



IRELAND: PHASE *2bis*

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

This Phase 2bis report was approved and adopted by the Working Group on Bribery in International Business Transactions on 11 December 2008.

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EXECUTIVE SUMMARY

1. The Phase 2bis report on Ireland evaluates certain aspects of Ireland's implementation of the OECD Anti-Bribery Convention, identified by the OECD Working Group on Bribery as areas of particular concern. In March 2007, the Working Group on Bribery had conducted Ireland's Phase 2 evaluation, and found that it could not adequately and fully assess Ireland's implementation of the Convention under the Phase 2 procedures, due in particular to the low level of participation during the on-site visit.
2. The Working Group welcomes the satisfactory efforts of Ireland in terms of preparation and participation during the Phase 2bis process. However, the Group is concerned that some important recommendations concerning the foreign bribery offence and liability of legal persons have not yet been taken into account by Ireland.
3. In particular, the Working Group is disappointed that Ireland did not seize the opportunity of the Prevention of Corruption (Amendment) Bill 2008 to act upon the Phase 2 recommendations to consolidate and harmonise the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001. The Group therefore recommends, as it did in 2007, that Ireland act on this issue as a matter of priority. It urges Ireland to pursue its declared intent to make changes to the 2008 Bill in order to achieve greater consistency between the two statutes, and consolidate at the first possible opportunity the corruption offences into a single piece of legislation. In addition, the Group continues to recommend that Ireland adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery.
4. The report also highlights some positive aspects of Ireland's fight against foreign bribery, and points out areas of improvement since the Phase 2 evaluation. The Working Group notes the significant efforts by Ireland to raise awareness of the foreign bribery offence among Irish public officials in key Irish ministries and agencies, as well as within the business community. In this regard, the establishment of a Senior Officials Compliance Committee to oversee and coordinate the fight against foreign bribery in Ireland is noteworthy. The Group also welcomes improvements to the anti-bribery legislation proposed in the Prevention of Corruption (Amendment) Bill 2008, which expands the scope of nationality jurisdiction in the Prevention of Corruption (Amendment) Act 2001, and provides for the protection of whistleblowers.
5. This Phase 2bis report, which reflects findings of experts from Estonia and New Zealand, was adopted by the Working Group on Bribery in December 2008, along with recommendations. This report is based on the laws, regulations, and other materials provided by Ireland, as well as information obtained by the evaluation team during its on-site visit. During this three day visit to Dublin in June 2008, the evaluation team met with representatives of Irish government departments and agencies, law enforcement authorities, the business community, the private bar, and civil society.
6. The Working Group will continue to monitor Ireland's implementation of the Convention through the regular follow-up reports to be provided by Ireland to the Group on implementation of its Phase 2 and Phase 2bis recommendations. It requests that Ireland provide the Working Group with a written follow-up report on the implementation of the Group's Phase 2 and Phase 2bis recommendations for consideration during the Working Group's meeting in October 2009.

INTRODUCTION

7. Ireland was evaluated under the Phase 2 process of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) in March 2007. As a result of its findings in the Phase 2 examination of Ireland, the Working Group on Bribery in International Business Transactions (the Working Group) recommended that a Phase 2bis examination take place within one year.¹

1. Reasons for Phase 2bis examination

8. From 16 to 20 October 2006, a team from the OECD Working Group on Bribery visited Dublin in Ireland as part of the Phase 2 self and mutual evaluation of the implementation of the OECD Anti-Bribery Convention. The purpose of the visit was to examine structures in place in Ireland for preventing, investigating, prosecuting and sanctioning the bribery of foreign public officials in international business transactions.

9. The Phase 2 on-site visit was characterised by very low attendance from major government bodies and private sector representatives. In particular, the Working Group considered that the absence of key ministries signalled that Ireland did not fully appreciate the crucial role it needed to play in ensuring and adequate level of awareness of the Convention and relevant legislative framework. Indeed, at the time of the Phase 2 on-site visit, no awareness-raising activities had been provided by the Irish authorities, either internally or for the private sector. This may have accounted for the fact that only one company attended the panel dedicated to the private sector, and that no representatives of the legal profession participated.

10. The low level of participation also limited the ability of the examiners to assess the effectiveness of the statutory and institutional framework in place in Ireland for implementing the Convention. In particular, the examination team was not afforded the interactive environment necessary for an effective examination of issues relating to the implementation in practice of Article 1 of the Convention on the foreign bribery offence, and Article 2 on liability of legal persons, as well as on practical issues surrounding the investigation and prosecution of foreign bribery cases.

11. Following the Phase 2 on-site visit, and prior to the adoption of the Phase 2 Report by the Working Group, Ireland demonstrated its intention to give implementation of the Convention higher priority. A large delegation attended the discussions of the Working Group on Bribery meeting to adopt Ireland's Phase 2 Report. Ireland took rapid steps to develop new legislation, and to raise awareness of the foreign bribery offence. Ireland also demonstrated its commitment by inviting the examination team to carry out a Phase 2bis on-site evaluation of Ireland.

