PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN IRELAND

December 2013

This Phase 3 Report on Ireland by the OECD Working Group on Bribery evaluates and makes recommendations on Ireland's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 13 December 2013.

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EXECUTIVE SUMMARY

The Phase 3 Report on Ireland by the OECD Working Group on Bribery evaluates and makes recommendations on Ireland's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and related instruments. This Report focuses on developments since Ireland's Phase 2 evaluation in March 2007, taking into account other Phase 2 monitoring steps, including Ireland's Phase 2*bis* evaluation in December 2008, and Written Follow-up Report in March 2010. It also addresses cross-cutting horizontal issues that are routinely covered in each country's Phase 3 evaluation.

The Working Group has serious concerns that Ireland has not prosecuted a foreign bribery case in the twelve years since its foreign bribery offence came into force. Ireland is currently investigating one case and assessing three. The Working Group is concerned that Ireland has taken few proactive investigative steps in these cases. This appears to be due to inadequate resources to detect and investigate foreign bribery cases, due to their depletion by the investigation of non-bribery cases related to the financial sector. The Working Group therefore recommends that Ireland urgently reorganise law enforcement resources in a manner that credible allegations of foreign bribery will be investigated and prosecuted in a timely and effective manner. The Group also recommends that Ireland consider how to apply cost effective and simple detection and investigative steps at the earliest opportunity.

Ireland's two foreign bribery offences in separate statutes, which contain certain inconsistencies, including the level of sanctions, have still not been consolidated and harmonised in a way that is in compliance with Article 1 of the Anti-Bribery Convention. Additionally, corporate liability for the foreign bribery offence, which only embodies the common law 'identification theory' of liability, and was previously assessed as inadequate by the Working Group, remains unchanged since Phase 2. As a result of these continuing weaknesses in Ireland's legal framework for criminalising foreign bribery, the Working Group recommends that Ireland consolidate and harmonise the two foreign bribery offences without further delay, and review corporate liability with a view to codifying it and expanding it to fully comply with the Good Practice Guidance in Annex 1 of the 2009 Anti-Bribery Recommendation. The Working Group considers that the Draft Scheme of the Criminal Justice Corruption Bill 2012 could be a suitable vehicle to address these issues, and notes that the Irish Government has indicated its interest in receiving recommendations that could contribute to this legislative process.

Further recommendations by the Working Group regarding enforcement include the need for Ireland to take proactive and concrete steps, as a matter of priority, to determine whether there is a link to Ireland in credible allegations of Irish companies and individuals bribing abroad. Ireland is also recommended to strengthen its anti-money laundering system for the purpose of detecting foreign bribery cases and supporting the investigation and prosecution of such cases, and enforcing its offence of money laundering where the proceeds of foreign bribery are involved. Recommendations on preventing and detecting foreign bribery include the need for Ireland to raise awareness in the private sector about the importance of adopting effective internal controls, ethics and compliance measures, as set out in the OECD Good Practice Guidance in Annex II of the OECD 2009 Anti-Bribery Recommendation. The priority of more closely engaging with the private sector was underlined by the participation of only one company in the on-site visit to Ireland by the lead examiners. Moreover, the Working Group recommends that Ireland establish procedures to facilitate the reporting of suspicions of foreign bribery by public sector employees, including

employees of DFAT and trade promotion and development aid agencies, and raise greater awareness in the public and private sectors of such channels, as well as whistleblower protections available for those who make reports. Ireland also needs to harmonise its current whistleblower protections, which are confusing and exist in a plethora of statutes. The draft Protected Disclosures Bill could address this challenge.

The Working Group commends Ireland in certain areas. Ireland has broadened the forms of bribes covered by the foreign bribery offence in POCA 2010. The categories of foreign public officials covered by the offence in POCA 2010 now also include persons acting on behalf of international organisations in which Ireland is not a member. Furthermore, Ireland now has jurisdiction over foreign bribery offences in POCA 2010 committed abroad by Irish companies and nationals. The sanctions for false accounting offences have been increased under the Companies Act 1990. It is now an offence under the Criminal Justice Act 2011 to fail to report information to AGS that would help prevent the commission of an offence by another person. In addition, DFAT has been raising awareness among its staff of this reporting obligation, and Irish Aid, which is part of DFAT, now considers prior convictions of foreign bribery in its contracting decisions.

The Report and the Recommendations, which reflect the findings of the lead examiners from the United Kingdom and Estonia, are adopted by the OECD Working Group on Bribery on 13 December 2013. Ireland is invited to report back in writing within one year on implementation of the following recommendations: 1(a) on the foreign bribery offence, 2(a) and (b) on corporate liability for the foreign bribery offence, and 5 on enforcement. In accordance with the normal procedure, a further written follow-up report on progress implementing the recommendations will be given within 2 years. The Working Group will closely re-examine foreign bribery enforcement efforts when Ireland makes its one-year Phase 3 written follow-up report in December 2014, and two-year written follow-up report in December 2015.

This report is based on the laws, regulations and other materials submitted by Ireland and information obtained by the lead examiners during their three-day on-site visit to Dublin from 24-26 June 2013, during which they met with representatives of Ireland's public administration, private sector and civil society.

A. INTRODUCTION

1. The on-site visit

1. On 24-26 June 2013, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (the Working Group) visited Dublin as part of the Phase 3 evaluation of Ireland's implementation of the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and related anti-bribery instruments.[1] The 40 States that make up the Working Group were represented at the on-site visit by lead examiners from Estonia and the United Kingdom. The lead examiners were supported by members of the OECD Secretariat.[2]

2. The purpose of the on-site visit was to meet with the main stakeholders in Ireland's efforts to combat the bribery of foreign public officials in international business transactions. The visit focused on practical steps taken by Ireland to implement and enforce the Anti-Bribery Convention, as well as the 2009 Recommendation for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation), and the 2009 Recommendation of the Council on Tax Measures for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

3. Prior to, during and following the on-site visit, the Irish authorities provided responses to significant requests for information from the evaluation team, including legislation, statistics, and questions about enforcement practices. Prior to the on-site visit, Ireland responded to the standard questionnaire and a supplementary questionnaire with country-specific questions, which together comprise the Phase 3 Questionnaire. The responses to the Questionnaire helped the evaluation team focus on the most important issues regarding implementation and enforcement during and following the visit.

4. The evaluation team held several meetings with various stakeholders during the three-day visit, including key government ministries and agencies, law enforcement authorities, the private sector and civil society.[3] At all times, the Irish government officials were frank and forthcoming. The Assistant Secretary-General of the Department of Justice and Equality (DJE) chaired the opening session of the on-site visit, at

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1 . Related anti-bribery instruments include: the 2009 Recommendation for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation); and 2009 Recommendation of the Council on Tax Measures for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2 . Estonia was represented by Mr. Tanel Kalmet, Adviser, Criminal Policy Department, Ministry of Justice, and Mr. Sten Lind, Judge at the Appellate Court, Tallinn District Court. The United Kingdom was represented by Mr. Raymond Emson, Associate General Counsel, Serious Fraud Office; Mr. Roderick Macauley, Criminal Law Policy Unit, Ministry of Justice; and Mr. Peter Monday, Department for Business, Innovation and Skills. The OECD Secretariat was represented by Ms. Christine Uriarte, Senior Legal Analyst and Counsel, Directorate for Financial and Enterprise Affairs, Anti-Corruption Division, Ms. Mary Crane-Charef, Communications Coordinator and Policy Analyst, Anti-Corruption Division, and Mr. Georgios Andriotis, Anti-Corruption Division.

3 . See Annex 2 for a list of participants.

which he underlined that the Irish government was open to suggestions on how to improve its fight against foreign bribery through recommendations from the Working Group. He also stated that the on-site visit was taking place at an opportune time, as the Irish government was in the process of consolidating all its laws on corruption, and the Phase 3 report on Ireland could provide helpful input on this process. This message was repeated following the on-site visit, in early September 2013, before the draft Phase 3 report had been submitted to the Irish authorities, when DJE notified the Secretariat that progress on a draft Bill to consolidate the Irish legislation on corruption was moving quickly, and the Irish government informed the Secretariat that it would consider the *Commentaries* from the lead examiners in reviewing the Bill before submitting it to Parliament.

5. Although, for various reasons (such as staff movements), the government representatives who met with the lead examiners were not always the right ones and were sometimes unable to respond fully to the questions from the lead examiners, the Irish authorities made significant efforts to rectify such situations. For instance, during the on-site visit a parallel meeting was arranged with an agency that was not originally requested by the lead examiners to participate in the visit. In addition, in response to a request during the on-site visit, the Irish authorities arranged a teleconference with representatives of the An Garda Siochána (AGS), Ireland's national police force, based in County Cork and County Clare.

6. The lead examiners were able to meet with an adequate number of civil society representatives, including a journalist from a major daily newspaper, and representatives of the legal and compliance profession, which provided opportunities for robust discussions. On the other hand, the attendance at the private sector meetings was inadequate, with only one private sector company present, and no representatives of individual accounting and auditing firms. The presence of three business associations could not compensate for the lack of opportunity to speak to companies themselves. However, with three professional accounting and auditing bodies representing approximately one-third of the accounting and auditing profession, the lead examiners were able to obtain sufficient information for the purpose of preparing the part of this report on accounting and auditing.

7. The lead examiners were conscious before the on-site visit that, in Phase 2, Ireland had not succeeded in attracting adequate private sector representation, which in part led to the decision of the Working Group to recommend a Phase 2bis evaluation. As a result, the evaluation team made considerable efforts to ensure adequate participation by the private sector. According to information provided following the on-site visit by the Department of Jobs, Enterprise and Innovation (DJEI), which was responsible for inviting the private sector, invitations were sent to private sector companies to participate in the on-site visit in late May, with reminders in early and mid-June. The low private sector representation and the nature and level of engagement between the Irish government and the private sector are indicative of the awareness of foreign bribery in Ireland. This issue is discussed further under B.9.a.i. of this report.

8. The discussions at the on-site visit were focussed on the main issues identified by the evaluation team. The evaluation team covered all the unimplemented, partially implemented and follow-up issues from the Phase 2 and Phase 2bis Reviews of Ireland, as well as a few new topics identified in Phase 3 as warranting exploration. The evaluation team's focus throughout was on identifying major obstacles to implementing the Anti-Bribery Convention and related OECD anti-bribery instruments in Ireland, in particular taking into account the absence of any successful prosecution of the bribery of foreign public officials in Ireland since the foreign bribery offence came into force in November 2001.

2. Summary of monitoring steps leading to Phase 3

9. Ireland has undergone a number of monitoring steps leading up to Phase 3, according to the regular monitoring procedure that applies to all Parties to the Convention as follows: Phase 1 (June 2002); Phase 2 (March 2007); Phase 2bis (December 2008); and Phase 2 and Phase 2bis Written Follow-up

Report (March 2010). A table with all recommendations made to Ireland and their status as of Ireland's Phase 2 and Phase 2bis Written Follow-Up Report is included as Annex 1 to this report.

10. The Working Group on Bribery decided to undertake a Phase 2bis evaluation of Ireland for two reasons: (1) Ireland's failure to secure proper attendance by Irish officials and representatives of other groups at the Phase 2 on-site visit, which limited the lead examiners ability to assess issues, and (2) Ireland was, at the time of the adoption of the Phase 2 evaluation, planning to revise its legislative framework for implementing Article 1 with the preparation of the Prevention of Corruption (Amendment) Bill 2008.

3. Outline of the report

11. This report is divided into three parts. Part A provides the introductory sections; Part B examines Ireland's efforts to implement and enforce the Convention, 2009 Anti-Bribery Recommendation, and 2009 Tax Recommendation; and Part C presents the Working Group's recommendations and issues for follow-up. Part B, which comprises the bulk of the analysis in this Report, focuses on three kinds of issues: i) Ireland's efforts to enforce its foreign bribery offence; ii) efforts to address remaining weaknesses identified in previous evaluations of Ireland; and iii) new issues, including those arising from amendments to the current legislative framework, and others that may have not been identified in Phase 2.

4. Ireland's economic background

a. Introduction

12. Ireland's is a small, trade-dependent economy. In terms of GDP (Purchasing Power Parity), in 2012, the Irish economy was the 47th largest in the world, according to the International Monetary Fund, and 45th in the world, according to the World Bank. In addition, Ireland's internationally traded goods and services in 2012 were equivalent to 191 per cent of GDP, and were valued at EUR 164 billion.[4]

13. From 1994 to 2000, the "Celtic Tiger" years, Ireland enjoyed strong growth, averaging 9.6 per cent per annum and driven by foreign investment and exports. In the early 2000s growth increasingly depended on a housing construction bubble that peaked in 2007, by which time Ireland had the fourth-highest level of GDP per capita in the OECD. As soon as the housing bubble burst, the economy suffered a severe recession, contracting by 10 per cent and sparking a banking and fiscal crisis that resulted in an EU-IMF financial support programme. Strong programme implementation, solid export growth and signs of stabilisation in domestic demand have set the stage for a sustained recovery and successful IMF programme exit at the end of 2013.

b. Ireland's banking and economic crisis[5]

14. According to the OECD 2011 Economic Survey of Ireland, Ireland's financial crisis was linked to overreliance on a speculative housing bubble encouraged by lax bank-lending standards that permitted excessive credit expansion. The bubble collapsed in 2008 in the midst of the global economic and financial crisis. In addition, in the years leading up to the crisis, rising Irish wages had eroded international cost-competitiveness and the banking system had become over-extended. After the bubble burst, Irish banks

4 . Economic and Social Research Institute of Ireland (ESRI), Irish Economy.

5 . Sources: Bank of Ireland, Ireland Overview: June 2012; Economic and Social Research Institute of Ireland (ESRI), Irish Economy; ESRI, Quarterly Economic Commentary – Winter 2012; IMD World Competitiveness Yearbook 2012; International Monetary Fund (IMF), "Statement by IMF Managing Director Christine Lagarde at the Conclusion of her Visit to Ireland" (8 March 2013); DJEI, 2012 Action Plan for Jobs; OECD, OECD Economic Surveys: Ireland (October 2011).

would have been insolvent without state support, which in turn resulted in sharply higher public debt. (Government gross debt as a share of gross domestic product [GDP] has reached one of the highest levels in the OECD area.) The collapse of house prices, construction, credit and trading partner demand, brought about a severe recession that resulted in large job losses and a large rise in the fiscal deficit as revenue evaporated and expenditures sharply declined.

15. To address these problems, the Irish Government carried out a sizeable economic adjustment and financial stabilization programme with financial support from the International Monetary Fund (IMF), the European Union, and the European Central Bank (ECB) totalling EUR 85 billion (including EUR 17.5 billion of Ireland's own resources). The funds were allocated to cover Ireland's fiscal deficit, bank recapitalisation costs, and debt maturities over 2011-13, thus providing breathing space for Ireland to improve its situation. Ireland has implemented measures to meet these goals in a transparent manner, its stabilization programme is on track, it has returned to market financing, and is set to exit its programme at the end of 2013 as originally envisaged.

16. Compared to other crisis countries, Ireland has a number of advantages: a sophisticated and large export sector (export of Irish goods and services exceed 100 per cent of GDP in Ireland); a highly qualified workforce; a friendly environment to do business; an efficient tax system with low tax on labour and low corporate taxes; and flexible and well-regulated product and labour markets. During the on-site visit, DJEI explained that, during the economic crisis, unemployment rose from 5 to 15 per cent, and that the construction and retail sectors were hit hardest. After shrinking almost continuously for 4 years, employment began to grow again by mid-2012. To maintain this momentum, an Action Plan for Jobs, and a Trade and Investment Strategy were adopted by the Irish government. The latter, an initiative of the Export Trade Council, which seeks to identify priority markets for Irish exports, is under review, and is chaired by the Deputy Prime Minister and Minister of Foreign Affairs

17. In 2011, Ireland returned to growth driven by the performance of the external sector of the economy, particularly services. However, fiscal consolidation, weak trading partner growth, private sector debt reduction and tight credit conditions have meant the overall recovery has been weak. Public debt is expected to peak in 2013, following large fiscal consolidation efforts from 2008 to 2013. Further fiscal measures will be required in 2014 to 2015 to ensure that debt is firmly on a downward path. However, improvements in trading partner demand, rising employment, signs that the housing market has hit bottom, and domestic demand is stabilising, should help stimulate a more robust recovery, going forward.

c. Irish trade and foreign investment abroad[6]

18. Ireland's recovery from its financial crisis depends highly on the health of its trading partners and their ability to recover from the global economic recession and the European debt crisis.

(i) Major exports and exporting industries

19. Exports of goods and services returned to robust growth in 2010 and 2011 (6.4 per cent and 5.3 per cent in volume terms, respectively). The export recovery relied heavily on high-technology sectors and

6 . Sources: China.org.cn, "Xi's Irish trip brings trade bonzanza" (21 February 2012); Enterprise Ireland, "Get Export Ready" website; Industrial Development Agency of Ireland, "Incentives to Invest" website; Institute of International and European Affairs, "The Visit of Chinese Vice President Xi Jinping to Ireland, 18 – 20 February 2012: Key issues and where we go from here" (1 March 2012); Irish Exporters Association, Top 250 Exporters: An Analysis of the top 60 IFSC Companies and Top 50 Northern Ireland Exporters (2012).

sectors dominated by multinational enterprises (MNE). There was also progress in Ireland's largest indigenous exporting sector, food and beverages. Bord Bia, the Irish Food Board, estimates that, over the 2010-2011 period, the value of food and drink exports increased by a quarter (or EUR 1.8 billion), leading to revenues valued at EUR 8.84 billion across more than 170 countries worldwide. According to the Irish authorities, multinationals are responsible for around 90 per cent of Ireland's exports. A major accounting body informed the lead examiners that Ireland has a massive small- to medium-sized enterprise (SME) sector, of which most members trade with the United Kingdom.

20. Export growth in 2012 was driven by a large expansion in services, while exports of goods declined slightly. The fall in goods exports reflect, in part, factors in the pharmaceutical industry (including branded drugs going off patent), and the deceleration in the pace of global growth. Food exports continue to perform steadily. Ireland's Economic and Social Research Institute (ESRI) estimates the growth in exports of services in 2012, at 8 to 9 per cent, was primarily due to the expansion of recently established overseas firms in the communications and IT sectors.

21. More broadly, services (e.g., business, computer, insurance, and financial services) are accounting for an increasing share of Irish total exports (47 per cent in 2010, against 22 per cent in 2000). Again, much of this growth is led by foreign MNEs, despite recent growth in Ireland's indigenous software sector.

(ii) Major trading partners

22. According to the Bank of Ireland, the Euro Area accounts for some 40 per cent of Irish merchandise exports; the U.S. accounts for 23 per cent of Irish exports; and the UK accounts for 16 per cent. These estimates are in line with the OECD's estimates of Ireland's largest services export partners: In 2009, the European Union absorbed almost 70 per cent of geographically allocated Irish services exports, with the UK alone purchasing 22 per cent.

23. In contrast, the whole of Asia accounted for 9 per cent, and South America for less than 1 per cent. China is Ireland's largest trading partner in Asia and 10th largest trading partner in the world. During a visit to Ireland by Chinese Vice President Xi Jinping in February 2012, the two countries signed an agreement to set up a joint investment promotion group. China accounts for 2.5 per cent of Irish merchandise exports and 1.9 per cent of services, and it is being targeted as a key growth area, in particular for Ireland's agri-food sector. Bilateral trade reached USD 5.87 billion in 2011, an increase of 8.6 per cent from 2010.

d. Post-crisis economic priorities

24. The Government's stabilization programme aims to revive economic growth and job creation by restoring the banking system to health, returning public finances to a sustainable path and reversing past losses in external competitiveness.[7] By mid-2013, significant progress had been made under the programme and unemployment had begun to decline, but still remained high with a significant share of long-term unemployment. The household survey measure of the unemployment rate averaged 4.4 per cent from 2000 to 2007, but with the onset of the recession it rose to a peak of 15.2 per cent in the first quarter of 2012 before decreasing to 13.7 per cent by mid-2013.

25. In order to ensure a sustained return to economic growth, Ireland will need to continue to promote foreign direct investment (FDI) and Irish exports while encouraging a more dynamic and export oriented SME sector, which makes up 90 per cent of private sector employment. Attracting inward foreign

7 . OECD, OECD Economic Surveys: Ireland (October 2011).

direct investment and increasing exports are the two-fold goals of the government's 2012 Action Plan for Jobs. Assisting indigenous businesses to trade, and developing and deepening the impact of FDI are included in the 2013 Action Plan for Jobs.

26. The Government is also placing a strong emphasis on attracting FDI to Ireland from foreign MNEs. These firms account for over two-thirds of Irish exports and business sector research and development. Skilled labour, and investment incentives, including an English-language entry to the EU and an attractive corporate tax rate of 12.5 per cent, act in Ireland's favour.

