For a detailed account of these provisions, see the Phase 1 Report, pp. 32-34.

123. Under all the provisions governing MLA in the Criminal Justice Act 1994, the Minister for Justice retains discretion for any provision of MLA. In Phase 1, the Irish authorities stated that assistance could be refused on political, security or national interest grounds. This could raise issues of effective investigation and prosecution of the foreign bribery offence if decisions to refuse MLA are influenced by considerations of national economic interest, relations with other countries, or the identity of the person involved. Following the on-site visit, Irish authorities indicated that, rather than being influenced by such considerations, decisions in relation to mutual legal assistance are made in accordance with the relevant international instruments, bilateral agreements or reciprocity and the relevant Irish legislation.

124. Outgoing mutual legal assistance requests are also sent via the Central Authority, from the DPP's office. In 2006, a total of 237 requests were issued, of which 58 requests for mutual legal assistance (the rest of the requests concern service of judicial documents).

125. The Irish authorities informed the examining team that a Criminal Justice (Mutual Assistance) Bill 2005 was being considered by Parliament. As of February 2007, the Bill was at Committee Stage in the Lower House of the Irish Parliament, and expected to be enacted by mid-2007. Arrangements will then be made to ratify the instruments to which the Bill is giving effect. This legislation aims to strengthen procedures for provision of MLA to EU member states, as well as Norway, Iceland, and other designated states. It retains a provision which allows the Minister for Justice to refuse provision of MLA if this "would be likely to prejudice [...] essential interests of the State".¹¹²

(ii) *Extradition*

126. Under the Irish legislation (Extradition Act 1965), a dual criminality requirement exists for extradition (except for EU countries under the European Arrest Warrant). The offence in relation to which extradition is sought has to be punishable by at least one year imprisonment in Ireland and in the requesting country. As foreign bribery carries superior penalties, it meets the criteria of an extraditable offence.

127. In Phase 1, the Working Group had raised the issue of the dual criminality requirement, which could have been a problem due to the late implementation of the foreign bribery offence in Ireland.¹¹³ However, Ireland indicates that it has not received any request relating to a foreign bribery offence, and, thus, has never had to refuse extradition on the basis that foreign bribery did not exist in Ireland at the time of the offence. Consequently, it appears that the dual criminality requirement has not constituted a problem in practice, as of the time of this review, and, as time passes, is less likely to be an obstacle to extradition in foreign bribery cases.

128. Usual grounds for refusal exist in the Extradition Act 1965, for instance where there are reasons to believe that a person is being prosecuted on account of race, religion, etc., where the death penalty is sought against the person, and for military offences.¹¹⁴ Other grounds for refusal may raise potential issues, and could usefully be followed-up by the Working Group:

- Section 11 states that extradition should not be granted for "political offences". It does not appear that case law is available defining a "political offence". If this provision could be relied on in relation to bribery of a (high ranking) foreign public official, this could be a

¹¹² See, *inter alia*, section 3 of the Criminal Justice (Mutual Assistance) Bill 2005 available at www.oireachtas.ie/documents/bills28/bills/2005/3505/B35b05s.pdf.

¹¹³ See Phase 1 Report at p.44.

¹¹⁴ For a detailed account of the grounds for refusal, see the Phase 1 Report, pp. 36-38.

serious issue with regard to the Convention. Following the on-site visit, the Irish authorities further clarified that the act of bribing a high ranking foreign public official or politician would not, of itself, be considered a political offence, but that, if this bribery were engaged in order to advance political ends, the political offence exemption might apply. This also raises concern as to what the “advancement of political ends” could be interpreted to mean. Ireland considers that this issue is unlikely to arise in respect of the bribery of foreign officials, which is more likely to be motivated by the seeking of an economic rather than political advantage.

- Section 14 specifies that extradition of Irish citizens is not generally possible. There are however exceptions where specific extradition treaties exist, and usually on a reciprocal basis. With specific regard to the foreign bribery offence, and as indicated in Phase 1, “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.”¹¹⁵ Refusal to extradite nationals is admissible under Article 10(3) of the Convention, which also specifies that where extradition is refused solely on the grounds of nationality, the case must be submitted to competent authorities for prosecution in the country. However, this raises a specific issue in Ireland, because of the very limited scope of the nationality jurisdiction principle (see section C.1.f. below on nationality jurisdiction). This provision could imply that an Irish national guilty of a foreign bribery offence committed entirely abroad could neither be extradited for prosecution nor prosecuted in Ireland, thus creating a potential loophole in the effective application of the Convention. It should be noted that none of the refusals to extradite since 2000 were on the grounds of Irish nationality.
- Section 15 provides that extradition may be refused if the offence is considered to have been committed in Ireland. As foreign bribery is an offence which can typically take place in several jurisdictions (different contacts, promise of a bribe, payment, benefits obtained, etc.), it would be fairly easy to consider that (part of) a foreign bribery offence has taken place in Ireland. While refusal to extradite on the basis of section 15 is not per se problematic, any such refusal should trigger prosecutions in Ireland, in order to ensure effective enforcement of the Convention. The representatives of the Irish Central Authority were not aware of circumstances in which extradition was refused on this ground. Following the on-site visit, the Irish authorities further indicated that bilateral extradition treaties in fact often impose that any refusal on this ground should trigger a prosecution in Ireland, as is for instance required under the Ireland-U.S.A. extradition treaty.
- Section 35 grants the possibility to refuse an extradition at any time by the Minister of Justice if he/she is of the opinion that the extradition is prohibited under the Extradition Act 1965. Representatives of the Irish Central Authority do not recall any instance where this provision was used as a ground to refuse extradition. The Irish authorities have pointed out that a Minister would not lightly form this view and, would require to be in a position to justify this belief based on sound legal arguments. In their view, it is unlikely that this power would ever be invoked by a Minister without legal advice from the Attorney General that there was a legal bar to extradition.

129. The Mutual Assistance and Extradition Division of the Department of Justice, Equality and Law Reform is the Central Authority for receiving extradition requests under the European Arrest Warrant. There is no Central Authority responsible for receiving extradition request under Part II of the Extradition

¹¹⁵ Section 29A, Extradition Act 1965, as amended.

Act 1965; these requests are received through the diplomatic channels. The Central Authority receives approximately 40 extradition requests per year. Since 2000, seven extradition requests under the Extradition Act 1965 have been refused, including for procedural reasons, or in relation to human rights issues. Representatives of the Central Authority present at the on-site visit explained that it is not possible to indicate an approximate time-frame for the execution of extradition requests, as they vary widely. As indicated earlier, Ireland has not received or sent any request for extradition in a foreign bribery case as of the time of this review.

Commentary:

The lead examiners recommend that Ireland take all necessary measure to ensure that decisions regarding mutual legal assistance or extradition are not influenced by considerations of national economic interest, the potential effect upon relations with other countries, or the identity of the person involved, which could hinder the effective investigation and prosecution of foreign bribery. They also recommend that the Working Group monitor this issue as cases develop.

(f) Jurisdiction

(i) Territorial jurisdiction

130. 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.

131. Section 6 of the Prevention of Corruption (Amendment) Act 2001, 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 State¹¹⁶.

The Explanatory Memorandum¹¹⁷ on the Prevention of Corruption (Amendment) Act 2001, clarifies 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. However, no supporting case law was available on the extent of a connection that is required between an offence and Ireland¹¹⁸.

¹¹⁶ By stating that a person “may be tried” where an act was committed in Ireland, sections 6 of the Prevention of Corruption (Amendment) Act, 2001 seems to imply discretion in establishing territorial jurisdiction. In Phase 1 (p.20) the Irish authorities stated that the implication of discretion was merely a matter of dealing in the most effective way with the prosecution process where more than one state may take proceedings.

¹¹⁷ [www.oecd.org/dataoecd/23/34/2735449.pdf#search=%22explanatory%20memorandum%20PREVENTION%20OF%20CORRUPTION%20\(AMENDMENT\)%20ACT%2C%202001%22](http://www.oecd.org/dataoecd/23/34/2735449.pdf#search=%22explanatory%20memorandum%20PREVENTION%20OF%20CORRUPTION%20(AMENDMENT)%20ACT%2C%202001%22)

¹¹⁸ In Phase 1, the Irish authorities indicated that 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.

132. The lead examiners are not convinced that territorial jurisdiction under Irish law is broad enough to enable the effective application of the offence under section 6 of the Prevention of Corruption (Amendment) Act 2001. The uncertainty about the effectiveness of territorial jurisdiction in respect of section 6 of the Prevention of Corruption (Amendment) Act 2001 was confirmed by some representatives of the Irish law enforcement agencies interviewed at the on-site visit who provided the lead examiners with conflicting interpretations of this matter.

133. In particular, Garda officials indicated that in cases where the offer, promise or giving took place abroad, but the benefit occurred in Ireland, the “legislation (i.e. the Prevention of Corruption Act 2001) would take care of this weakness”. Contrary to this statement, however, other Irish officials interviewed at the on-site visit indicated that “some act” would have to take place in Ireland in order to trigger the foreign bribery offence under the Prevention of Corruption Act 2001. Thus it was their view that where no act took place in Ireland, jurisdiction would not apply simply because the proceeds occurred in Ireland.

134. Garda officers also stated that in the alternative, where all the elements of the offence occurred abroad but the proceeds of the bribe were received in Ireland, they could establish jurisdiction over the money laundering offence. They conceded, however, that due to the dual criminality requirement for money laundering offences set out in section 31(7) of the Criminal Justice Act 1994 (see section C.4.a.) if the bribery of a foreign public official (i.e. the predicate offence) occurred in a country where the foreign bribery offence was not punished, there would be no money laundering offence generated by the foreign bribery. The lead examiners note that in such a case Ireland would not be able to establish jurisdiction over either money laundering or foreign bribery offence.

(ii) *Nationality jurisdiction*

135. 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”.

136. The Irish authorities have stated that under the Irish legal system, extraterritorial jurisdiction is atypical, and that Ireland only asserts it in exceptional cases, pursuant to its obligations under international treaties. However, the lead examiners note that Ireland has established extraterritorial jurisdiction over specific offences on the basis of public policy priorities. Nationality jurisdiction has been established, for instance, over certain serious offences, such as terrorist financing, murder and manslaughter.

137. With respect to corruption offences, section 7 of the Prevention of Corruption (Amendment) Act 2001 provides conditions for establishing extraterritorial jurisdiction¹¹⁹. Pursuant thereto, nationality jurisdiction is established where the briber is a domestic public official in respect of active bribery (domestic and foreign). However, section 7 of the Prevention of Corruption (Amendment) Act 2001 does not establish jurisdiction over a national who committed the foreign bribery offence abroad if he/she is not

¹¹⁹ Section 7 provides as follows:

- (1) Subject to *subsection (2)* of this section, where a person does outside the State an act that, if done in the State, would constitute an offence under section 1 (inserted by *section 2* of this Act) of the Act of 1906, he or she shall be guilty of an offence and he or she shall be liable on conviction to the penalty to which he or she would have been liable if he or she had done the act in the State.
- (2) *Subsection (1)* shall apply only where the person concerned is a person referred to in *subsection (5)(b)* of the said section 1.

a domestic public official. Furthermore, Ireland has indicated that it has not jurisdiction over cases where non Irish citizen working abroad for an Irish company bribes a foreign official abroad.

138. In contrast, section 45(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001 establishes jurisdiction over the bribery of foreign public officials of the EU or EU member states committed abroad, where the offender is an Irish citizen¹²⁰. Section 46(1) of the Criminal Justice (Theft and Fraud) Act 2001 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.

139. In Phase 1, the Working Group noted the risk of discriminatory application of nationality jurisdiction between the Criminal Justice (Theft and Fraud Offences) Act 2001 and the Prevention of Corruption (Amendment) Act 2001: 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 bribery offence would involve damages or potential damages to the European Communities' financial interests. The Working Group thus requested the Irish authorities to take nationality jurisdiction over the foreign bribery offence under the 1906 Act as amended¹²¹.

140. Since Phase 1, Ireland has not established nationality jurisdiction under the Prevention of Corruption (Amendment) Act 2001. The Irish authorities have indicated that the Prevention of Corruption (Amendment) Bill would include a proposed amendment to the Prevention of Corruption (Amendment) Act 2001 in order to allow for the establishment of nationality jurisdiction as requested by the Working Group¹²². At the time of writing, the Irish Government had recently given approval for the drafting of Prevention of Corruption (Amendment) Bill.

Commentary

The lead examiners are not convinced that territorial jurisdiction under Irish law is broad enough to enable the effective application of the offence under the Prevention of Corruption

¹²⁰ Section 45(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001, provides as follows:

(2) Active or passive corruption committed by a person outside the State is an offence if—

(a) the offender is an Irish citizen, a national 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 the State, or

(b) in the case of active corruption, it is directed against an official, or a member of one of the institutions mentioned in paragraphs (i) to (iv) of the definition of “national official” in section 40 who is an Irish citizen.

¹²¹ In this regard, the Irish authorities have indicated that it is difficult to establish national jurisdiction for a foreign bribery offence as opposed to an “active corruption” offence, because the offence under the Act of 1906, encompasses both private and public bribery, domestic and foreign.

¹²² Head 27(3) (Recommendations of OECD Working Party on Bribery for amendments to Prevention of Corruption Acts 1889-2001) of the Draft Scheme of a Criminal Justice (Miscellaneous Provisions) Bill, provides as follows:

(3) A new section 2A be included in the Prevention of Corruption (Amendment) Act 2001 as follows:

(1) A person who commits a corruption offence as defined in section 2 of this Act, or who participates in, instigates or attempts to commit any such offence, outside the State shall be guilty of an offence, provided

—
(a) the benefit of the corruption offence is obtained, or a pecuniary advantage is derived from it, by a person within the State, or

(b) a person within the State knowingly assists or induces the commission of the corruption offence, or

(2) A person guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

(Amendment) Act 2001. In their view an element of the offence would likely be required by the courts to have taken place in Ireland. The lead examiners recommend that this issue be followed-up once there has been sufficient practice under the Prevention of Corruption (Amendment) Act 2001 and comparable legislation to assess the effectiveness in practice of territorial jurisdiction.