12. The Working Group adopted the Phase 2 Report on Ireland in March 2007. It concluded that Ireland had not fully met its Phase 2 monitoring obligations, and considered that a Phase 2bis examination

¹ The complete Phase 2 Report on Ireland is publicly available and can be downloaded from the OECD website at: www.oecd.org/dataoecd/27/45/38322693.pdf. The Recommendations of the Working Group in the Phase 2 Report are set out in Annex 1 herein.

was necessary to effectively assess those issues that could not be dealt with adequately in Phase 2. The Working Group therefore accepted Ireland's invitation to carry-out a Phase 2bis on-site visit.

2. Goal and framework of Phase 2bis

13. The Phase 2bis on-site visit to Ireland took place from 11 to 13 June 2008. The examination team was composed of lead examiners from Estonia and New Zealand, and from the OECD Secretariat.² According to the Working Group Phase 2 Recommendations to Ireland, the Phase 2bis evaluation was intended to achieve two main purposes: (i) to provide the examination team with the opportunity to convene the panels that were not attended or were inadequately attended and ensure an adequate assessment of the issues that should have been discussed during these panels; and (ii) to make an effective assessment of the implementation of Article 1 of the Convention.³

14. The Phase 2bis on-site visit to Ireland was characterised by high attendance in all sessions. Meetings in the form of panel discussions were held with representatives from several relevant Government ministries, including the Department of Justice, Equality and Law Reform, the Department of Foreign Affairs, the Department of Enterprise, Trade and Employment, the Department of Finance, and several Irish trade promotion agencies; from the law enforcement authorities, notably An Garda Síochána (the Irish police), and the Office of the Director of Public Prosecutions; from the judiciary; from Parliament; from the private sector, including several business organisations, and a large number of corporations; from the private bar; and from civil society, including non-governmental organisations and trade unions.⁴

15. Panel discussions addressed a variety of topics, most notably: (1) awareness raising and prevention; (2) detection and reporting, including issues of whistleblower protection; (3) investigation and prosecution of foreign bribery cases; (4) the foreign bribery offence, in particular the Prevention of Corruption (Amendment) Bill 2008,⁵ which amends the Criminal Justice (Theft and Fraud Offences) Act 2001; and (5) liability of legal persons.

3. Overview of findings

16. The level of cooperation and participation in the Phase 2bis on-site visit was very satisfactory. Prior to the visit, Ireland responded to a Phase 2bis questionnaire, and provided the examination team with relevant material. Further information was also provided to the examination team following the on-site visit. Furthermore, due to the high number of panellists present at the on-site visit, the spirit of cooperation leading up to and during the on-site visit, and the open discussions, the examination team was able to obtain sufficient information to adequately assess Ireland's enforcement of the Anti-Bribery Convention. In particular, the examination team was able to adequately assess issues and developments regarding

² The examination team was composed of examiners from Estonia (Elina Elkind, Adviser to the Criminal Chamber, Supreme Court of the Republic of Estonia), New Zealand (Paul Mason, Investigations Manager, New Zealand's Inland Revenue Department; and Boris van Beusekom, Senior Advisor, International Criminal Law, New Zealand Department of Justice), and the OECD Secretariat (France Chain, Coordinator for the Phase 2 of Ireland, Legal Expert, OECD Anti-Corruption Division; Alex Conte, Senior Legal Expert, OECD Anti-Corruption Division; and Christine Uriarte, Senior Legal Expert, OECD Anti-Corruption Division).

³ See paragraph 5 of the Recommendations to Ireland in Ireland's Phase 2 Report.

⁴ See the full list of participants under Annex 3.

⁵ The Prevention of Corruption (Amendment) Bill 2008 can be found under Annex 2 of this report.

awareness and detection, as well as the application of the foreign bribery offence and the liability of legal persons in Irish law.

17. The Working Group welcomes the progress made by Ireland since its Phase 2 evaluation in a number of areas. In particular, the Irish authorities have initiated a number of awareness raising activities, and steps have been taken to encourage the reporting of suspected foreign bribery instances.

18. Furthermore, Ireland has taken important legislative steps in relatively little time to address some of the concerns of the Working Group concerning certain elements of the foreign bribery offence. The Prevention of Corruption (Amendment) Bill 2008 aims to amend the Prevention of Corruption Act 1906 and the Prevention of Corruption (Amendment) Act 2001 and overall strengthen the Irish legislation on corruption. In particular, it addresses the definition of agent and bribes, expands the scope of nationality jurisdiction, and introduces whistleblower protection provisions. The Bill was published on 10 June 2008 (the day prior to the beginning of the on-site visit), and the Irish authorities indicated that it would most likely be enacted by December 2008. The members of the examination team were provided with draft copies of the Bill several weeks prior to the Phase 2bis on-site visit. Improvements intended to be brought about by the 2008 Bill, as well as remaining concerns, are addressed below in section A.3 of the report on whistleblower protection, and in section B.1.b and B.2 on nationality jurisdiction and the foreign bribery offence respectively. As of December 2008, Ireland indicated that the Prevention of Corruption Bill has completed the second stage in parliament and will shortly be considered at Committee stage. The Committee stage provides an opportunity for Government to propose amendments to a bill. The Minister for Justice, Equality and Law Reform indicated that he would seize this opportunity and consider introducing certain recommendations made in this report as suggested amendments to the Prevention of Corruption Bill.

