

## White collar crime in Ireland - priorities and trends in a new era of corporate enforcement

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This article is an up-to-date summary of the corporate and financial crime landscape in Ireland. It examines emerging trends that may shape the future of corporate criminal enforcement in Ireland.

### Background

The corporate criminal and regulatory framework in Ireland has been significantly overhauled in recent years, with a new Corporate Enforcement Authority (CEA) established to replace the Office of the Director of Corporate Enforcement, which grew to be seen as ill-equipped to deal with Ireland's rapidly developing corporate environment.

The CEA is an independent statutory agency, which is equipped to deal with the large, complex investigations that have become commonplace in Ireland since its establishment as a go-to destination for the world's largest multinational corporations.

At the same time, the Garda National Economic Crime Bureau (GNECB), a branch of the Irish police force, has flexed its muscles in prosecuting corporate fraud, recently securing the first criminal conviction for insider trading in Ireland in October 2023, following an investigation with the Central Bank of Ireland (CBI).

### Enforcement bodies and powers

The Irish corporate criminal enforcement framework is made up of several multidisciplinary independent bodies, including the CEA, the Competition and Consumer Protection Commission and the CBI aided by the Irish police, including the GNECB.

#### Garda National Economic Crime Bureau

The GNECB (formerly known as the Garda Bureau of Fraud Investigation) is a specialist unit within the Irish police force (known as An Garda Síochána) which is responsible for the investigation of fraud and economic crimes and all foreign bribery and corruption offences. The GNECB also acts as the central repository for economic crime related intelligence.

The GNECB encompasses a number of units, including the Anti-Bribery & Corruption Unit and the Money Laundering Investigation Unit. These units interact with certain regulatory bodies, for example, the Central Bank of Ireland, which has a statutory mandate to supervise regulated entities and investigate contraventions of anti-money laundering laws.

Furthermore, the GNECB sends a number of specialist Gardaí (police) on secondment to the Competition and Consumer Protection Commission and the Corporate Enforcement Authority.

## Corporate Enforcement Authority

In a major overhaul of the corporate enforcement regime the CEA was established in July 2022 under the Companies (Corporate Enforcement Authority) Act 2021.

The CEA's statutory mandate is principally: to prosecute breaches of the Companies Act 2014; to impose sanctions on company directors under the Companies (Statutory Audits) Act 2018; and to act as the primary enforcement agency for certain investment vehicles under the Irish Collective Asset-management Vehicles Act 2015.

The CEA's primary functions under the functions under the Companies Act 2014 include:

- promoting compliance with company law
- investigating instances of suspected breaches of company law
- taking appropriate enforcement action in response to identified breaches of company law
- supervising the activities of liquidators of insolvent companies
- operating a regime of restriction and disqualification sanctions on directors of insolvent companies.

Where appropriate, the CEA will refer serious offences to be prosecuted by the Director of Public Prosecutions (DPP).

## Criminal Assets Bureau

In response to a high-profile period of proliferation of organised and violent drug crime in the 1990s, Ireland established a robust regime for the seizure of unexplained wealth, based primarily around the multi-agency Criminal Assets Bureau (CAB).

The statutory objectives of the CAB, as set out in s.4 of the Criminal Assets Bureau Act 1996 are: (a)

the identification of the assets, wherever situated, of persons which derive or are suspected to derive, directly or indirectly, from criminal activity; and (b) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets.

The CAB can use many powers normally reserved for the Gardaí, including search warrants and mandatory orders to furnish documents and information to the CAB.

In addition, the CAB can apply pursuant to s.2 of the Criminal Assets Bureau Act 1996 *ex parte* to the High Court for short-term "interim" orders to prevent a person from dealing with assets on the basis that they are the proceeds of crime. Crucially, the standard of proof applied in determining these applications is the balance of probabilities (i.e., the civil standard of proof). S.2 of the Criminal Assets Bureau Act 1996 allows for the longer-term freezing of assets for a minimum of seven years. At the expiry of seven years, the CAB can apply to transfer the asset in question to the State or to any other body that the Court may direct.

## **Dawn raids and powers of search and seizure**

In Ireland, a number of bodies have the power to carry out unannounced inspections of business premises to obtain documents and information. Dawn raids are frequently carried out with the assistance of An Garda Síochána and are used to gather evidence and information relevant to an investigation. Most of the statutes which confer powers on authorities to carry out dawn raids also create a number of offences relating to the obstruction of the exercise of those powers.

In Ireland the following bodies have the power to carry out a dawn raid:

- The Corporate Enforcement Agency
- The European Commission
- The Central Bank of Ireland
- The Competition and Consumer Protection Commission
- The Data Protection Commission
- The Commission for Regulation of Utilities
- The Commission for Aviation Regulation
- The Revenue Commissioners
- The Health Information and Quality Authority
- The Health and Safety Authority
- The Environmental Protection Agency
- The Workplace Relations Commission
- The Commission for Communication Regulation (ComReg)
- The Pharmaceutical Society of Ireland
- The Food Safety Authority

It is clear that entities may be the target of more than one of the above bodies. For example, a telecoms provider who is suspected of a breach of competition law could be the target of a raid by any combination of: the European Commission, the CCPC and/or ComReg).

## Corporate offences

### Corporate fraud

The Criminal Justice (Theft and Fraud Offences) Act, 2001 (as amended by the Criminal Justice (Theft and Fraud Offences) Amendment Act 2021) is the primary source of legislative provisions governing corporate fraud issues, including the criminal offences of theft, deception, forgery, and false accounting.