5. Other background factors

a. Major investigations in financial sector

27. In recent years, the investigation and prosecution of complex fraud cases in the financial sector, once a rarity, have become more common. The impact of this change on the law enforcement profile for Ireland is discussed in more detail under B.4.d. of this report.

b. Mahon Tribunal[8]

28. The Irish public has been sensitised to corruption in the domestic public sector, due to the highly publicised "Mahon Tribunal", a Tribunal of Inquiry into Certain Planning Matters and Payments. This public inquiry was established in 1997 to investigate allegations of corrupt payments to politicians, mainly regarding decisions related to planning permissions and land rezoning applications in the 1990s in the Dublin County Council area. The Tribunal's 3000-plus page final report was published in March 2012, and the findings exposed high-level political corruption. The report of the Tribunal was also a catalyst for the adoption of the Draft Scheme of Criminal Justice Corruption Bill 2012, discussed further under A.6., and in other relevant parts of this report.

8 . Sources: Transparency International, National Integrity Systems: Ireland Country Study Addendum (2012); and Tribunal of Inquiry Into Certain Planning Matters and Payments ("Mahon Tribunal").

6. Cases involving the bribery of foreign public officials

a. Introduction

29. Ireland has not prosecuted a single case of the bribery of foreign public officials. There are four publicly known allegations of foreign bribery against Irish companies and nationals that fall within the ambit of the Anti-Bribery Convention (i.e. they occurred after the Convention came into force in February 1999, and appear to involve the kind of bribery activity prohibited by Article 1 of the Convention). Following the on-site visit, the OECD Secretariat discovered another allegation of bribery within the ambit of the Anti-Bribery Convention reported by the media, and immediately brought it to the attention of the Irish authorities. However, since the evaluation team did not have information about this allegation at the time of the visit, and could not test it with the Irish law enforcement authorities, it is not dealt with in this report.

30. The four allegations addressed in depth at the on-site visit are called Cases #1, #2, #3 and #4, respectively in this report. Cases #1, #2 and #3 are currently under assessment.[9] Cases #2 and #3 appear closely related. Case #4 is under investigation. In order to protect the identity of persons and companies who have not been convicted of the allegations, and to ensure the confidentiality of the three assessments and ongoing investigation, only highly anonymised information about those allegations is provided in this report. In addition, references in this report to the existence of media reports concerning the allegations are not meant to give credibility to the allegations. Instead, their existence is only referred to as a potential source of information about the allegations.

b. Allegations under assessment – Cases #1, #2 and #3

i) Case #1

31. According to news reports published in a foreign country in 2005, several officials from that country were convicted of receiving bribes in relation to a public procurement contract involving an Irish state-owned company. The alleged benefit to the company from the bribery is estimated in news reports to be more than USD 5 million. AGS was not aware of the foreign media reports, but says it initiated contact through police-to-police channels via Interpol. AGS has not requested MLA from the foreign country. The Irish authorities state that this is because there is not enough information on which to base such a request. The ODPP has not been informed by AGS about this case. The Irish authorities explain that ODPP would only find out about the case if AGS were to send them the file seeking directions.

32. Ireland has a consulate in the foreign country in question, but has not sought information from the consulate regarding this case. AGS has not sought information from the government agency that supervises the Irish company, because it does not consider that it has enough information on which to base such an enquiry, including meeting possible suspects. AGS has not checked the publicly available books and records of the Irish company, because the foreign country has not responded to a request for information such as when the bribery was supposed to have occurred. The Irish authorities further explain that it is the experience of AGS that publicly available books and records do not indicate specific transactions.

33. The government agency that supervises the Irish company participated in the on-site visit on request of the lead examiners, and also provided follow-up information in response to several questions

[9] In Ireland, an "assessment" is the pre-investigation stage. The decision to progress from the assessment stage to a full investigation is normally taken by an AGS member. The case is then assigned to a team of investigators. The Assessment Unit in the AGS consists of four police officers and one assistant.

from the evaluation team posed at the on-site visit. According to its files from the relevant period, there does not appear to be any record of the allegations in the foreign country – however, the supervisory agency has lost a number of staff over the intervening years, and so cannot be certain that information about the allegations was not known. The Irish state-owned company did not report about the allegations in any of its annual reports for the relevant period, or by letter to the supervisory agency.

ii) Case #2

34. Case #2 concerns allegations of bribery in a developing country by a company with strong links to Ireland and another Party to the Anti-Bribery Convention, although Ireland explains that the main seat of registration and management of the company is not in Ireland. News articles state that the case came to light as a result of a whistleblower report, and that the allegations involve bribes amounting to a very substantial sum to obtain licenses. According to AGS, requests were sent via Interpol in March 2013 to ascertain the circumstances of these allegations. The Irish authorities state that it took almost two years since the allegations occurred to make the Interpol request because they did not become aware of them until March 2013, when the existence of the foreign media reports was brought to their attention at the OECD. AGS has a capacity building project with the police in the foreign country. The Irish authorities explain that while enquiries have been made in this case, it remains at the assessment stage. An investigation would not be opened unless the foreign country's authorities confirm that evidence exists to link an Irish registered company or individual to an allegation of foreign bribery, or such evidence were received from another source.

35. Media articles from the country where the bribery allegedly took place state that significant investigate steps were taken in 2011 in that country concerning the allegations, which involved prominent government officials. According to those media reports, the company denied the allegations.

36. Following the on-site visit, in response to questions from the evaluation team, the Irish authorities confirmed that the Irish Embassy in the country in which the alleged bribery occurred was aware of the investigation of the allegations in 2011/2012. The Embassy followed the proceedings closely, and reported the matter to Department of Foreign Affairs and Trade (DFAT) headquarters in Dublin. The reporting reflected the media reporting in the foreign country. The Irish authorities also confirmed following the on-site visit that in light of the nature of the reports and lack of any final conclusions or final report to emerge from the foreign country, a report was not made by DFAT headquarters to AGS. In addition, the Irish authorities stated information available to the Irish Embassy in the foreign country indicated that a third country involved in the allegations, which is a Party to the Anti-Bribery Convention, examined documents related to the allegations, and dismissed them as forgeries. The Irish authorities also confirmed that neither the Irish Embassy in the country where the allegations occurred, nor the relevant desk at DFAT headquarters was aware of the AGS assessment ongoing in Ireland, and neither had been contacted for information on the case by AGS.

iii) Case #3

37. Case #3 involves allegations of bribery of a high level official in a developing country by the same company involved in allegations in Case #2. The bribe allegedly amounted to a very substantial sum. Information about the alleged bribe arose during testimony in a civil trial in another Party to the Convention involving the company allegedly involved in the bribery. The company received a favourable judgement in the civil suit, which it publicly disclosed on its website. The Irish authorities seek further information about the case through requests sent through Interpol Otherwise, no further proactive investigative steps appear to have been taken by AGS. The Irish authorities explain that while enquiries have been made in this case, it remains at the assessment stage. An investigation would not be opened

unless the foreign country's authorities confirm that evidence exists to link an Irish registered company or individual to an allegation of foreign bribery, or such evidence were received from another source.

d. Open Investigation

Case #4

38. According to media reports, an Irish company allegedly bribed procurement officers to obtain contracts. The bribes allegedly amounted to more than USD 500 000, and one of the procurement officials has been convicted in the country in which the bribery transaction allegedly took place, which is a Party to the Convention.

39. AGS learned about the existence of allegations in media reports at the OECD. Reports on Case #4 appeared in various sources, including an Irish daily newspaper, a press release by the government in which the transaction allegedly took place, and a press release from the procurement body. At the time of the on-site visit, AGS had prepared to take two important investigative steps to follow the money flow. Following the on-site visit, it was confirmed that these steps had been taken, one of which has already produced documents, which are currently being evaluated. AGS had obtained a report on the findings in the case by the public procurement body, which the body requests be treated as confidential. AGS has spoken to the Irish Revenue Commissioners, who informed that they were not conducting any investigations into the suspect company. AGS has not talked directly to the Irish company, and has not searched the company's books and records or bank records. The Irish authorities state that this is due to a lack of evidence or information on which to question it to date.

7. Legislative Initiatives since Phase 2

40. Since Phase 2, the most significant legislative initiatives that impact on Ireland's implementation of the Anti-Bribery Convention are: i) enactment of the Prevention of Corruption (Amendment) Act 2010 (POCA 2010), in respect of which relevant amendments to POCA 2001 are discussed in detail in this report; and ii) publication of the Draft Scheme of the Criminal Justice Corruption Bill 2012 (Draft Scheme 2012). As mentioned earlier in the Introduction, the Draft Scheme 2012 is an ongoing initiative, and the Irish government welcomes recommendations in this report that could feed into this legislative process.

B. IMPLEMENTATION AND APPLICATION BY IRELAND OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

1. Foreign bribery offence

a. Inconsistency between foreign bribery offences in two separate statutes

41. In Phase 2, the Working Group identified certain inconsistencies between the foreign bribery offence in the Prevention of Corruption Act 2001 (POCA 2001) and the Criminal Justice (Theft and Fraud) Offences Act 2001 (CJOA 2001). Ireland established two separate foreign bribery offences in the two statutes; POCA 2001 established a general offence of bribing a foreign public official, and CJOA 2001 established an offence of the bribery of an official of the European Communities or any national official of another Member State of the European Communities.[10] The Working Group believed that inconsistencies between the foreign bribery offences could be obstacles to effective enforcement. The Working Group recommended that, in the context of the preparation of the Prevention of Corruption (Amendment) Bill, underway at that time, Ireland consolidate and harmonise POCA 2001 and CJOA 2001 and remove the inconsistencies between the foreign bribery offences in the two statutes. One of the main reasons for this concern was the application of different sanctions for the foreign bribery offences in the two statutes – under POCA 2001 the penalty for foreign bribery was up to 10 years' imprisonment and/or an unlimited fine, and under CJOA 2001 it was 5 years' imprisonment and/or an unlimited fine. The disparity between the penalties of imprisonment continues under POCA 2010. (Sanctions are further discussed under Section B.3 of this report.)

42. Essentially, the foreign bribery offences in POCA 2001 and CJOA 2001 overlapped as regards the bribery of an official of the European Communities or any national official of another Member State of the European Communities where the bribery is for the purpose of the official acting or refraining from acting in accordance with her/his duty "in a way that damages or is likely to damage the European Communities' financial interests". The differing standards between the foreign bribery offences in the two statutes could be summarised as follows:

a) CJOA 2001 did not expressly cover offers to bribe;

b) POCA 2001 covered bribes in the form of "any gift or consideration", and CJOA 2001 covered "any gift, consideration or advantage";

c) POCA 2001 covered the bribery of "agents", while CJOA 2001 covered the bribery of "officials";

d) POCA 2001 required a "corrupt" intent to bribe, whereas CJOA 2001 did not;

10 . The POCA 2001 implemented 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 CJOA 2001 implemented the Convention on the Protection of European Communities' Financial Interests.

e) POCA 2001 established extraterritorial jurisdiction only when the briber was an Irish public official or a member of the European Parliament, and CJOA 2001 established nationality jurisdiction. This area of inconsistency is addressed under B.4.a.i.in this report; and

f) POCA 2001 appeared to maintain the need for the consent of the Attorney-General or Solicitor-General of Ireland to prosecute an offence, which was also required under the 1906 Prevention of Corruption Act. This area of inconsistency is addressed under B.4.b. of this report.

43. By the time of Ireland's Phase 2bis evaluation in December 2008, no steps had been taken to implement the Working Group's recommendation to consolidate and harmonise POCA 2001 and CJOA 2001, to remove inconsistencies between the text of the offences in the two statutes. By the time of Ireland's Phase 2 and 2bis Written Follow-Up Report in March 2010, this recommendation had not been implemented.

44. In the responses to the Phase 3 Questionnaire, Ireland explains that it has enacted the Prevention of Corruption (Amendment) Act 2010 (POCA 2010), which amends POCA 2001, in order to implement the Phase 2 recommendation on consolidation and harmonisation. In addition, a Draft Scheme of the Criminal Justice Corruption Bill 2012 (Draft Scheme 2012) has been published. Whether these two legislative initiatives have satisfactorily implemented the relevant recommendation was assessed by the lead examiners.

45. POCA 2010 does not attempt to consolidate the foreign bribery offences under POCA 2001 and CJOA 2001. It does address one area in which POCA 2001 and CJOA 2001 were not harmonised: It now covers bribes in the form of an "advantage" in addition to any gift or consideration. However, the following principal areas of inconsistency persist between the offence in POCA 2010 and CJOA 2001:

a) absence of the term "offers" in CJOA 2001 has not been rectified;

b) POCA 2010 maintains use of the term "agent" for the person bribed; and

c) the requirement of a "corrupt intent" has been maintained in POCA 2010. It is now defined so that "corruptly" includes "acting with an improper purpose personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or other information, or by any other means".

46. The Irish authorities explain that the difference in terminology between the two offences reflects the separate conventions that they are intended to implement. They also repeat their position provided in Phase 2, that the common law and Criminal Law Act 1997 could make up for differences in formulation between the two offences in practice. For instance, regarding absence of the term "offers" in CJOA 2001, the common law provides for attempts, and the Criminal Law Act 1997 criminalises aiding, abetting counselling and procuring the commission of an indictable offence. Following the on-site visit the Irish authorities explained that they now propose to align the Draft Scheme 2012 with the standard approach of relying on the common law by removing all references to "attempts" from it.

47. Regarding the continued use of the term "agent" in POCA 2010, the Irish authorities state that it is clear that the term does not require proof of a breach of the agent-principal fiduciary duty, because POCA 2001 already included "a judge in a court in the State" in the definition of an "agent", and POCA 2010 contains two new categories that according to the Irish authorities do not signify an agent-principal fiduciary duty – i.e., "persons employed by or acting on behalf of the public administration of states other than Ireland, including, persons under the direct or indirect control of governments of such states"; and "people employed by or acting on behalf of international organisations". Ireland cannot cite case law to support its position that use of the term "agent" in POCA 2010 would not require proof of a breach of the

agent-principal fiduciary duty in relation to these two new categories of officials, but states that such an argument has not been made in court. The Irish authorities point out that the Draft Scheme 2012 does not employ the term "agent".

48. Regarding the requirement of a "corrupt intent", the Phase 2 Report recommended that Ireland clarify the meaning of the term "corruptly". The lead examiners note that the definition in POCA 2010 provides clarification and in that sense affords a positive response to the recommendation. The lead examiners are mindful, however, that it is also incumbent on the Irish authorities to have regard to the primary objective of conformity with the Anti-Bribery Convention, and in this regard note that the clarification provided by POCA 2010 is not in fact in line with Article 1 of the Convention, which requires only that the person who bribed intended to cause a foreign public official to "act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business". Regarding the lack of harmony between POCA 2010 and CJOA 2001 on this issue, the Irish authorities state that it is too simplistic to not impute a type of corrupt intent in the foreign bribery offence in CJOA. The CJOA requires proof that the bribery was for the purpose of obtaining a breach of the officials' duties in a way that damages or is likely to damage the European Communities' financial interests. In addition, they state that given the narrow scope of the offence in the CJOA 2001, which is meant to implement the Convention on the Protection of European Communities, it is not appropriate to align the two offences in this respect. Ireland also points out that the offence in POCA 2010 does not require proof of obtaining or retaining business or other improper advantage in the conduct of international business.

49. The Irish authorities explain that they are not concerned about the continued differing terminology and standards between the foreign bribery offences in the two statutes, because law enforcement authorities would address a case under the statute that they think is the most appropriate in given circumstances. They also state that there is no evidence to suggest that the existence of two foreign bribery offences in two different statutes with differing standards has had an impact on the application of the Anti-Bribery Convention. The Irish authorities cite three leading court decisions on the interpretation of unclear provisions in criminal statutes,[11] and conclude that it is the position of Ireland that "while an unclear provision must ordinarily be construed in favour of the accused, if the prosecution can prove its case on a purposive interpretation using the ordinary meaning of the words, then a conviction is also possible".

50. The Draft Scheme 2012 proposes to consolidate various corruption statutes, including POCA 1906, POCA 2001 and POCA 2010; however, it does not address consolidation of POCA 2010 and CJOA 2001. Regarding the areas in which the foreign bribery offences in the two statutes continue to lack harmonisation, the Irish authorities state that the Draft Scheme 2012 does not use the term "agent" to define the persons who are bribed. However, there does not appear to be any intention to revisit the requirement of a "corrupt intent" in POCA 2010 through the Draft Scheme 2012. In addition, the continued absence of the term "offers" in CJOA 2001 would not be addressed by the Draft Scheme 2012. The Irish authorities also informed the lead examiners that a proposed EU Directive on protecting the financial interests of the EU is currently under discussion, and that when negotiations are concluded, it is likely that amendments to the Irish legislation will be necessary. The Irish authorities therefore consider that

11 . In DPP v. Moorehouse [2006] 1 IR 421, the Court stated that the principle of interpreting unclear terms in favour of the accused should not lead to an unreal construction of a statute "which leads to an artificial or absurd result". A similar conclusion was made in DPP v. Davenport (Unreported. Hedigan J, 19 November 2009). In the leading case of Inspector of Taxes v. Kiernan [1981] ER 117, the Court stated that "if a word or expression is used in a statute creating a penal or taxation liability and there is a looseness or ambiguity attaching to it, the word should be construed strictly to prevent a fresh imposition of liability from being created unfairly…"

amendments to the CJOA should not be undertaken until negotiations on the proposed Directive are completed.

Commentary

The lead examiners are of the opinion that POCA 2010 fully implements the Working Group's recommendation in Phase 2 to broaden the forms of bribes covered in POCA to include "advantages", consistent with CJOA 2001. However, POCA 2010 does not address the lack of consistency between the foreign bribery offences in POCA 2001 and CJOA 2001 with regard to the following elements of the offences: i) absence of coverage of "offers" in CJOA 2001; ii) use of the term "agent" in POCA 2001; and iii) the requirement of a "corrupt intent" in POCA 2001.

Regarding the remaining areas of inconsistency, the lead examiners reiterate the concerns of the Working Group in Phase 2 and Phase 2bis that inconsistent terminology between overlapping offences could be an obstacle to effective enforcement, in large part due to the differing sanctions between the two statutes. The lead examiners also reiterate their concerns from Phase 2 that use of the term "agent" and the definition of a "corrupt intent" in POCA 2010, as well as the lack of coverage of "offers" in CJOA 2001, might not be consistent with Article 1 of the Convention. The lead examiners therefore reiterate the recommendation in Phase 2 and Phase 2bis to consolidate and harmonise the foreign bribery offences in the two statutes and in a manner that is in compliance with Article 1 of the Convention, without further delay, including by removing reference to the term "agent" in POCA 2010. The lead examiners consider that the Draft Scheme 2012 could provide a suitable vehicle to address these issues.

b. Definition of foreign public officials

51. In Phase 2, the Working Group recommended that Ireland take appropriate steps to ensure that the definition of foreign public officials cover the bribery of the following categories of officials: i) employees of foreign public enterprises regardless of their legal form, including those under indirect control of a foreign government; and ii) officials of international organisations in which Ireland is not a member. At the time of Phase 2, POCA 2001, through its definition of "agent", did not cover these categories of foreign public officials. At the time of Ireland's Phase 2 and 2bis Written Follow-Up Report, this recommendation had not been implemented. In Phase 2bis the Working Group further recommended that Ireland amend POCA 2001 to remove reference to the term "agent" in order to avoid any ambiguity concerning whether the prosecution must prove that the foreign public official was an "agent" and whether the agent-principle fiduciary duty had been violated. The recommendation concerning the term "agent" is addressed above under B.1.a., in which the recommendation of the Working Group to consolidate and harmonise terminologies and standards in POCA 2001 and CJOA 2001 is discussed. In this part of the report, the issue is discussed regarding the two further categories of foreign public officials that Ireland was recommended to cover.

52. In order to implement the relevant recommendations of the Working Group, Ireland has expanded the definition of "agent" in POCA 2010 to cover: i) "any other person employed by or acting on behalf of the public administration of any state (other than Ireland), including a person under the direct or indirect control of the government of such state"; and ii) "a member of, or any other person employed by or acting on behalf of any international organisation established by an international agreement between states to which (Ireland) is not a party". The former category is intended to implement the Working Group's recommendation regarding employees of foreign public enterprises, and the latter category is intended to implement the recommendation on officials of international organisations.

53. Regarding the new category of "agent" under POCA 2010 of a person under the direct or indirect control of a foreign government, on the face of it, this category would not appear to fully implement the Working Group's recommendation in this respect. This is because POCA 2010 applies to the bribery of a "person" under the direct or indirect control of a foreign government, rather than bribery of person exercising a public function for a "public enterprise", which is under the direct or indirect control of a foreign government, as required by article 1.4(a) of the Convention. It would not necessarily be the case that a person performing a public function for an enterprise that is under the direct or indirect control of a foreign government, would her/himself be considered under the control of the foreign government. In response to the lead examiners' concerns that the terminology in POCA 2010 is not in compliance with the Convention, the Irish authorities explained that, when read in conjunction with section 18(c) of the Interpretation Act 2005, which defines "person" as including a "body corporate" and an "unincorporated body of persons",[12] it is clear that POCA 2010 would catch a bribe paid to an individual performing a public function for an entity under the direct or indirect control of a foreign government. However, given the newness of the provision in POCA 2010, no case law is available to support this interpretation. The Irish authorities are not aware of any academic literature on this point. Following the on-site visit, the Irish authorities added that a person performing a public function for an enterprise that is under the direct or indirect control of a foreign government could be covered under the catch-all category of "agent" defined as "any person employed by or acting for another". They also stated that, subject to legal advice, it is the intention to broaden the definition of "foreign public official" in the Draft Scheme 2012 to clarify that persons acting on behalf of a foreign public enterprise or agency are included in the definition.