4. Outline of the report

19. This report is based on information provided by Ireland in responses to the questionnaire and following the on-site visit, discussions with panellists during the on-site visit, and independent research by the lead examiners and the OECD Secretariat.

20. Part A examines efforts by Ireland to raise awareness and improve detection and reporting of foreign bribery offences, as well as whistleblower protection. Part B focuses on the investigation and prosecution of foreign bribery. Part C sets out the Recommendations of the Working Group on Bribery and identifies issues for follow-up.

A. AWARENESS, PREVENTION, AND DETECTION OF FOREIGN BRIBERY

1. Awareness raising efforts

21. At the time of Ireland's Phase 2 evaluation in March 2007, there had not been any awareness raising or training activity undertaken by the Irish authorities, either for Irish civil servants or to raise awareness of the foreign bribery offence among the private sector. As for private sector initiatives, given that only one company attended the Phase 2 on-site visit, it was difficult to evaluate the level of awareness among Irish companies, as well as the structures in place within Irish companies to address and prevent bribery.

22. As of the time of this review, Ireland has taken significant steps to put in place training and generally circulate information regarding bribery of foreign public officials in international business transactions. Conferences and training has been or is being organised for staff of major Government departments, publications have been developed, and efforts are being made to coordinate with Irish business associations to ensure information on foreign bribery is circulated among the private sector. Nevertheless, it is worth noting that, at the time of the on-site visit, many of these initiatives were still just underway or even at the planning stage. Following the on-site visit, the Irish authorities indicated that most of these initiatives had moved forward, or had already been implemented, and are now part of the regular awareness-raising activities of Government departments.

a. Government initiatives

23. Following the adoption of the Phase 2 Report and the Working Group Recommendations, Ireland set up a Senior Officials Compliance Committee (SOCC). The SOCC is chaired by a senior level official from the Department of Justice, Equality and Law Reform. It is composed of officials from the Department of Justice, Equality and Law Reform, the Department of Finance, the Department of Foreign Affairs, the Department of Enterprise, Trade and Employment, the Garda Bureau of Fraud Investigation, the Office of the Director of Public Prosecution, the Office of the Attorney General, the Irish Financial Services Regulatory Authority, the Office of the Director of Corporate Enforcement, and the Revenue Commissioners. The SOCC has adopted a strategic plan of action to address each Phase 2 Recommendation made by the Working Group on Bribery in a coordinated manner. The SOCC also receives regular updates concerning discussions held during the four annual meetings of the Working Group on Bribery.

24. The SOCC consists of two sub-groups: the Awareness Raising Sub-Group and the Law-Enforcement Sub-Group. The Awareness Raising Sub-Group is made up of relevant Government departments and agencies, and meets independently of the SOCC. The Sub-Group has itself adopted a strategic action plan to improve awareness of foreign bribery within the Irish public and private sector. At regular Sub-Group meetings, members report on progress undertaken in their particular area of competence.

(i) In the public sector

25. The Department of Justice, Equality and Law Reform (DOJ) has initiated many awareness raising efforts in Ireland. Most notably, in May 2008, the DOJ launched a website (www.anticorruption.ie), which addresses issues of corruption and bribery, and includes an overview of the Convention and other international anticorruption instruments to which Ireland is a Party, as well as FAQs. The website also offers practical information on how to make a complaint if foreign bribery is suspected. At the time of the Phase 2bis on-site visit, this website had only been recently launched. Efforts remain to be carried out to ensure that information regarding this website is disseminated among relevant Irish officials. Furthermore, significant improvements in dissemination of information could be achieved if this site were linked to from the website of other Government departments and public agencies, such as the Department of Foreign Affairs, or the Department of Enterprise, Trade and Employment, as well as the Irish trade promotion agencies.

26. The Department of Foreign Affairs (DFA), given its presence overseas, has an important role to play in disseminating information on the Convention and the criminalisation of foreign bribery under Irish law. Awareness and training of its staff is consequently essential. Bearing this in mind, DFA staff departing on postings abroad attended a training programme in 2007 organised by the Trinity College School of Business, which included a workshop on foreign bribery, delivered by the Irish Chapter of Transparency International. Specific training on the Convention was also included in pre-posting training

organised by the DFA in 2008. The DFA expressed its intention to set up systematic training on the Convention for all staff departing on postings to missions abroad. The DFA has also circulated information on the foreign bribery offence in written material. A booklet on the Economic Work of Embassies was issued in August 2007 for Irish missions abroad, and includes a short reference to “obligations that may arise from international conventions such as the OECD Convention”. This booklet could probably benefit from more detailed information on the subject, including on the fact that foreign bribery is now an offence under Irish law, which can be prosecuted in Ireland even if it is committed abroad; information on Irish officials’ duty to report suspected foreign bribery and adequate reporting channels could also be provided. A more detailed Circular was sent out in September 2007 to all staff, highlighting the principal provisions of the OECD Anti-Bribery Convention and the Irish law in this area. Following the on-site visit, Ireland informed the examining team that information on the Convention was available on the DFA’s website and intranet, and that a copy of the DETE pamphlet on “The OECD Anti-Bribery Initiative” (see below) was also circulated to all missions, with a request to Heads of Missions that they ensure that all staff are familiar with the provisions of the Convention and that it be brought to the attention of business networks and other interlocutors. As regards the Prevention of Corruption (Amendment) Bill 2008, the DFA announced its intention to develop detailed reporting guidelines once the Bill is enacted, and to make the necessary adjustments to its booklet on the Economic Work of Embassies. Furthermore, Irish Aid, the DFA division in charge of handling Irish official development assistance, is including foreign bribery as part of the training for its staff. Irish Aid has also taken steps to raise awareness of the foreign bribery offence among staff in Ireland and abroad, as well as through publication of information on the issue of foreign bribery on its website.