In addition, the lead examiners note that, although the general principle is that Irish criminal law is territorial, there have been exceptions to this rule, including a form of nationality jurisdiction which was established over bribery offences involving damages or potential damages to the European Communities' financial interests under the Criminal Justice (Theft and Fraud Offences) Act 2001. Given the risk of discriminatory application of nationality jurisdiction between the Criminal Justice (Theft and Fraud Offences) Act 2001 and the Prevention of Corruption (Amendment) Act 2001, the lead examiners recommend that Ireland promptly establish nationality jurisdiction under the Prevention of Corruption (Amendment) Act 2001 consistent with the Criminal Justice (Theft and Fraud) Act 2001, and welcome Ireland's expressed intention to address this issue in the Prevention of Corruption (Amendment) Bill.

2. The Foreign Bribery Offence

(a) Overview of legislation

(i) Current scheme

141. Ireland established an offence of bribing a foreign public official in two pieces of legislation: 1. the Prevention of Corruption (Amendment) Act 2001; and 2. the Criminal Justice (Theft and Fraud Offences) Act 2001. The Prevention of Corruption (Amendment) Act 2001, implements the OECD Convention as well as the Convention on the Fight against Corruption by the European Union and the Criminal Law Convention on Corruption of the Council of Europe. The Criminal Justice (Theft and Fraud Offences) Act 2001 implements the Convention on the Protection of European Communities' Financial Interests. As will be shown in this part of the Report, there is a certain amount of overlap between the offences of bribing a foreign public official in the two statutes.

142. Until the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) were enacted, the law of corruption in Ireland was set out in a series of old statutes, which were promulgated by the United Kingdom before Ireland's independence – *i.e.* the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. Other than Ireland, the United Kingdom is the only Common Law country which bases its offence of bribing a foreign public official on the old statutory scheme.

143. Since the 1906 Prevention of Corruption Act introduced the notion of corruption of an "agent", which includes a domestic public official, Ireland has implemented the OECD Convention by amending the 1906 Act through the Prevention of Corruption (Amendment) Act 2001, which repeals and replaces section 1 of the 1906 Act by essentially extending the definition of "agent" to certain categories of "foreign public officials" and establishing new offences of active and passive bribery of agents. The new offences cover the elements of bribing more precisely than those in the 1906 Act (*e.g.*, they expressly cover the notions of bribing through an intermediary, as well as bribes that benefit third parties).

144. On the other hand, the offences of active and passive corruption in the First Protocol Drawn up on the Basis of Article K.3 of the Treaty on European Union to the Convention on the Protection of the European Communities' Financial Interests done at Brussels on 27 September 1996, are implemented

through Schedule 4 to the Criminal Justice (Theft and Fraud Offences) Act 2001. The corruption offences apply essentially to the bribery of “an official” to obtain a breach of duties “which damages or is likely to damage the European Communities’ interests”. Overlap therefore occurs between the active bribery offence under the Prevention of Corruption (Amendment) Act 2001, and the Criminal Justice (Theft and Fraud Offences) Act 2001, to the extent that the Prevention of Corruption Act also covers the bribery of “Community” officials to obtain a breach of duties “which damages or is likely to damage the European Communities’ interests”. The impact of this overlap on the implementation of the Convention is discussed below.

(ii) *Draft scheme and Bill to ratify UNCAC*

145. In Phase 1, Ireland announced that the Government was considering whether the framework of the Irish corruption laws should be modernised. Since then, the Irish Government has approved the drafting of a Criminal Justice (Miscellaneous Provisions) Bill (Draft Scheme) to give legislative effect to a number of international initiatives, including the recommendations of the Working Group on Bribery in the Phase 1 Report on Ireland. In response to the Phase 2 Questionnaire, Ireland explained that the Draft Scheme responds to the three following Phase 1 recommendations concerning the foreign bribery offence under the Prevention of Corruption (Amendment) Act 2001: (i) the scope of the definition of “agent”; (ii) coverage of non-pecuniary advantages; and (iii) jurisdiction over the offence. The Department of Justice, Equality and Law Reform explained that an external resource is assisting in the drafting of the Bill, to “ensure that it is done in a timely manner and is not impacted by other issues which may lessen the attention it receives in the Parliamentary Draftsman’s Office”. Following the on-site visit, the Government announced that it approved the drafting of a Prevention of Corruption (Amendment) Bill to take into account provisions of the OECD Convention and the EU Framework Decision on Combating Corruption in the Private Sector. It was decided that a separate Bill dealing with these matters [rather than dealing with them as part of a Criminal Justice (Miscellaneous Provisions) Bill] will accord these measures priority. The Government intends to move quickly to prepare the Bill and introduce it into Parliament.

146. The Department of Justice, Equality and Law Reform explained that the Draft Scheme should be dealt with speedily, due to the importance of the issues covered (e.g. amendments concerning evidence, the European Arrest Warrant Act, Council of Europe Convention on Cyber Crime and Schengen Information System). However, the Department of Justice, Equality and Law Reform emphasised that the Draft Scheme addresses several issues, and that issues addressed from the Phase 1 recommendations comprise only one part of the Draft Scheme, and are not necessarily considered as urgent as some others. There is a certain amount of pressure to pass the Bill quickly due to the upcoming general election in May 2007. The Department of Justice explained that the Phase 2 examination might add to the pressure to pass the Bill, where discussions indicate a need to move quickly.

147. The Department of Justice, Equality and Law Reform also indicated that another bill will be prepared to implement the United Nations Convention against Corruption (UNCAC). Although Ireland is a signatory to the UNCAC, ratification will not take place before implementing legislation is passed. The Irish authorities did not indicate how the active offence of bribing a foreign public official under the UNCAC will be implemented, except that a “small bill” will be needed.

(iii) *Priority of statutory framework for the foreign bribery offence*

148. A member of the All Party Committee on the Constitution felt that the Irish Government should give the Convention high priority. However, he conceded that although the bribery of foreign public officials is an important issue, it does not attract media interest in Ireland. Moreover, the legislature does not perceive it as a pressing issue, and Cabinet may see its priorities elsewhere.

149. The Department of Justice, Equality and Law Reform also did not demonstrate a high sense of priority concerning the statutory framework for implementing the Convention. For instance, the Department of Justice did not make available at the on-site visit an official with sufficient knowledge of the legislative history of the amendments to the Prevention of Corruption Act 2001. He also did not have sufficient knowledge to respond to questions from the examination team concerning the interpretation of the foreign bribery offence, but undertook to provide written answers following the on-site visit. The Department of Justice, Equality and Law Reform explains that due to staff changes in the intervening six years since the 2001 amendments were enacted, it was not possible to provide an official with the requisite detailed knowledge of the preparation of that legislation. Responses to many questions submitted by the examination team during the on-site visit were provided by the Department of Justice, Equality and Law Reform and the DPP three-and-a-half weeks following the termination of the on-site visit, which was within the time-frame given to Ireland by the examination team to provide information that what was not available during the on-site visit.

150. The low level of priority given by the Irish Government to the development of the statutory framework for implementing the Convention is perhaps best demonstrated by the consultation process concerning the amendments to the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 – namely, the private sector was not included in the process. The Department of Justice, Equality and Law Reform stated following the on-site visit that private sector consultations were not held because the foreign bribery offences in the two statutes are “not concerned with the issue of bribery beyond the public sector”. However, considering that the vast majority of international business transactions worldwide are conducted by the private-sector, the lead examiners are disappointed that the Irish authorities did not appreciate the impact of the foreign bribery offences on the private sector. In addition, the failure to consult the private sector raises concerns given that awareness that conduct amounts to an offence is a key element of *mens rea* under Irish law (see below). However, the Irish authorities explain that since the 2001 amendments, the Government has prepared a Government White Paper (*Regulating Better*) to ensure that new regulations and statutory instruments are more rigorously assessed and more accessible. As a result, consultation with a wide population through appropriate media channels is now a mandatory part of the process of developing legislation.

151. The lack of priority regarding the legislative framework for implementing the Convention is also evident in the overall strategy of the Department of Justice, Equality and Law Reform as articulated in its *Strategy Statement 2005-2007*¹²³, which provides the current priorities for fighting crime in Ireland. The Strategy Statement identifies a number of focuses, including “giving effect to (Ireland’s) international obligations to combat crime”. The discussion under this topic heading only refers to international judicial assistance, and combating the bribery of foreign public officials is not mentioned specifically. The Department of Justice, Equality and Law Reform explains that due to the vast number of issues within its remit, it was not possible to specifically refer to the bribery of foreign public officials in the *Strategy Statement*.

152. One anti-corruption law enforcement issue which has been singled out for special attention by the Department of Justice, Equality and Law Reform is fighting and combating the corruption of public figures in the administration of immigration regulations. In November 2005, the Department of Justice, Equality and Law Reform hosted and co-funded an EU AGIS conference regarding best practices in this field. Given the overall low level of awareness of foreign bribery issues in Ireland documented throughout this Report, it is perhaps not surprising that the Irish Government’s responses to a corruption questionnaire for the purpose of the conference only looked at the potential of Irish officials to be corrupted, and not the

¹²³ See: *An Examination of Best Practice in Fighting and Preventing the Corruption of Public Figures involved in the Administration of Immigration Regulations* ([www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6JMLPZ-en/\\$File/EnStrategy0507.pdf](http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6JMLPZ-en/$File/EnStrategy0507.pdf)) .

potential for non-Irish immigration authorities to be bribed by Irish nationals involved in the trafficking of human beings.¹²⁴

153. The *Policing Plan 2006* for the *Garda Síochána*,¹²⁵ which sets out the government's policing priorities for 2006, also does not expressly refer to the bribery of foreign public officials or corruption. It lists several priority areas, including organised crime and drugs, terrorism, public safety, road traffic law enforcement, crime prevention and reduction, including "high value white collar crime" and trading in contraband goods, under-age drinking, rural crime prevention, illegal immigration and human trafficking, and crime statistics. In addition, *Fraud Alert*, a 1999 publication of the *Garda Síochána* and *PricewaterhouseCoopers*, which the *Garda Síochána* states applies equally to foreign bribery as it would to any other fraud-related offence, does not specifically refer to the offence of bribing a foreign public official. Following the on-site visit, the *Garda Síochána* has indicated that both these documents will be reviewed in light of the lead examiners comments.

(b) Overall weaknesses in legislation

(i) Outdated legislative framework

154. The Prevention of Corruption Act 2001 represents a continuation, with certain amendments to implement the Convention, of the old statutory framework comprised of the United Kingdom Prevention of Corruption Acts 1889 to 1916. In the United Kingdom, this framework has been widely criticised as outdated, beginning with the First Report in 1976 of the Royal Commission on Standards of Conduct in Public Life, which recommended rationalisation of this statutory framework. Since then, the law on corruption in the United Kingdom has been the subject of various additional government reports, and has been widely criticised in these reports as complex and uncertain.¹²⁶ In particular, a White Paper issued by the Home Office in 2000 (*Raising Standards and Upholding Integrity: The Prevention of Corruption*), which provides the Government's proposals for the reform of the criminal law of corruption in England and Wales, identifies key elements and concepts in the current statutory framework which are difficult to interpret, including the following: (i) the definition of the term "corruptly"; (ii) the agent-principal concept; and (iii) jurisdiction. All of these elements will be analysed in detail in this Report, and are referred to in this part only in terms of the overall need to modernise the 1889-1916 statutory framework.

155. During the on-site visit, a representative of the Office of the Director of Public Prosecutions (DPP) agreed that certain terms and concepts used in the 1889-1916 statutory framework on corruption lack clarity, including the need to prove that the bribe was given "corruptly" and that the person bribed was an "agent". He explained that this state of affairs is clearly unsatisfactory, but was unsure if it was the reason for the small number of successful prosecutions. A representative of the All Party Committee on the Constitution stated that the 1889-1916 statutory scheme inherited from the United Kingdom may "lack some validity in today's world". Following the on-site visit, the DPP explained that the Irish courts have not so far interpreted the terms "corruptly" and "agent", and that the United Kingdom's courts have defined "corruptly" in different ways. The DPP also advised that strict rules of evidence rather than legislative weaknesses are responsible for the small number of successful prosecutions.

¹²⁴ See: www.garda.ie/angarda/pub/AGIS%20Corruption%20report.doc

¹²⁵ See: www.garda.ie/angarda/policing_plans.html

¹²⁶ See for instance, the Law Commission Report No. 248, *Legislating the Criminal Code: Corruption* (1998), which states that the current law is "uncertain and inconsistent"; and the Government's Proposals for the Reform of the Criminal Law of Corruption in England and Wales, *Raising Standards and Upholding Integrity: The Prevention of Corruption* (June 2000), which states that "the Government accepts that there are difficulties of interpreting the language and concepts used in the statutes and largely accepts the recommendations made by the Law Commission".

(ii) *Overlapping foreign bribery offences*

156. As previously mentioned, there is overlap between the officials covered by the bribery offences in the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, to the extent that they both cover the bribery of an official of the European Communities or any national official of another Member State of the European Communities and the bribery is for the purpose of the official acting or refraining from acting in accordance with his/her duty, etc. “in a way that damages or is likely to damage the European Communities’ financial interests”. Given that the Criminal Justice (Theft and Fraud Offences) Act 2001 does not provide a definition of “damage” to the “European Communities’ financial interests”, the overlap between the two statutes in respect of the bribery of EC officials and officials of EC Member States could potentially be quite broad. In Phase 1, the Working Group was concerned that where the two offences overlap and apply to the same act of bribery, since the penalty under the Prevention of Corruption Act 2001 is higher than under the Criminal Justice (Theft and Fraud Offences) Act 2001 (*i.e.*, 10 years of imprisonment versus 5 years)¹²⁷, the court would apply the lower maximum penalty. For this reason the Working Group recommended follow-up of the effect of the overlapping offences.¹²⁸

157. At the on-site visit, the representative of the Department of Justice, Equality and Law Reform conceded that any conflict between overlapping legislation that would adversely affect compliance with the Convention would be a matter of concern. He stated that the Minister of Justice, Equality and Law Reform is fully aware of the provisions in both statutes. Following the on-site visit, the Department of Justice stated that “it is the belief that any overlap between these offences does not give rise to any difficulties”. In addition, the Department of Justice provided the following two reasons for having established different foreign bribery offences in two different statutes:

- (a) the Department “sought to separate the law relating to bribery involving public officials and that involving private individuals”; and
- (b) a policy decision was taken in 2001 to implement the two conventions in separate statutes due to the large volume of legislative business being carried out at that time

158. On the first point, the Department felt that “certain constructions of private individuals could not fit into” the definition of ‘agent’ in the Prevention of Corruption Act, and thus “dealt with corruption involving individuals in the private sector in a separate legislative scheme, namely the Criminal Justice (Theft and Fraud Offences) Act”. However, the definition of “agent” under the Prevention of Corruption Act 1906 includes private sector individuals (*i.e.*, “any person employed by or acting for another”), and the Criminal Justice (Theft and Fraud Offences) Act applies specifically to the bribery of an “official”. In addition, the public versus private dichotomy rationale is not supported because both the amendments to the Prevention of Corruption Act 2001 and the offence established in the Criminal Justice (Theft and Fraud Offences) Act 2001 specifically target the bribery of public officials.