54. The new category of "agent" under POCA 2010 of a person acting on behalf of an international organisation appears to bring Ireland in compliance with the Convention[13] on this point, as it makes it clear that the foreign bribery offence also applies to the bribery of officials of international organisations in which Ireland is not a member.

Commentary

The lead examiners recognise that Ireland has taken concrete measures to implement the Working Group's Phase 2 recommendation to broaden the categories of foreign public officials covered by the definition of "agent" in POCA 2001, through the enactment of POCA 2010. The lead examiners find that it is clear that the definition now covers the bribery of persons acting on behalf of international organisations in which Ireland is not a member. However, it is necessary to read the definition in POCA 2010 regarding persons performing a public function for a person under the direct or indirect control of a foreign government in conjunction with the definition of "person" in the Interpretation Act. The lead examiners therefore recommend following up this aspect of the definition of foreign public official in POCA 2010 as practice develops. In addition, for the sake of simplicity and clarity, the lead examiners recommend that Ireland consider making this aspect of the definition of a foreign

12 . Section 18(c) of the Interpretation Act applies to use of the term "person" in a statute generally, and states it shall be read as importing a body corporate "and an unincorporated body of persons...". Section 18(j) applies specifically to the use of the term "person" in relation to an "offence", and states that it "shall be read as including a reference to a body corporate".

13 . The relevant provision is Commentary 17 on the Convention, which does not differentiate between international organisations in which the Party to the Convention is and is not a member. In full, Commentary 17 states that "*public international organisation* includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities".

public official in the Draft Scheme 2012 completely autonomous, without need of reference to the Interpretation Act.

2. Responsibility of legal persons

a. Scope of liability of legal persons

55. In Phase 2, the Working Group recommended that Ireland review the relevant law on the criminal liability of legal persons with a view to codifying and clarifying its scope. In addition, the Working Group recommended that Ireland expand the scope of the liability of legal persons for the foreign bribery offence to cover, in addition to bribery committed by a senior person (e.g., directors and other high managerial authorities), bribery committed by a lower level person with the express or implied permission of a senior person.

56. The recommendation to review the law with a view to codifying and clarifying the scope of the liability of legal persons for foreign bribery arose from the continued reliance in Ireland on the common law "identification theory" of liability of legal persons, which had evolved in Ireland along the same lines as jurisprudence in the United Kingdom (and other common law countries, including Australia and Canada). In short, pursuant to the theory, legal persons are criminally liable for the acts of those persons who may be regarded as the controlling mind and will of the legal person. In relation to corporate liability for manslaughter, the Irish Law Reform Commission (LRC 77-2005) criticised the common law identification theory approach as "fall[ing] afoul of the legality principle" which requires "clear and precise legislative rules which effectively eliminate the need for creative interpretation by judges".

57. The recommendation to expand the scope of the liability of legal persons arose from concerns of the Working Group that it would be relatively simple to avoid liability under the "identification theory" by using a lower level person to commit the bribery. It was not clear that, for instance, the case would be covered where a senior level person directed or authorised a lower level person to bribe.

58. By the time of Phase 2bis in December 2008, neither of these recommendations had been implemented. The Working Group therefore reiterated them and recommended that they be implemented on a "high priority basis". By the time of the Phase 2 and 2bis Written Follow-Up Report in March 2010, these recommendations had not been implemented.

59. Regarding the recommendation to review the law with a view to codifying the liability of legal persons, in the responses to the Phase 3 Questionnaire, the Irish authorities state that, on advice from the Attorney-General's Office, they will maintain the common law position and allow the law to evolve in this area rather than legislate for it. The Irish authorities added later that the scope of the liability of legal persons has expanded over time to meet new situations. At the on-site visit, DJE stated that they do not want to "bend" the common law. Following the on-site visit, the Irish authorities stated that the Draft Scheme 2012 provides further clarity on the scope of the liability of legal persons for offences under the legislation, and Head 13 of the Draft Scheme makes specific provision for a body corporate to be found guilty of an offence where a relevant offence has been committed by a person listed therein, including: director, manager, or agent of a body corporate, as provided in subsection (1). The Draft Scheme 2012 also provides a defence where all reasonable steps and all due diligence has been exercised to avoid commission of the offence.

60. The second recommendation to expand the scope of liability is inextricably linked to the first, as it would not be possible to expand the scope in the absence of a relevant binding court decision, unless a legislative provision for this purpose were adopted. Since Phase 2, the OECD has adopted the 2009 Anti-Bribery Recommendation, which clarifies in its Annex 1 good practices on the liability of legal persons.

Essentially, Annex 1 states that the following three foreign bribery situations are to be covered: i) a person with the highest level managerial authority bribes a foreign public official; ii) a person with the highest level managerial authority directs or authorises a lower level person to bribe a foreign public official; and iii) a person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official.

61. In response to the second recommendation, and the good practices provided in Annex 1 of the 2009 Anti-Bribery Recommendation, Ireland cited section 9(1) of POCA 2010, which states that a high level managerial authority (i.e. "director, manager, secretary or other similar officer of a body corporate" or "person purporting to act in such capacity") shall be guilty of an offence under POCA 2010 if an offence under POCA 2010 is committed by a body corporate (or unincorporated body under section 9(3)), and it is proved that the offence was committed with the high level managerial authority's consent, connivance, approval or neglect. The Irish authorities also cite DPP v. Hegarty [2011] 1 ESC 32 (Supreme Court of Ireland), which addresses a similar provision in the Competition Act, and in which the Court held that the entity does not have to have been convicted in order to find the high level managerial authority guilty of an offence: "Rather, it is an essential ingredient of this offence that the company itself must have committed an offence". Section 9(1) of POCA 2010 and the case of DPP v. Hegarty help clarify the liability of high managerial authorities for the bribery of foreign public officials when they themselves are not directly involved in the bribery. However, neither the provision in POCA 2010, nor the cited jurisprudence addresses the Working Group's recommendation or Annex 1 of the 2009 Anti-Bribery Recommendation – i.e., liability of the entity itself in relation to the acts of high level managerial authorities.

Commentary

Ireland has not implemented the Working Group's recommendations in Phase 2/2bis to review "on a high priority basis" the law on the liability of legal persons for the bribery of foreign public officials with a view to codifying it, and to expand the scope of the liability of legal persons to cover bribery committed by a lower level person with the express or implied permission of a senior person. In addition, these recommendations have taken on increased importance due to the standards articulated in Annex 1 of the 2009 Anti-Bribery Recommendation, which also state that the case should be covered where a person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her through a failure to implement adequate internal controls, ethics and compliance programmes or measures. The lead examiners therefore reiterate the Phase 2 and 2bis recommendations and further recommend that Ireland should expand the scope of the liability of legal persons to meet the Good Practice Guidance in paragraph B) b) of Annex 1 to the 2009 Anti-Bribery Recommendation. The lead examiners consider that the Draft Scheme 2012 could provide an opportunity to address these issues.

c. Unincorporated legal persons

62. In Phase 2 the Working Group recommended that Ireland expressly provide for the liability of unincorporated legal persons for the bribery of foreign public officials. This recommendation arose from the language in POCA 2001 and CJOA 2001, which is restricted in application to "bodies corporate" due to the relevant definition of "person" in the Interpretation Act 2005. Section 18(j) of the Interpretation Act, headed offences by corporations states that "a reference to a person in relation to an offence (whether punishable on indictment or on summary conviction) shall be read as including a reference to a body corporate". In Phase 2bis this recommendation had not been implemented, and the Working Group reiterated that it be implemented on a "high priority basis". By the time of the Phase 2 and 2bis Written Follow-Up Report, this recommendation had not been implemented.

63. Ireland states in its responses to the Phase 3 Questionnaire that this recommendation has been implemented by section 9 of POCA 2010. Ireland specifically refers to section 9(3), which states that section 9(1) and 9(2) "shall with any necessary modifications, apply in respect of offences" under the Act. Section 9(1), which is discussed above under B.2.a., in relation to the scope of the liability of legal persons, and section 9(2), both address specifically the criminal liability of a high managerial authority if an offence under POCA 2010 is committed by a body corporate (or unincorporated body under section 9(3)). As mentioned in the previous section of the report, section 9 of POCA 2010 does not address the liability of a legal person *per se*, incorporated or unincorporated.

64. In response to the lead examiners' concerns that this recommendation continues to be unimplemented, the Irish authorities cited DPP (at the suit of Garda John Barron) v. Wexford Farmers Club [1994] 2 I.L.R.M. 295 (High Court, November 1993). However, this case is not on point because it interprets the Intoxicating Liquor Act, which in section 45, specifically states that a "registered club" can be convicted of a summary offence under the Act.

Commentary

Ireland has not implemented the Working Group's recommendation to expressly provide for the liability of unincorporated legal persons for the bribery of foreign public officials. The lead examiners therefore reiterate this recommendation. The lead examiners consider that the Draft Scheme 2012 could provide an opportunity to address this issue.

3. Sanctions and confiscation

65. This section discusses the possible sanctions for foreign bribery in Ireland. It focuses on the level of sanctions for natural and legal persons for foreign bribery, civil or administrative sanctions for foreign bribery, and confiscation. Sanctions for accounting-related offences are discussed in B.6.a. of this report, and Irish policies for considering prior foreign bribery convictions in public contracting decisions are discussed in B.10.

a. Level of sanctions for natural and legal persons

(i) Sanctions for natural persons

66. In Phase 2, the Working Group agreed to follow-up on the level of sanctions pronounced by the courts in foreign bribery cases to assess whether they are effective, proportionate, and dissuasive. This section will focus on sanctions for natural persons; and section B.3.a.ii will focus on fines for legal persons.

67. As noted above, in section B.1.a of this report, at the time of the Phase 2 report, criminal sanctions for foreign bribery were provided for in two pieces of legislation. First, section 1 of POCA 1906 (as amended by section 2 of POCA 2001), 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 3 000[14] for a summary offence).[15] Section 43 of CJOA 2001 carries a less severe penalty of a maximum of 5 years'

14 . The sanction in section 1 of the Prevention of Corruption Act 1906 in the actual legislation is listed as £2,362.69, which was calculated as EUR 3000 at the time of the Phase 2 evaluation. All references to sanctions values from the Phase 2 report will be included in this issues paper in EUR, as they appeared in the Phase 2 text. (Euro banknotes and coins were introduced in Ireland on 1 January 2002.)

15. The Phase 1 Ireland report notes that the foreign bribery offence under the 2001 Act could be tried either as a summary offence or an indictable offence (see page 24).

imprisonment and/or an unlimited fine. The sanctions under section 43 of CJOA 2001 are lower than the maximum penalty for a domestic bribery offence, therefore raising concerns over the CJOA's conformity with Article 3.1 of the Convention. As in Phase 2, given the absence of foreign bribery cases and the prosecution of only two domestic bribery cases (both pre-dating the entry into force of POCA 2001), the Working Group agreed to follow up the level of sanctions applied in cases of foreign bribery.

68. There have been no changes affecting the sanctions applicable to natural persons for the foreign bribery offence since Phase 2. The Draft Scheme 2012, if passed in its current form, would not change the level of sanctions applicable to natural persons for foreign bribery currently available under POCA 2001 and would not affect the parallel provisions in CJOA 2001. At the on-site visit, the ODPP conceded, again as in Phase 2, that defendants convicted of foreign bribery could be given the lower sentence under section 43 of CJOA 2001.

(ii) Fines for legal persons

69. Pursuant to POCA 2010 and CJOA 2001, unlimited fines are available upon conviction of legal persons for the foreign bribery offences. In Phase 2, the Working Group recommended that Ireland ensure that legal persons are subject to effective, proportionate and dissuasive criminal sanctions for foreign bribery. The Working Group also recommended follow-up on the level of sanctions for legal persons as practice develops. The first recommendation reflected the Working Group's concerns about the regime under Irish law for the liability of legal persons, and has been discussed in depth above in relation to the liability of legal persons under B.2 of this report. The second recommendation was due to the absence of any foreign bribery conviction by the time of Phase 2, as a result of which the Working Group deemed it necessary to closely monitor the level of sanctions for legal persons once there had been sufficient practice.

Commentary

The lead examiners reiterate the Phase 2 follow-up issue on the level of sanctions for natural persons to assess whether they are effective, proportionate, and dissuasive. They also reiterate the Phase 2 recommendations that: i) Ireland ensure that legal persons are subject to effective, proportionate and dissuasive criminal sanctions for foreign bribery; and ii) the Working Group follow-up on the level of sanctions for legal persons as practice develops.

b. Additional civil or administrative sanctions for natural and legal persons

70. In Phase 2, the Working Group recommended that Ireland "consider introducing additional civil or administrative sanctions by the courts for natural and legal persons convicted of foreign bribery". In addition, the WGB recommended that Ireland 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. At the time of the Phase 2 and 2bis written follow-up report, the Working Group considered both of these recommendations not implemented.

(i) Disqualification orders

71. "Disqualification orders," as per section 160 of the Companies Act 1990, prohibit persons from being appointed or acting in certain capacities (auditor, director, etc.), or being involved in the promotion, formation or management of any company. The Companies Bill 2012, if passed in its current form, will largely re-enact section 160 of the Companies Act 1990.[16] (The Bill was introduced to the Houses of the

16 . The Irish Government estimates the Companies Bill 2012 will enter into force in 2014.

Oireachtas in December 2012 and could enter into force in 2014.) In Phase 2, the Working Group determined that, the lack of foreign bribery cases made it difficult to assess whether and/or to what extent a conviction for foreign bribery would provide sufficient basis for the imposition of a disqualification order under the Companies Act 1990. Since there have not been any prosecutions of the bribery of foreign public officials to date, it is still not possible to assess the effectiveness of the relevant provision in the Companies Act.

(ii) Exclusion from public contracting[17]

72. Any person who, to the knowledge of the Irish contracting authority, has been convicted of corruption is excluded from being considered for awards of public contracts under section 53.1 of Statutory Instrument (S.I.) 329/2006, which transposes into Irish law Directive 2004/18/EC of the European Parliament and of the Council on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts. SI 329/2006 incorporates by reference the definition of "corruption" and "official" in the Convention of the Treaty on European Union on the Fight against Corruption involving Officials of the European Communities or Officials of Members States of the European Union. Under SI 329/2006, the bribery of "any Community or national official, including any national official of another Member State" triggers exclusion. In Phase 2, the WGB was concerned that the bribery of officials of Non-Member States of the European Union would not be covered by this provision. During Phase 2, discussions at the on-site visit confirmed that, in Ireland, only the bribery of officials of Member States of the European Union would trigger exclusion. Phase 3 on-site visit discussions confirmed that this interpretation has not changed since Phase 2. In addition, to date, no tenderers for public advantages have been excluded from public contracting under S.I. No. 329/2006.

c. Confiscation

73. In Phase 2, the Working Group agreed to follow up on the issue of Ireland's criminal confiscation and civil forfeiture procedures, given the absence of any foreign bribery convictions at that time. In Ireland's responses to the Phase 3 Questionnaire and during the on-site visit, Ireland confirmed there have been no legislative changes since Phase 2 affecting Ireland's criminal confiscation and civil forfeiture procedures.

74. In summary, *criminal confiscation* procedures are provided for under the Criminal Justice Act 1994. Section 61 allows for forfeiture orders to be pronounced by the Court to confiscate the instrument of the crime. 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. Section 9 provides for the confiscation of the property or the pecuniary advantage obtained as a consequence of an offence. Confiscation under section 9 is available upon the discretionary application by the ODPP.

75. PCA 1996 allows for the *civil forfeiture* of the proceeds of a crime. Under the PCA 1996, Ireland's Asset Recovery Office, the Criminal Assets Bureau (CAB), must satisfy the High Court (exercising civil jurisdiction) that, on the balance of probabilities, the specified property constitutes directly or indirectly the proceeds of crime. Assets are identified by the CAB, which was established under the Criminal Assets Bureau Act 1996 and is staffed by 70 officers from AGS, Revenue Commissioners Taxes, Revenue Commissioners Customs, and the Department of Social, Community and Family Affairs. CAB staff members are assisted in their investigations by 158 Criminal Asset Profilers from AGS and the Revenue Commissioners engaged in customs and excise duties. Arising from Proceeds of Crime Act 1996 actions in 2011, a total of EUR 2.7 million was paid over to the Minister for Finance and the Minister for

17 . Debarment is also discussed under section B.10 of this report.

Public Expenditure and Reform. In 2010, this figure was EUR 3.1 million, and in 2009 it was EUR 1.4 million.

Commentary

The lead examiners recommend that the Working Group continue to follow up the level of sanctions against natural persons in foreign bribery cases as practice develops to assess whether they are effective, proportionate, and dissuasive.

Regarding the availability for disqualification orders, the lead examiners consider that it would be appropriate to follow up this issue as practice develops rather than reiterate the Phase 2 recommendation that Ireland "consider introducing additional civil or administrative sanctions by the courts for natural and legal persons convicted of foreign bribery".

The lead examiners also reiterate the Phase 2 recommendation that Ireland should consider the imposition of exclusion from tendering for awards of public contracts upon conviction of the bribery of a foreign public official, regardless if the official is from a Member State of the European Union.

Furthermore, the lead examiners recommend that the Working Group continue to monitor the application of confiscation measures in foreign bribery cases.

4. Investigation and prosecution of the foreign bribery offence

a. Jurisdiction

(i) Nationality jurisdiction

76. In Phase 2, the Working Group recommended that Ireland promptly establish nationality jurisdiction under POCA 2001, as already provided under CJOA 2001. As of Ireland's Phase 2 and 2bis Written Follow-Up Report, this recommendation was not implemented. In addition, in Phase 2bis the Working Group recommended following up the application of nationality jurisdiction in general, due to confusing information about its application provided by some of the Irish authorities.

77. This recommendation stemmed from the following Phase 2 findings: i) Under POCA 2001, nationality jurisdiction only applied to the briber where s/he was an Irish public official; and ii) under CJOA 2001, nationality jurisdiction applied to any Irish national who bribed officials of the European Communities or member states of the European Communities where the bribery takes place abroad. The Working Group was therefore concerned about the lack of nationality jurisdiction for non-Irish public officials under POCA, as well as the lack of harmony between POCA and CJOA on this issue. Concerns about the harmonisation issue are discussed in detail earlier in this report under B.1.a. In addition, in Phase 2bis, the Working Group was concerned that certain officials stated at the on-site visit that "an obvious connection with Ireland" was needed to apply nationality jurisdiction in general.

78. POCA 2010 substantially expands the application of nationality jurisdiction beyond the limits set in POCA 2001. Pursuant to POCA 2010, extraterritorial jurisdiction for the foreign bribery offence now applies to the following categories of natural and legal persons: i) an Irish citizen; ii) an individual who is ordinarily resident in Ireland; iii) a company registered under the Companies Act; iv) any other body corporate established under Irish law; and v) a relevant agent in any case where the relevant agent does not fall within any of the categories i) to v). The first four categories appear to satisfy the requirements under

Article 4 of the Convention.[18] The fifth category is not easily understood, but appears to go beyond the requirements of Article 4 of the Convention. Regarding the confusing information provided by Ireland in Phase 2bis about the application in general of nationality jurisdiction, the Irish authorities have clarified that the "connection with Ireland" that must be established is nationality or residency in Ireland.

Commentary

The lead examiners are satisfied that Ireland has fully implemented the recommendation to establish nationality jurisdiction, and no issues remain outstanding under this topic.

(ii) Territorial jurisdiction

79. In Phase 2 the Working Group recommended following up the effectiveness in practice of territorial jurisdiction for the bribery of foreign public officials. This recommendation stemmed from an absence of jurisprudence to show the extent of a territorial connection needed to apply territorial jurisdiction. It was also due to the language in section 6 of POCA 2001, which states that territorial jurisdiction may be applied "if any of the acts alleged to constitute the offence" took place in Ireland, which the Working Group was concerned might require that the offer, promise or giving take place in Ireland. Pursuant to the Convention, aiding and abetting the bribery of a foreign public official in Ireland, such as authorising or inciting the bribery, should also be sufficient to trigger territorial jurisdiction.

80. At the on-site visit, the evaluation team discussed in depth four allegations of the bribery of foreign public officials with the Irish law enforcement authorities (see description of Cases #1 to #4 in the Introduction). The Irish authorities did not describe significant proactive steps being taken to establish territorial jurisdiction in any of these cases. In Case #1, which is at the assessment stage, the allegations were not proactively investigated to any extent in Ireland to determine whether it would be possible to establish a territorial link. In Case #2 and Case #3, a request has been made through Interpol, but while waiting for a response, no investigative steps have been taken in Ireland to establish a territorial link. In Case #4, the law enforcement authorities have spoken to the Revenue Commissioners, but no other proactive investigative steps appear to have been taken in Ireland to establish a territorial link.