27. The Department of Enterprise, Trade and Employment (DETE), as the Government department in charge of consulting and cooperating with the private sector, also has a crucial role to play in raising awareness of foreign bribery in Ireland. Its role as the oversight body for the Irish trade promotion agencies also makes it a key player in the area of prevention. The DETE has developed a pamphlet on “The OECD Anti-Bribery Initiative” which sets out the main elements and provisions of the Convention and how it has been transposed into Irish law. It includes explanations on the consequences in practice for Irish companies operating abroad, including the possible sanctions applicable for those found in contravention of the Irish law on foreign bribery. Concerning this latter point, discussions at the on-site visit pointed out the fact that it may be useful to refer to the possibility to confiscate not only the bribe, but, more importantly, the proceeds of bribery. The examining team welcomed the announcement by Ireland, following the on-site visit, that a correction had been promptly made in response to this concern in the DETE pamphlet to read “the Criminal Assets Bureau has power to seize a suspected bribe and, more importantly, the proceeds of bribery.” At the time of the on-site visit, The pamphlet was due to be circulated to staff of the DETE, as well as of those agencies operating under the DETE’s remit. In addition, the DETE announced its intention to put in place training for DETE employees who engage with Irish companies operating abroad. Following the visit to Dublin, the DETE indicated that the pamphlet had been circulated to relevant staff of the DETE, as well as of those agencies operating under the DETE’s remit. In addition, a large number of copies were supplied to the DFA, for distribution to staff at headquarters as well as to Missions abroad, as well as to Irish Aid, the Overseas Development Aid Division, and for distribution through the Irish Aid Volunteering and Information Centre, a public information centre dealing with ODA, including governance and anticorruption issues.

28. Ireland has also focused on the fiscal aspect of bribe payments. While this Phase 2bis does not aim to address the issue of the non tax deductibility of bribes,⁶ it is worth noting that the Finance Act 2008

⁶ This issue is addressed in the Phase 2 Report at paras 55 – 63, and is the subject of Phase 2 Recommendation 13a. This issue will be followed-up when Ireland presents its written follow-up report on implementation of its Phase 2 Recommendations. This report is due to be presented to the Working Group on Bribery in October 2009, together with Ireland’s written follow-up report on implementation of its

clarifies that “no deduction shall be made for any expenditure incurred in making a payment the making of which constitutes the commission of a criminal offence.” Irish Revenue indicated that training on specific changes included in the Finance Act 2008 has been provided to its staff. Where detection of bribe payments is concerned, all tax auditors have been alerted to the existence of the OECD Bribery Awareness Handbook for Tax Examiners, which is accessible via the Irish Revenue intranet. Furthermore, Irish Revenue indicated that the non-deductibility of bribes is being included in all future training modules of their audit programme. Finally, Irish Revenue has also undertaken an awareness campaign for tax practitioners, notably in the context of the Audit Sub-Committee of the Tax Administration Liaison Committee, which includes discussions at meetings of the Sub-Committee, informative e-mails, and publication of an article on the issue of non tax deductibility of bribes in a future issue of *Tax Briefing*, a publication aimed at tax practitioners.

(ii) *In the private sector*

29. The Anti-Corruption website set up by the DOJ is also meant to target the private sector. The FAQs address the effect of bribery on international business transactions, as well as specific actions which companies can take to minimise the risks of corruption. A novel initiative also appeared on the Anti-Corruption website prior to the Phase 2bis on-site visit: it featured an invitation to interested companies to attend panel discussions organised with the private sector.⁷

30. The DETE expressed its intention to send out the pamphlet mentioned above to a large number of Irish corporations. As noted earlier, this pamphlet mentions the serious implications for companies engaging in this type of behaviour. The DETE also explained that a leaflet detailing additional provisions contained in the Prevention of Corruption (Amendment) Bill 2008 would be developed. As noted earlier, following the on-site visit, the DETE sent out its anticorruption pamphlet to Irish corporations and Irish business associations, including Chambers of Commerce, IBEC (the Business and Employers Confederation), ICTU (the Irish Congress of Trade Unions), ISME (the Irish Small and Medium Enterprises Association), the Irish Exporters Association, and the Irish Auditing and Accounting Supervisory Authority.

31. As far as trade promotion is concerned, Enterprise Ireland⁸ could play an important role in disseminating information on foreign bribery to Irish enterprises operating abroad, notably given the wide network of worldwide agencies it boasts. However, as of the time of the on-site visit, the issue of foreign bribery did not form part of any formal briefing note, nor did it appear in the numerous paper and online guides and publications which Enterprise Ireland provides for companies operating abroad. Following the on-site visit, the Irish authorities indicated that Enterprise Ireland now uses the DETE pamphlet as a basis for briefing client companies and routinely includes this publication in the briefing packs provided to companies on trade missions overseas. Furthermore, an article setting out all aspects of the Convention, including company obligations, was published in the May 2008 edition of Enterprise Ireland’s magazine “The Market”, which is circulated to all the Agency’s staff as well as to all client companies operating in overseas markets.