159. On the second point, the Irish authorities did not indicate that the two legislative processes were co-ordinated at any level, including through co-operation and the sharing of information to ensure the harmonisation of the foreign bribery offences in the two statutes and rationalisation of any differences.

¹²⁷ The offence under the 2001 Prevention of Corruption Act can be a summary conviction offence, whereas the one under the Criminal Justice Act 2001 cannot be.

¹²⁸ The Criminal Law Act 1997 provides a mechanism for pleading guilty to an offence that provides a lesser penalty than the one charged on the indictment.

Indeed, regarding a question about the inconsistent terminology between the two statutes,¹²⁹ the Department replied in writing that this “reflects the difference in the views of one parliamentary draftsman *vis-à-vis* another”. The Department had also previously stated that it planned a restatement of the criminal law, and that “consideration may be given to consolidating various measures” where deemed appropriate.

160. During the on-site visit, the examination team brought to the attention of the representative of the Department of Justice, Equality and Law Reform, several areas in which the bribery offences under the two statutes provide inconsistent standards. The examination team was concerned that the differing standards add further confusion regarding the application of the overlapping offences. At the time of the on-site visit, the representative was unaware of the differing standards and how they would be implemented, but undertook to provide information following the on-site visit. The differing standards include the following:

- The active bribery offence under the Criminal Justice (Theft and Fraud Offences) Act 2001 does not cover offers.
- The active bribery offence under the Criminal Justice (Theft and Fraud Offences) Act 2001 covers the bribery of officials while the one under the Prevention of Corruption Act 2001 covers the bribery of agents.
- The active bribery offence under the Criminal Justice (Theft and Fraud Offences) Act 2001 covers bribery for an official to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties. The offence under the Prevention of Corruption Act 2001 covers bribes 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.
- The active bribery offence under the Criminal Justice (Theft and Fraud Offences) Act 2001 requires that the financial interests of the European Communities are damaged or likely to be damaged. No such requirement exists under the Prevention of Corruption Act 2001.
- A corrupt intent is only required under the Prevention of Corruption Act 2001.
- The definition of a “national official” under the Criminal Justice (Theft and Fraud Offences) Act 2001 is not autonomous, requiring reference to the definition of “official” or “public officer” in the national law of the Member State. The definition of “agent” under the Prevention of Corruption Act 2001 is autonomous.
- The scope of extra-territorial jurisdiction under the Criminal Justice (Theft and Fraud Offences) Act 2001 is broader than under the Prevention of Corruption Act 2001. For instance, nationality jurisdiction applies under the Criminal Justice (Theft and Fraud Offences) Act 2001, whereas under the Prevention of Corruption Act 2001 extraterritorial jurisdiction only applies where the offender is an Irish public official or a member of the European Parliament.

161. Following the on-site visit the DPP provided input on some of the above issues. Regarding how the courts would determine whether damages to the European Communities’ financial interests have occurred or are like to occur, as required by the Criminal Justice (Theft and Fraud Offences) Act 2001, the

¹²⁹ The question submitted to the Irish authorities was the following: Would it be preferable to amend the 2001 Prevention of Corruption Act in order that the language regarding the advantage to be offered, etc. to the foreign public official is consistent with the language under the Criminal Justice Act 2001?

DPP explained that this is an evidential matter and would depend on the circumstances of the case. Regarding how the Irish courts would reconcile inconsistencies between the two foreign bribery offences, the DPP stated that where a case comes before the DPP which is covered by both offences, the DPP would deal with the case under the most appropriate statute “having regard to the facts of the particular case” as well as whether a conviction would be more easily obtained under one statute. The DPP would decide under which statute to proceed in consultation with professional officers of the Directing Division. The *Garda Síochána* would have no role in such a decision. Concerning whether the Irish courts would be likely to impose the lower sanction under the Criminal Justice (Theft and Fraud Offences) Act 2001 if a foreign bribery case covered by both statutes were prosecuted under the Prevention of Corruption Act 2001, the DPP stated that to date the courts have not dealt with such an argument. Later, the Department of Justice, Equality and Law Reform came back to this issue, stating that the courts might have regard to the lower sentencing regime in a case which could be prosecuted pursuant to either offence, but that nevertheless the sentence imposed would be the one the court considered appropriate in the circumstances.

162. The representative of the DPP who attended the on-site visit explained that where a case of bribing a foreign public official is covered under both the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, he would prefer to prosecute under the Prevention of Corruption Act 2001 due to the availability of higher sanctions. He believed that the notion of *lex specialis* would not apply, leaving it open to prosecute under either statute, but stated that he would have to verify whether there was a relevant legal precedent. The DPP confirms that it was not consulted on the issue of the overlapping issues.

(iii) *Small number of domestic bribery cases*

163. Ireland has not had any cases of the bribery of foreign public officials, and is therefore not able to provide case law on the interpretation of the offence. For this reason, court interpretations of analogous concepts in domestic bribery cases would have been very useful. However, during the on-site visit the examining team was informed by the DPP that prior to the coming into force of the amendments to the Prevention of Corruption Act 2001 there had only been two prosecutions of domestic bribery that resulted in convictions at trial— one in 1944 and the other in 1986. In a third case the defendant entered a guilty plea, and in a fourth case the conviction was overturned on appeal due to a technical point related to the disclosure of evidence.

164. The DPP explained that pursuant to the 2001 legislation, prosecutions have been directed in eight matters (the number of suspects is higher). A number of guilty pleas have been entered in these cases and a number are still pending. There have still not been any convictions at trial or acquittals.

165. The quite low number of convictions for domestic bribery is cause for concern for two reasons. First, the absence of case law on the interpretation of concepts under the Prevention of Corruption statutory framework makes it impossible to anticipate how the foreign bribery offence under the Prevention of Corruption Act 2001 will be applied in practice. In addition, the existence of only two convictions at trial since 1889, the date when the first Prevention of Corruption Act came into force, puts into doubt the effectiveness of the statutory framework, and reinforces concerns articulated above that the framework is outdated.

Commentary

The lead examiners are of the view that establishing an effective legislative framework for implementing the Convention was not a legislative priority in Ireland at the time the 2001 amendments were made. This is reflected in the implementing legislation – the Prevention of Corruption Act 2001-- which is based on an outdated (1889-1916) anti-corruption statutory

framework which has only resulted in two convictions for bribery (domestic) since its enactment. It is also reflected in the lack of harmonisation between the overlapping foreign bribery offences in the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, which provide inconsistent standards and sanctions. The lead examiners therefore welcome Ireland's announcement that it is moving quickly to draft and introduce into Parliament a Prevention of Corruption (Amendment) Bill to, inter alia, take into account provisions of the OECD Convention.

The lead examiners therefore recommend that the Irish authorities amend the current statutory framework for implementing the Convention, with a view to providing an offence of bribing a foreign public official which employs unambiguous terms. This might be done in the context of the drafting of the Prevention of Corruption (Amendment) Bill. The lead examiners also recommend that the Irish authorities consolidate or harmonise the foreign bribery offence under the Prevention of Corruption Act 2001 with the one under the Criminal Justice (Theft and Fraud Offences) Act 2001, in order to remove inconsistencies between the two offences which could provide obstacles to the effective implementation of the Convention.

(c) Specific elements of the offence of bribing a foreign public official

(i) Coverage of non-pecuniary advantages

166. Contrary to Article 1 of the Convention, which requires criminalisation of offers, etc., of “any undue pecuniary or other advantage”, the 2001 Prevention of Corruption (Amendment) Act 2001, criminalises the offering, etc., of “any gift or consideration”. “Consideration” is defined as including “valuable consideration of any kind”. In contrast, the passive bribery offence covers the acceptance, etc., “of any gift, consideration or advantage”. The lack of uniformity in this respect between the active and passive bribery offences could raise a problem of interpretation. Furthermore the Criminal Justice (Theft and Fraud Offences) Act 2001 appears broader in this regard as it criminalises the giving, etc., of “an advantage of any kind whatsoever”.

167. In Phase 1 the Working Group questioned whether the terminology in the Prevention of Corruption Act 2001 covers all kinds of pecuniary and non-pecuniary advantages, tangible and intangible. Indeed, the Irish authorities conceded that the formulation created some uncertainty. As a result, the Working Group recommended that the Irish authorities consider amending the Prevention of Corruption Act accordingly.

168. The Draft Scheme of a Criminal Justice (Miscellaneous Provisions) Bill provides the following suggested amendment in order to address the recommendation of the Working Group in Phase 1 on this issue – *i.e.*, the formulation would be expanded to “any gift, consideration or advantage”. Although such an amendment would remove the inconsistency in this respect between the active and passive bribery offences under the Prevention of Corruption Act 2001, it might still not necessarily be clear that an “advantage” includes a non-pecuniary advantage, in light of the different wording in the Criminal Justice (Theft and Fraud Offences) Act.

Commentary

The lead examiners recommend harmonisation of the terminology used in the foreign bribery offences in the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 regarding the nature of the advantages prohibited from being offered, promised or given to a foreign public official.

(ii) *Definition of “foreign public official”*

169. The Prevention of Corruption Act 2001 extends the scope of the 1906 Prevention of Corruption Act to the bribery of certain categories of foreign public officials through the definition of “agent”, which in addition to certain categories of domestic public officials, includes: (i) a member of the government of any other state; (ii) a member of parliament, regional or national, of any other state; (iii) a member of the European Parliament; (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 of any other state; (vii) a judge of a court of any other state; (viii) a judge of a court under an international agreement to which the State is a party; (ix) a member of, or any other person employed by or acting 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.

170. On the other hand, the Criminal Justice (Theft and Fraud Offences) Act 2001 applies to the bribery of an “official”, which is defined as “any ‘Community’ or ‘national’ official, including any national official of another Member State”. The term “Community official” includes categories of foreign public officials covered by the offence of bribing an “agent” in the Prevention of Corruption Act 2001. In addition, the definition under the Criminal Justice (Theft and Fraud Offences) Act is not autonomous, in that what constitutes a “national official of another Member State” is to 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”. This raises the question of whether the bribery of an official of a State Member of the European Communities that does not fall under the definition of a “public official” in his/her state but does fall under the definition of an “agent” in the Prevention of Corruption Act 2001 would automatically be covered by the latter.

171. In Phase 1, the Working Group identified three areas in which the definition of “agent” in the Prevention of Corruption Act 2001 did not fully implement the definition of “foreign public official” under Article 1 of the OECD Convention, and thus recommended that Ireland consider the definition of “agent” to cover the following categories of foreign public officials:

- Employees of a foreign public enterprise including those under indirect control of a foreign government(s).
- Officials of territorial units other than states.
- Agents of international organisations to which Ireland is not a party.

172. In order to address the recommendation of the Working Group in Phase 1, the Draft Scheme of a Criminal Justice (Miscellaneous Provisions) Bill suggests that item (x) of the definition of “agent” in the Prevention of Corruption Act 2001 be expanded as follows: “any other person employed by or acting on behalf of the public administration, including those under control of the government, territory or sub-sovereign entity”. However, it appears that the suggested amendment would only effectively address one of these areas of non-compliance identified in Phase 1 – *i.e.*, officials of territorial units other than states.

173. The Draft Scheme seems inadequate to address the other two areas. Regarding “agents of international organisations to which Ireland is not a Party”, the Draft Scheme states that Ireland faces a “constitutional difficulty in enabling the prosecution of a case involving an official of an international organisation of which Ireland was not a member”. The Draft Scheme does not explain the basis in the Irish Constitution for such a limitation, and the Irish authorities have not provided an explanation in this regard.

174. Regarding “employees of a foreign public enterprise including those under indirect control of a foreign government(s)”, the Draft Scheme does not seem satisfactory. In particular, the suggested

amendment does not cover indirect control by a foreign government(s) of an enterprise (e.g., the case where the foreign government(s) exercises *de facto* control but does not hold in excess of 50% of the shares or does not control in excess of 50% of the votes attached to the shares). In addition, the suggested new language continues to refer to the “public administration” and does not mention “public enterprise”. Such a formulation is too narrow to satisfy the meaning of “public enterprise”, since the term “public administration” is commonly understood to mean government agencies that administer, oversee and manage public programs and have executive, legislative or judicial authority. Broadly speaking, such agencies have the authority to implement policy within a state framework. Pursuant to the Convention, a “public enterprise” could take any legal form, and is only excluded from coverage where it operates on a normal commercial basis in the relevant market (*i.e.*, without preferential subsidies or other privileges).

Commentary

The lead examiners recommend that the Irish authorities take appropriate steps to ensure that bribery of the following foreign public officials is covered: (i) employees of foreign public enterprises regardless of their legal form, including those under the indirect control of a foreign government(s); and (ii) agents of international organisations to which Ireland is not a party.

(iii) Bribery of an “agent”

175. The Prevention of Corruption Act 2001 applies to the bribery of an “agent” whereas the Criminal Justice (Theft and Fraud Offences) Act 2001 applies to the bribery of an “official”. The Irish authorities have not indicated whether the different terminology might have an impact on the effective application of the foreign bribery offences under the two statutes.