Commentary

The lead examiners believe that the Irish law enforcement authorities could be taking much more concrete and proactive steps to establish a territorial link in relation to foreign bribery allegations involving Irish companies and individuals. They therefore recommend that, as a matter of priority, Ireland take proactive and concrete steps to determine whether it is possible to establish a territorial link in credible allegations of the bribery of foreign public officials by Irish companies and nationals, including in cases where an MLA request or request through Interpol has been sent and Ireland is waiting for a response.

b. Discretion in investigative and prosecutorial decision-making

81. In Phase 2, the Working Group recommended that Ireland ensure that the Attorney-General's consent to prosecute cases of the bribery of foreign public officials under POCA is not required. This issue was raised in Phase 2 because POCA 1906, which had not been repealed by POCA 2001, states: "A prosecution for an offence under this Act shall not be instituted without the consent…in Ireland of the

18 . Article 4.2 of the Convention states that "each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to do so in respect of the bribery of a foreign public official, according to the same principles".

Attorney-General or Solicitor-General for Ireland". In Phase 2, the Irish authorities explained that this provision had not been applied since the 1974 Prosecution of Offences Act came into force, which states that the Public Prosecutors shall perform all the functions "capable of being performed…by the Attorney-General…" In Phase 2, the Working Group was concerned that the 1974 Prosecution of Offences Act did not necessarily do away with the need for the A-G's consent under POCA 2001, since such consent is "required" under POCA 1906, whereas the 1974 Prosecution of Offences Act only addressed functions of the A-G "capable" of being performed. The Working Group was also concerned about this point, because the A-G's consent was not required under the CJOA. This was therefore also an issue of harmonisation between POCA 2001 and CJOA. However, in Phase 2bis, the lead examiners commented in the report that they "are satisfied that it is sufficiently clear that the responsibility for authorising prosecutions under POCA 1906 has been delegated to the DPP". They decided that this issue was no longer a concern because during the Phase 2bis on-site visit, they met with lawyers and judges who persuaded them that the ODPP now has the authority to provide consent to prosecute under POCA 2001.

82. In Phase 3, the lead examiners therefore decided to focus on the application of the ODPP's consent to prosecute foreign bribery cases under the 1974 Prosecution of Offences Act. Their mandate to address this issue came from the following issue for follow-up identified in the Phase 2 report: Whether prohibited factors under Article 5 of the Anti-Bribery Convention ("national economic interest, the potential effect on relations with another State, identity of natural or legal persons involved") could influence the investigation and prosecution of foreign bribery offences in Ireland. This follow-up issue was raised in Phase 2 because the Guidelines for Prosecutors, issued by the ODPP, provided an inclusive list[19] of the public interest factors that require prosecution, once the evidentiary test is satisfied. The Guidelines did not exclude consideration of Article 5 prohibited factors.

83. With respect to commencing investigations, AGS states that each complaint is analysed and reviewed to establish whether there is a *prima facie* case of criminality disclosed, and to make recommendations as to the scope and nature of the required investigation. Complaints that are not complex are referred to a local division of AGS to ensure that the AGS Bureau of Fraud Investigation can concentrate on complex fraud cases. The criteria for making this decision are: i) complexity of the case; ii) diversity of the criminal acts involved; iii) venue of the crime; and 4) amount at risk. The Irish authorities add that although there is not anything in law or regulation that specifically states that Article 5 considerations cannot be taken into account, the AGS does not and never has considered such factors when deciding whether matters should be investigated.

84. The ODPP also strongly maintains that Article 5 prohibited factors cannot be taken into account in making decisions on whether to prosecute foreign bribery cases. Nevertheless, the Guidelines for Prosecutors still only provide an inclusive list of public interest factors that require prosecution, and do not specifically exclude consideration of Article 5 prohibited factors. The Irish authorities also maintain that Article 5 prohibited factors did not come into play in relation Case #1, which allegedly involves an Irish state-owned company. Allegations in this case have not led to an investigation.

Commentary

The lead examiners consider that due to the low level of law enforcement activity on foreign bribery cases in Ireland, it is premature to discontinue following-up whether factors prohibited by Article 5 of the Convention may influence decisions on whether to investigate or prosecute foreign bribery cases in Ireland. They therefore reiterate that this issue should continue to be followed up as practice develops.

19 . The Irish authorities state that it should be recognised that Ireland has a discretionary prosecution system, and thus guidelines cannot provide an exhaustive list.

c. Obtaining search warrants

85. In Phase 2bis the Working Group recommended following up the application of the "reasonable grounds" standard reqired to obtain search warrants in the investigation of foreign bribery pursuant to section 5 of POCA 2001. This recommendation followed from confusing information obtained during the Phase 2bis on-site visit about the standard of proof applied in practice for obtaining search warrants. Some practitioners stated that a search warrant could only be obtained on the basis of "admissible" documentary evidence, and others said that this was not necessary. In Phase 2, it was also explained that, due to the restrictive form of nationality jurisdiction in POCA 2001, a search warrant could only be obtained if part of the foreign bribery offence took place in Ireland. With the enactment of POCA 2010, which provides for a very broad form of nationality jurisdiction, this aspect of the issue has been addressed. In Phase 3, the lead examiners therefore focus on the standard of proof in practice for obtaining a search warrant.

86. At the on-site visit, AGS explained that the standard of proof for obtaining search warrants – "reasonable grounds" under section 15 of the Criminal Justice Act 2011 – is very well understood, and has not led to any problems in practice. ODPP also stated that the standard is well understood, and in practice it is necessary to produce information that an offence has taken place from a "previously reliable confidential source".

87. Search warrants have not been applied for in Cases #1 to #4. The lack of proactive steps being taken by the law enforcement authorities to find a territorial link between the allegations and Ireland is already discussed earlier under B.4.a.ii., and discussed in further detail below under B.4.e. At this stage it is not possible to know with certainty whether part of the lack of proactivity in these cases is due to the interpretation by the law enforcement authorities of the standard of proof for obtaining search warrants, or whether other reasons are responsible.

Commentary

The lead examiners consider that, due to the low level of enforcement activity in foreign bribery cases, and because in the four foreign bribery allegations known at this time search warrants have not been applied for, it is premature to discontinue following up the application of the "reasonable grounds" standard reuired to obtain search warrants in the investigation of foreign bribery pursuant to section 5 of POCA 2001. They therefore reiterate that this issue should continue to be followed-up as practice develops.

d. Resources for investigating and prosecuting foreign bribery cases

88. The level of resources for investigating and prosecuting cases of the bribery of foreign public officials was not raised as an issue by the Working Group in Phase 2 or Phase 2bis. However, due to the low level of law enforcement activity and the absence of prosecutions since Ireland's foreign bribery offences came into force in 2001, the lead examiners decided that resources might be a factor. Part of this impression was due to the heavy burden placed on law enforcement resources since Phase 2 by the substantial increase in investigations and prosecutions of non-bribery cases relating to the financial sector. The lead examiners believe that these cases have had a substantial impact on the availability of law enforcement resources in Ireland for investigating and prosecuting foreign bribery cases. During the Phase 3 evaluation, the Irish authorities stated that approximately 40 per cent of the resources of the AGS Bureau of Fraud Investigation are currently deployed to address cases related to the banking crisis, and approximately 5 to 10 percent of ODPP's are similarly deployed. They also identified further reasons why resources do not appear adequate for the purpose of effectively enforcing the foreign bribery offence, which are discussed in this part of the report.

89. AGS Bureau of Fraud Investigation consists of 90 people, including two forensic accountants. Two more forensic accountants are being recruited. However, otherwise there has not been any recruitment in four to five years. At this juncture, the Bureau of Fraud's primary work load is focused on investigations of breaches of criminal and company law in the financial sector. The situation at ODPP is similar. It has 191.3 personnel.[20] Due to inadequate resources, its attendance of meetings of the Working Group has gone down. In addition, ODCE currently has a staff of 44.4, including two accountants. This is a decline from 50.7 over the last three years. The Irish authorities point out that the staffing situation at ODPP cannot be compared to AGS Bureau of Fraud or ODCE, because the primary work load of ODPP does not concern the financial collapse. The ODPP is a national office, and its remit includes all indictable crimes, including murder, rape, robbery, blackmail, etc. The Irish authorities add that, nevertheless, the financial collapse has had some impact on the ODPP, which, like the rest of the Irish government, is "trying to do more with less". However, following the on-site visit, the Irish authorities stated that the level of resources is not an issue for foreign bribery prosecutions. ODPP has not received any foreign bribery files to date. If it were to do so, it would treat them like any other files, and make a decision to prosecute or not in a timely and efficient manner.

20 . Ireland clarifies that the ODPP has approximately 150 outside counsel and 32 prosecutors on long-term contracts (typically 10 years).

Commentary

The lead examiners believe that the level of resources for investigating, and, in particular, detecting cases of the bribery of foreign public officials is inadequate. They are also convinced that the priority of detecting, investigating and prosecuting non-bribery cases related to the financial sector has depleted Ireland's law enforcement authorities, particularly the AGS Bureau of Fraud Investigation, and to a lesser extent ODCE, of resources. The current legal and institutional framework for enforcing the foreign bribery offence does not permit ODCE or ODPP to prosecute such cases unless referred to them by the AGS Bureau of Fraud Investigation. The lead examiners understand the strain that the cases involving the banking crisis has put on Irish law enforcement authorities, but Ireland is still obligated to fulfil its commitment to effectively implement the Anti-Bribery Convention. The lead examiners therefore recommend that Ireland urgently reorganise law enforcement resources in such manner that credible allegations of the bribery of foreign public officials will be investigated and prosecuted in a timely and efficient manner.

e. Level of proactivity in investigating and prosecuting foreign bribery cases

90. Although a recommendation regarding the level of proactivity in investigating and prosecuting foreign bribery cases was not specifically made in Phase 2 or Phase 2bis, the lead examiners considered that, in view of the absence of any foreign bribery prosecutions since foreign bribery became an offence in 2001, it was necessary to examine whether Ireland's law enforcement authorities had not been adequately proactive on such bribery. This issue is closely linked with the discussion above (see B.4.d.) on the level of resources for investigating and prosecuting foreign bribery in Ireland.

91. As mentioned in other parts of this report, in Cases #1 to #4, described in the Introduction to this report, the only proactive steps taken by the Irish law enforcement authorities appear to be: i) submission of a request for information from the foreign country through Interpol in Case #1 in response to a request for information received through Interpol from the foreign country; ii) making a request through Interpol in Case #2 and Case #3; iii) preparation of investigative steps and following through with one of them so far to follow the money flow in Case #4; and iv) speaking to the Revenue Commissioners in Case #4.

92. In Case #1, which is under assessment, the Irish law enforcement authorities learned about the allegations in the foreign country through an Interpol request, although information about the case had been published by the foreign country's media in 2005. Indeed, the Irish law enforcement authorities learned for the first time about the reports in the foreign media from the evaluation team. The Irish law enforcement authorities have not initiated direct contact with the law enforcement authorities in the foreign country. In addition, the Irish law enforcement authorities have not checked publicly available books and records for the Irish state-owned company involved in the joint venture that allegedly bribed the foreign public officials, and have not contacted the Irish agency that is responsible for supervising the Irish state-owned company. Moreover, the Irish law enforcement authorities have not contacted the Irish consulate in the foreign country to see if it has information that could be used in an investigation.

93. In Case #2, which is under assessment, the Irish law enforcement authorities learned about the allegations through media information that was brought to their attention at the OECD. As a result, there was approximately a two-year gap between the time the media reports appeared, and the time the Irish authorities became aware of them. Requests were made by Ireland via Interpol in March 2013 to ascertain the circumstances of the allegations. AGS has a capacity building project with the foreign country's police force funded through Irish development assistance funds. The Irish Embassy in the foreign country had been aware that significant investigative steps regarding the allegations were conducted in that country in 2011. These steps were followed closely by the Embassy, which reported on them to DFAT headquarters.

However, DFAT Headquarters did not report this information to AGS, and AGS did not request information from the Irish Embassy or DFAT Headquarters. As a result, DFAT Headquarters and the Irish Embassy were not aware of the ongoing investigation. Moreover, the Irish authorities have not searched the company's books and records or bank accounts.

94. In Case #3, which appears to be linked to Case #2, an assessment is ongoing. The observations made by the lead examiners regarding Case #2 also pertain to this case. In addition, since a civil trial related to the allegations in Case #2 took place in a third country, which is a Party to the Anti-Bribery Convention, it would appear that potentially evidence regarding the case could be available in that country. However, it does not appear that the Irish authorities have sought through formal or informal means to obtain such information from the third country.

95. In Case #4, which involves the bribery of public procurement officials of an international organisation, an investigation has been opened. The Irish law enforcement authorities learned about this case through media reports brought to their attention at the OECD. However, media reports on this case appeared in 2007, including in an Irish daily newspaper. In this case, two important investigative steps were recently taken, and one has resulted in the production of documents, which are currently being evaluated. No contact has been made by the Irish law enforcement authorities with the country in which the foreign public officials hold nationality. Both the country in which the bribe took place and the country in which the foreign public officials hold nationality are Parties to the Anti-Bribery Convention. The Irish law enforcement authorities have not made contact with the Irish company allegedly involved in the allegations, and has not searched the company's books and records or bank accounts.

96. At the on-site visit, the cross-cutting reason given by the Irish law enforcement authorities for not taking more proactive steps in Cases #1 to #4 was that there was a lack of evidence to take such steps. However, the lead examiners consider that there is an inherent circularity in this argument, and came away with a very strong impression that the Irish authorities were taking a highly reactive approach to foreign bribery investigations. If detecting, investigating and prosecuting foreign bribery in Ireland were a priority, the Irish authorities could have been more proactive in using available tools to look for evidence. Steps such as contacting the government agency that supervises the state-owned Irish company involved in the allegations in Case #1, contacting DFAT headquarters and the Irish Embassy in Case #2, and obtaining the formal report on the case by the procurement body in Case #4, are all relatively low cost and simple steps that could have been taken.

Commentary

The lead examiners are concerned that detecting, investigating and prosecuting the bribery of foreign public officials is not a priority for the Irish law enforcement authorities. This finding is in large part due to the absence of meaningful proactive steps having been taken in Cases #1 to #4, some of which would have been relatively simple to take and not costly. Nevertheless, as observed by the lead examiners earlier under B.4.d., resources do not appear to be available to embark on full-scale investigations and prosecutions of foreign bribery cases, which might discourage taking feasible steps early on. The lead examiners therefore recommend that, in implementing the earlier recommendation to urgently reorganise law enforcement resources in such manner that credible allegations of the bribery of foreign public officials can be investigated and prosecuted in a timely and efficient manner, Ireland include consideration of how to apply cost effective and simple detection and investigative steps at the earliest opportunity.

f. Companies with limited connections to Ireland

97. The Irish authorities explain that the use of Irish registered non-resident companies is limited by section 42 to 45 of the Companies (Amendment) Act No. 2, 1999, which states that such companies wishing to register and therefore incorporate in Ireland must have: i) proof that the company intends to carry on an activity within Ireland, and the activity is mentioned in the Memorandum of Association; and ii) at least one director is resident in the European Economic Area, or a bond up to EUR 25 395 to secure compliance with legal obligations, or a certificate from the Registrar of Companies stating that the company has a real and continuous link with one or more economic activities in the State.

98. To attract and retain inward FDI, the Irish Government has committed itself to protecting Ireland's attractive 12.5% rate of corporation tax.[21] This strategy appears to be successful, with many major companies[22] setting up offices in Ireland, and making record profits. As a result, companies with a limited link to Ireland might incorporate in Ireland, for the purpose of carrying out their commercial activities in another country, in order to benefit from the Irish corporate tax rate. The lead examiners are concerned whether, if such a company were to engage in the bribery of foreign public officials, Ireland would robustly investigate and prosecute the company for alleged foreign bribery, due to, for instance, difficulties obtaining evidence abroad. However, in the absence of practical cases, it is difficult to assess whether this is indeed an area of concern.

Commentary

The lead examiners recommend following up enforcement of the foreign bribery offence against companies incorporated in Ireland that have a limited connection to Ireland.

5. Money laundering

a. Dual criminality requirement for predicate offence

99. In Phase 2, the Working Group recommended that Ireland amend the dual criminality exception for the money laundering offence under section 31(7) of the Criminal Justice Act 1994, in order to ensure that the offence of bribing a foreign public official is always a predicate offence for money laundering, without regard to where the bribery occurred. Pursuant to section 31(7), in order for the money laundering offence to apply when the predicate offence takes place abroad, the criminal conduct that comprises the predicate offence must constitute an offence in Ireland and the foreign country where it occurred. The Working Group was therefore concerned that the following scenario would not necessarily meet the dual criminality requirement: A company from Ireland bribes an official from country "C" in country "B", and country "B" has not criminalised the bribery of foreign public officials. At the time of the Phase 2 and 2bis Written Follow-Up Report, this recommendation had not been implemented. Section 31(7) of the Criminal Justice Act 1994 applied to the laundering of proceeds of bribing foreign public officials in violation of POCA 2010.

100. At the on-site visit, ODPP explained that the dual criminality requirement under POCA 2010 no longer applies because POCA 2010 establishes extraterritorial jurisdiction with regard to the foreign bribery offence. The lead examiners can see how having extraterritorial jurisdiction for the foreign bribery

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21 See: "Ireland's Corporation Tax Strategy and FDI" (Budget 2013, Department of Finance, Ireland): http://budget.gov.ie/budgets/2013/Documents/Budget%202013%20-%20Presentation%20on%20Corporation%20Tax%20and%20FDI.pdf

22 The Department of Finance of Ireland states that "over 1,000 multinational corporations have chosen Ireland as their strategic location in Europe" (*Ibid).*

offence in Ireland ensures that the requirement of dual criminality is fulfilled by Ireland where the bribery of a foreign public official from a third country takes place in a second country and the second country also has extraterritorial jurisdiction over such bribery. However, the lead examiners consider that a loophole would still exist for the purpose of the money laundering offence under section 31(7) of the Criminal Justice Act 1994, in cases where the second country either has not criminalised foreign bribery, or has done so, but does not have extraterritorial jurisdiction over the offence.

101. The lead examiners also note that pursuant to the money laundering offence in CJOA 2001, it is not necessary to prove that the predicate offence constituted an offence in Ireland and the foreign country where it occurred, because it is an offence to deal with the illegal proceeds "knowing or believing that the property is or represents the proceeds of criminal conduct". Thus, pursuant to CJOA it is only necessary to prove that the person who dealt with the property believed that it represented the proceeds of criminal conduct. As a result, the threshold for proving money laundering offences involving the proceeds of bribing officials of the European Communities and member states of the European Communities is lower under the CJOA than bribing foreign public officials under POCA 2010. The Irish authorities underline that the money laundering offence in CJOA is very wide reaching, being based on "criminal conduct" and strong presumptions.

102. Following the on-site visit, the Irish authorities also brought to the attention of the lead examiners Part 2 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, which they explain sets out the principal money laundering offences. Before the evaluation in the Working Group, Ireland stated that section 31 of the Criminal Justice Act 1994 has been repealed and money laundering is now incriminated by the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. Pursuant to the Act, the predicate offence for money laundering includes conduct that occurs outside Ireland, if it is an offence in the state where it occurs and it would be an offence if it were to occur in Ireland.[23] The dual criminality requirement under this statute is therefore the same as under POCA 2010. The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 provides important presumptions regarding the knowledge or belief in money laundering proceedings, and the kinds of predicate offences ("criminal conduct") are very broad (i.e., an offence without a *de minimis* threshold). However, these important features do not address the recommendation of the Working Group in Phase 2 regarding the dual criminality requirement for the predicate offence.

[23] Under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, it is an offence to engage in certain acts in relation to property that is the "proceeds of criminal conduct". Under section 6, the "proceeds of criminal conduct" means property that is derived from or obtained through "criminal conduct". Section 6 defines "criminal conduct" as: (a) "conduct that constitutes an offence", or (b) "conduct occurring in a place outside the State that constitutes an offence under the law of the place and would constitute an offence if it were to occur in the State". It is Ireland's position that the definition under section 6 (a) would cover bribery of a foreign public official abroad by an Irish legal or natural person, and that, therefore, the requirement of dual criminality for the predicate offence of foreign bribery would be limited under section 6 (b) to foreign bribery that takes place abroad and is committed by a non-Irish legal or natural person.

Commentary

The lead examiners reiterate the recommendation in Phase 2 that Ireland amend the dual criminality exception for the money laundering offence, now under section 6 (b) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred.

b. Money laundering statistics

103. In Phase 2 the Working Group recommended that Ireland maintain more detailed statistics on the following: i) sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets; ii) whether the bribery of foreign public officials is the predicate offence in suspicious transaction reports (STRs); and iii) the number of STRs that result in or support bribery investigations, prosecutions and investigations. At the time of the Phase 2 and 2bis Written Follow-Up Report, this recommendation had not been implemented.