32. Regarding awareness raising by the DFA, the Department works in cooperation with the DETE and Enterprise Ireland to disseminate information among Irish companies abroad. In addition, the

Phase 2bis recommendations. The summary and conclusions of the Working Group will be made publicly available shortly thereafter.

⁷ This was in addition to letters of invitation which were sent out to a large number of Irish corporations.

⁸ Enterprise Ireland is the Irish state development agency focused on transforming Irish industry, including through the provision of advice and support to Irish exporters. See www.enterprise-ireland.com.

abovementioned September 2007 Circular highlights the need for officers in Irish missions to be “familiar with the Convention so that it may be drawn to the attention of Irish companies as and when it is considered appropriate.” The DFA further mentioned that detailed guidelines were in preparation and would be circulated at a later date.

33. Notwithstanding these significant steps, when discussing the necessity of raising awareness of the Irish private sector on issues relating to foreign bribery, and the risks incurred in partaking in such practices, some Irish officials expressed the view that it would not be appropriate and/or necessary to raise the issue with companies. The perception appeared to be that Irish companies do not engage in corrupt behaviour abroad, and that to raise the issue with them may imply otherwise. Following the on-site visit, the Irish authorities indicated that they consider that the comments referred to above represented the views of the head office management personnel from one agency, who may not have been as familiar with the Anti-Bribery Convention as staff operating at the crucial agency-company level. The Irish authorities indicated that this issue has since been discussed with the agency concerned and the matter satisfactorily resolved. This perception that Irish companies may be exempt from corruption was also somewhat confirmed during discussions with Irish companies, which appeared on the whole reluctant to discuss practical issues related to foreign bribery, and some of which denied facing any corruption-related challenges in their overseas business operations. The lead examiners stress the importance for Ireland to take a more realistic and constructive approach, so as to enable it to engage in proactive discussions with the private sector and ensure that Irish corporations, including small and medium size enterprises (SMEs), are fully aware of their obligations under Irish law, where foreign bribery is concerned.

Commentary

The lead examiners welcome the significant steps taken by Ireland to improve awareness of the foreign bribery offence among the public and private sector. They applaud the institution of the Senior Officials Compliance Committee and the coordinated approach it is taking to respond to the Phase 2 Recommendations of the Working Group, and more generally to tackle issues of foreign bribery and corruption.

Nevertheless, the lead examiners noted that, as far as awareness raising is concerned, many of the steps taken by the Irish authorities were still at a preliminary stage at the time of the on-site visit. They recommend that Ireland maintain its focus on the issue and continue with the practical implementation of awareness raising measures, targeted both at Irish officials as well as the private sector. They encourage in particular the Department of Foreign Affairs, through its diplomatic missions, and the trade promotion agencies who deal with Irish companies operating abroad to pursue its proactive approach to raising awareness of foreign bribery among Irish corporations abroad, particularly where they may operate in sensitive industrial or geographical sectors.

b. Private sector initiatives

34. While the Phase 2 on-site visit had been characterised notably by the very low number of participants from the private sector, the Phase 2bis on-site visit in June 2008 attracted close to 20 companies, as well as representatives from several business associations. Consequently, the perspective of the private sector could be sought in many areas which could not be explored in September 2006.

35. The lead examiners were somewhat surprised to note that there was almost complete refusal on the part of companies to acknowledge the possibility that bribery may occur on certain foreign markets. This impression was reinforced by the fact that most companies who attended did not wish to be identified

during the panel discussions.⁹ Representatives of business associations were less hesitant to address this issue, and acknowledged the fact that, in certain industrial or geographical sectors, bribery is difficult to avoid, and that the use of agents to enter certain markets may still be indispensable.

36. However, this reluctance to discuss the practicalities and realities of foreign bribery does not appear to prevent Irish companies from having rather comprehensive mechanisms in place to combat bribery, including in international business transactions. Codes of conduct were in place in most of the companies present, and include provisions regarding the giving of bribes to public officials, as well as whistleblower protection. Most companies provide for an inside or outside body to oversee implementation of codes of conduct. As regards training on corruption issues, several companies indicated that training on issues pertaining to foreign bribery would vary depending on the employment and geographical location of the person concerned. A number of companies also provide interactive training, including role plays and case studies. Where whistleblowing is concerned, internal protection is afforded to whistleblowers under most corporate codes. Outside hotlines are occasionally used, and confidentiality is often provided (see also discussions on whistleblower protection in section 2.b below).

37. Overall, companies interviewed during the on-site visit did not appear aware of any initiative undertaken by the Irish Government to raise awareness of the foreign bribery offence. Business associations, on the other hand, acknowledged a number of Government initiatives in this area, and provided information on how they have or intend to disseminate this information to their own members. This divergence may be explained by the fact that, at the time of the on-site visit, circulation of the DETE booklet and the DETE's engagement with the business associations had only recently got underway. The Irish authorities assured the examining team that this has since been remedied, with the very wide distribution of the anti-corruption pamphlet to a large number of Irish corporations and business associations.