176. The agent-principal construct originates in the 1906 Prevention of Corruption Act, but has been expanded by the Prevention of Corruption Act 2001 in one important way: whereas the 1906 Act only applied to the bribery of an “agent” to do or omit to do “any act in relation to his principal’s affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business”, the 2001 Act also covers bribery of an “agent” for an act or omission in relation to his or her own office or position.

177. In any case, despite the broadening of the ambit in this respect, due to the retention of the term “agent” in the Prevention of Corruption Act 2001, and in the absence of jurisprudence, it is not possible to predict with certainty what the consequences of this terminology might be on the effectiveness of the foreign bribery offence in practice. For instance, the prosecution would have to prove that the person bribed was an agent. The DPP states that the prosecution would normally prove that a person was an “agent” by or through the evidence of his or her employer or the person for whom he or she was acting as an agent.

178. With regard to whether the agent-principal fiduciary relationship must be violated in order to prove an offence under the Act, the Irish authorities explained following the on-site visit that although inclusion of the term “agent” in the Prevention of Corruption Act 2001 demonstrates “that the protection of the agent-principal relationship is central to the objectives of the Act”, it does not follow that the Act is solely concerned with bribery involving the agent-principal relationship. The Department of Justice, Equality and Law Reform points out that the Prevention of Corruption Act 2001 does not expressly require a breach of the agent-principal fiduciary relationship, and that the definition of “agent” in the 2001 Act provides categories where no such agent-principal relationship exists, such as “a judge in a court in the State”.

179. In considering the agent-principal construct, it is important to keep in mind that it originated in the United Kingdom's Prevention of Corruption Acts.¹³⁰ The retention of the notion of an "agent" in the Prevention of Corruption Act 2001 is notable in light of comments made during the Irish Parliamentary debates in 2001 on the passage of the Prevention of Corruption Act 2001, during which the Department of Justice, Equality and Law Reform stated that "it is interesting to note that the amendment continues to use the word 'agent' despite the Deputy's previous comments about the use of outdated language in the Bill".

180. Retaining the notion of an "agent" in the Prevention of Corruption Act 2001 also raises an issue concerning the nature of the act which must be sought by the briber from the agent in exchange for the bribe. An offence is committed under subsection 2(2) of the 2001 Act where a bribe is provided to obtain an act or omission to induce an act or omission of (i) an agent "in relation to his or her office or position"; or (ii) "his or her principal's affairs or business". Concerning the difference between these two types of acts or omissions, the Irish authorities explain that the latter applies where an act or omission outside the agent's authorised competence is sought. Contrary to Article 1.4.c of the Convention,¹³¹ this response might appear to limit the application of the foreign bribery offence to cases where the act or omission sought is either (i) within the authorised competence of the agent; or (ii) within the authorised competence of his or her principal. However, the Irish authorities state that the offence can occur where the agent is requested to do something outside the competence of the agent or the principle if it relates to his or her position.

Commentary

The lead examiners recommend that Ireland seriously consider amending the Prevention of Corruption Act 2001 to remove any ambiguity concerning whether the prosecution must prove that the foreign public official was an "agent" and whether the agent-principal fiduciary relationship had been violated.

(iv) Corrupt intent

181. The Prevention of Corruption Act 2001 retains the notion of a "corrupt" intent, which was initially adopted in the early United Kingdom corruption statutes, including the 1906 Prevention of Corruption Act [note that this notion has not been used in the Criminal Justice (Theft and Fraud Offences) Act 2001]. Pursuant to subsection 2(2) of the Prevention of Corruption Act 2001, an offence is only committed where a person "corruptly gives or agrees to give", or "corruptly offers" any gift or consideration to an agent. As a result it is incumbent on the prosecution to prove a corrupt intent on the part of the bribe giver. The United Kingdom Consultation Paper, *Reform of the Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials* (December 2005) comments that there is not a clear definition of "corruption" and that "this is one of the main reasons why in practice other charges may be

¹³⁰ The United Kingdom Law Commission has stated that the essence of the specific crime of bribery lies in the subversion of the relationship of an agent to his/her principal or to the public. The Law Commission added the caveat that in the private sector an advantage is not corruptly given or received if the agent's principal agrees to it. The United Kingdom Draft Corruption Bill retains the agent-principal construct despite the recommendation of the Joint Committee on the Draft Corruption Bill to abandon it. The Joint Committee stated that discarding the agent-principal concept would extend the offence to bribes that are sanctioned by the agent's principal, and that it would make the definition of corruption less complex. The United Kingdom Government rejected this recommendation mainly because it feels that corruption constitutes the subversion of loyalty to a principal

¹³¹ Article 1.4.c of the Convention states that "'act or refrain from acting in relation to the performance of official duties' includes any use of the public official's position, whether or not within the official's authorised competence".

selected in preference to corruption”. Notably, the Irish Draft Scheme of a Criminal Justice (Miscellaneous Provisions) Bill retains the notion of a corrupt intent.

182. The United States Foreign Corruption Practices Act also requires a “corrupt” intent, and United States courts have interpreted this to mean that “an act is ‘corruptly’ done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result done by some unlawful method or means”. The Irish authorities have not indicated that a U.S.-like interpretation is intended under the Prevention of Corruption Act 2001. The Department of Justice, Equality and Law Reform explained following the on-site visit that according to extensive judicial analysis (*Smith* 1960 QB 423) the term “corruptly” denotes “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”. Jurisprudence concerning what constitutes a “corrupt bargain” was not provided. The DPP states that pursuant to the decision in *Smith* the prosecution does not have to prove that the bribe was made with a corrupt intent, but rather that the offer, etc., was made knowing that it might have a “tendency to corrupt”.

183. A “presumption of corruption” has been incorporated into the Prevention of Corruption Act 2001 in two specific cases which are not relevant to the bribery of foreign public officials. Under section 3, a “presumption of corruption” applies in respect of political donations under the Electoral Act, 1997 or the Local Elections (Disclosure of Donations and Expenditure) Act 1999. Under section 4, a “presumption of corruption applies” in relation to specific functions performed by a minister, etc. “of the State” (*i.e.* the Irish State)¹³². The Irish authorities have not provided a rationale for establishing a “presumption of corruption” in certain cases of domestic bribery but not for foreign bribery.

Commentary

The lead examiners recommend that Ireland clarify the term “corruptly” under the Prevention of Corruption Act 2001 in the absence of clear case law concerning what the prosecution must prove in this respect.

(v) Requirement of consent of Attorney-General

184. Subsection 2(2) of the 1906 Prevention of Corruption Act states that “a prosecution for an offence under this Act shall not be instituted without the consent...in Ireland of the Attorney-General or Solicitor-General for Ireland”. Nothing in the Prevention of Corruption Act 2001 indicates that subsection 2(2) of the 1906 Act has been repealed. The consent of the Attorney-General is not required under the Criminal Justice (Theft and Fraud Offences) Act 2001.

185. The Department of Justice, Equality and Law Reform explained that although the specific provision in the 1906 Prevention of Corruption Act has not been repealed, it has not applied in practice since the 1974 Prosecution of Offences Act came into force, because subsection 3(1) of the 1974 Act transfers all the prosecutorial functions of the Attorney-General’s Office to the Director of Public Prosecutions. The Department of Justice feels that it is therefore clear that the consent of the DPP and not the Attorney-General must be obtained in order to institute proceedings under the Prevention of Corruption Act 2001.

186. However, subsection 3(1) of the 1974 Prosecution of Offences Act provides that the Director of Public Prosecutions shall perform all the functions “capable of being performed in relation to criminal matters...by the Attorney-General immediately before the commencement of this section...” Since the

¹³² In the 2001 Presumption of Corruption Act, the Irish State is always referred to as the “State” with a capital “S”, and other states are referred to as “any other state” with a small “s”.

Attorney-General is required to provide his or her consent to prosecute cases under the 1906 Prevention of Corruption Act, and does not simply have the capacity to provide such consent, subsection 3(1) of the 1974 Prosecution of Offences Act does not appear unequivocally to repeal and replace the requirement for the Attorney-General's consent under the Prevention of Corruption Act 2001. The DPP points out that subsection 3(5) of the Prosecution of Offences Act maintains the requirement of the consent of the Attorney-General to "further proceedings" where a person is "charged with an offence" under certain statutes (*e.g.* the Genocide Act 1973), and that this provision does not refer to the 1906 Prevention of Corruption Act. The DPP also believes that an interpretation insisting upon the necessity of the Attorney-General's consent would completely disregard the rules of statutory interpretation. In any case, the Department of Justice intends to raise this issue with the Office of the Attorney-General.

Commentary

The lead examiners recommend that Ireland ensure that the Attorney-General's consent is not required under the 1906 Prevention of Corruption Act to initiate prosecutions.

3. Liability of Legal Persons for the Foreign Bribery Offence

(a) Establishing criminal liability of legal persons

187. Both the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 establish two forms of criminal liability for legal persons: (i) the identification theory of corporate criminal liability; and (ii) a form of derivative managerial liability.

(i) Identification theory of criminal liability of legal persons

188. Both the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 establish the liability of a "person" for the offences there under. Pursuant to paragraph 18(j) of the Interpretation Act 2005, a reference to a "person" in relation to an offence shall be read "as including a reference to a body corporate". (The issue of the non-express coverage of unincorporated bodies under the Prevention of Corruption Act 2001 is discussed further below.)

189. The jurisprudence on the criminal liability of legal persons in Ireland has evolved along the same lines as the jurisprudence in the United Kingdom (and for instance Australia and Canada). The standard of liability for legal persons is thus commonly known as the "identification theory", which generally means that only the acts of those who may be regarded as being the controlling mind and will of the company may give rise to the criminal liability of the company. The "identification theory" has been slightly clarified over the years by the courts.

190. Beginning with the decision in *Tesco Supermarkets Ltd. v. Natrass* [1971] 2 All E.R. 127, the court clarified that the board of directors, managing director and perhaps a superior officer of a company could carry out management functions and speak and act as the company. However, following the decision in *Tesco* it was still not clear to what extent the director's mandate must have been given directly to the person in question through constituent articles or the board of directors. Then, the decision in *Meridian Global Funds Management Asia Ltd. v. Securities Commission* [1995] 1 AC 500 clarified that a broader type of identification approach could be taken in determining whether a person could be identified as the "directing mind" of a company. In *Meridian* the court held that the primary rules of attributing the director's mandate is the company's constitution, memorandum and articles of association. Secondly, such an attribution could be made by analogy to company law (*e.g.*, a unanimous decision of all the shareholders). Thirdly the court could decide on a case-by-case basis through statutory interpretation whether a particular person satisfies the "directing mind" role.

191. Although the “identification theory” continues to operate in Ireland, recent case law has criticised the case-by-case approach to determining whether a particular person constitutes the “directing mind” as an almost *ad hoc* approach by the courts to attributing criminal liability, and thus contrary to the principle of “legal certainty”. This prohibition on vagueness in criminal rules in Ireland was initially upheld in *King v. A.G.* [1981] I.R. 233, in which Mr. Justice Hinchy held that the section of the criminal law in question was unconstitutional chiefly because it gave the courts too much discretion to decide what was criminally prohibited. Only a “clearly prescribed standard” could be consistent with the Constitution.¹³³

192. A recent report by the Irish Law Reform Commission on corporate killing¹³⁴ echoes these concerns. It states that “no single method of attributing liability to a corporate entity has been found to be authoritative”, and that “the current state of law may fall afoul of the legality principle” which requires “clear and precise legislative rules which effectively eliminate the need for creative interpretation by judges”. The Irish authorities indicate that in light of concerns about the constitutionality of the “identification theory”, they are considering whether to undertake a review of the law in this area. In addition, the Department of Justice, Equality and Law Reform indicates that the Minister of Justice recently established a Criminal Law Codification Advisory Committee, charged with codification of the criminal law into a single Crimes Act. It is intended that the codification will include a restatement, consolidation and reform of the law.

193. The Irish authorities state in the Phase 2 Supplementary Responses that there are no examples of a criminal proceeding against a body corporate where the natural person who committed the offence was not identified, was identified but no criminal proceedings were instituted, or was prosecuted but no conviction was obtained. However, following the on-site visit, the Irish authorities explained that there are numerous examples in the areas of Health and Safety or Environmental Law.

Commentary

The lead examiners recommend that the Irish authorities undertake a review of the law on the criminal liability of legal persons for the offence of bribing a foreign public official at the earliest opportunity, with a view to codifying and clarifying the scope of the law in this respect. In addition, the lead examiners recommend that, similar to other Common Law countries which have codified the law on the criminal liability of legal persons, Ireland expand the scope of the liability to cover, in addition to foreign bribery committed personally by a senior person (e.g. directors and high managerial agents), foreign bribery committed by a lower level person with the express or implied permission of a senior person. The Irish authorities might consider further broadening the criminal liability of legal persons in light of emerging trends in other Parties to the Convention.

(ii) Derivative managerial liability

194. Pursuant to section 9 of the Prevention of Corruption Act 2001 and section 58 of the Criminal Justice (Theft and Fraud Offences) Act 2001, where an offence has been committed under those statutes by a “body corporate” and the body corporate is proved to have committed the offence “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 purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence...” This provision serves to extend liability of the legal person to officers of the legal person who have contributed to the commission of an

¹³³ See: *The Criminal Character of a Company* (Conway, G., Irish Student Law Review, 1999)

¹³⁴ *Report: Corporate Killing* (Ireland, Law Reform Commission, LRC 77-2005)

offence through consent, etc. A provision of this type has also been included in some other Irish criminal statutes, such as the Illegal Immigrants (Trafficking) Act and the Occasional Trading Act.