104. STRs have not played a role in the detection of Cases #1 to #4 (see description of cases in Introduction). In addition, STRs do not appear to have played any role in supporting the assessments in Cases #!2 to #3, and the investigation in Case #4. Moreover, the Irish law enforcement authorities have not contacted the financial intelligence unit (FIU) to find out if it might have any relevant information regarding Cases #1 to #4.

105. In the responses to the Phase 3 Questionnaire, Ireland explains that work is ongoing to provide a sound statistical basis upon which to systematically review the efficiency and efficacy of Ireland's anti-money laundering / combating terrorist financing (AML/CFT) system. For this purpose, a committee has been established, which is chaired by the AML Compliance Unit of the DJE, and includes the Central Statistics Office, AGS and the Revenue Commissioners. In addition, the Report on Money Laundering Statistics 2011 (Report of the AML Compliance Unit) provides statistics on the number of STRs received in 2009, 2010 and 2011 (14 400, 13 416 and 11 168, respectively). It also provides statistics on the number of persons convicted of money laundering in the same years (2, 4 and 6, respectively), and the total amount of property seized, frozen and confiscated in 2011 (EUR 1 095 412 by AGS, and EUR 1 466 720 by Revenue Commissioners/Customs). In addition, it lists the top ten settlements in 2011 as a result of STRs, which ranged from EUR 1.2 million to EUR 3.5 million. Furthermore, it provides statistics on selected topics, including the number of STRs that facilitated criminal prosecutions in 2011 (30), and the number that facilitated criminal investigations (25). DJE is currently finalising the Report for 2012. The work is now dealt with under the aegis of the Money Laundering Steering Committee, which is headed by the Department of Finance and comprises all the relevant criminal justice and financial regulation bodies.

Commentary

The lead examiners consider that the information published in the Report on Money Laundering Statistics by the AML Unit of DJE partly implements the Working Group's Phase 2 recommendation on statistics, and that it is positive that a committee has been established to review the efficiency and efficacy of Ireland's AML/CFT system, which includes the Central Statistics Office. The lead examiners therefore note that important progress is being made but recommend that this recommendation continue in force, i.e. that Ireland maintain more detailed statistics on the following: i) sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets; ii) whether the bribery of foreign public officials is the predicate offence in suspicious transaction reports (STRs); and iii) the number of STRs that result in or support bribery investigations and prosecutions .

c. Detection of foreign bribery through AML/CFT system

106. Although neither the Phase 2 nor Phase 2bis report makes specific recommendations on the detection of foreign bribery cases through Ireland's AML/CFT system, in view of the continued lack of prosecutions or convictions, the lead examiners decided to explore what role STRs may or may not have played so far in Ireland in detecting foreign bribery cases, and supporting foreign bribery investigations.

107. According to the Report on Money Laundering Statistics 2011 (also discussed above under B.5.), quite a substantial number of STRs were received in 2009, 2010 and 2011.[24] However, the number of persons convicted of money laundering in the same years seems very low, in light of the number of STRs, and in view of the size of the financial sector in Ireland. The Irish authorities explained that AGS has commenced a "small" number of theft and fraud investigations based on STRs, estimated at around 10 to 12 in the last three years. These reports led to charges against twelve persons for offences other than money laundering (i.e. theft, social welfare fraud and drug trafficking). They add that STRs have been used to inform "a number" of fraud and drug related offences.

108. The lead examiners are aware of a foreign bribery case involving a company from another Party to the Anti-Bribery Convention, in which, according to a publicly available plea agreement in the country in which the company was convicted, an Irish company was used as a conduit for laundering the bribe payments. The plea agreement provides detailed information about the alleged money laundering transaction and the Irish company allegedly involved in the transaction. The Irish authorities do not indicate that they have followed up this information to conduct a money laundering investigation regarding the Irish company.

Commentary

The lead examiners believe that Ireland's AML/CFT system should play a stronger role in the detection of foreign bribery cases and support of investigations. Moreover, the system must facilitate the effective detection, investigation and prosecution of money laundering cases where foreign bribery is the predicate offence. They therefore recommend that the committee chaired by the Money Laundering Steering Committee, headed by the Department of Finance, which has been established to systematically review the efficiency and efficacy of Ireland's AML/CFT system, specifically include in its review how the system can be strengthened for the purpose of detecting foreign bribery and supporting foreign bribery investigations and prosecutions, as well as facilitating the effective detection, investigation and prosecution of money laundering cases where foreign bribery is the predicate offence.

24 . Recent amendments to the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 should result in more STRs. For instance, one of the main improvements is the expansion of entities and professionals subject to STRs under the Act.

6. Accounting requirements, external audit, and company compliance and ethics programmes

a. False accounting

109. In Phase 2, the Working Group recommended that Ireland "ensure that false accounting offences are sanctioned in an effective, proportionate, and dissuasive manner".[25] The recommendation was made after assessing Ireland's enforcement of the false accounting offences in the CJOA 2001 and the Companies Act 1990. The Working Group was concerned that there had been no enforcement of the former, and sanctions applied under the latter were too low to be considered effective, proportionate, and dissuasive, especially if applied to legal persons. The Working Group considered this recommendation not implemented at the time of Ireland's Phase 2 and Phase 2bis Written Follow-up Report.

110. Ireland's false accounting provisions include:

- section 10 of CJOA 2001, under which the intentional falsification of books and records is subject to an unlimited fine and/or imprisonment for a term not exceeding 10 years. Section 10 of CJOA is enforced by AGS; and

- section 240 of the Companies Act 1990, under which the sanctions for the failure to comply with requirements outlined in the Act—including the keeping of books of account and the destruction, mutilation, or falsification of such records—increased since Phase 2 with the introduction of the Fines Act 2010. Section 240 of the Companies Act 1990, as amended by the Fines Act 2010, provides for imprisonment not exceeding 5 years and/or a fine not exceeding EUR 22 220 on indictment (imprisonment not exceeding 12 months and/or a fine not exceeding EUR 2 500 on summary conviction).[26] The Companies Act 1990 is enforced by the Office of the Director of Corporate Enforcement (ODCE).

111. Ireland stated during the on-site visit that, since Phase 2, sanctions have not been applied to natural or legal persons by the AGS or the ODPP under Section 10 of CJOA 2001.

112. The ODCE continues to actively enforce the Companies Act 1990. From 2001 to 2011, the ODCE estimates that more than 100 companies, company directors and other persons have been successfully prosecuted on some 300 criminal charges in the company law area, and more than 100 company directors and other persons have been disqualified from involvement in a company for an average of about five years.[27] However, as in Phase 2, the average fines applied for violations of the Companies Act remain low. The ODCE stated at the on-site visit that the average fine is around EUR 1 000, but a representative from the accounting and auditing profession at the on-site visit estimated fines range from EUR 400 to EUR 500, adding: "It's more expensive to keep clean books."

113. If passed in its current form, the Companies Bill 2012 could significantly increase penalties for false accounting currently available under the Companies Act 1990. A category 1 offence under the Bill would have a penalty of a maximum fine of EUR 500 000 and/or up to 10 years in prison on indictment. A

25 . See section B.3, above, for further discussion of sanctions.

26 . As of Phase 2, fines under Section 240 of the Companies Act 1990 were EUR 12 697 on indictment and EUR 1 905 on summary conviction.

27 . OCDE Annual Report 2011, available at: http://www.odce.ie/en/media_general_publications_article.aspx?article=a59cffe6-1435-4969-a97d-ca1822c64c21

category 2 offence would have a penalty of a maximum fine of EUR 50 000 and/or up to 5 years in prison on indictment.

Commentary

Regarding sanctions for false accounting offences, the lead examiners note that Ireland has increased sanctions under Section 240 of the Companies Act 1990. However, sanctions applied under the Act remain low and no sanctions have been applied since Phase 2 under Section 10 of CJOA 2001. Therefore, the lead examiners recommend that the Working Group consider this Phase 2 recommendation partially implemented and further recommend that Ireland: i) increase the penalties for false accounting, as suggested in the current draft of the Companies Bill 2012; and ii) raise awareness among, and provide training to, AGS investigators, in order to help them better detect and investigate possible violations of the fraudulent accounting offence under section 10 of CJOA 2001.

b. Accounting and external audit requirements

114. This section addresses the partially implemented Phase 2 recommendation to raise awareness among the accounting and auditing profession, the Working Group's recommendation to follow-up on the threshold for external audit requirements, and recent provisions regarding internal company controls in the Companies (Auditing and Accounting) Act 2003.

(i) Awareness-raising in the accounting and auditing profession

115. As of Phase 2, there had been no specific awareness-raising efforts undertaken by any professional or government bodies in Ireland for the accounting and auditing profession. Ireland notes in its responses to the Phase 3 questionnaire that reference to the Convention was included in recent guidance issued by the Chartered Accountants Ireland Consultative Committee of Accountancy Bodies.

116. At the on-site visit, the accounting and auditing profession, which was represented by three professional accounting and auditing bodies (see discussion in Introduction), seemed to have a greater awareness of the UK Bribery Act than Ireland's domestic legislation. One representative stated that, in the accounting and auditing field, there is the perception that there is "not much going on" in terms of Irish anti-bribery enforcement, since, in their view, Irish companies are not typically engaged in high-risk sectors or geographies. All three professional bodies considered that foreign bribery falls within the interpretation of reportable offences under existing Irish anti-money laundering legislation.[28]

Commentary

Regarding awareness-raising in the accounting and auditing profession, the lead examiners consider this Phase 2 recommendation to remain partially implemented, and therefore reiterate the Working Group's recommendation to raise awareness of the foreign bribery offence among the accounting and auditing professions.

(ii) Threshold for external audit and internal controls

- Threshold for external audit

28 . See section 6, above, for more on anti-money laundering.

117. In Phase 2, the Working Group recommended following up whether the threshold for external audit requirements is adequate in practice to trigger an external audit of all companies with substantial overseas operations. Since Phase 2, amendments[29] to Part III of the Companies (Amendment) (No.2) Act 1999 have entered into force. The amendments increased the turnover threshold for audit exemption from EUR 1.5 million to EUR 7.3 million, and the balance sheet threshold from EUR 1.905 million to EUR 3.65 million. These thresholds were in line with European Union (EU) standards.

118. In August 2012, these thresholds increased again with the signing of Statutory Instrument No. 308/2012 – Companies (Amendment) (No. 2) Act 1999 (section 32) Order 2012. Under S.I. No. 308/2012, a company can qualify for an audit exemption if it has a turnover of less than EUR 8.8 million, a balance sheet total of less than EUR 4.4 million, and fewer than 50 employees. These amounts reflect the maximum under EU law. Ireland's responses to the Phase 3 Questionnaire state that these measures are meant to reduce costs for business by cutting administrative burdens. Ireland's responses to the Phase 3 Questionnaire also state that the Companies Bill 2012 will extend the audit exemption to companies in a group situation,[30] guarantee companies,[31] and dormant companies,[32] which meet the S.I. No. 308/2012 thresholds.

119. At the on-site visit, representatives from the accounting and auditing profession estimated that, while "nearly 90 per cent" of Irish companies could apply for audit exemptions under these thresholds, the number of larger companies that have an audit requirement under the Companies (Amendment) (No. 2) Act 1999 still "covers a high volume of business" in Ireland. This statement would be consistent with the view expressed by a number of government and non-government on-site visit participants that a small percentage of Ireland's largest companies account for the vast majority of Irish exports.

- Internal company controls

120. In Phase 2, the Working Group also recommended following up the effectiveness of then-draft provisions regarding internal company controls in the Companies (Auditing and Accounting) Act 2003. These provisions, which never have been commenced, included:

a) section 42, which requires public limited companies to *establish an audit committee* to review the company's accounts and to determine whether the books were kept in accordance with Section 202 of the Companies Act 1990. (Section 202 requires every company in Ireland to keep accounts and sets standards for how books of accounts should be managed.); and

b) section 45, which requires 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

29 . The amendments were introduced by the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

30 . Ireland defines a "group situation" as a holding company (parent company) or a subsidiary company.

31 . Section 1167 of the Companies Bill 2012 defines a "company limited by guarantee" as "a company which does not have a share capital and which…has the liability of its members limited by the constitution to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up".

32 . Section 366.2 of the Companies Bill 2012 defines a "dormant company" as one that, during a financial year (a) "has no significant accounting transaction"; and (b) "its assets and liabilities comprise only permitted assets and liabilities".

and other relevant laws "that provide a legal framework within which the company operates and that may materially affect the company's financial statements". Auditors must certify in their reports that directors' compliance statements are "fair and reasonable".

121. Regarding the obligation to establish an *audit committee*, the Irish Government signed in 2010 the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220/2010). Section 91 of S.I. No. 220/2010 applies the audit committee requirement to "public-interest entities" (i.e., publicly traded companies, credit institutions, or insurance undertakings), regardless of company size.

122. Similar requirements may be introduced under section 168 of the Companies Bill 2012, which would amend un-commenced section 42 of the Companies (Auditing and Accounting) Act 2003. It requires the establishment of audit committees by boards of directors of large companies. The term ''large company'' means a company whose balance sheet total exceeds EUR 25 million and whose amount of turnover exceeds EUR 50 million in the previous reporting year, or if the company and all of its subsidiary undertakings together meet the above balance sheet and turnover criteria. Regarding the potential overlap between Section 91 of S.I. No. 220/2010 and Section 168 of the Companies Bill 2012: Section 1094 of the Companies Bill 2012 states that Section 168 would apply to a public limited company that does not fall under Section 91 of S.I. No. 220/2010.

123. Regarding the requirement to include *statements of compliance* in annual reports, Ireland states in its responses to the Phase 3 Questionnaire that, in 2005, the Company Law Review Group (CLRG)[33] decided that section 45 of the Companies (Auditing and Accounting) Act 2003 was "disproportionate and presented a significant risk to national competitiveness". Instead, CLRG introduced section 226 of the Companies Bill 2012. Section 226 of the Companies Bill 2012 is much less prescriptive than section 45 of the Companies (Auditing and Accounting) Act 2003 on what directors' statements of compliance should include and how they should be prepared. It also doubles the threshold for applying for an exemption from this requirement,[34] and does not require a regular review of the statements of compliance by the board of directors or by the company's auditor.

Commentary

Regarding external audit requirements and required internal company controls, the lead examiners recommend that the Working Group continue to follow up on the threshold for external audit requirements. The lead examiners also recommend that the Working Group continue to follow-up required internal company controls under S.I. No. 220/2010 and, once it enters into force, the Companies Bill 2012. The lead examiners also recommend Ireland consider clarifying any possible inconsistencies between Section 91 of S.I. No. 220/2010 and Section 168 of the Companies Bill 2012 before the Companies Bill 2012 enters into force.

33 . The CLRG is a statutory advisory expert body charged with advising the Minister for Jobs, Enterprise & Innovation on the review and development of company law in Ireland: http://www.clrg.org/

34 . Under the Companies (Auditing and Accounting) Act 2003, a company could request an exemption from Section 45 if its balance sheet for the reporting year does not exceed EUR 7.6 million and its turnover does not exceed EUR 15.2 million. Under the Companies Bill 2012, a company can request an exemption from Section 226 if its balance sheet for the reporting year does not exceed EUR 12.5 million and its turnover does not exceed EUR 25 million.

(iii) Reporting by external auditors[35]

124. In Phase 2, the Working Group recommended that Ireland require external auditors to report all suspicions of foreign bribery to management and, as appropriate, to corporate monitoring bodies, regardless of whether the suspected bribery would have a material impact on financial statements. The Working Group's recommendation also called on Ireland to consider requiring external auditors, where appropriate, to report such suspicions to the competent law enforcement authorities. The Working Group's recommendation reflects the Group's concern that: i) none of the numerous reporting obligations on auditors expressly covered reporting of offences under the Prevention of Corruption Act 2001; and ii) materiality was not defined in Irish law or case law. The Working Group considered this recommendation not implemented at the time of Ireland's Phase 2 and Phase 2bis Written Follow-up Report.

125. Since Phase 3, the most significant change regarding reporting obligations in general is the introduction of section 19 of the Criminal Justice Act 2011.[36] Section 19 introduces a new offence applicable to everyone in Ireland for the failure to report information to AGS that could prevent the commission of a "relevant offence" or assist AGS in an investigation into white collar crime. The definition of "relevant offence" includes foreign bribery. Auditors are also required to report possible violations of: the Companies Act 1990, the Company Law Enforcement Act 2001, CJOA 2001, the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, and the Taxes Consolidation Act.[37]

126. A representative from the accounting and auditing profession called the myriad reporting requirements on auditors "a maze" and described the reporting process as tedious: "You could end up reporting the same offence to six different people." The ODCE stated during the on-site visit that the Government recognizes the reporting burden on Irish auditors. The ODCE added that, in 2012, the CLRG considered how to streamline existing reporting obligations. Their first conclusion was that such an undertaking would require "a very wide, representative group to make conclusive proposals".

127. On *materiality*, there has been no definition introduced since Phase 2 in Irish law. Ireland states in its responses to the Phase 3 Questionnaire that "the statutory threshold is where the auditor forms the opinion that there are reasonable grounds for believing that an offence has been committed".

> ***Regarding reporting by external auditors, the lead examiners consider the relevant recommendation to remain not implemented and therefore reiterate the Phase 2 recommendation to require external auditors to report all suspicions of foreign bribery to management and, as appropriate, to corporate monitoring bodies, regardless of whether the suspected bribery would have a material impact on financial statements. The lead examiners also recommend that Ireland continue to consider possibilities for streamlining existing reporting obligations for auditors.***

c. Company compliance and ethics programmes

128. In general, the largest companies in Ireland have in place compliance and ethics programmes that address bribery. An analysis of publicly available information on the largest indigenous Irish companies' compliance programmes and codes of conduct reveal that: two-thirds of the companies specifically refer to

35 . See section 10, below, for more on reporting foreign bribery.

36 . See Annex 2 for the full text of Section 19.

37 . The list of relevant provisions introducing auditor reporting obligations is available at paras. 78-82 of the Phase 2 report.

bribery or foreign bribery; just over half provide specific channels and protections for reporting violations of the company compliance programme; and a third refer to small facilitation payments, third-party risks, and the ability to report violations of the compliance programme anonymously. Like the accounting and auditing representatives, the one company representative at the on-site visit stated that these measures have been put in place by Ireland's largest companies in order to comply with the UK Bribery Act.

129. The above findings contrast, however, with recent surveys of Irish companies that indicate a number of Irish business professionals continue to believe that some degree of unethical behaviour is permissible, if engagement in such activity helps them achieve business growth.[38] These survey results were supported by discussions with business association representatives during the on-site visit.

130. The implementation of company compliance and ethics programmes is increasingly important, as Ireland actively endeavours to increase exports and to reach further into foreign markets. An analysis of publicly available information of Ireland's 21 largest companies (including both foreign- and Irish-owned enterprises) shows that the majority already have a significant presence or intend to increase their presence in emerging markets, such as India, P.R. China, Central and Eastern Europe, and Africa. A number of on-site visit participants also mentioned the increasing level of food exports to the Middle East region.

Commentary

Regarding company compliance and ethics programmes, the lead examiners are concerned by the lack of private sector interest and participation in the Phase 3 on-site visit. They are also concerned by reports that many Irish business professionals may believe that some degree of unethical behaviour is permissible, if engagement in such activity helps them achieve business growth. They therefore recommend that Ireland raise awareness in the private sector of the OECD Anti-Bribery Convention and the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance.

7. Tax measures for combating bribery

a. Non-tax deductibility of bribes

131. In Phase 2 the Working Group recommended that Ireland 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, by issuing guidelines or manuals, and through training programmes. This recommendation arose from the Working Group's finding in Phase 2 that bribes were not explicitly non-tax deductible in Ireland's tax law. Instead, at that time, Ireland's position was that bribes were not tax deductible "on policy grounds". Ireland was not able to support this position with jurisprudence, and the Revenue Commissioners had not issued any specific guidelines on this issue.

132. In Ireland's Phase 2 and 2bis Written Follow-Up Report, the Irish authorities explained that section 41 of the Finance Act 2008 was enacted specifically in response to the Working Group's Phase 2 recommendation, and that the provision "explicitly denies a tax deduction in computing the amount of any income chargeable to tax under Schedule D for any payment, the making of which constitutes a criminal offence or, in the case of a payment made outside of the State, where the payment, if made in the State,

38 . Ernst & Young European Fraud Survey 2011: http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/European-fraud-survey-2011--recovery--regulation-and-integrity

Ernst & Young Global Fraud Survey 2012: http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf

would constitute a criminal offence". On the basis of this explanation, the Working Group considered its Phase 2 recommendation in this regard fully implemented.

133. Since Phase 2, the OECD adopted the 2009 Tax Recommendation, which clarifies the standard for the non-tax deductibility of bribe payments. The lead examiners therefore reviewed section 41 of the Finance Act 2008 in view of the 2009 Tax Recommendation. Section 41 reads as follows:

> (1) In computing any income chargeable to tax under Schedule D, no deduction shall be made for any expenditure incurred—
>
> (a) in making a payment the making of which constitutes the commission of a criminal offence, or
>
> (b) in making a payment outside of the State where the making of a corresponding payment in the State would constitute a criminal offence.
>
> (2) Any expenditure specified in subsection (1) shall not be included in computing any expenses of management in respect of which relief may be given under the Tax Acts."