38. IBEC¹⁰ reported that it has held discussions on the issue of foreign bribery in the context of its Trade Council, which includes IBEC members, Government departments and state agencies. While much remains to be done, IBEC expressed its intention to disseminate information through its website, including a link to the www.anticorruption.ie Government website, as well as through electronic and paper publications, to circulate the DETE pamphlet among its members, to raise the issue, as relevant, when visiting trade missions, and to raise the issue of foreign bribery in reports produced for the Irish Government, and in reports to its own National Council. Furthermore, in view of the publication of the Prevention of Corruption (Amendment) Bill on 10 June 2008, IBEC announced its intention to take specific steps to alert its membership to the new provisions introduced by the Bill, notably with regard to nationality jurisdiction.

39. As regards SMEs, in September 2006, the Irish Small and Medium Enterprise Association (ISME) had stated the view that very few SMEs would be aware of the foreign bribery offence, a view also expressed at the time by the Irish Exporters Association.¹¹ At the Phase 2bis visit, the ISME noted the huge progress accomplished since the Phase 2 in terms of increased awareness due to Government efforts, as well as information disseminated by the Irish Chapter of Transparency International. Representatives of TI

⁹ Note that the Phase 2 Reports never identify companies by name. It is however usual for companies to be identified, and for representatives to speak under the company's name during panel discussions at the on-site visit.

¹⁰ The Irish Business and Employers Confederation (IBEC), with over 7500 member business and organisations from all sectors and all sizes, presents itself as the umbrella body for Ireland's leading industry groups and associations, and the national voice of Irish business and employers. See www.ibec.ie.

¹¹ See para. 36 of the Phase 2 Report.

confirmed that most Irish companies, including SMEs, are now aware that foreign bribery is illegal in Ireland, although, in their view, knowledge of the foreign bribery offence may not extend to the use of agents. The ISME expressed the wish that further practical guidance be made available via a Government website, including in the form of FAQs and scenarios providing examples on “corrupt” behaviour. It also stressed that making interactive training modules available online for SMEs could be extremely helpful for companies with smaller structures and insufficient resources to put in place their own training programmes.

Commentary

The lead examiners recognise that much progress has been done in terms of raising awareness within the Irish private sector, including SMEs. They recommend that Ireland further work in cooperation with business organisations and other civil society stakeholders to pursue its awareness raising activities, and provide advice and assistance to companies with regard to the prevention of foreign bribery.

2. Reporting by the public and private sectors

40. According to civil servants interviewed during the Phase 2 on-site visit, the likelihood of reporting from Irish public officials to law enforcement authorities appeared to be remote, given the absence of formal and informal reporting procedures or legislation, as well as a lack of protection from retaliatory action against whistleblowers. In its Phase 2 report on Ireland, the Working Group therefore recommended that Ireland develop procedures for public sector employees to report to law enforcement authorities credible information about foreign bribery offences that they may uncover in the course of their work, including where these concern offences that are committed by a private person (natural or legal person).¹²

a. Reporting by the public sector

41. Between the time of the Phase 2 report and the Phase 2bis on-site visit, two steps were taken by Ireland which are relevant to the reporting of corruption by the public sector. The first, which relates only to corruption within the Garda Síochána, involved the making in late April 2007 of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007. The Regulations provide for Garda employees to make confidential reports of suspected corruption or malpractice by a Garda employee to an independent person, appointed by the Minister for Justice, Equality and Law Reform. Provision is also made for the independent Garda Ombudsman Commission to be kept fully informed of all investigations into confidential reports of corruption and malpractice. Of more relevance to this report, and applicable to the reporting of information concerning *foreign* bribery, the second step taken by Ireland was the drafting of whistleblower protection provisions under the Prevention of Corruption (Amendment) Bill 2008. The substance of these provisions is considered in the following section of this report.

42. As the whistleblower provisions apply to the public sector (as well as the private sector), Irish authorities advised that comprehensive procedures for staff of Irish diplomatic missions will be introduced upon enactment of the Prevention of Corruption (Amendment) Bill 2008 and commencement of its whistleblower protection provisions. Authorities further advised that the Department of Enterprise, Trade and Employment will work with the agencies within its remit which engage in business abroad, namely Enterprise Ireland, the IDA and Shannon Development, to introduce measures to implement the whistleblower provisions.

¹² See Phase 2 Recommendation 8(b) in Annex 1.

b. Whistleblower protection

43. The Phase 2 report noted that Ireland had, at that time, given no consideration to encouraging whistleblowing in respect of criminal offences, including foreign bribery, and to developing comprehensive whistleblower protection, either through legislative measures or encouragement to companies. The lead examiners were therefore encouraged by the inclusion in the Prevention of Corruption (Amendment) Bill 2008 of whistleblower protection provisions. If enacted in its current form, the Bill would introduce a new section 8A to the Prevention of Corruption (Amendment) Act 2001. The provision would protect persons who have formed in good faith an opinion that an offence under the Prevention of Corruption Acts 1889 to 2008 (including the bribery of a foreign public official) has or is being committed and acts reasonably to communicate this to an “appropriate person”. Such persons are listed as a member of the Garda Síochána and, where the opinion is formed during the course of one’s employment, also to the person’s employer or employer’s nominee. A protected person would not be held liable in damages for making such a communication, and would be protected against dismissal or unfair treatment in their employment.