195. In the Irish Law Reform Commission's report on corporate killing, it states that the purpose of this kind of criminal responsibility is to also attribute liability to individuals who are prominent within a corporation that has committed an offence. It further states that the test is to assess "how senior in the corporate entity the individual was and what their role in the offence was", and calls it a "derivative managerial liability" where a body corporate commits an offence. The Law Reform Commission indicates that it may be appropriate for such liability to be dependent on a conviction of the body corporate. In the Phase 2 Supplementary Responses, the Irish authorities confirm that the liability of the corporate body will have to be established "along with the consent or connivance or wilful neglect of an officer, etc. of the body corporate" in order to apply derivative managerial liability. The DPP explains that a conviction of the body corporate would not be necessary in order to apply derivative managerial liability, although the prosecution would have to prove that the body corporate committed the offence.

(b) Prosecution of legal persons in practice

(i) Non-coverage of unincorporated bodies

196. As mentioned above, the liability of legal persons under the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 is expressly restricted to "bodies corporate" by virtue of the definition of "person" in the Interpretation Act 2005. However, Article 2 of the Convention does not distinguish between incorporated and unincorporated legal persons.

197. During the on-site visit, the *Garda Síochána* explained that investigations under the Prevention of Corruption Act 2001 would only be made regarding corporate bodies.¹³⁵ On the other hand, the representative of the DPP felt that unincorporated bodies could be prosecuted, but was unable to provide examples. Following the on-site visit, the DPP provided the decision of DPP v. Wexford Farmers Club [High Court, 1993 No. 351 SS] as supporting authority, because the Court held that the term "person" in an offence under subsection 45(1) of the Intoxicating Liquor Act 1988, applied also to an unincorporated body of persons (i.e., a registered club). However, given that subsection 45.1(3) of the Intoxicating Liquor Act 1988 states that a "registered club" shall be guilty of an offence where an individual contravenes the Act, the lead examiners feel that it cannot be ruled out that the Prevention of Corruption Act 2001 does not apply to the bribery of unincorporated bodies.

Commentary

The lead examiners believe that the non-application of foreign bribery offence to unincorporated legal persons, such as unincorporated associations, foundations, partnerships, etc., would result in a sizable gap in the application of the Convention. The lead examiners appreciate that it is the position of the DPP that unincorporated bodies can be prosecuted for foreign bribery, but believe that an express statement to this effect would remove any ambiguity, and thus recommend that Ireland expressly provide for the liability of unincorporated legal persons for the offence.

¹³⁵ Contrast the situation under the 2001 Prevention of Corruption act to the Companies Act 1990, which, in addition to "bodies corporate" also applies to certain unincorporated companies in certain circumstances.

(ii) *Use of liability of legal persons in general*

198. During the on-site visit, the Irish authorities were not able to point to any examples where legal persons were investigated or prosecuted for violations of the Prevention of Corruption Act 2001 or the pre-existing 1889-1916 Prevention of Corruption statutory framework, including for domestic corruption. Following the on-site visit, the DPP explained that there has been at least one investigation involve a legal person, but for legal reasons further comment is precluded.

Commentary

The lead examiners recommend that awareness-raising of the foreign bribery offences and the Convention for the Garda Síochána and members of the DPP be incorporated into training programmes and include a component on the application of the relevant legislation to legal persons.

4. Adjudication and Sanction of the Foreign Bribery Offence

(a) Sanctions imposed by the courts

(i) Criminal sanctions

199. In Irish law, different sanctions are provided for active bribery of a foreign public official. Section 1 of the Prevention of Corruption Act 1906 provides that the foreign bribery offence carries a penalty of up to 10 years imprisonment and/or an unlimited fine on indictment (1 year and/or EUR 3000 for summary offence).

200. The offence under section 43 of the Criminal Justice (Theft and Fraud Offences) Act 2001, which covers the specific offence of active corruption of an EU official with damage to EU's financial interests, carries a less severe penalty of a maximum of 5 years imprisonment and/or an unlimited fine. This penalty is in fact inferior to the maximum penalty for a domestic bribery offence, and, if applied in practice, could raise issues of conformity with Article 3(1) of the Convention, which prescribes that penalties for foreign bribery "shall be comparable to that applicable to the bribery of the Party's own public officials" (for discussion on overlap between the two offences, see section C.2. above). Representatives of the DPP's office pointed out that they are free to decide under which offence to prosecute. They admitted, however, that the existence of lower sanctions for foreign bribery under the Criminal Justice (Theft and Fraud) Offences Act could have a bearing on the mind of the Courts when handing down sentencing decisions, especially if this were brought to their attention by the defendant, arguing for the lesser penalty on the basis of unequal treatment.

201. As mentioned above, Ireland has not had any cases of bribery of foreign public officials as of the time of this review, and is therefore not able to provide examples of sentences handed down by the courts in this regard. Examples of sentences handed down in domestic bribery cases are also scarce, since, as noted earlier, there have only been two successful prosecutions of domestic bribery – one in 1944 and the other in 1986 prior to the coming into force of the amendments to the Prevention of Corruption Act 2001. Since 2001, there has been only one bribery conviction, where the recipient of the bribe was sentenced to twelve months imprisonment in the first instance for receiving bribes in the amount of EUR 12 697 in return for assistance in the purchase of a right of way from Dublin County Council. This sentence was

overturned on appeal for technical reasons. The Court decision submitted by the Irish authorities does not indicate that the briber was convicted.¹³⁶

202. With specific regard to the sanctioning of legal persons, section 11 of the Interpretation Act 1937 provides that the term “person” applies to both natural and legal persons. Consequently, sanctions under the Prevention of Corruption Act and/or the Criminal Justice (Theft and Fraud) Offences Act are also applicable to legal persons. However, due to the problems identified above relating to the regime of liability of legal persons, concerns remain as to the effective, proportionate and dissuasive character in practice of sanctions applicable to legal persons. These concerns are notably reinforced by the fact that there have been no prosecutions or convictions of bodies corporate for domestic or foreign bribery in Ireland as of the time of this review.

(ii) *Confiscation*

Criminal confiscation

203. Criminal confiscation procedures are provided for under the Criminal Justice Act 1994.

204. Section 61 of the Criminal Justice Act (CJA) 1994 allows for forfeiture orders to be pronounced by the Court (i.e., there is no need for a separate application by the DPP) to confiscate the instrument of crime (i.e. the bribe) by the court. If the bribe was not in the form of money, or if the bribe is no longer in possession of the briber, confiscation of a monetary equivalent is not possible.

205. Confiscation orders in respect of property which constitutes a benefit or pecuniary advantage obtained as a consequence of an offence may be ordered under section 9 of the CJA 1994. This would cover the proceeds of bribery as well as their monetary equivalent. Confiscation is available only upon discretionary application by the DPP,¹³⁷ under a separate procedure, and after conviction on indictment. The standard of proof required to determine any question arising under this procedure is that applicable to civil proceedings (i.e. issues of evidence are determined on the balance of probabilities, rather than under the criminal standard of reasonable doubt). Confiscation of proceeds is possible only if the proceeds are in the possession of the person convicted for the specific offence in relation to which the proceeds were obtained. If the proceeds are with a third party who has not been convicted, then only civil forfeiture procedures may be used.

206. The mechanisms for criminal confiscation are of complicated application, as representatives of the Garda and DPP acknowledged. This is notably due to the fact that applications for criminal confiscation may only take place once a first trial has taken place and the accused has been convicted and sentenced to the extent that the Court believes is appropriate. Law enforcement representatives explained that the confiscation provisions in the CJA 1994 were seen, when they first entered into force, to contain novel provisions and constitute a potentially powerful tool in the deterrence of criminal activity. However, there have been only a small number of cases processed by the Courts. Consequently, and also due to political pressure to vigorously deal with organised crime, legislation was enacted in 1996 to provide for civil confiscation measures.

Civil forfeiture

¹³⁶ The People (DPP) v Redmond, Court of Criminal Appeal, 28 July 2004.

¹³⁷ Note that for drug trafficking offences, it is mandatory for the Court to determine whether the convicted person has benefited from the offence, and to what extent. Initiation of proceedings by the DPP is not necessary.

207. The Proceeds of Crime Act (POCA) 1996 covers confiscation of the proceeds of crime (confiscation of the bribe, as an instrument of crime, is only available under criminal confiscation procedures). Civil forfeiture orders under POCA can be made on application *ex-parte* by the Garda (Chief Superintendent or above) or an officer of the Revenue Commissioners. The court can pronounce interim orders¹³⁸ (valid 21 days) or interlocutory orders.¹³⁹ In both cases, the property is in fact “blocked” and can not be used by the owner. After 7 years, it is possible to apply for a disposal order (i.e. the property is then transferred to the Minister or another person).¹⁴⁰

208. Under POCA, proceeds cover any property obtained or received as result of an offence, and property acquired with property obtained as result of an offence, as long as the value of the property is not less than EUR 13 000. This would thus cover direct and indirect proceeds. Confiscation orders under POCA can be pronounced against any person in possession of proceeds of crime, whether or not they have been convicted previously or not (i.e. whether the proceeds are in the hands of the briber, or a third party).

209. In 1996, Ireland also passed legislation creating the Criminal Assets Bureau (CAB), established pursuant to the Criminal Assets Bureau Act 1996. The CAB is staffed by officers from An Garda Síochána, Revenue Commissioners Taxes, Revenue Commissioners Customs and the Department of Social, Community and Family Affairs. As of January 2006, the CAB had a total staff of 52 persons. The objectives of the Bureau include the identification of assets, wherever situated, of persons, which derive or are suspected to derive directly or indirectly from criminal activity. The CAB has primary responsibility for taking action under POCA, but may also assist the DPP in the identification of proceeds of crime for purposes of criminal confiscation procedures. Figures provided in the annual reports of the CAB show a steady increase in the monetary value of property confiscated under POCA. 2004 saw the first two disposal orders pronounced¹⁴¹, amounting to EUR 276 000, which were transferred to the Minister of Finance for the benefit of the Central Fund. In 2005, this amount reached over EUR 2 million, for a total of 13 disposal orders.

(iii) *Additional civil or administrative sanctions*

210. The Prevention of Corruption Act and the Criminal Justice (Theft and Fraud Offences) Act do not provide for other sanctions or exclusions.

211. As explained earlier, the Companies Act does not include foreign bribery offences, but concerns fraud and accounting, which could be ancillary offences to foreign bribery. However, under section 160 of the Companies Act 1990, it is possible for disqualification orders to be imposed which have the effect of prohibiting persons from being appointed or acting in certain capacities (auditor, director, etc.), or being involved in the promotion, formation or management of any company. Disqualification orders are imposed automatically in the criminal courts where a person is convicted on indictment of “any indictable offence in relation to a company, or involving fraud or dishonesty”.¹⁴² In the civil courts, they may be imposed in a variety of circumstances, including where the directors or other officers of a company have been guilty of any fraud in relation to a company, its members or creditors, or have breached their duties, or “where the

¹³⁸ Section 2, POCA 1996.

¹³⁹ Section 3, *ibid.*

¹⁴⁰ Section 4, *ibid.*

¹⁴¹ This is because any property confiscated under an interim order is effectively frozen for seven years; hence, the first applications for disposal orders under POCA 1996 legislation arrived before the Courts only in 2003.

¹⁴² Section 160(1) of the Companies Act 1990.

conduct of such persons makes them unfit to be concerned in the management of a company.”¹⁴³ As no cases involving foreign bribery have yet arisen in the Irish courts it is not possible to say with certainty whether and/or to what extent Irish law would permit a conviction for a foreign bribery offence, or proof in the civil courts of acts of foreign bribery, to constitute “fraud or dishonesty” and, consequently, to provide a sufficient basis for the imposition of resulting disqualification orders under the Companies Acts. However, in the view of the ODCE, such possibilities exist.

Commentary:

The lead examiners are concerned about the very low number of convictions under the Irish anti-corruption legislation. This raises questions as to the effective, proportionate and dissuasive character of sanctions for bribery, including bribery of foreign public officials.

With regard to confiscation, the lead examiners welcome the facilitated procedures introduced by the Proceeds of Crime Act 1966, and the creation of the Criminal Assets Bureau to identify and pursue confiscation of proceeds of crime. Given that monetary sanctions are a fundamental deterrent for economic offences such as foreign bribery, the lead examiners encourage the Irish authorities to draw the attention of investigative and prosecutorial authorities to the importance of requesting confiscation on bribers.

With regard to legal persons, the lead examiners consider that Ireland does not apply effective, proportionate and dissuasive sanctions on legal persons for foreign bribery as required by the Convention principally because of the considerations set forth above relating to the regime for the liability of legal persons.

The lead examiners also recommend that Ireland consider providing for the imposition of additional civil or administrative sanctions by the courts on legal and natural persons convicted of foreign bribery, as is possible for other related offences.

Finally, given the absence of any foreign bribery conviction to date, the lead examiners recommend that the Working Group monitor the level of sanctions and application of confiscation measures when there has been sufficient practice, in order to ensure that the sanctions handed down by the courts are effective, proportionate and dissuasive.

(b) Sanctions imposable by agencies other than the courts

(i) Officially supported export credits

212. As previously indicated, Ireland does not have any official export credit programme (see section B.3.c. above), and can therefore not use this as an additional tool to sanction corporations suspected or convicted of foreign bribery.

213. As concerns other forms of support that Irish trade promotion agencies provide to Irish exporters, there is no specific procedure to suspend or withdraw support where the applicant may be suspected or convicted of foreign bribery. In any case, there is no systematic procedure to verify that applicants are not or have not been involved in foreign bribery instances.

¹⁴³ Section 160(2)(a), (b) and (d), *ibid.*

(ii) *Official development assistance*

214. Irish Aid includes a standard and broadly-worded anti-corruption clause in its aid procurement contracts, under which the tenderer must disclose any prior conviction for corruption, but only where those convictions were in relation to contracts with Irish Aid. Irish Aid reserves the right to reject a tender where a tenderer has been convicted. However, as mentioned earlier (see section B.3.d.), there are no processes in place to verify these convictions, nor to follow-up on this once the contract has been signed. Representatives of Irish Aid present at the on-site visit were not aware that any tender had been rejected on the grounds of corruption convictions.