134. The 2009 Tax Recommendation provides two optional wordings for denying the tax deductibility of bribes – the first option is to expressly deny the tax deductibility of bribes (i.e., "prohibiting tax deductibility of bribes to foreign public officials"). The second option is to link the non-tax deductibility, as Ireland does, to the commission of a criminal offence. The 2009 Tax Recommendation recommends the following wording when the latter technique is chosen: "prohibiting tax deductibility of all bribes or expenditures incurred in furtherance of corrupt conduct in contravention of the criminal law or any other laws of the Party to the Anti-Bribery Convention". The difference in wording highlights a potential loophole in the Irish provision – i.e., the Irish wording only makes payments which themselves constitute a criminal offence non tax deductible. As a result, it is not clear whether, as recommended by Paragraph I(i) of the 2009 Tax Recommendation, the Irish provision also makes non-tax deductible indirect payments that are made with the intention of furthering corrupt conduct, such as a transfer of funds to a foreign subsidiary that will in turn be used by the foreign subsidiary to bribe a foreign public official.

Commentary

The lead examiners recommend following up application in practice of the non-tax deductibility provision in section 41(1) of the Finance Act, to ensure that it effectively implements Paragraph I(i) of the 2009 Tax Recommendation.

b. Detection in practice of foreign bribery by tax authorities and sharing of information

135. Although neither the Phase 2 nor Phase 2bis reports make specific recommendations on the detection in practice of foreign bribery by tax authorities, in view of the continued lack of prosecutions or convictions, the lead examiners decided to explore what role the Revenue Commissioners may or may not have played so far in Ireland in detecting foreign bribery cases, and supporting foreign bribery investigations. They also reviewed Ireland's framework for sharing tax information relating to the bribery of foreign public officials with foreign tax and criminal law enforcement authorities.

136. Pursuant to section 63A of the Criminal Justice Act 1994, the Revenue Commissioners are permitted to share spontaneously information with AGS regarding investigations. In practice, this information-sharing channel has so far been used once in a foreign bribery investigation in Ireland. At the on-site visit, AGS confirmed that it spoke to the Revenue Commissioners regarding Case #4; although they did not have information about suspicious payments by the company alleged to have bribed. In all the other

cases (Case #1, #2 and #3), contact between AGS and the Revenue Commissioners does not appear to have been made.

137. In its responses to the Phase 3 Questionnaire, Ireland states that the OECD Bribery Awareness Handbook for Tax Examiners is available electronically to staff of the Revenue Commissioners, and that the non-deductibility of bribes is included as part of the ongoing training for all Revenue auditors.

138. The Irish Tax and Customs Office of Revenue Commissioners appears well staffed for the purpose of investigating and prosecuting tax evasion cases, with 191 personnel in its investigations and prosecutions units, and 38 personnel in its legal unit.

139. In Ireland, the tax authorities are authorised to spontaneously share information with tax authorities in other countries in accordance with the provisions of the "Exchange of Information Article" in Ireland's Double Taxation Conventions and under the provisions of Council Directive 2011/16/EU. Such information may only be shared with the law enforcement authorities of another country on receipt of a request for MLA. So far, Ireland has included the language in Article 26 paragraph 2 of the OECD Model Tax Convention in its bilateral tax treaty with Germany.[39] The Irish authorities explain that, nevertheless, Germany must continue to make MLA requests because Irish domestic law currently does not permit the sharing of tax information with foreign law enforcement authorities.

Commentary

The lead examiners recommend that Ireland continue to provide ongoing training for the Revenue Commissioners on the detection of foreign bribery through tax information. They also recommend that such training be provided to members of AGS, to encourage them to contact the Revenue Commissioners to see if they have relevant tax information when investigating allegations of foreign bribery, where appropriate.

The lead examiners further recommend that Ireland consider including the language in Article 26 paragraph 2 of the OECD Model Tax Convention in its bilateral tax treaties.

8. International cooperation

140. Ireland does not have any outstanding issues from its Phase 2 or Phase 2bis reports on the provision of MLA or extradition.

141. In the responses to the Phase 3 Questionnaire, the Irish authorities state that since 2008, the Central Authorities have received two requests for MLA concerning foreign bribery related to searching and freezing bank accounts, which were received from a Party to the Convention. The request to search the bank records took five weeks to execute, and the request to freeze bank accounts was executed within eight months. The Central Authority on Mutual Assistance is not aware of any formal MLA requests in relation to Cases #1 to #4 in the Introduction of this report.

39 . Article 26 paragraph 2 of the OECD Model Tax Convention, provides the following exception to the rule that tax information received by a Contracting State shall be treated as secret: "*Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorised such use.*" In addition, Ireland is a Party to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters which includes in Article 22.4 a provision similar to the language in Article 26 paragraph 2 of the OECD Model Tax Convention.

9. Public awareness and the reporting of foreign bribery

a. Public awareness

142. In Ireland's Phase 2 and Phase 2bis evaluations, the Working Group issued a number of recommendations relating to raising the awareness of companies, especially small- to medium-sized enterprises (SMEs) and the public administration, particularly those agencies that deal with Irish enterprises operating abroad. In the Working Group's assessment of Ireland's Phase 2 and Phase 2bis Written Follow-up Report, the Working Group recognised the increased awareness-raising within the Irish public sector, and considered its recommendation in this regard fully implemented. However, it considered that awareness-raising efforts needed to be maintained as concerns the private sector, in particular by trade promotion agencies. Therefore, these recommendations were considered partially implemented. (Awareness among accountants and auditors is addressed in section B.6.b(i) of this report.)

143. As noted in the Introduction to this report, the Phase 3 evaluation of Ireland comes at a time of heightened sensitivities to domestic fraud and corruption, following the completion of the Mahon Tribunal and ongoing high-profile investigations of fraud linked to Ireland's financial and economic crisis. On-site visit discussions with government and non-government representatives confirmed that tackling these issues is a top priority for the Irish Government. However, little has been done since Phase 2bis to expand on Ireland's existing efforts to raise awareness of the risks of foreign bribery with the public and private sectors.

(i) Awareness among companies[40]

144. At the time of Ireland's Phase 2 and Phase 2bis reports, Ireland had done little to reach out to the private sector, and Irish governmental agencies stated they were not "responsible for raising awareness of […] the myriad of Government legislation" and that "it would not be appropriate and/or necessary to raise the issue of the risks of foreign bribery with companies".

145. Discussions with private sector representatives confirmed that the Irish Government has done little since then to raise awareness of Ireland's foreign bribery offence among the private sector. This analysis, however, comes with a caveat: The evaluation team met with only one company representative, as noted in the Introduction to this report, and with representatives from four business associations. As a result, it is difficult to adequately assess companies' awareness of the Irish foreign bribery offence and Annex II to the 2009 Anti-Bribery Recommendation, the Good Practice Guidance on Internal Controls, Ethics and Compliance.[41]

146. Three of the four individuals representing Irish business associations were unaware that foreign bribery was criminalized under Irish law. One individual from a business association said foreign bribery is not an issue for Irish companies. The individual from an Irish company and the four business association representatives at the on-site visit stated they have had no interaction with government agencies on the foreign bribery issue, including the ODCE, the Department of Foreign Affairs and Trade, as well as the Department of Jobs, Enterprise and Innovation's trade promotion agencies, Enterprise Ireland, the Industrial Development Authority, and Forfás.[42]

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40 . See Section B.6.c, above, on the implementation of compliance and ethics programmes by Irish companies.

41 . As noted in Section B.6.c., above, the one company representative at the on-site visit stated compliance and ethics measures have been put in place by Ireland's largest companies to comply with the UK Bribery Act.

42 . Enterprise Ireland "is the government organisation responsible for the development and growth of Irish enterprises in world markets" (http://www.enterprise-ireland.com/). The Industrial Development Agency is

(ii) Public awareness in the public administration

147. In its responses to the Phase 3 Questionnaire, DFAT listed measures taken to raise awareness among its staff of the Anti-Bribery Convention. These include: referring to the Anti-Bribery Convention in regular trainings for DFAT staff and briefing materials for DFAT diplomats and officials prior to overseas postings and the posting on DFAT's staff intranet of an information note and a Guide on the Convention, as well as reporting guidelines for DFAT staff in Ireland and abroad that include information on how to make a report both internally and externally to law enforcement authorities.

148. No effort has been made by the Irish Government to raise greater awareness among those agencies that deal with Irish enterprises operating abroad, including DJEI's trade promotion agencies, Enterprise Ireland, the Industrial Development Authority, and Forfás. Enterprise Ireland, for example, was not aware that the Anti-Bribery Convention brochure it distributes in information packets at trade missions for companies exporting overseas is obsolete. It pre-dates the Prevention of Corruption (Amendment) Act 2010 and the 2009 Anti-Bribery Recommendation and, as of the on-site visit, there were no plans to update the brochure. Therefore, although the recommendation to increase the awareness of public agencies that interact with the private sector was considered fully implemented at the time of the Phase 2 and 2bis two-year written follow-up report, the Phase 3 on-site visit showed that in practice this recommendation remains outstanding.

Commentary

Regarding awareness-raising among the private and public sectors of the Irish foreign bribery offence, the lead examiners reiterate the concerns of the Working Group in Phase 2 and Phase 2bis that such efforts need to be maintained, especially given the apparent lack of awareness-raising undertaken by the Irish Government since Ireland's Phase 2 and Phase 2bis Follow-Up Report. The lead examiners therefore reiterate these partially implemented recommendations that Ireland increase the awareness of public agencies that interact with private sector companies operating abroad and improve awareness of Ireland's foreign bribery offence among companies, in particular small- to medium-sized enterprises active in foreign markets.

b. Reporting and detecting cases of foreign bribery

(i) Process for reporting by the public administration[43]

149. In Phase 2 and Phase 2bis, the Working Group recommended that Ireland establish procedures to be followed by public sector employees, and in particular employees of DFAT, and trade promotion and development aid agencies, to encourage and facilitate the reporting of suspected foreign bribery to law enforcement. The Working Group considered these recommendations not implemented at the time of Ireland's Phase 2 and Phase 2bis Written Follow-up Report.

150. At the time of the Phase 2 evaluation, there were no formal or informal reporting procedures or legislation for reporting suspected foreign bribery instances by civil servants in Ireland. Since then, there have been three recent developments in this area. First, Ireland's responses to the Phase 3 Questionnaire state that DFAT has posted on its intranet reporting guidelines for all DFAT staff that include information on how to make a report to law enforcement authorities. Second, the Criminal Justice Act 2011 creates a

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"Ireland's inward investment promotion agency" (http://www.idaireland.com/). Forfás is "Ireland's policy advisory board for enterprise and science" (http://www.forfas.ie/).

43 . See section B.6.b(iii) for more on reporting by external auditors.

new offence for all Irish citizens under section 19 of the failure to report information to AGS that would help in "preventing the commission by any other person of a relevant offence," or "securing the apprehension, prosecution or conviction of any other person from a relevant offence". Failure to report suspected illegal acts under section 19 results, on summary conviction, in a class A fine (maximum EUR 5 000) or imprisonment for up to 12 months, or both; or, on conviction on indictment, in an unlimited fine or imprisonment for up to five years or both. Finally, the draft Protected Disclosures Bill 2012 provides for a stepped system of channels through which employees (both public and private) can make a protected disclosure.

151. Despite these developments, procedures for public sector employees to report foreign bribery allegations to law enforcement may still be unclear. For example, in Case #2, DFAT representatives did not report foreign bribery allegations to law enforcement (including to AGS representatives working alongside DFAT staff working in the country where the bribery allegedly took place). Ireland stated after the on-site visit that DFAT and AGS have been in contact since the on-site visit on this matter.

(ii) Whistleblower protections

152. In Phase 2 and Phase 2bis, the Working Group recommended that Ireland encourage whistleblowing by establishing whistleblowing protections for both public- and private-sector employees who report suspected cases of foreign bribery. The Working Group considered these recommendations not implemented at the time of Ireland's Phase 2 and Phase 2bis Written Follow-up Report.

153. Today, the problem is the overlapping overabundance of such protections that led one legal professional to call the patchwork of protections a "maze". The ODDP also conceded that "the law relating to whistleblowers is sectoral and it may be difficult for a lay person to readily understand." Ireland has historically taken a sectoral approach, providing 16 different whistleblower protections to specific industries or sectors. There also appears to have been no attempt to repeal existing statutory provisions to ensure consistency with new provisions. This has left significant gaps in protections and left potential whistleblowers confused in a country where whistleblowing already has a negative connotation.[44]

154. In addition to the sectoral provisions, the Government introduced additional protections under section 4 of POCA 2010 to address the Working Group's Phase 2 and Phase 2*bis* recommendations, as well as Section 20 of the Criminal Justice Act 2011,[45] which provides protections for whistleblowers who report information under section 19 of the same Act. Both section 4 of POCA and section 20 of the Criminal Justice Act, which are not mutually consistent, provide protections to private- and public-sector employees who report crimes—including foreign bribery—to law enforcement.

155. The Irish Government published in July 2013 a new, comprehensive draft whistleblower bill, the Protected Disclosures Bill 2013. Once entered into force, the Protected Disclosures Bill would not replace any of the existing whistleblower protections already in Irish legislation. At the on-site visit, the D/PER explained, "We couldn't come up with any one single legal solution to resolve the patchwork approach of current legislation". After the on-site visit, however, the Irish Government clarified that the Bill's drafting committee "seeks to amend each relevant sectoral provision so that any disclosure falling within the meaning of the Protected Disclosures Bill will be dealt with under the Bill. The effect is to provide a discloser with all of the (generally stronger) protections available in the Bill, whilst at the same time ensuring that in the unlikely event that his/her disclosure does not fall within the meaning of the

44 . For more on the political and cultural context of whistleblowing in Ireland see: *An Alternative to Silence: Whistleblower Protection in Ireland* (Transparency International Ireland, 2010).

45 . See Annex 2 for Section 4 of POCA 2010 and Sections 19-20 of the Criminal Justice Act

overarching Protected Disclosures Bill, the protections of the sectoral provisions will continue to be available."

Commentary

Regarding the reporting of foreign bribery by public servants, the lead examiners recognise DFAT's efforts and the new obligation to report suspected illegal acts under section 19 of the Criminal Justice Act 2011. However, these measures are relatively new and do not appear to have been applied in practice, as yet. The lead examiners therefore consider partially implemented the relevant Phase 2 and Phase 2bis recommendations, and reiterate the recommendation to put in place procedures for public sector employees, including employees of DFAT and trade promotion and development aid agencies, to encourage and facilitate the reporting of suspected foreign bribery offences that they may uncover in the course of their work. They also recommend that Ireland: i) consider maintaining statistics on the number of reports that are made by DFAT employees under the DFAT reporting guidelines and of the reports filed with AGS by both public and private sector employees under section 19 of the Criminal Justice Act 2011; and ii) raise greater awareness among the public and private sectors of available channels for reporting suspected illegal acts, including foreign bribery.

The lead examiners recognise Ireland's efforts to establish whistleblower protections since Phase 2 and recommend that the Working Group consider these Phase 2 and Phase 2bis recommendations partially implemented. However, they are concerned that the confusion surrounding available whistleblower protections in Ireland discourages whistleblowers from reporting suspected acts of foreign bribery. They therefore also recommend that the drafting committee of the Protected Disclosures Bill 2013 harmonize the Bill, to the greatest extent possible, with current whistleblower protections provided in Irish legislation. The lead examiners also recommend that Ireland raise greater awareness of whistleblower protections available in Irish legislation and—once it enters into force—in the Protected Disclosures Bill. Such efforts are especially important, given the recent introduction of the obligation to report suspected illegal acts to law enforcement.

10. Public advantages[46]

156. In Phase 2, the Working Group recommended that Ireland "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". The Working Group considered this recommendation not implemented at the time of Ireland's Phase 2 and Phase 2bis Written Follow-up Report.

a. Public procurement

157. Representatives from the Department of Public Expenditure and Reform (D/PER), which was carved out of the Department of Finance in 2011, stated during the on-site visit that all tenderers for public advantages must complete a statutory declaration that they have not been convicted of any of the offences referred to in S.I. No. 329/2006, including corruption.[47,48] D/PER stated that the Government is reliant on

46 . For note, Ireland does not have an official export credit programme.

47 . See Section B.3.b(ii) above for more information on debarment procedures under S.I. No. 329/2006.

48 . As noted in Section B.3.b(ii), "corruption" in S.I. No. 329/2006, the definition of "corruption" is provided by the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union.

tenderers providing truthful statutory declarations. No systematic due diligence is undertaken before or during the fulfilment of the contract. Following the on-site visit, D/PER clarified that "the Contracting Authority must choose whether the Statutory Declaration is required", but that D/PER guidelines for circulating requests for tender for goods and general services "make clear that the requirements apply to all contracts with a value exceeding the EU threshold", the minimum of which is EUR 130 000. D/PER also added after the on-site visit that requests for tender for public sector construction procurement projects must include statutory declarations under the Capital Works Management Framework (CWMF).[49] D/PER confirmed that there remains no formalized process for checking the publicly available debarment lists of international financial institutions (IFI).

b. Official development assistance

158. In Phase 2, the Working Group expressed concern that Irish Aid, which is managed by DFAT's Development Cooperation Division and is responsible for the administration of Irish official development assistance (ODA), had no processes in place to verify whether tenderers had been convicted of foreign bribery or to follow-up on this once ODA-financed public contracts were signed.

159. Ireland stated in its responses to the Phase 3 Questionnaire that Irish Aid now provides "Instructions for Submitting a Tender to Irish Aid", which specifically mentions fighting bribery as a priority for Irish Aid's programmes. The instructions also request tenderers to familiarise themselves with the provisions of the Anti-Bribery Convention and the relevant provisions of Irish law. Irish Aid also considers non-governmental organisations' systems of governance, internal controls and external audit when ODA funding decisions are made, and ongoing oversight of partners' systems occurs at the reporting and monitoring and evaluation phases of Irish Aid-funded projects.

Commentary

The lead examiners recognise the positive efforts made by Irish Aid to consider in its contracting decisions prior convictions for foreign bribery. However, D/PER has made little effort to do the same. Therefore, the lead examiners consider as partially implemented the relevant Phase 2 Recommendation, and reiterate the Working Group's recommendation to 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. The lead examiners also recommend that Ireland consider routinely checking publicly available debarment lists of multilateral financial institutions in relation to public procurement contracting.

49 . For more information, see: http://constructionprocurement.gov.ie/capital-works-management-framework/

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

1. Recommendations of the Working Group

The Working Group commends the Irish authorities for their cooperation and disclosure throughout the Phase 3 process. However, Ireland's failure to organise robust participation of the private sector during the on-site visit – with only one company attending this portion of the meetings – indicates a lack of engagement with the private sector on the bribery of foreign public officials.

Ireland has made progress on the following Phase 2 recommendations that remained partially or unimplemented at the end of Phase 2: Recommendation 4 on nationality jurisdiction is now fully implemented, and the following recommendations which were unimplemented are now partially implemented: 2(a) on whistleblower protections, 2(b) on reporting by public sector employees, 5(a) and 5(b) on the foreign bribery offence, 7(b) on false accounting offences, and 7(d) on statistics. Recommendation 8(b) on sanctions has been converted to a follow-up issue. In addition, Ireland has made progress on the following Phase 2*bis* Recommendations that remained unimplemented at the end of Phase 2 and are now partially implemented: 2(a) on reporting by public sector employees, 2(b) on whistleblower protections, and 3(a) on the foreign bribery offence.

Despite progress in certain areas, Ireland continues to have significant issues regarding its implementation of the Anti-Bribery Convention. Ireland has not prosecuted a foreign bribery case in the twelve years since its foreign bribery offences came into force. One investigation and three assessments of cases were ongoing at the time of the on-site visit. Ireland took few proactive investigative steps in these cases. This appears to be largely due to an inadequacy of resources for detecting and investigating foreign bribery cases, due to their depletion by non-bribery cases related to the financial sector. In addition, Ireland's legislative framework for criminalising foreign bribery retains significant weaknesses identified in Phase 2 and Phase 2*bis*. The two foreign bribery offences contained in two separate statutes have still not been consolidated and harmonised in a manner that is in compliance with Article 1 of the Convention, and the liability of legal persons for the foreign bribery offences is still based on the common law identification theory, which was assessed as inadequate by the Working Group. The Working Group considers that the Draft Scheme 2012 could provide a suitable vehicle to address these issues.

In conclusion, based on the findings in this report on Ireland's implementation of the Anti-Bribery Convention, 2009 Anti-Bribery Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group also invites Ireland to report back in writing within 12 months (December 2014) on implementation of the following Phase 3 Recommendations: 1(a) on the foreign bribery offence, 2(a) and (b) on the liability of legal persons, and 5 on enforcement. The Working Group will closely re-examine foreign bribery enforcement efforts when Ireland makes its one-year Phase 3 written follow-up report in December 2014, and two-year written follow-up report in December 2015.