44. Despite this positive step, there are two important ways in which protection could be enhanced to achieve an effective regime for whistleblower protection. The first concerns the definition within draft section 8A(12) (clause 4 of the Bill) of the “appropriate person” to whom a communication must be made for protection to follow. As it applies in the employment setting, the definition seems appropriate. Otherwise, for protection to follow, a communication must be made to a member of the Garda Síochána. The lead examiners heard from both the private sector and civil society that this fails to make protection practical, especially in the case of communications made overseas. Such a person may, for example, only be able to make his or her report of suspicion to a law enforcement officer in the country within which the person works, or to a member of an Irish diplomatic mission abroad. In such a case, the current definition of the “appropriate person” to whom a report must be made would exclude protection. Irish authorities advised that these are matters that might be at least partially addressed within the procedures for staff of Irish diplomatic missions, intended to be introduced following the commencement of the whistleblower protection provisions under the Prevention of Corruption (Amendment) Bill 2008. Notwithstanding such procedures, however, legal protection only flows from a report to a person within the definition of “appropriate persons”.

45. The Working Group therefore considers that, to achieve effective whistleblower protection, the definition of “appropriate persons” to whom communications can be made could be strengthened to include the possibility of making protected communications to law enforcement authorities, whether those in Ireland or abroad, as well as staff of Irish diplomatic missions abroad. This should not be taken as suggesting that Irish diplomatic staff act as agents of the Garda Síochána, nor that Ireland protect such a communication from defamation proceedings that may be taken in another State. As regards communications made abroad to foreign law enforcement authorities, Irish authorities have commented that it may be constitutionally problematic for Ireland to seek to extend the application of domestic legislation in such an extra-territorial manner. However, extending the definition of “appropriate persons” in the manner suggested would simply act to protect the whistleblower under clause 4 of the 2008 Bill. As suggested by the Department of Foreign Affairs, where a communication is made to staff of Irish diplomatic missions abroad, or to law enforcement authorities abroad, the person should be put in contact with a relevant member of the Garda Síochána. If, however, the individual decides not to take this further step, effective whistleblower protection would demand that the person is nevertheless protected under clause 4.

46. The lead examiners also heard concerns expressed about the apparent lack of confidentiality by which communications would be treated. The identity of a person making a report of corruption by a Garda employee under the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations

2007 will be treated as confidential, unless the person's identity is determined to be essential to the investigation or prosecution of the alleged offence. Such confidentiality is not proposed, however, under the Prevention of Corruption (Amendment) Bill 2008 and the lead examiners heard from both the private sector and civil society that this may act as an important factor against the willingness of persons to report instances of foreign bribery under the Prevention of Corruption (Amendment) Act 2001.

47. In December 2008, Irish authorities explained that they are positively disposed to addressing some of the specific concerns raised above, by making amendments to the Prevention of Corruption (Amendment) Bill 2008. The Working Group is encouraged to hear that authorities are positively disposed to: (i) expand the definition of "appropriate persons" to include the possibility of making protected communications to law enforcement authorities abroad, as well as staff of Irish diplomatic missions abroad; and (ii) to provide for communications to be treated confidentially. Authorities explained that these are matters that will be raised with the Office of the Attorney-General with a view to presenting a redrafting of clause 4 of the Bill to the parliamentary select committee.

Commentary

The lead examiners are encouraged by the introduction under the Prevention of Corruption (Amendment) Bill 2008 of provisions for the protection of whistleblowers from retaliatory action. They are further encouraged by recent declarations from Irish authorities that they are positively disposed to addressing concerns of the lead examiners by making amendments to the Prevention of Corruption (Amendment) Bill 2008. In order to achieve effective whistleblower protection, the lead examiners recommend that Ireland pursue its intention to expand the definition of "appropriate persons" to whom communications can be made be extended to include all law enforcement authorities, whether those in Ireland or abroad, as well as staff of Irish diplomatic missions abroad. The lead examiners also recommend that Ireland pursue its intention to amend section 8A of the Prevention of Corruption (Amendment) Act 2001 so that the identity of an informant remains confidential unless disclosure of the informant's identity is essential to the investigation or prosecution of the alleged offence.

The lead examiners further recommend that the intended procedures for staff of Irish diplomatic missions should include steps for the effective communication of reports to mission staff, and then on to appropriate law enforcement authorities.

B. INVESTIGATION AND PROSECUTION OF THE FOREIGN BRIBERY OFFENCE

1. Investigation and prosecution of foreign bribery cases

a. The conduct of investigations

48. As of the time of this report, there have been no prosecutions of foreign bribery in Ireland. During the Phase 2bis on-site visit, Irish authorities advised that they are currently dealing with five allegations concerning the direct or indirect involvement of Irish companies in the bribery of foreign public officials, three of which concern the UN Oil-For-Food Programme. In discussing the current status of these investigations during the on-site visit, concern arose regarding the interpretation and application of certain provisions of Irish law regarding search warrants, as well as a general lack of progress. The lead examiners

were surprised to learn that no concurrent investigative steps were being taken or considered by the GBFI in two other cases because action was been taken by overseas authorities or had been requested from such authorities. The lead examiners were assured that these cases are being pursued by the Irish authorities and that investigation will be undertaken in the event that any information of wrongdoing comes to notice which merits investigation in Ireland.