(iii) *Public procurement and public-private partnerships*

Public procurement

215. In Ireland, government agencies are individually responsible for public procurement relating to the work of the agency. Nevertheless, the National Public Procurement Policy Unit (NPPPU) of the Department of Finance sets out regulations and guidelines on public procurement to which agencies should adhere. In their responses to the Phase 2 questionnaires, Ireland indicated that section 53 of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 provides that persons shall be excluded from public tenders where they have been convicted of corruption. However, the definition of corruption under these regulations is limited to the meaning given by the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union.¹⁴⁴ Consequently, convictions for bribery of a non-EU foreign public official would not trigger an exclusion from public tenders in Ireland under the law. Discussions at the on-site visit confirmed that convictions for bribery of non-EU public officials would not be taken into consideration in the context of public procurement decisions, but indicated that they felt that these Regulations would cover the vast majority of instances of bribery that might arise in Ireland's public procurement regime. Representatives of the public procurement authorities explained, during on-site discussions, that they have little experience to date with these Regulations, as they have only come in force recently (March 2006). However, it would appear that the due diligence process relies mostly on self declarations by applicants. There is no central register for checking prior convictions, and panellists were not certain whether debarment lists of International Financial Institutions would be verified. In addition, representatives of the public procurement authorities indicated that the due diligence process occurs only before the contract is awarded, and that there is no continued due diligence afterwards, as such a requirement is not provided for by EU rules.

Public private partnerships

216. In addition to regular public procurement mechanisms, Ireland also relies on public-private partnerships (PPPs) for infrastructural investment. PPPs are partnerships between public sector organisations and private sector investors and businesses for the purpose of designing, planning, financing, constructing and/or operating infrastructure projects normally provided through traditional procurement mechanisms by the State.¹⁴⁵ PPP arrangements are an important element of the Irish infrastructural renewal: the government has set a target that around 13% of capital spending should be delivered by PPPs between 2006 and 2010. As of June 2005, there were around 50 PPP projects with a capital cost of EUR 20 million or more in operation, at the planning or procurement stage.

¹⁴⁴ See the definition of "corruption" under section 3 of the European Communities (Award of Public Authorities' Contracts) Regulations 2006.

¹⁴⁵ See the Framework for Public Private Partnerships at www.ppp.gov.ie/keydocs/guidance/central/Framework%20for%20Public%20Private%20Partnerships.pdf.

217. The National Development Finance Agency (NDFA), established under the National Development Finance Agency Act 2002, has the function of advising on the optimal means of financing the cost of public sector investment projects. Its role was recently expanded to facilitate the establishment of a new Centre of Expertise, with the aim of centralising responsibility for the procurement and construction phase of project, other than in the transport and environment areas, which will continue under the current procurement agencies (or their successors). Individual ministries continue to be responsible for all aspects of the assessment and approval of PPP projects, including the decision to set up a PPP. Thus, PPP procurement for all new projects has been centralised, except for roads and rail (where existing arrangements with the National Roads Authority and Railway Procurement Agency continue). The Irish authorities have explained that the rules for participation in PPPs are the same as for public procurement. Thus, persons may be excluded from PPPs only where they have been previously convicted of corruption of EU officials. Verification mechanisms and due diligence procedures are also similar.

Commentary:

The lead examiners recommend that agencies in charge of administering public funds and government contracts, notably Ireland Aid, the public procurement authorities, and those responsible for public-private partnerships, take due consideration of prior convictions for all foreign bribery offences in their contracting decisions. In addition, they recommend that Ireland put in place due diligence procedures to verify the criminal records of applicants and of relevant officers of applicants where the applicants are corporations, for offences of dishonesty, including breaches of the Companies Act, both before the contract is awarded and during its execution.

5. The False Accounting Offence

(a) The offence

218. As indicated earlier (see section B.5 on accounting and auditing), the main requirements on the proper keeping of books of account are in section 202 of the Companies Act 1990. Failure to keep proper books of accounts carries penalties of imprisonment not exceeding 12 months and/or a fine not exceeding EUR 1 905 on summary conviction, and of imprisonment not exceeding 5 years and/or a fine not exceeding EUR 12 697 on indictment.¹⁴⁶ Under section 243, officers of the company may be similarly sanctioned for falsification of documents. In addition, penalties are provided for persons knowingly or recklessly furnishing false information in respect of the Companies Act requirements, in the amount of a fine not exceeding EUR 12 697 and/or imprisonment up to 7 years, depending on the existence of aggravating factors.¹⁴⁷

219. Section 10 of the Criminal Justice (Theft and Fraud Offences) Act 2001 also provides for a false accounting offence, although this offence seems to include additional elements of intent and dishonesty. Penalties are much higher under this Act and carry penalties of imprisonment of up to 10 years and/or an unlimited fine.

(b) Sanctions

220. The Office of the Director of Corporate Enforcement (ODCE) is legally responsible for investigating and enforcing suspected breaches of the Companies Act legislation. The ODCE reports that, since it was established in November 2001, and up to the end of 2005, 34 companies and 37 directors have

¹⁴⁶ Section 240 of the Companies Act 1990.

¹⁴⁷ Sections 240(1), 242(1), (1)A, and (2), *ibid.*

been convicted of 95 offences of failing to keep proper books of account in accordance with section 202 requirements. All the companies and directors were fined by the Courts, with one exception where a suspended prison sentence was pronounced. The ODCE explained that, while fines at or close to the current maximum are occasionally imposed, ODCE experience is that most convictions attract fines of less than EUR 1 000 per offence.

221. In addition, the ODCE secured up to the end of 2005 the civil disqualification of 25 company directors and senior managers from acting in a leading position in companies because of findings of significant misconduct or omissions in the performance of their duties.¹⁴⁸ The majority were disqualified for five years or for a longer period. These figures show a sharp increase in enforcement of company law, as compared to the period before 2001. Prior to the establishment of the ODCE in November 2001, the Department of Enterprise, Trade and Employment undertook an enforcement role of the Companies Acts, and secured 10 convictions of companies and 17 convictions of directors for breaches of section 202 requirements between 1995 and 2001.

222. Ireland has supplied limited information about the enforcement of the false accounting offences. While the Phase 2 Responses provide figures relating to enforcement by the ODCE of failure to meet bookkeeping requirements under section 202 of the Companies Act 1990, no statistics have been supplied with regard to the enforcement of the false accounting offences by the Garda or the DPP, under the Criminal Justice (Theft and Fraud Offences) Act 2001. This raises questions regarding the number of false accounting offences prosecuted under the Criminal Justice (Theft and Fraud Offences) Act 2001, and causes some concern, notably because of the relatively low level of monetary sanctions available under the Companies Act 1990, especially where they may be imposed on legal persons.

223. Following the on-site visit, Ireland further indicated that the Company Law Review Group is currently finalising a Companies Consolidation and Reform Bill. This Bill aims to consolidate existing Irish company legislation, and to introduce a number of reforms. Among the new initiatives to be contained in the Bill will be a new system for the categorisation of offences, according to the level of seriousness of each individual offence. As part of this exercise, the level of fines attributable to each category of offence has been reviewed and consequently many fines would be increased to more modern realistic levels.

Commentary:

The lead examiners welcome the creation of the Office of the Director of Corporate Enforcement and its action to effectively enforce accounting offences under company law.

Nevertheless, the lead examiners are concerned about the low level of monetary sanctions available in the law and imposed in practice, especially where these sanctions may be imposed against legal persons. They recommend that Ireland ensure that it provides effective, proportionate and dissuasive penalties for omissions and falsifications in respect of the books, records, accounts and financial statements of companies. In this respect, they notably encourage Ireland to promptly proceed with the adoption of appropriate legislation.

6. The Money Laundering Offence

224. Article 7 of the Convention states that a Party “which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the

¹⁴⁸ Section 160, *ibid*, provides the possibility for the Courts to pronounce disqualifications of persons convicted of indictable offences under company law.

same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.”

(a) Scope of the money laundering offence

225. In Ireland, money laundering has been a criminal offence since 1994 with the enactment of the Criminal Justice Act (CJA) 1994.

226. Section 31(1) of the CJA (1994) (as substituted by section 21 of the Criminal Justice (Theft and Fraud Offences) Act 2001 describes the current extent of offence. A person is guilty of a money laundering offence if he, knowing or believing that property is or represents the proceeds of criminal conduct, or being reckless whether it is or represents the proceeds of criminal conduct¹⁴⁹, deals with the property in a number of specific ways. These include converting, transferring, handling or removing the property from the State; concealing or disguising the true nature, source, disposition, ownership or any rights with respect to the property; and generally acquiring, possessing and using the property.

227. Section 31(7) of the CJA 1994, as amended by substitution of section 21 of the Criminal Justice (Theft and Fraud Offences) Act 2001 extends the predicate offence to all criminal conduct, and sets out a double criminality requirement to the money laundering offence, which applies, inter alia, where foreign bribery is the predicate offence. Criminal conduct is defined therein as conduct which constitutes an indictable offence; or where the conduct occurs outside the State would constitute such an offence if it had occurred inside the State and also constitutes an offence under the law of that other place. This would imply, for instance, that if a company or a natural person from Ireland paid a bribe to a foreign public official from country B, but the act was accomplished in country C, where the foreign bribery offence does not exist, then the predicate offence would not exist. Consequently, there would be no money laundering offence generated by the foreign bribery.

228. The money laundering offence covers both the acts of laundering one’s own proceeds (“self-laundering”) and a third person’s proceeds. It is not necessary that a person be convicted of the predicate offence in order to secure a conviction for money laundering. In this regard, the Irish authorities have indicated that a new provision in the Criminal Justice (Mutual Assistance) Bill 2006 will explicitly state that an indictable offence can be considered a predicate offence irrespective of whether or not a person has been convicted for that offence.

229. Pursuant to section 59 of the CJA (1994), where an offence is committed by a body corporate under the Act and the offence is proved to have been committed with the consent, connivance or neglect on the part of a person being a secretary, manager or any other officer of the body corporate, then that person, as well as the body corporate, is liable for the offence.

Commentary

The lead examiners recommend that the Ireland authorities amend the double criminality exception for the money laundering offence under section 31(7) of the CJA (1994) in order to ensure that foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred.

¹⁴⁹ Section 16(2) of Criminal Justice (Theft and Fraud Offences) Act 2001, provides that a person is reckless if he disregards a substantial risk that the property handled is stolen.

(b) Enforcement of the money laundering offence

230. Irish investigative authorities pass money laundering investigation files to the DPP for directions as to the initiation of a prosecution. The number of money laundering prosecutions in Ireland has been 53 since the enactment of the CJA (1994). Between 2001 and 2004 inclusive, 15 people were charged with money laundering and 8 people have been convicted¹⁵⁰. The lead examiners do not have the statistical data on money laundering investigations to reach a final conclusion, but are concerned about the apparently relatively low number of prosecutions and convictions for money laundering offences since the enactment of the 1994 Act. As well, given the lack of comprehensive statistical data on money laundering investigations, prosecutions and convictions, they note that Ireland should maintain more detailed statistics on sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets, and whether bribery is the predicate offence.

(c) Sanctions for money laundering

231. The penalties under section 31(2) of the 1994 Act apply to both natural and legal persons. A person found guilty of an offence of money laundering on conviction or indictment is liable to a fine or to imprisonment for a term not exceeding 14 years, or to both. There is no maximum stated level of fine applicable for conviction on indictment.

Commentary

The lead examiners recommend that Ireland take appropriate measures to enforce its money laundering offence more effectively in connection with bribery cases.

The lead examiners also recommend that Ireland maintain more detailed statistics on sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets, and whether bribery is the predicate offence. They recommend that the Working Group monitor the sanctions for money laundering imposed in Ireland.

¹⁵⁰

In its 2006 evaluation of Ireland, the FATF raised concerns of the relatively low number of prosecutions and convictions for money laundering offences since the enactment of the 1994 Act. FATF also reported a lack of comprehensive statistical data on ML investigations, prosecutions and convictions. Financial Action Task Force, Third Mutual Evaluation Report, Anti-money Laundering and Combating The Financing of Terrorism, Ireland, February 2006, pagg.37-38.

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

1. The Working Group appreciates the openness of those Irish Government officials who participated in the Phase 2 examination, as well as their genuine efforts to provide requested information to the examining team within a reasonable period following the on-site visit. However, for the reasons given below, the Working Group concludes that Ireland has not fully met its Phase 2 monitoring obligations, with the result that the Working Group was not able to adequately and fully assess Ireland's implementation of the Convention under the Phase 2 procedures.

2. The Working Group takes note of the very low level of attendance by Irish officials and representatives of other groups at the on-site visit, which limited the lead examiners in assessing issues. Only the Office of the Director of Corporate Enforcement was represented at a panel concerning awareness-raising, prevention and detection of foreign bribery by the public sector. The absence in particular of one key ministry at this panel signals that Ireland does not appreciate the crucial role that it needs to play in ensuring an adequate level of awareness of the Convention and the relevant legislative framework. Indeed, the Department of Justice, Equality and Law Reform acknowledged that no awareness-raising activities on the Convention have been provided by the Irish authorities either internally or targeted at the private sector. In addition, the private sector was not consulted on the 2001 amendments to the relevant legislative framework. It is therefore not surprising that only one Irish company attended the panel dedicated to the private sector, and that no representatives of the legal profession attended the panel on the perspectives of the private Bar and legal academics.

3. The low level of participation also limited the lead examiners in assessing the effectiveness of the statutory framework for implementing the Convention as they were not afforded the interactive environment necessary for an effective examination of the implementation of Article 1 of the Convention. The importance of a fully interactive examination of the relevant legislative framework is underscored by its complexity, given that Ireland implemented Article 1 of the Convention through two offences contained in two statutes, one statute which is based on a statutory framework that has been widely criticised as outdated, and given that the two offences contain overlapping and apparently inconsistent elements.

4. The Working Group is pleased that since the Phase 2 on-site visit Ireland has demonstrated that it intends to give implementation of the Convention higher priority. A large delegation consisting of representatives from all the key ministries and agencies involved in implementing the Convention attended the examination in the Working Group, and was willing to engage in an in-depth discussion on Ireland's implementation of the Convention. However, in the short time-frame available, and given the impossibility of holding separate meetings with all the relevant bodies to elicit different opinions and interpretations as required by the procedures for Phase 2 on-site visits, the Working Group was unable to engage in the discussions which should have taken place at the on-site visit. Ireland also demonstrated renewed commitment through its announcement that preparation of a Prevention of Corruption (Amendment) Bill had been approved by the Government, and that the Government intends to move quickly to introduce it to Parliament.