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

1. Regarding Ireland's offences of bribing a foreign public official in POCA 2010 and CJOA 2001, the Working Group recommends that Ireland:
    a. As previously recommended in Phase 2, consolidate and harmonise the foreign bribery offences in the two statutes in a manner that is in compliance with Article 1 of the Anti-Bribery Convention, without further delay, including by removing reference to the term "agent" in POCA 2010 (Convention, Article 1); and
    b. Consider making the definition in POCA 2010, which is meant to describe a person performing a public function for a foreign public enterprise, completely autonomous, without need to refer to the definition of "person" in the Interpretation Act (Convention, Article 1).

2. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Ireland:
    a. Review on a high priority basis, the law on the liability of legal persons for foreign bribery with a view to codifying it, and to expand the scope of the liability to cover bribery committed by a lower level person with the express or implied permission of a senior person, as previously recommended in Phase 2 and Phase 2*bis*, and further expand the liability to meet the standards in the Good Practice Guidance in Annex I of the 2009 Anti-Bribery Recommendation (Convention, Article 2; 2009 Recommendation Annex I.B)*;* and
    b. Expressly provide for the liability of unincorporated legal persons for foreign bribery as recommended in Phase 2. (Convention, Article 2)

3. Regarding sanctions for foreign bribery, the Working Group recommends that Ireland:
    a. Ensure that legal persons are subject to effective, proportionate and dissuasive criminal sanctions, as previously recommended in Phase 2 (Convention, Article 3); and
    b. Consider the imposition of exclusion from tendering for awards of public contracts upon conviction of foreign bribery, regardless if the person bribed is an official from a Member State of the European Union, as previously recommended in Phase 2. (Convention, Article 3.4; 2009 Recommendation XI)

4. The Working Group recommends that Ireland as a matter or priority, take proactive and concrete steps to determine whether it is possible to establish a territorial link in credible allegations of foreign bribery by Irish companies and individuals, including in cases where an MLA request or request through Interpol has been sent and Ireland is waiting for a response (Convention, Article 4; 2009 Recommendation XIII).

5. Concerning enforcement of the foreign bribery offences, the Working Group recommends that Ireland:
    a. Urgently reorganise law enforcement resources in such manner that credible allegations of foreign bribery will be investigated and prosecuted in a timely and effective manner (Convention, Article 5; 2009 Recommendation IV, V and Annex I.D); and
    b. Consider how to apply cost effective and simple detection and investigative steps at the earliest opportunity (Convention, Article 5; 2009 Recommendation IV, V and Annex I.D).

6. Concerning anti-money laundering (AML) measures and foreign bribery, the Working Group recommends that Ireland:
    a. Amend the dual criminality exception for the money laundering offence in the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred, as previously recommended in Phase 2 in relation to the Criminal Justice Act 1994 (Convention, Article 7; Commentary 28);
    b. Maintain more detailed statistics on: i) sanctions in money laundering cases, including the size of fines and forfeited assets; ii) whether foreign bribery is a predicate offence in suspicious transaction reports (STRs); and iii) the number of STRs that result in or support bribery investigations and prosecutions (Convention, Article 7); and
    c. In the review of Ireland's AML/CFT System, the Money Laundering Steering Committee specifically look at how the AML system can be strengthened for the purpose of detecting foreign bribery and supporting foreign bribery investigations and prosecutions, and facilitate the effective detection, investigation and prosecution of money laundering cases where foreign bribery is the predicate offence (Convention, Article 7).

Recommendations for ensuring effective prevention and detection of foreign bribery

7. Regarding accounting requirements, external audit and internal controls, ethics and compliance as they relate to foreign bribery, the Working Group recommends that Ireland:
    a. Ensure that false accounting offences are sanctioned in an effective, proportionate, and dissuasive manner, as previously recommended in Phase 2, and also: i) increase the penalties for false accounting, as suggested in the current draft of the Companies Bill 2012, and ii) raise the awareness of, and provide training to, AGS investigators on the detection and investigation of fraudulent accounting offences related to foreign bribery in the CJOA 2001 (Convention, Article 8; 2009 Recommendation III.i);
    b. Raise awareness of the accounting and auditing profession of the foreign bribery offence, as previously recommended in Phase 2 (Convention, Article 8; 2009 Recommendation III.i,III.v, and X);
    c. Require external auditors to report all suspicions of foreign bribery to management and, as appropriate, to corporate monitoring bodies, regardless if the suspected bribery would have a material impact on financial statements, as previously recommended in Phase 2 (Convention, Article 8; 2009 Recommendation X.B);
    d. Consider clarifying any inconsistencies between the S.I. No. 220/2010 and the Companies Bill 2012 (before it enters into force) concerning required internal company controls (Convention, Article 8; 2009 Recommendation X.A); and
    e. Raise awareness in the private sector of the OECD Anti-Bribery Convention and the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance (2009 Recommendation X.C.i).

8. Regarding the detection of foreign bribery through tax measures, the Working Group recommends that Ireland:

a. Continue to provide ongoing training for the Revenue Commissioners on the detection of foreign bribery through tax information (2009 Recommendation III and VIII; 2009 Tax Recommendation II);
b. Provide training to members of AGS to encourage them to contact the Revenue Commissioners if they have relevant tax information when investigating foreign bribery cases, where appropriate (2009 Recommendation III and VIII; 2009 Tax Recommendation II); and
c. Consider including the language in Article 26 paragraph 2 of the OECD Model Tax Convention in its bilateral treaties (2009 Recommendation VIII; 2009 Tax Recommendation I.iii).

9. Concerning awareness and reporting foreign bribery, the Working Group recommends that Ireland:
   a. Increase the awareness of public agencies that interact with companies operating abroad and to improve awareness of Ireland's foreign bribery offence among companies, in particular small- to medium-sized enterprises active in foreign markets, as previously recommended in Phase 2 (2009 Recommendation III);
   b. Establish procedures for public sector employees, including employees of DFAT and trade promotion and development aid agencies, to encourage and facilitate the reporting of suspected foreign bribery offences that they may uncover in the course of their work, as previously recommended in Phase 2 (2009 Recommendation IX.i-ii);
   c. Consider maintaining statistics on the number of reports that are made by DFAT employees under the DFAT reporting guidelines and of the reports filed with AGS by both public and private sector employees pursuant to section 19 of the Criminal Justice Act 2011 (2009 Recommendation IX.i-ii);
   d. Raise greater awareness in the public and private sectors of available channels for reporting suspected cases of foreign bribery, and raise greater awareness of whistleblower protections in legislation, once the Protected Disclosure Bill 2013 enters into force (2009 Recommendation III and IX.i-ii); and
   e. Harmonise to the greatest extent possible the current whistleblower protections in legislation in the Protected Disclosures Bill 2013 (2009 Recommendation IX.iii).

10. Regarding public contracting opportunities for Irish entrepreneurs, the Working Group recommends that Ireland:
    a. Revisit the policies of agencies responsible for development aid, public procurement and public-private partnerships, to take due consideration of prior convictions of foreign bribery in their contracting decisions, as previously recommended in Phase 2 (Convention, Article 3.4; 2009 Recommendation XI); and
    b. Consider routinely checking publicly available debarment lists of multilateral financial institutions in relation to public procurement contracting (Convention, Article 3.4; 2009 Recommendation XI).

2. Follow-up by the Working Group

11. The Working Group will follow-up the issues below as case law and practice develop:
    a. Application of the foreign bribery offence in POCA 2010 to the bribery of persons performing a public function for a foreign public enterprise (Convention, Article 1);

b. Level of sanctions for foreign bribery imposed on natural and legal persons (Convention, Article 3);
c. Imposition of disqualification orders under the Companies Act 1990 upon conviction for foreign bribery (Convention, Article. 3.4);
d. Imposition of confiscation measures for foreign bribery (Convention, Article 3.3);
e. Enforcement of the foreign bribery offence against companies incorporated in Ireland that have a limited connection to Ireland;
f. Whether factors prohibited by Article 5 of the Anti-Bribery Convention may influence decisions of whether to investigate or prosecute foreign bribery cases (Convention, Article 5);
g. Application of the 'reasonable grounds' standard required to obtain search warrants in the investigation of foreign bribery cases pursuant to POCA 2001 (Convention, Article 5; 2009 Recommendation III, V, and Annex 1);
h. The threshold for external audit requirements, and required internal company controls under S.I. No. 220/2010 and, once it enters into force, the Companies Bill 2012 (Convention, Article 8; 2009 Recommendation X.A); and
i. Application of the non-tax deductibility provision in section 41(1) of the Finance Act, to ensure that it effectively implements Paragraph I(i) of the 2009 Tax Recommendation (2009 Recommendation III and VIII; 2009 Tax Recommendation I).

ANNEX 1: TABLE OF PHASE 2 AND PHASE 2BIS RECOMMENDATIONS

Phase 2 Recommendations – 2007 [50]	***Written Follow-Up – 2010*** [51]
1) Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery	
Text of Recommendation 1(a) 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];	*Fully implemented*
Text of Recommendation 1(b) 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: *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	*Partially implemented*

50 This column sets out the recommendations of the Working Group on Bribery to Ireland, as adopted in the March 2007 Ireland Phase 2 Report.

51 This column sets out the findings of the Working Group on Bribery on the Written follow-up to Phase 2 and Phase 2*bis* by Ireland, as adopted by the Working Group in March 2010.

Text of Recommendation 1(c) 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: *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].	*Partially implemented*
Text of Recommendation 2(a) 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];	*Not implemented*
Text of Recommendation 2(b) With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that Ireland: *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];	*Not implemented*
Text of Recommendation 2(c) With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that Ireland: *c)* 1.1 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];	*Fully implemented*

and	
Text of Recommendation 2(d) With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that Ireland: *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.].	*Not implemented*
2) Recommendations for Ensuring Effective Prosecution and Sanctioning of Bribery of Foreign Public Officials	
Text of Recommendation 3 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].	*Fully implemented*
Text of Recommendation 4 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].	*Not implemented*
Text of Recommendation 5(a) 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:	*Not implemented*

a) 1.2 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) 1.3the terminology used to describe the nature of the advantage prohibited from being offered, promised or given, (ii) 1.4by 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) 1.5by 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) 1.6by ensuring that the Attorney-General's consent under the 1906 Prevention of Corruption Act is not required; and	
Text of Recommendation 5(b) 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: *b)* 1.7 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].	*Not implemented*
Text of Recommendation 6(a) 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	*Not implemented*

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	
Text of Recommendation 6(b) 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: *b)* Expressly provide for the liability of unincorporated legal persons [Convention, Article 2].	*Not implemented*
Text of Recommendation 7(a) 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];	*Fully implemented*
Text of Recommendation 7(b) With respect to related tax, accounting and money laundering offences, the Working Group recommends that Ireland: *b)* Ensure that false accounting offences are sanctioned in an effective, proportionate and dissuasive manner [Convention, Article 8];	*Not implemented*
Text of Recommendation 7(c) With respect to related tax, accounting and money laundering offences, the Working Group recommends that Ireland: *c)* 1.8 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	*Not implemented*

[Convention, Article 7]; and	
Text of Recommendation 7(d) With respect to related tax, accounting and money laundering offences, the Working Group recommends that Ireland: *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].	*Not implemented*
Text of Recommendation 8(a) 160. 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];	*Not implemented*
Text of Recommendation 8(b) With respect to sanctions for foreign bribery offences, the Working Group recommends that Ireland: *b)* Consider introducing additional civil or administrative sanctions by the courts for natural and legal persons convicted of foreign bribery [Convention, Article 3];	*Not implemented*
Text of Recommendation 8(c) With respect to sanctions for foreign bribery offences, the Working Group recommends that Ireland: *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	*Not implemented*
Text of Recommendation 8(d)	*Fully*

With respect to sanctions for foreign bribery offences, the Working Group recommends that Ireland: *d)* Draw the attention of investigative and prosecutorial authorities to the importance of requesting confiscation as a sanction for foreign bribery [Convention, Article 3].	*implemented*

2. Follow-up by the Working Group

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) 161. 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.].

Phase 2bis Recommendations – 2008 [52]	***Written Follow-Up – 2010*** [53]
1) Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery	
Text of Recommendation 1 With regard to prevention, awareness raising and training, the Working Group recommends that Ireland continue its efforts to raise the level of awareness on the foreign bribery offence and on the risks that Irish companies may engage in bribery abroad: (i) within the public administration and amongst those agencies that deal	*Partially implemented*

52 This column sets out the recommendations of the Working Group on Bribery to Ireland, as adopted in the December 2008 Ireland Phase 2*bis* Report.

53 This column sets out the findings of the Working Group on Bribery on the Written follow-up to Phase 2 and Phase 2*bis* by Ireland, as adopted by the Working Group in March 2010.

with Irish enterprises operating abroad, including trade promotion agencies and Irish diplomatic missions; and (ii) within the Irish business community, including SMEs, engaging in business abroad [Revised Recommendation I].	
Text of Recommendation 2(a) With regard to the detection and reporting of the foreign bribery offence, the Working Group recommends that Ireland: a) Proceed promptly with its intention to put in place procedures for public sector employees, including staff of Irish diplomatic missions, to encourage and facilitate the reporting of suspected foreign bribery that they may uncover in the course of their work; and	*Not implemented*
Text of Recommendation 2(b) With regard to the detection and reporting of the foreign bribery offence, the Working Group recommends that Ireland: b) As concerns legislation on whistleblower protection, proceed promptly with the enactment of whistleblowing provisions as proposed under the Prevention of Corruption (Amendment) Bill 2008. In this regard, Ireland should pursue its intention to: (i) expand the definition of "appropriate persons" to whom communications can be made; and (ii) allow for the confidentiality of such communications, in order to encourage public and private whistleblowers to report suspected cases of foreign bribery without fear of retaliation [Revised Recommendation I].	*Not implemented*
2) Recommendations for Ensuring Effective Prosecution and Sanctioning of Bribery of Foreign Public Officials	
Text of Recommendation 3(a) With regard to the foreign bribery offence, the Working Group reiterates its Phase 2 recommendations, and recommends that Ireland consolidate and harmonise, as a matter of priority, the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 to remove inconsistencies between the two statutes, including [Convention, Article 1]: a) By proceeding promptly with the enactment of the Prevention of Corruption (Amendment) Bill 2008, and pursuing its intention to make changes to the Bill in order to: (i) harmonise the terminology used to describe the nature of the advantage prohibited from being offered, promised or given; (ii) harmonise the scope of nationality jurisdiction for	*Not implemented*

the foreign bribery offence in a manner that does not restrict nationality jurisdiction; and (iii) clarify the term "corruptly", in the absence of clear case law of what the prosecution must prove in this respect;	
Text of Recommendation 3(b) With regard to the foreign bribery offence, the Working Group reiterates its Phase 2 recommendations, and recommends that Ireland consolidate and harmonise, as a matter of priority, the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 to remove inconsistencies between the two statutes, including [Convention, Article 1]: b) By amending the Prevention of Corruption Act 2001 to remove reference to the term "agent" in order to avoid 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; and	*Not implemented*
Text of Recommendation 3(c) With regard to the foreign bribery offence, the Working Group reiterates its Phase 2 recommendations, and recommends that Ireland consolidate and harmonise, as a matter of priority, the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 to remove inconsistencies between the two statutes, including [Convention, Article 1]: c) By taking the first possible opportunity to consolidate the corruption offences into a single piece of legislation.	*Not implemented*
Text of Recommendation 4(a) With regard to the liability of legal persons, the Working Group reaffirms its concern and reiterates its recommendations expressed in Phase 2. The Working Group recommends that Ireland [Convention, Articles 2 and 3]: a) Adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery; and	*Not implemented*
Text of Recommendation 4(b) With regard to the liability of legal persons, the Working Group reaffirms its concern and reiterates its recommendations expressed in Phase 2. The Working Group recommends that Ireland [Convention, Articles 2 and 3]:	*Not implemented*

b) Expressly provide for the liability of unincorporated entities.	

2. Follow-up by the Working Group

5. In addition, the Working Group will follow-up, as practice develops:

a) The application of "reasonable grounds" required to obtain search warrants in the investigation of foreign bribery; and

b) The application of nationality jurisdiction to the bribery of foreign public officials as provided in the Prevention of Corruption (Amendment) Bill 2008.

ANNEX 2: KEY LEGISLATIVE PROVISIONS

PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2010

1.— In this Act, "Act of 2001" means the Prevention of Corruption (Amendment) Act 2001 .

2.— Section 1 (inserted by section 2 of the Act of 2001) of the Prevention of Corruption Act 1906 is amended—

(*a*) in subsection (2), by substituting ", consideration or advantage" for "or consideration", and

(*b*) in subsection (5)—

(i) in the definition of "agent"—

(I) in paragraph (*c*), in subparagraph (ix), by deleting "and", and

(II) in paragraph (*c*), by substituting the following subparagraphs for subparagraph (x):

"(x) any other person employed by or acting on behalf of the public administration of any state (other than the State), including a person under the direct or indirect control of the government of any such state, and

(xi) a member of, or any other person employed by or acting for or on behalf of, any international organisation established by an international agreement between states to which the State is not a party;",

and

(ii) by inserting the following definitions:

" 'corruptly' includes acting with an improper purpose personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or other information, or by any other means;

'state', in relation to a state other than the State, includes—

(*a*) a territory, whether in the state or outside it, for whose external relations the state or its government is wholly or partly responsible,

(*b*) a subdivision of the government of the state, and

(*c*) a national, regional or local entity of the state.".

3.— Section 7 of the Act of 2001 is amended—

(*a*) in subsection (1)—

(i) by inserting "(whether or not the person is an agent)" after "where a person", and

(ii) by substituting "the relevant section" for "section 1 (inserted by section 2 of this Act) of the Act of 1906",

and

(*b*) by substituting the following subsections for subsection (2):

"(2) Subsection (1) shall apply only where the person concerned is—

(*a*) an Irish citizen,

(*b*) an individual who is ordinarily resident in the State,

(*c*) a company registered under the Companies Acts,

(*d*) any other body corporate established under a law of the State, or

(*e*) a relevant agent in any case where the relevant agent does not fall within any of paragraphs (*a*) to (*d*).

(3) In this section—

'agent' has the meaning assigned to it by subsection (5) of the relevant section;

'ordinarily resident in the State', in relation to an individual, means the individual has had his or her principal residence in the State for the period of 12 months immediately preceding the alleged commission of the offence concerned under subsection (1);

'relevant agent' means a person who falls within paragraph (*b*) of the definition of 'agent' in subsection (5) of the relevant section;

'relevant section' means section 1 (inserted by section 2 of this Act and as amended by *section 2* of the *Prevention of Corruption (Amendment) Act 2010*) of the Act of 1906.".

4.— The Act of 2001 is amended by inserting the following section after section 8:

"Protection for persons (including employees) reporting offences under *Prevention of Corruption Acts 1889 to 2010*.

8A.— (1) A person who, apart from this section, would be so liable shall not be liable in damages in respect of the communication, whether in writing or otherwise, by the person to an appropriate person of his or her opinion that an offence under the *Prevention of Corruption Acts 1889 to 2010* may have been or may be being committed unless—

(*a*) in communicating his or her opinion to that appropriate person did so—

(i) knowing it to be false, misleading, frivolous or vexatious, or

(ii) reckless as to whether it was false, misleading, frivolous or vexatious,

or

(*b*) in connection with the communication of his or her opinion to that appropriate person, furnished information that he or she knew to be false or misleading.

(2) The reference in subsection (1) to liability in damages shall be construed as including a reference to liability to any other form of relief.

(3) A person who makes a communication under subsection (1), which the person knows to be false, that a person may have committed or may be committing an offence under the *Prevention of Corruption Acts 1889 to 2010* shall be guilty of an offence.

(4) Subsection (1) is in addition to, and not in substitution for, any privilege or defence available in legal proceedings, by virtue of any enactment or rule of law in force immediately before the commencement of this section, in respect of the communication by a person to another (whether that other person is an appropriate person or not) of an opinion of the kind referred to in subsection (1).

(5) An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for—

(*a*) having formed an opinion of the kind referred to in subsection (1) and communicated it, whether in writing or otherwise, to an appropriate person unless the employee—

(i) in communicating his or her opinion to that appropriate person did so—

(I) knowing it to be false, misleading, frivolous or vexatious, or

(II) reckless as to whether it was false, misleading, frivolous or vexatious,

or

(ii) in connection with the communication of his or her opinion to that

appropriate person, furnished information that he or she knew to be false or misleading,

or

(*b*) giving notice of his or her intention to do the thing referred to in paragraph (*a*).

(6) Schedule 1 shall have effect in relation to an alleged contravention of subsection (5).

(7) An employer who contravenes subsection (5) shall be guilty of an offence.

(8) A person guilty of an offence under subsection (3) or (7) shall be liable—

(*a*) on summary conviction, to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both, or

(*b*) on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 3 years or both.

(9) Section 13 of the Criminal Procedure Act 1967 shall apply in relation to an offence referred to in subsection (8) as if, in lieu of the penalties specified in subsection (3)(*a*) of that section, there were specified therein the penalties provided for in subsection (8)(*a*) and the reference in subsection (2)(*a*) of that section to the penalties provided for by subsection (3) of that section shall be construed and have effect accordingly.