The Criminal Justice (Theft and Fraud Offences) Amendment Act 2021 was introduced to transpose Directive (EU) 2017/1371 and created the new offence of fraud which affects the financial interests of the EU and re-enforcing the corporate liability for offences committed by agents, employees and others acting in the interests of a company.

### Anti-competitive behaviour

The Competition Act 2020 is the primary statutory framework governing compliance with competition law in Ireland.

Section 4 of the Competition Act 2002 provides that it is prohibited for "undertakings" to enter into agreements, take decisions, or engage concerted practices that have as their object or effect the prevention, restriction, or distortion of competition in trade in any goods or services. This includes price fixing, bid-rigging, market sharing or artificially limiting production to maintain prices. An "undertaking" is defined broadly and includes any person, body corporate, or unincorporated body of persons engaged for gain in the production, supply, or distribution of goods or the provision of a service.

Under the Act, a conviction for cartel activity such as price fixing can carry criminal penalties of up to ten years imprisonment for individuals, and fines of up to €5 million or 10% of turnover for individuals and undertakings. A company director convicted of an offence faces automatic disqualification from acting as a director for five years.

## Corruption / bribery offences

Ireland introduced wide-ranging reforms to its anti-corruption laws through the Criminal Justice (Corruption Offences) Act 2018 (the **2018 Act**), which was heavily influenced by the UK's primary anti-corruption legislation, the UK Bribery Act 2010. The offences proscribed by the 2018 Act include active and passive corruption and corruption in relation to office, employment, position, or business.

The 2018 Act also provides for a new corporate liability offence, by which a corporate body may be held liable for the actions of its directors, managers, employees, agents, subsidiaries, or persons otherwise acting in the interests of the company, with the intention of obtaining and advantage for the corporate entity.

As some of the offences are explicitly stated to have extra-territorial effect, Irish persons, companies, and other organisations registered in Ireland can commit an offence contrary to the 2018 if they commit acts outside Irish territory which would constitute an offence if committed in Ireland.

## Money laundering, terrorist financing and sanctions

The Fifth Anti-Money Laundering Directive (**MLD5**) was transposed into Irish legislation by Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act, 2021. The 2021 Act expanded the category of "designated person" to include Virtual Asset Service Providers (**VASPs**) (which must register with the Central Bank of Ireland and other specified entities).

Prior to establishing a business relationship with certain clients, designated persons will be required to adhere to strict Customer Due Diligence (**CDD**) measures, including establishing

relevant beneficial ownership information. Furthermore, additional CDD requirements will apply to high-risk third countries

The move to include VASPs as a designated person (which will be regulated by the Central Bank of Ireland) is Ireland's first move to regulate digital, crypto and/or other non-fiat currencies, which are seen as highly vulnerable to money-laundering and terrorist funding risk. As a major hub for the global tech industry, Ireland's regulation of VASPs is likely to be the subject of scrutiny and the regime introduced by the 2021 Act will likely be a feature of crypto-asset related investigations and regulatory sanctions in Ireland.

## Future developments

### Increased activity from the CEA

The CEA has had a relatively quiet first 18 months, however it is clear that it is intent on further increasing its powers. A public consultation is currently underway on the proposed Companies (Corporate Enforcement and Regulatory Provisions) Bill 2023, which is aimed at enhancing corporate governance and company law enforcement.

In its response to the consultation, the CEA has proposed that it be given additional powers to: (i) enhance its investigative capabilities; (ii) increase its access to certain Court documents; and (iii) permit the sharing of certain information with other statutory bodies.

It can be expected that the CEA will continue to increase its investigation and enforcement activities in 2024 and beyond.

### Deferred prosecution agreements in Ireland

In a 2019 report on "*Regulatory Powers and Corporate Offences*" the Irish Law Reform Commission recommended that Deferred Prosecution Agreements, based on those deployed by UK agencies, be introduced in Ireland.

The report took some encouragement from the breadth of remedies secured in the UK by use of DPAs and recommended that to ensure consistency with requirements of Irish constitutional law, DPAs in Ireland must be: (a) placed on a statutory basis, (b) subject to judicial oversight, (c) subject to guiding principles, and (d) contain sufficient procedural safeguards.

It is envisaged that the CEA and/or the Director of Public Prosecutions would work closely with the relevant regulator to determine whether a Deferred Prosecution Agreement would be suitable in any given case. In all cases, the Irish Courts would have to be satisfied that the DPA was both (a) fair and proportionate and (b) in the interests of justice. Finally, the report recommends that any DPA in Ireland must be dealt with in open Court and the relevant arrangements be made public.

Despite the recommendations, DPAs have not yet been introduced in Ireland and it remains unclear whether the CEA has the same appetite to see their introduction in the near future.

## Increased focus on personal accountability

In keeping with a general shift in regulatory focus towards individual accountability (as best illustrated by the Central Bank of Ireland's "Senior Executive Accountability Regime", which shares many features with the UK's "Senior Managers and Certification Regime"), Ireland's strengthening corporate crime framework has serious implications for directors of Irish companies.

Across Irish legislation (particularly the Companies Act, the Competition Act and the Corruption Act) there are provisions imposing criminal liability on directors and officers of bodies corporate. Personal criminal liability for a director can arise where an offence is committed with the consent, connivance of or attributable to any neglect by the director.

In a 2023 press release, the CEA issued a press release for the attention of persons considering accepting directorships in companies, warning that "acting as a director of a company about which a person knows little or nothing can expose that person to criminal liability".

The CEA also noted that a "person who takes little, if any, active role in the management of a company or, for example, acts merely as a post box or as a signatory of company documents is likely to encounter, potentially significant, difficulties in satisfying a court that they have acted responsibly."

## How Ogier can help

For more information on white collar crime and legal services related to this topic, contact a member of our team via their contact details below.

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