5. In view of these circumstances, the Working Group welcomes and accepts an invitation by Ireland to carry out another two to three-day on-site evaluation of Ireland in approximately one year, which the Working Group feels is necessary to achieve two main purposes: (i) to provide the examination team with the opportunity to convene the panels that were not attended or were inadequately attended and ensure an adequate assessment of the issues that should have been discussed during these panels; and (ii) to make an effective assessment of the implementation of Article 1 of the Convention. Regarding the latter purpose,

one year from now the examination team will also be able to assess progress made on reforming the legislative framework for implementing Article 1, due to the soon to be published Prevention of Corruption (Amendment) Bill. In addition, since Ireland recently introduced reforms to improve the process for consulting on statutory instruments, a second on-site visit will enable the team to assess the effect of this new process on implementation of the Convention, in particular whether the private sector is actively engaged.

6. In addition, based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Ireland, the Working Group (i) makes further recommendations to Ireland under Part 1 and (ii) will follow-up the issues under Part 2 where there has been sufficient practice in Ireland.

1. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

7. With respect to awareness raising and prevention related activities to promote the implementation of the Convention and Revised Recommendation, the Working Group recommends that Ireland:

- a) Promptly take all necessary measures, including appropriate training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Irish companies operating abroad, including foreign diplomatic representations, trade promotion and development aid agencies [Revised Recommendation I];
- b) Promptly take all necessary action, in cooperation with business organisations and other civil society stakeholders, to improve awareness of the foreign bribery offence among companies, and in particular small and medium size companies, active in foreign markets, and advise and assist companies with regard to the prevention and reporting of foreign bribery; and consider appointing a specific committee in charge of developing and coordinating such awareness raising programmes [Revised Recommendation I]; and
- c) Work proactively with the accounting and auditing profession to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to include training on foreign bribery in their professional education and training [Revised Recommendation I].

8. With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that Ireland:

- a) Adopt comprehensive measures to protect public and private whistleblowers in order to encourage those employees to report suspected cases of foreign bribery without fear of retaliation [Revised Recommendation I];
- b) Establish procedures to be followed by public sector employees, and in particular employees of the Department of Foreign Affairs, and of trade promotion and development aid agencies, for reporting to law enforcement authorities in Ireland credible information about foreign bribery offences that they may uncover in the course of their work, and encourage and facilitate such reporting [Revised Recommendation I];
- c) Ensure that the necessary human and financial resources are made available (i) to the FIU for adequately dealing with suspicious transactions reports and forwarding them in due time to the investigative authorities; and (ii) to the Irish Financial Regulator and Self-Regulatory

Organisations (non-financial sector) for an adequate enforcement of sanctions for non compliance with AML laws and regulations [Revised Recommendation I]; and

- d) Require external auditors to report all suspicions of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, regardless of whether or not the suspected bribery would have a material impact on the financial statements, and of whether the suspected offence falls under the Prevention of Corruption Act 2001 or the Criminal Justice (Theft and Fraud Offences) Act 2001; and consider requiring external auditors, where appropriate, to report such suspicions to the competent law enforcement authorities [Revised Recommendation V.B.].

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

9. With respect to the investigation and prosecution of foreign bribery offences, the Working Group recommends that Ireland ensure the continuation of provision of intensified training to police officers, prosecutors and judges on foreign bribery, including the practical aspects of bribery investigations and the application of foreign bribery offences to legal persons [Revised Recommendation I].

10. Concerning jurisdiction, the Working Group recommends that Ireland promptly establish nationality jurisdiction under the Prevention of Corruption (Amendment) Act 2001 as provided under the Criminal Justice (Theft and Fraud Offences) Act 2001 [Convention, Article 4].

11. With respect to the implementation of Article 1 of the Convention through the offence of bribing an “agent” under the Prevention of Corruption Act 2001 and the offence of bribing an “official” under the Criminal Justice (Theft and Fraud Offences) Act 2001, the Working Group recommends that, in the context of the ongoing preparation of the Prevention of Corruption (Amendment) Bill, Ireland amend the current statutory framework as follows:

- a) Consolidate or harmonise the offence under the Prevention of Corruption Act 2001 with the one under the Criminal Justice (Theft and Fraud) Offences Act 2001, to remove inconsistencies between the two offences which could provide obstacles to the effective implementation of the Convention, including as follows:
 - (i) the terminology used to describe the nature of the advantage prohibited from being offered, promised or given,
 - (ii) by seriously considering amending the Prevention of Corruption Act 2001 to remove any ambiguity concerning whether the prosecution must prove that the foreign public official was an “agent” and whether the agent-principal fiduciary relationship has been violated,
 - (iii) by clarifying the term “corruptly” in the Prevention of Corruption Act 2001, in the absence of clear case law of what the prosecution must prove in this respect,
 - (iv) by ensuring that the Attorney-General’s consent under the 1906 Prevention of Corruption Act is not required; and
- b) Take appropriate steps to ensure that bribery of foreign public officials covers: (i) employees of foreign public enterprises regardless of their legal form, including those under the indirect control of a foreign government(s), and (ii) agents of international organisations to which Ireland is not a party [Convention, Article 1].

12. With respect to the liability of legal persons for the offences implementing Article 1 of the Convention under the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, the Working Group recommends that Ireland undertake a review of the relevant law on the criminal liability of legal persons with a view to codifying and clarifying its scope, and that in addition Ireland do the following:

- a) Expand the scope of liability to cover, in addition to bribery committed personally by a senior person (e.g., directors and high managerial agents), bribery committed by a lower level person with the express or implied permission of a senior person; and
- b) Expressly provide for the liability of unincorporated legal persons [Convention, Article 2].

13. With respect to related tax, accounting and money laundering offences, the Working Group recommends that Ireland:

- a) Amend its tax legislation to clarify that bribes to foreign public officials are not tax-deductible; and expressly communicate to tax examiners the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, through the issuance of guidelines or manuals, and training programmes [Revised Recommendation I and IV];
- b) Ensure that false accounting offences are sanctioned in an effective, proportionate and dissuasive manner [Convention, Article 8];
- c) Amend the double criminality exception for the money laundering offence under section 31(7) of the Criminal Justice Act 1994, in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred [Convention, Article 7]; and
- d) Maintain more detailed statistics on (i) sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets, and whether bribery is the predicate offence; and (ii) on suspicious transaction reports that result in or support bribery investigations, prosecutions and convictions [Convention, Article 7].

14. With respect to sanctions for foreign bribery offences, the Working Group recommends that Ireland:

- a) Ensure that legal persons are subject to effective, proportionate and dissuasive sanctions for foreign bribery [Convention, Articles 2 and 3];
- b) Consider introducing additional civil or administrative sanctions by the courts for natural and legal persons convicted of foreign bribery [Convention, Article 3];
- c) Revisit the policies of agencies such as those responsible for development aid, public procurement, and public-private partnerships, to take due consideration in their contracting decisions of prior convictions for all foreign bribery offences [Convention, Article 3; Revised Recommendation II(vi), and VI (ii) and (iii)]; and
- d) Draw the attention of investigative and prosecutorial authorities to the importance of requesting confiscation as a sanction for foreign bribery [Convention, Article 3].

2. Follow-up by the Working Group

15. The Working Group will follow-up on the issues below, as practice develops, in order to assess:
- a) The effectiveness in practice of territorial jurisdiction under Irish law to enable the effective application of the offence under the Prevention of Corruption (Amendment) Act, 2001 [Convention, Article 4];
 - b) That considerations of national economic interest, the potential effect on relations with another State and the identity of the person involved shall not influence (i) investigation and prosecution of foreign bribery cases; and (ii) decisions regarding mutual legal assistance or extradition [Convention, Articles 5, 9 and 10];
 - c) The level of sanctions, including confiscation, pronounced by the courts in foreign bribery cases to assess whether they are sufficiently effective, proportionate, and dissuasive [Convention, Article 3]; and the sanctions for money laundering imposed in Ireland [Convention, Article 7]; and
 - d) With respect to auditing standards, whether the threshold for external audit requirements is adequate in practice to trigger external audit of all companies with substantial overseas operations [Revised Recommendation V.B.]; and the effectiveness of the new provisions regarding internal company controls in the Companies (Auditing and Accounting) Act 2003, once they have entered into force [Revised Recommendation V.C.].

Annex 1 List of Participants in the On-Site Visit

LEAD EXAMINERS FROM NEW ZEALAND

- *Mr. Gordon Hook, Manager, Criminal and International Law, Ministry of Justice*
- *Mr. Paul Mason, Sector Manager Corporates, Inland Revenue Department*
- *Mr. James Mullineux, Senior Prosecutor, Serious Fraud Office*

LEAD EXAMINERS FROM ESTONIA

- *Ms. Elina Elkind, Adviser, Criminal Policy Department, Ministry of Justice*
- *Ms. Heili Sepp, Leading Prosecutor, Southern Circuit Prosecutor's Office*
- *Ms. Kristi Tulva, Audit Division Head, Ministry of Finance*

OECD SECRETARIAT

- *Mr. Silvio Bonfigli, Principal Administrator, Anti-Corruption Division*
- *Ms. Christine Uriarte, Principal Administrator, Anti-Corruption Division*
- *Ms. France Chain, Administrator, Anti-Corruption Division*

MINISTRIES AND OTHER STATE ORGANS

- *Houses of the Oireachtas*
- *Department of Justice, Equality and Law Reform*
- *Department of Finance*
- *Department of Foreign Affairs*
- *Department of Enterprise, Trade and Employment*
- *FORFAS*
- *Enterprise Ireland*
- *IDA Ireland*
- *Central Bank and Financial Services*
- *Irish Financial Services Regulatory Authority*
- *Companies Registration Office*
- *Comptroller & Auditor General Office*
- *National Roads Authority*

LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

- *The Chief Justice*
- *The Courts Service*
- *The Office of the Director of Public Prosecutions*
- *The Revenue Commissioners*
- *Office of the Director of Corporate Enforcement*
- *An Garda Síochána, (Police)*
- *The Garda Bureau of Fraud Investigation*
- *Money Laundering Investigation Unit*
- *Financial Investigative Unit (FIU)*
- *Criminal Assets Bureau*

PRIVATE SECTOR AND CIVIL SOCIETY

Accounting and Auditing:

- *Consultative Committee of Accountancy Bodies Ireland*
- *Irish Auditing and Accounting Standards Authority*

Civil Society:

- *Transparency International Ireland*
- *Dublin Institute of Technology*
- *Dublin City University*

Private Sector:

- *Diageo Ireland*
- *Bank of Ireland*
- *Irish National Bank*
- *Allied Irish Banks*
- *Morgan Stanley Bank*
- *Fortis Bank*
- *HSBC Bank*
- *Chambers of Commerce Ireland*
- *Irish Bankers Federation*
- *Irish Stock Exchange*
- *Irish Funds Association*
- *Irish Exporters Association*
- *Small and Medium Enterprise Association*
- *Small Firms Association*

Annex 2 List of Abbreviations and Acronyms

AML/CFT	Anti-money Laundering/and Combating the Financing of Terrorism
APB	Auditing Practices Board
ASB	Accounting Standards Board
CJA	Criminal Justice Act
DOJ	Department of Justice, Equality and Law Reform
DPP	Office of the Director of Public Prosecutions
CAB	Criminal Asset Bureau
EIRO	European Industrial Relations Observatory
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FIU	Financial Investigative Unit
GBFI	Garda Bureau of Fraud Investigation
GDP	Gross Domestic Product
GRECO	Council of Europe Group of States against Corruption
IAASA	Irish Auditing and Accounting Supervisory Authority
IBEC	Irish Business and Employers' Confederation
IEP	Irish pounds
IFRS	International Financial Reporting Standards
IFSRA	Irish Financial Services Regulatory Authority
IIC	Independent Inquiry Committee
ISA	International Standards on Auditing
ISME	Irish Small and Medium Enterprises
ML	Money laundering
MLA	Mutual legal assistance
MLIU	Money Laundering Investigation Unit
MLSC	Money Laundering Steering Committee
ODA	Official Development Assistance
ODCE	Office of Director of Corporate Enforcement
PEPs	Politically Exposed Persons
SASs	Auditing Standards, as developed by the UK APB
SFA	Small Firms Association
SME	Small and Medium-Sized Enterprise
SROs	Self-Regulatory Organisations
STRO	Suspicious Transaction Reports Office
STRs	Suspicious Transaction Reports
TI	Transparency International
UNCAC	United Nation Convention Against Corruption
USD	United States Dollar
WGB	OECD Working Group on Bribery

Annex 3 Excerpts from Relevant Legislation

PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2001

Amendment of section 1 of Act of 1906

2.—The Act of 1906 is hereby amended by the substitution of the following section for section 1:

“1.—(1) An agent or any other person who—(a) corruptly accepts or obtains, or (b) corruptly agrees to accept or attempts to obtain, for himself or herself, or for any other person, any gift, consideration or advantage 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.

(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) A person who knowingly gives to any agent, or an agent who knowingly uses with intent to deceive his or her principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his or her knowledge is intended to mislead the principal shall be guilty of an offence.

(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) In this Act—‘agent’ includes—(a) any person employed by or acting for another, (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, (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, and (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 4a 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; ‘consideration’ includes valuable consideration of any kind; ‘principal’ includes an employer.”

Corruption occurring partially in State

6.—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.

Corruption occurring outside State

7.—(1) Subject to *subsection (2)* of this section, where a person does outside the State an act that, if done in the State, would constitute an offence under section 1 (inserted by *section 2* of this Act) of the Act of 1906, he or she shall be guilty of an offence and he or she shall be liable on conviction to the penalty to which he or she would have been liable if he or she had done the act in the State.(2) *Subsection (1)* shall apply only where the person concerned is a person referred to in *subsection (5) (b)* of the said section 1.

