

Risky Business: How companies can minimise the corruption conundrum

The Irish government has recently overhauled its anti-corruption laws with the enactment of the Criminal Justice (Corruption Offences) Act 2018. For the first time, corporates can be prosecuted if someone acting on their behalf commits an offence under the Act. Muireann Reedy looks at some of the Act's key provisions and what companies can do to try to mitigate that risk.

The Irish government identified the introduction of the Criminal Justice (Corruption Offences) Act 2018 (the Act) as one of the key measures to be taken in the fight against white collar crime. The Act contains six main offences - five of which apply to both the public and private sectors - as well as the section 18 offence, under which corporates can be prosecuted for corrupt acts committed by certain parties on their behalf.

Key Provisions

Most of the offences in the Act are predicated on a "gift, consideration or advantage" being "corruptly" given or received by a party. The definition of the phrase "corruptly" includes where a party acts "with an improper purpose".



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will be used to facilitate an offence under the Act can be guilty of an offence. The Act also criminalises threatening harm to a person with the intention of corruptly influencing that person or another to carry out an act in relation to the person's office, employment, position or business. It is also an offence to corruptly create or use a document where a person knows or believes it contains a statement which is false or misleading in a material particular, with the intention of inducing another person to do an act in relation to his/her office, employment, position or business to the prejudice of that other person.

A person can be sentenced for up to ten years in prison and/or be subject to an unlimited fine, if convicted on indictment of one of the main corruption offences in the Act.

A company can be subject to an unlimited fine if convicted of the section 18 offence, discussed further below. The Act has extraterritorial reach, as in certain circumstances, Irish citizens and companies may be prosecuted in Ireland for acts committed outside of

Ireland, which constitute an offence under the Act.

Companies – Strict Liability

While all of the above offences can be committed by a company or individual, section 18 provides for the criminal liability of a company where an officer, manager, employee, agent or subsidiary of the company commits an offence under the Act, with the intention of winning or retaining business, or a business advantage, for the company. However the Act states that it will be a defence for a company to show that "it took all reasonable steps" and "exercised all due diligence" to avoid the commission of the offence. Although no guidance is given as to what might constitute "all reasonable steps" and "all due diligence" it is recommended that companies take the actions suggested below, in order to try and reduce the risk of a section 18 prosecution.

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It is also worth noting that where a company commits an offence under section 18 of the Act and it is proven that the offence was committed with the consent, connivance or wilful neglect of senior management within the company, then those personnel can also be guilty of an offence.

Recommended Actions

It is advisable for companies to conduct a risk assessment of the main bribery

and corruption threats (both internal and external) relevant to their business, with input from all material stakeholders. The assessment should be documented, overseen by senior management and controls should be implemented to mitigate against any identified risks.

Companies should also adopt an anti-corruption policy, which is reviewed from time to time, particularly where there are changes to its business model. The board should be involved in reviewing and approving the policy and staff should also be trained on the policy periodically and on how to deal with suspected bribery.

Where a company uses third parties, for example, to introduce business or to distribute products on its behalf, it should check that the relevant contract contains an anti-bribery clause whereby the third party confirms that it adheres to the Act, that it has anti-bribery policies and procedures in place and that it will report any suspected acts of bribery to the

company. The company should also have a right to terminate the contract with immediate effect if the third party does not comply with any of the provisions of the anti-bribery clause.

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To help identify any potentially corrupt activity, it is recommended that companies keep a register of gifts (given and received) and of political and/or charitable donations. Any hospitality offered to clients and third

parties should also be recorded in sufficient detail. These registers and any expense payments should be audited on a periodic basis by a compliance manager to identify if there are any unusual patterns which give rise to a suspicion of bribery. Finally, when considering whether to initiate a prosecution under section 18 it is suspected that the Gardaí/the Director of Public Prosecutions will take into account the "tone from the top". Therefore in order for a company to increase its prospects of successfully defending (or avoiding) a section 18 prosecution, it will be important for senior management to show their active involvement in the company's anti-corruption programme and to demonstrate that they have created an environment in which corruption will not be tolerated. As the saying goes, actions speak louder than words.

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