(10) Any person who, upon examination on oath or affirmation authorised under paragraph 3(1) of Schedule 1, wilfully makes any statement which is material for that purpose and which the person knows to be false or does not believe to be true shall be guilty of an offence and liable on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both.

(11) A person to whom a notice under paragraph 3(2) of Schedule 1 has been given and who refuses or wilfully neglects to attend in accordance with the notice or who, having so attended, refuses to give evidence or refuses or wilfully fails to produce any document to which the notice relates shall be guilty of an offence and liable on summary conviction to a fine not exceeding €5,000.

(12) A document purporting to be signed by the chairperson or a deputy chairperson of the Labour Court stating that—

(*a*) a person named in the document was, by a notice under paragraph 3(2) of Schedule 1, required to attend before the Labour Court on a day and at a time and place specified in the document, to give evidence or produce a document, or both,

(*b*) a sitting of the Labour Court was held on that day and at that time and place, and

(*c*) the person did not attend before the Labour Court in pursuance of the notice or, as the case may be, having so attended, refused to give evidence or refused or wilfully failed to produce the document,

shall, in a prosecution of the person under subsection (11), be evidence of the matters so stated without further proof unless the contrary is shown.

(13) For the purposes of this section, a reference to 'dismissal' includes—

(*a*) a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2007, and

(*b*) a dismissal wholly or partly for or connected with the purpose of the avoidance of a fixed-term contract being deemed to be a contract of indefinite duration under section 9 (3) of the Protection of Employees (Fixed-Term Work) Act 2003 .

(14) Schedule 2 shall have effect for the purposes of a communication referred to in this section made to an appropriate person who is a confidential recipient.

(15) Paragraphs (*a*), (*c*), (*d*), (*e*) and (*f*) of the definition of 'penalisation' in subsection (16) shall not be construed in a manner which prevents an employer from—

(*a*) ensuring that the business concerned is carried on in an efficient manner, or

(*b*) taking any action required for economic, technical or organisational reasons.

(16) In this section—

'appropriate person', in relation to a communication referred to in this section made by a person, means a communication to—

(*a*) in any case, a member of the Garda Síochána,

(*b*) in any case where the opinion concerned of the kind referred to in subsection (1) was formed in the course of the person's employment—

(i) the person's employer, or

(ii) a person nominated by such employer as the person to whom a communication of that kind may be made,

(*c*) without prejudice to the generality of paragraphs (*a*) and (*b*), in any case where the person is in a state other than the State—

(i) a diplomatic or consular officer of the State who is in that state, or

(ii) a member of a law enforcement agency of that state,

or

(*d*) in any case where the person wishes to make the communication in confidence, to a confidential recipient;

'confidential recipient' has the meaning assigned to it by paragraph 1 of Schedule 2;

'contract of employment' means a contract of employment or of service or of apprenticeship, whether the contract is express or implied and, if express, whether it is oral or in writing;

'employee' means a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer;

'employer', in relation to an employee, means the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment, and includes—

(*a*) a person (other than an employee of that person) under whose control and direction an employee works, and

(*b*) where appropriate, the successor of the employer or an associated employer of the employer;

'penalisation' means any act or omission by an employer, or by a person acting on behalf of an employer, that affects an employee to his or her detriment with respect to any term or condition of his or her employment, and, without prejudice to the generality of the foregoing, includes—

(*a*) suspension, lay-off or dismissal,

(*b*) the threat of suspension, lay-off or dismissal,

(*c*) demotion or loss of opportunity for promotion,

(*d*) transfer of duties, change of location of place of work, reduction in wages or change in working hours,

(*e*) the imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty),

(*f*) unfair treatment, including selection for redundancy,

(*g*) coercion, intimidation or harassment,

(*h*) discrimination, disadvantage or adverse treatment,

(*i*) injury, damage or loss, and

(*j*) threats of reprisal.".

5.— The Act of 2001 is amended by substituting the following section for section 9:

"Offences — general.

9.— (1) Where an offence under the relevant Acts has been committed by a body corporate and is proved to have been committed with the consent, connivance or approval of, or to have been attributable to any neglect on the part of, a person who was either—

(*a*) a director, manager, secretary or other similar officer of the body corporate, or

(*b*) a person purporting to act in any such capacity,

that person shall also be guilty of an offence and liable to be proceeded against and punished as if the person 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 respect of the acts or defaults of a member in connection with the member's functions of management as if the member were a director or manager of the body corporate.

(3) Subsections (1) and (2) shall, with any necessary modifications, apply in respect of offences under the relevant Acts committed by an unincorporated body.

(4) Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act 1851, summary proceedings for an offence under the relevant Acts to which that provision applies may be instituted—

(*a*) within 12 months from the date on which the offence was committed, or

(*b*) within 6 months from the date on which evidence sufficient, in the opinion of the person instituting the proceedings, to justify proceedings comes to that person's knowledge,

whichever is the later, provided that no such proceedings shall be commenced later than 2 years from the date on which the offence concerned was committed.

(5) For the purposes of subsection (4), a certificate signed by or on behalf of the person initiating the proceedings as to the date on which evidence referred to in that subsection came to his or her knowledge shall be evidence of that date and, in any legal proceedings, a document purporting to be a certificate under this subsection and to be so signed shall be admitted as evidence without proof of the signature of the person purporting to sign the certificate, unless the contrary is shown.

(6) In this section, 'relevant Acts' means the *Prevention of Corruption Acts 1889 to 2010*.".

PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2001

1.—(1) In this Act "the Act of 1906" means the Prevention of Corruption Act, 1906.

(2) References in this Act to an act include references to an omission and references to the doing of an act include references to the making of an omission.

(3) References in this Act to any enactment shall be construed as references to that enactment as amended, adapted or extended by any subsequent enactment including this Act.

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.”.

3.—(1) Where in any proceedings against a person to whom this section applies for an offence under the Public Bodies Corrupt Practices Act, 1889, as amended, or the Act of 1906, as amended, it is proved that—

(*a*) the person received a donation exceeding in value the relevant amount specified in the Electoral

Act, 1997 , or the Local Elections (Disclosure of Donations and Expenditure) Act, 1999, as appropriate,

(*b*) the person failed to disclose the donation in accordance with that Act to the Public Offices Commission or the local authority concerned as appropriate, and

(*c*) the donor had an interest in the person 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 donation shall be deemed to have been given and received corruptly as an inducement to or reward for the person 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 unless the contrary is proved.

(2) This section applies to the following:

(*a*) a person required by section 24 of the Electoral Act, 1997 , to furnish a donation statement to the Public Offices Commission,

(*b*) a person required by section 13 of the Local Elections (Disclosure of Donations and Expenditure) Act, 1999 , to furnish to the local authority concerned a statement of donations under subsection (1) of that section.

(3) In this section—

"donation"

(*a*) in relation to persons referred to in section 24 of the Electoral Act, 1997 , has the meaning assigned to it by section 22 of that Act,

(*b*) in relation to persons referred to in section 13 of the Local Elections (Disclosure of Donations and Expenditure) Act, 1999 , has the meaning assigned to it by section 2 of that Act;

"donor" means the person who makes a donation or on whose behalf a donation is made.

4.—(1) Where in any proceedings against a person referred to in subsection (5)(*b*) of section 1 (inserted by *section 2* of this Act) of the Act of 1906 for an offence under the Public Bodies Corrupt Practices Act, 1889, as amended, or the Act of 1906, as amended, it is proved that—

(*a*) any gift, consideration or advantage has been given to or received by a person,

(*b*) the person who gave the gift, consideration or advantage or on whose behalf the gift, consideration or advantage was given had an interest in the discharge by the person of any of the functions specified in this section,

the gift or consideration or advantage shall be deemed to have been given and received corruptly as an inducement to or reward for the person performing or omitting to perform any of the functions aforesaid unless the contrary is proved.

(2) This section applies to the following functions:

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

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

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

(3) In this section—

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

"Minister" means a person who is a Minister of the Government or a Minister of State.

5.—(1) A judge of the District Court, on hearing evidence on oath given by a member of the Garda Síochána, or a member of the Garda Síochána not below the rank of superintendent, may, if he or she is

satisfied that there are reasonable grounds for suspecting that evidence of or relating to the commission of an offence or suspected offence under the *Prevention of Corruption Acts, 1889 to 2001*, punishable by imprisonment for a term of 5 years or by a more severe penalty ("an offence") is to be found in any place, issue a warrant for the search of that place and any persons found at that place.

(2) A member of the Garda Síochána not below the rank of superintendent shall not issue a search warrant under this section unless he or she is satisfied—

(*a*) that the search warrant is necessary for the proper investigation of an offence, and

(*b*) that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for the issue of the warrant.

(3) A warrant under this section shall be expressed, and shall operate, to authorise a named member of the Garda Síochána, accompanied by such other members or persons as the member thinks necessary, to enter, within one month of the date of issue of the warrant, if necessary by the use of reasonable force, the place named in the warrant, to search it and any persons found at that place and to seize and to retain anything found at that place, or anything found in the possession of a person present at that place at the time of the search, which the said member reasonably believes to be evidence of or relating to the commission of an offence or suspected offence.

(4) A search warrant issued by a member of the Garda Síochána under this section shall cease to have effect after a period of 24 hours has elapsed from the time of the issue of the warrant.

(5) A member of the Garda Síochána acting under the authority of a warrant under this section may—

(*a*) require any person present at the place where the search is being carried out to give to the member his or her name and address, and

(*b*) arrest without warrant any person who—

(i) obstructs or attempts to obstruct that member in the carrying out of his or her duties,

(ii) fails to comply with a requirement under *paragraph (a)*, or

(iii) gives a name or address which the member has reasonable cause for believing is false or misleading.

(6) A person who obstructs or attempts to obstruct a member acting under the authority of a warrant under this section, who fails to comply with a requirement under *paragraph (a)* of*subsection (5)*, or who gives a false or misleading name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £2,362.69 or to imprisonment for a period not exceeding 12 months or to both.

(7) The power to issue a warrant under this section is without prejudice to any other power conferred by statute for the issue of a warrant for the search of any place or person.

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.

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.

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

(*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.

(2) In this section—

"consideration" includes valuable consideration of any kind;

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

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.

10.—(1) This Act may be cited as the Prevention of Corruption (Amendment) Act, 2001.

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

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

CRIMINAL JUSTICE (THEFT AND FRAUD) OFFENCES ACT 2001

40.—(1) In this Part—

"active corruption" has the meaning given to it by Article 3.1 of the First Protocol;

"Community official" has the meaning given to it by Article 1.1(*b*) of the First Protocol;

"Convention" means the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests done at Brussels on 26 July 1995;

"First Protocol" means the 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;

"fraud affecting the European Communities' financial interests" has the meaning given to it by Article 1.1 of the Convention;

"money laundering" has the meaning given to it by section 31 (as substituted by *section 21* of this Act) of the Criminal Justice Act, 1994 ;

"national official", for the purposes of the application in the State of Article 1.1(*c*) of the First Protocol, means any one of the following persons:

(*a*) a Minister of the Government or Minister of State;

(*b*) an Attorney General who is not a member of Dáil Éireann or Seanad Éireann;

(*c*) the Comptroller and Auditor General;

(*d*) a member of Dáil Éireann or Seanad Éireann;

(*e*) a judge of a court in the State;

(*f*) the Director of Public Prosecutions;

(*g*) any other holder of an office who is remunerated wholly or partly out of moneys provided by the Oireachtas;

(*h*) any person employed by a person referred to in any of *paragraphs (d)* to *(g)* in the performance of that person's official functions; and

(*i*) a director of, or an occupier of a position of employment in, a public body as defined in the Ethics in Public Office Act, 1995 ,

and, for the purposes of the application in the State of Article 4.2 of the First Protocol, any one of the following persons shall be treated as a national official:

(i) a member of the Commission of the European Communities;

(ii) a member of the European Parliament;

(iii) a member of the Court of Justice of the European Communities;

(iv) a member of the Court of Auditors of the European Communities;

"official" has the meaning given to it by Article 1.1(*a*) of the First Protocol;

"passive corruption" has the meaning given to it by Article 2.1 of the First Protocol;

"Protocol on Interpretation" means the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests done at Brussels on 29 November 1996; and

"Second Protocol" means the 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 19 June 1997.

(2) For the purposes of *sections 42(c)* and *45(1)(a)*—

(*a*) a person benefits from fraud or money laundering if he or she obtains property as a result of or in connection with the commission of an offence under either of those provisions, and

(*b*) a person derives a pecuniary advantage from fraud or money laundering if he or she obtains a sum of money as a result of or in connection with the commission of such an offence.

41.—(1) Subject to the provisions of this Part, the Convention (other than Article 7.2), the First Protocol, the Protocol on Interpretation (other than Article 2(*b*)) and the Second Protocol (other than Articles 8 and 9) shall have the force of law in the State and judicial notice shall be taken of them.

(2) Judicial notice shall also be taken of any ruling or decision of, or expression of opinion by, the Court of Justice of the European Communities on any question as to the meaning or effect of any provision of the Convention, the First Protocol, the Protocol on Interpretation and the Second Protocol.

(3) For convenience of reference there are set out in *Schedules 2* to *9* respectively—

(*a*) the text in the English language of the Convention;

(*b*) the text in the Irish language of the Convention;

(*c*) the text in the English language of the First Protocol;

(*d*) the text in the Irish language of the First Protocol;

(*e*) the text in the English language of the Protocol on Interpretation;

(*f*) the text in the Irish language of the Protocol on Interpretation;

(*g*) the text in the English language of the Second Protocol;

(*h*) the text in the Irish language of the Second Protocol.

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.

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.

44.—An official who commits passive 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.

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.

46.—(1) Where a person is charged with an offence under *section 45* , 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.

(2) Where the Director of Public Prosecutions considers that another member state of the European Union has jurisdiction to try a person charged with an offence under *section 45* , the Director shall cooperate with the appropriate authorities in the member state concerned with a view to centralising the prosecution of the person in a single member state where possible.

(3) Proceedings for an offence to which this section applies may be taken in any place in the State, and the offence may for all incidental purposes be treated as having been committed in that place.

(4) Proceedings shall not be taken under section 38 of the Extradition Act, 1965, in respect of an act that is an offence under both that section and *section 45* of this Act.

47.—For the purposes of the application in the State of Article 5.3 of the Convention, as applied by Article 12.1 of the Second Protocol, extradition for the offence of fraud against the European Communities' financial interests or money laundering shall not be refused, notwithstanding section 13 of the Extradition Act, 1965, solely on the ground that the offence constitutes a revenue offence as defined in that Act.

CRIMINAL JUSTICE ACT 2011

19.— (1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in—

(*a*) preventing the commission by any other person of a relevant offence, or

(*b*) securing the apprehension, prosecution or conviction of any other person for a relevant offence,

and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.

(2) A person guilty of an offence under this section shall be liable—

(*a*) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or

(*b*) on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years or both.

20.— (1) An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee—

(*a*) for making a disclosure or for giving evidence in relation to such disclosure in any proceedings relating to a relevant offence, or

(*b*) for giving notice of his or her intention to do so.

(2) *Schedule 2* shall have effect in relation to an alleged contravention of *subsection (1)*.

(3) Nothing in *paragraphs (a), (c), (d), (e)* and *(f)* of the definition of "penalisation" shall be construed in a manner which prevents an employer from—

(*a*) ensuring that the business concerned is carried on in an efficient manner, or

(*b*) taking any action required for economic, technical or organisational reasons.

(4) (*a*) If penalisation of an employee, in contravention of *subsection (1)*, constitutes a dismissal of the employee, as referred to in *paragraph (a)* of the definition of "penalisation", the employee (or, in the case of an employee who has not reached the age of 18 years, the employee's parent or guardian, with his or her consent) may institute proceedings in respect of that dismissal under the Unfair Dismissals Acts 1977 to 2007 or to recover damages at common law for wrongful dismissal and, if the employee or his or her parent or guardian, as the case may be, does so, a complaint of such dismissal may not be presented to a rights commissioner under *paragraph 1(1)* of*Schedule 2* .

(*b*) If an employee (or, in the case of an employee who has not reached the age of 18 years, the employee's parent or guardian, with his or her consent) presents a complaint to a rights commissioner under *paragraph 1(1)* of *Schedule 2* in respect of a dismissal referred to in *paragraph (a)*, the employee or his or her parent or guardian, as the case may be, may not institute proceedings in respect of that dismissal under the Unfair Dismissals Acts 1977 to 2007 or to recover damages at common law for wrongful dismissal.

(5) For the purposes of this section and *Schedule 2* , a reference to "dismissal" includes—

(*a*) a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2007, and

(*b*) a dismissal wholly or partly for or connected with the purpose of the avoidance of a fixed-term contract being deemed to be a contract of indefinite duration under section 9 (3) of the Protection of Employees (Fixed-Term Work) Act 2003 .

(6) In this section, *section 21* and in *Schedule 2* —

"contract of employment" means a contract of employment or of service or of apprenticeship, whether the contract is express or implied and, if express, whether it is oral or in writing;

"disclosure", in relation to an employee, means a disclosure by the employee to a member of the Garda Síochána of information which he or she knows or believes might be of material assistance in—

(*a*) preventing the commission by any other person of a relevant offence, or

(*b*) securing the apprehension, prosecution or conviction of any other person for a relevant offence;

"employee" means a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer;

"employer", in relation to an employee, means the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment, and includes—

(*a*) a person (other than an employee of that person) under whose control and direction an employee works, and

(*b*) where appropriate, the successor of the employer or an associated employer of the employer;

"penalisation" means any act or omission by an employer, or by a person acting on behalf of an employer, that affects an employee to his or her detriment with respect to any term or condition of his or her employment, and, without prejudice to the generality of the foregoing, includes—

(*a*) suspension, lay-off or dismissal,

(*b*) the threat of suspension, lay-off or dismissal,

(*c*) demotion or loss of opportunity for promotion,

(*d*) transfer of duties, change of location of place of work, reduction in wages or change in working hours,

(*e*) the imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty),

(*f*) unfair treatment,

(*g*) coercion, intimidation or harassment,

(*h*) discrimination, disadvantage or adverse treatment,

(*i*) injury, damage or loss, and

(*j*) threats of reprisal.

ANNEX 3: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Bodies

- An Garda Síochána
- Central Bank of Ireland
- Department of Communications Energy + Natural Resources
- Department of Finance
- Department of Foreign Affairs and Trade
- Department of Jobs, Enterprise and Innovation
- Department of Justice and Equality
- Department of Public Expenditure and Reform
- Enterprise Ireland
- Law Reform Commission
- Office of the Attorney General
- Office of the Director of Corporate Enforcement
- Office of the Director of Public Prosecutions
- Office of Public Works
- Office of the Revenue Commissioners

Private Sector

- 1 company representative
- 4 representative from 4 business associations
- 4 representatives from 3 accounting and auditing professional bodies
- Financial sector:
  - 8 representatives from 6 financial institutions
  - 2 representatives from 2 associations of financial institutions

Academia, Civil Society, & the Legal Profession

- 5 representatives from the legal profession
- 2 representatives from 1 civil society organisation
- 1 representative of the media
- 2 representatives from academia

ANNEX 4: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

Legislative Abbreviations and Acronyms

CJOA 2001	Criminal Justice (Theft and Fraud) Offences Act 2001
CJ Bill Draft Scheme 2012	Criminal Justice (Corruption) Bill 2012 – Draft Scheme
PCA 1996	Proceeds of Crime Act 1996
PCA 2005	Proceeds of Crime (Amendment) Act 2005
POCA 1906	Prevention of Corruption Act 1906
POCA 1916	Prevention of Corruption Act 1916
POCA 2001	Prevention of Corruption (Amendment) Act 2001
POCA 2010	Prevention of Corruption (Amendment) Act 2010

All Other Abbreviations, Terms, and Acronyms

2006 Export Credits Recommendation	2006 OECD Recommendation on Bribery and Officially Supported Export Credits
2009 Anti-Bribery Recommendation	2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions
2009 Tax Recommendation	2009 Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions
Anti-Bribery Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
AGS	An Garda Siochána
AML	Anti-money laundering
CAB	Criminal Assets Bureau
CFT	Combating financing of terrorism

DFAT	Department of Foreign Affairs and Trade
DJE	Department of Justice and Equality
DJEI	Department of Jobs, Enterprise and Innovation
D/PER	Department of Public Expenditure and Reform
ODPP	Office of the Director of Public Prosecutions
ESRI	Economic and Social Research Institute
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FDI	Foreign direct investment
FIU	Financial intelligence unit
Good Practice Guidance	Good Practice Guidance on Internal Controls, Ethics, and Compliance
GDP	Gross domestic product
MNE	Multinational enterprise
ODA	Official development assistance
ODCE	Office of the Director of Corporate Enforcement
OECD	Organisation for Economic Co-operation and Development
SME	Small- to medium-sized enterprise
STR	Suspicious transaction report
UNCAC	United Nations Convention against Corruption
USD	U.S. Dollar
Working Group	Working Group on Bribery in International Business Transactions