Offences by bodies corporate

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

CRIMINAL JUSTICE (THEFT AND FRAUD OFFENCES) ACT, 2001

Fraud affecting European Communities' financial interests

42.—A person who—(a) commits in whole or in part any fraud affecting the European Communities' financial interests, (b) participates in, instigates or attempts any such fraud, or (c) obtains the benefit of, or derives any pecuniary advantage from, any such fraud, is guilty of an offence and is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

Active corruption

43.—A person who commits active corruption is guilty of an offence and is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

Extra-territorial jurisdiction in case of certain offences

45.—(1) It is an offence for a person to commit fraud affecting the Communities' financial interests or to commit the offence of money laundering, or to participate in, instigate or attempt any such fraud or offence, outside the State if—(a) the benefit of the fraud or offence is obtained, or a pecuniary advantage is derived from it, by a person within the State, or (b) a person within the State knowingly assists or induces the commission of the fraud or offence, or (c) the offender is an Irish citizen, a national 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 in the State.

(2) Active or passive corruption committed by a person outside the State is an offence if—(a) the offender is an Irish citizen, a national 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 the State, or (b) in the case of active corruption, it is directed against an official, or a member of one of the institutions mentioned in paragraphs (i) to (iv) of the definition of "national official" in section 40, who is an Irish citizen.

(3) A person guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

CRIMINAL JUSTICE ACT 1994

Measures to be taken to prevent money laundering

32.—(1) This section shall apply to the following persons or bodies (referred to in this section as "designated bodies") namely—(a) 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, (b) a building society incorporated or deemed to be incorporated under section 10 of the Building Societies Act, 1989, (c) a person authorised to carry on a money broking business under section 110 of the Central Bank Act, 1989, (d) a society licensed to carry on the business of a trustee savings bank under section 10 of the Trustee Savings Banks Act, 1989, (e) a life assurance undertaking which is the holder of an authorisation under the Insurance Acts 1909 to 1990, or under regulations made under the European Communities Act, 1972, (f) a person providing a service in financial futures and options exchanges within the meaning of section 97 of the Central Bank Act, 1989, (g) An Post, (h) ACC Bank p.l.c., (i) ICC Bank p.l.c., (j) a society which is registered as a credit union under the Industrial and Provident Societies Acts, 1893 to 1978, by virtue of the Credit Union Act, 1966, (k) a person providing a service in relation to buying and selling stocks, shares and other securities, (l) a person providing foreign currency exchange services, and (m) any other person or body prescribed in regulations made under subsection (1) (a) of this section.

(2) This section shall apply in respect of the carrying out of one or more of the operations which are included in numbers 2 to 12 and 14 of the list annexed to Council Directive 89/646/EEC, activities to which Council Directive 79/267/EEC as amended applies or any other activity which may be prescribed in regulations made under subsection (1) (b) of this section.

(3) A designated body shall take reasonable measures to establish the identity of any person for whom it proposes to provide a service of a kind mentioned in subsection (2) of this section—(a) on a continuing basis, or (b) in respect of transactions that, either as an individual transaction or a series of transactions which are or appear to be linked, amount in the aggregate to at least £10,000 or the amount for the time being prescribed by regulations made under subsection (1) (c) of this section, or (c) otherwise where it suspects that a service is connected with the commission of an offence under section 31 of this Act.

(4) For the purposes of paragraph (b) of subsection (3) of this section, where the sum involved is not known at the time of the transaction, the obligations arising under this section shall apply as soon as it is established that the sums involved amount to at least the sum mentioned in the said paragraph of subsection (3) of this section.

(5) Where a designated body proposes to provide a service of a kind mentioned in *subsection (2)* of this section for a person whom it knows or has reason to believe to be acting for a third party, the designated body shall take reasonable measures to establish the identity of the third party.

(6) This section shall not apply where a designated body provides a service for another designated body or a body corresponding to a designated body in a member state of the European Union or a state or country which stands prescribed for the time being for the purposes of this subsection.

(7) *Subsections (3), (4) and (5)* of this section shall not apply to a life assurance undertaking referred to in *subsection (1) (e)* of this section in a case where—(*a*) the amount or amounts of the periodic premiums to be paid in respect of the life assurance policy in any twelve month period does not or do not exceed £700 or the amount for the time being prescribed for the purpose of this paragraph by regulations made under *subsection (10) (e)* of this section unless the amount or amounts of the periodic premiums is or are increased so as to exceed in any twelve month period £700 or the amount so prescribed as the case may be, or (*b*) a single premium to be paid in respect of the life assurance policy does not exceed £1,750 or the amount for the time being prescribed for the purpose of this paragraph by regulations made under *subsection (10) (e)* of this section, and the said *subsections (3), (4) and (5)* shall not apply in the case where the life assurance policy is in respect of a pension scheme taken out by virtue of a contract of employment or the occupation of the person to be insured under the policy, provided that the policy in question does not contain a surrender clause and may not be used as collateral for a loan.

(8) *Subsections (3), (4) and (5)* of this section shall not apply to a life assurance undertaking referred to in *subsection (1) (e)* of this section in a case where there is a transaction or a series of transactions taking place in the course of its business in respect of which payment is made from an account held in the name of the other party with a designated body or a body corresponding to a designated body as referred to in *subsection (6)* of this section.

(9) Where a designated body identifies a person for the purposes of this section, it shall retain the following for use as evidence in any investigation into money laundering—(*a*) in the case of the identification of a customer or proposed customer, a copy of all materials used to identify the person concerned for a period of at least 5 years after the relationship with the person has ended, (*b*) in the case of transactions, the original documents or copies admissible in legal proceedings relating to the relevant transaction for a period of at least 5 years following the execution of the transaction.

(10) The Minister may by regulations— (*a*) following consultation with the Minister for Finance, prescribe other persons or bodies to be designated bodies for the purposes of this section, being persons or bodies whose business consists of or includes the provision of services involving the acceptance or holding of money or other property for or on behalf of other persons or whose business appears to the Minister to be otherwise liable to be used for the purpose of committing or facilitating the commission of offences under *section 31* of this Act or any corresponding or similar offences under the law of any other country or territory, (*b*) following consultation with the Minister for Finance, prescribe activities for the purposes of *subsection (2)* of this section which appear to the Minister to be liable to be used for the purpose of committing or facilitating the commission of offences under *section 31* of this Act or any corresponding or similar offences under the law of any other country or territory, (*c*) following consultation with the Minister for Finance, prescribe an amount for the purposes of *subsections (3) (b) and (4)* of this section, (*d*) following consultation with the Minister for Finance, prescribe states or countries for the purposes of *subsection (6)* of this section, (*e*) following consultation with the Minister for Enterprise and Employment, prescribe amounts for the purposes of *subsections (7)(a) and (b)* of this section.

(11) Every regulation made under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if either House shall, within the next 21 days on which that House has sat after the regulation was laid before it, pass a resolution annulling the regulation, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done under the regulation.

(12) A person who contravenes a provision of this section or who provides false or misleading information for the purposes of *subsection (3), (4) or (5)* of this section when required to do so under this section shall be guilty of an offence and shall be liable—(*a*) on summary conviction, to a fine not exceeding £1,000 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 5 years or to both.

CRIMINAL JUSTICE (THEFT AND FRAUD OFFENCES) ACT, 2001

Amendment of section 31 of Criminal Justice Act 1994

21.—The Criminal Justice Act, 1994, is hereby amended by the substitution of the following section for section 31 (money laundering, etc.):

“31.—(1) A person is guilty of money laundering if, knowing or believing that property is or represents the proceeds of criminal conduct or being reckless as to whether it is or represents such proceeds, the person, without lawful authority or excuse (the proof of which shall lie on him or her)—(a) converts, transfers or handles the property, or removes it from the State, with the intention of—(i) concealing or disguising its true nature, source, location, disposition, movement or ownership or any rights with respect to it, or (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 (within the meaning of section 46 of this Act) or frustrating its enforcement against that person or another person, (b) conceals or disguises its true nature, source, location, disposition, movement or ownership or any rights with respect to it, or (c) acquires, possesses or uses the property.

(2) A person guilty of money laundering is liable— (a) on summary conviction, to a fine not exceeding £1,500 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 14 years or to both.

(3) Where a person— (a) converts, transfers, handles or removes from the State any property which is or represents the proceeds of criminal conduct, (b) conceals or disguises its true nature, source, location, disposition, movement or ownership or any rights with respect to it, or (c) acquires, possesses or uses it, in such circumstances that it is reasonable to conclude that the person—(i) knew or believed that the property was or represented the proceeds of criminal conduct, or (ii) was reckless as to whether it was or represented such proceeds, the person shall be taken to have so known or believed or to have been so reckless, unless the court or jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether the person so knew or believed or was so reckless.

(4) Where a person first referred to in subsection (1) of this section does an act referred to in paragraph (a) of that subsection in such circumstances that it is reasonable to conclude that the act was done with an intention specified in that paragraph, the person shall be taken to have done the act with that intention unless the court or jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether the person did it with that intention.

(5) This section does not apply to a person in respect of anything done by the person in connection with the enforcement of any law.

(6) This Part shall apply whether the criminal conduct in question occurred before or after the commencement of this section and whether it was or is attributable to the person first mentioned in subsection (1) or another.

(7) (a) In this section— (i) ‘criminal conduct’ means conduct which—(I) constitutes an indictable offence, or (II) where the conduct occurs outside the State, would constitute such an offence if it occurred within the State and also constitutes an offence under the law of the country or territorial unit in which it occurs, and includes participation in such conduct; (ii) ‘reckless’ shall be construed in accordance with *section 16(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001*; (iii) references to converting, transferring, handling or removing any property include references to the provision of any advice or assistance in relation to converting, transferring, handling or removing it; (iv) references to believing that any property is or represents the proceeds of criminal conduct include references to thinking that the property was probably, or probably represented, such proceeds; (v) references to any property representing the proceeds of criminal conduct include references to the property representing those proceeds in whole or in part directly or indirectly, and cognate references shall be construed accordingly. (b) For the purposes of this section a person handles property if he or she, without a claim of right made in good faith—(i) receives it, or (ii) undertakes or assists in its retention, removal, disposal or realisation by or for the benefit of another person, or (iii) arranges to do any of the things specified in subparagraph (i) or (ii). (c) For the purposes of paragraph (a)(i)(II)— (i) a document purporting to be signed by a lawyer practising in the state or territorial unit in which the criminal conduct concerned is alleged to have occurred and stating that such conduct is an offence under the law of that state or territorial unit, and (ii) a document purporting to be a translation of a document mentioned in subparagraph (i) and to be certified as correct by a person appearing to be competent to so certify, shall be admissible in any proceedings, without further proof, as evidence of the matters mentioned in those documents, unless the contrary is shown.

(8) Where— (a) a report is made by a person or body to the Garda Síochána under section 57 of this Act in relation to property referred to in this section, or (b) a person or body (other than a person or body suspected of committing an offence under this section) is informed by the Garda Síochána that property in the possession of the person or body is property referred to in this section, the person or body shall not commit an offence under this section or section 58 of this Act if and for as long as the person or body complies with the directions of the Garda Síochána in relation to the property.”

TAXES CONSOLIDATION ACT 1997

Charge to tax of profits or gains from unknown or unlawful source

58.—(1) Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made—(*a*) the source from which those profits or gains arose was not known to the inspector, (*b*) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or (*c*) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity, and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains.

(2) Notwithstanding anything in the Tax Acts, any profits or gains charged to tax by virtue of *subsection (1)* or charged to tax by virtue of or following any investigation by any body (in this subsection referred to as “the body”) established by or under statute or by the Government, the purpose or one of the principal purposes of which is— (*a*) the identification of the assets of persons which derive or are suspected to derive, directly or indirectly, from criminal activity, (*b*) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and (*c*) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the purposes mentioned in *paragraphs (a)* and (*b*), shall be charged under Case IV of Schedule D and shall be described in the assessment to tax concerned as “miscellaneous income”, and in respect of such profits and gains so assessed— (i) the assessment—(I) may be made solely in the name of the body, and (II) shall not be discharged by the Appeal Commissioners or by a court by reason only of the fact that the income should apart from this section have been described in some other manner or by reason only of the fact that the profits or gains arose wholly or partly from an unknown or unlawful source or activity, and (ii) (I) the tax charged in the assessment may be demanded solely in the name of the body, and (II) on payment to it of the tax so demanded, the body shall issue a receipt in its name and shall forthwith—(A) lodge the tax paid to the General Account of the Revenue Commissioners in the Central Bank of Ireland, and (B) transmit to the Collector-General particulars of the tax assessed and payment received in respect of that tax.

General rule as to deductions

81.—(1) The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts.

(2) Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of— (*a*) any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession; (*b*) any disbursements or expenses of maintenance of the parties, their families or establishments, or any sums expended for any other domestic or private purposes distinct from the purposes of such trade or profession; (*c*) the rent of any dwelling house or domestic offices or any part of any dwelling house or domestic offices, except such part thereof as is used for the purposes of the trade or profession, and, where any such part is so used, the sum so deducted shall be such as may be determined by the inspector and shall not, unless in any particular case the inspector is of the opinion that having regard to all the circumstances some greater sum ought to be deducted, exceed two-thirds of the rent bona fide paid for that dwelling house or those domestic offices; (*d*) any sum expended for repairs of premises occupied, or for the supply, repairs or alterations of any implements, utensils or articles employed, for the purposes of the trade or profession, over and above the sum actually expended for those purposes; (*e*) any loss not connected with or arising out of the trade or profession; (*f*) any capital withdrawn from, or any sum employed or intended to be employed as capital in, the trade or profession; (*g*) any capital employed in improvements of premises occupied for the purposes of the trade or profession; (*h*) any interest which might have been made if any such sums as aforesaid had been laid out at interest; (*i*) any debts, except bad debts proved to be such to the satisfaction of the inspector and doubtful debts to the extent that they are respectively estimated to be bad and, in the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debts shall be deemed to be the value of any such debts; (*j*) any average loss over and above the actual amount of loss after adjustment; (*k*) any sum recoverable under an insurance or contract of indemnity; (*l*) any annuity or other annual payment (other than interest) payable out of the profits or gains; (*m*) any royalty or other sum paid in respect of the user of a patent.