49. Section 5 of the Prevention of Corruption (Amendment) Act 2001 allows for a warrant to search financial or company records in Ireland where there are “reasonable grounds for suspecting that evidence of, or relating to the commission of, an offence... is to be found in any place...”. Although the Garda Bureau of Fraud Investigation (GBFI) has not used this search provision to date, it has obtained production orders under the Bankers Books Evidence Act 1879 as amended. The law on corruption was changed in Ireland in 2001 with the enactment of the Prevention of Corruption (Amendment) Act 2001 and the Irish authorities advised that different considerations apply to offences committed prior to or after the coming into force of this legislation.

50. During the on-site visit, issues arose concerning the interpretation of the standard required to obtain warrants under section 5 of the PCA because of concerns of the examination team that the GBFI had not yet applied to obtain a warrant to conduct such searches in relation to certain cases of transnational bribery. The GBFI did not apply for such a warrant, despite the existence of credible and publicly available documentary information that transnational bribery involving Irish companies had taken place abroad, including documentation issued by an international high-level inquiry committee. Two concerns arose during the on-site visit in this regard:

- It was indicated, on the one hand, that a search warrant could only be obtained on the basis of *admissible* documentary evidence. On the other hand, others stated that it is not necessary for the Garda to present admissible evidence. It was clarified repeatedly after the on-site visit that the position in law is that “reasonable suspicion” required to obtain a search warrant can, in fact, be based on hearsay evidence or an official report from an outside source, a view shared by the private bar.
- It was also explained during the on-site visit that, due to the fact that the Prevention of Corruption (Amendment) Act 2001 currently only provides for a restrictive form of nationality jurisdiction, a search warrant could only be obtained if part of the transnational bribery offence took place in Ireland. This creates an inextricable situation. The Garda is effectively prevented from searching in Ireland for evidence of a connection between the offences abroad and Irish territory. Yet, evidence that part of the offences took place in Ireland is most likely to be found through first obtaining a warrant to search the relevant financial and company records. With only a very restricted ability to obtain such warrants, establishing links between the offence and Irish territory therefore seems unlikely. In the absence of nationality jurisdiction, this would, in effect, seriously hamper the conduct of investigations into foreign bribery cases. Given that Irish companies are unlikely to succeed in bribing abroad without having done something in Ireland to accomplish the offence, there needs to be an effective way of obtaining access to financial and company records in Ireland to provide proof of the part of the offence that took place in Ireland.

51. On the latter point, the Law Enforcement Sub-Committee of the Senior Officials Compliance Committee reviewed the matter following the on-site visit. Authorities advised that, as it relates to the cases concerned, this issue has been resolved by using an alternative search provision which was recently updated. Namely, section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by section 6 of the Criminal Justice Act 2006, could be used where offences were alleged to have been committed prior to enactment of Prevention of Corruption (Amendment) Act 2001. It is noted that the

enactment of the 2008 Bill will provide for full nationality jurisdiction and that this will strengthen the powers of Irish law enforcement authorities in conducting transnational investigations.

Commentary

The lead examiners consider that the Irish authorities should ensure an interpretation and application of search warrant provisions in Irish law in a manner that enables the use of appropriate information that an Irish individual or company bribed a foreign public official abroad as the basis for obtaining a warrant to search for evidence in financial and company records to determine whether the offence took place in part in Ireland. The lead examiners are encouraged by explanations provided by Irish authorities subsequent to the on-site visit and recommend follow-up of this issue as practice evolves.

b. Nationality jurisdiction

52. In Phase 2, the Working Group recommended that Ireland promptly establish nationality jurisdiction under the Prevention of Corruption (Amendment) Act 2001 in a manner consistent with the Criminal Justice (Theft and Fraud Offences) Act 2001.¹³ The Prevention of Corruption (Amendment) Bill 2008 looks to extend nationality jurisdiction to: (a) an Irish citizen; (b) an individual who is ordinarily resident in Ireland; (c) a company registered under the Companies Act; and (d) any other body corporate established under a law of Ireland.

(i) Need to harmonise or consolidate in relation to the two foreign bribery offences

53. The 2008 Bill would appear to satisfy the Working Group's Recommendation in Phase 2, except that the grounds for establishing nationality jurisdiction in the 2008 Bill are broader than those in the Criminal Justice (Theft and Fraud Offences) Act 2001 in one respect. Namely, the Criminal Justice (Theft and Fraud Offences) Act 2001 does not establish nationality jurisdiction over residents or bodies corporate. These differences may create problems in the ability of law enforcement and prosecutorial authorities to rely on nationality jurisdiction. Irish authorities are satisfied that these differences would not cause difficulties in prosecuting the foreign bribery offence. Issues surrounding the lack of consolidation and harmonisation of the two statutes are addressed in more detail in section 2.b below.

(ii) Scope of interpretation

54. The second matter of potential concern arises from Ireland's Phase 2bis responses, in which it set out a description of how jurisdiction would be extended to cover an offence committed outside the State. The explanation given seemed to suggest that it would be necessary in order for jurisdiction to be established that a person fall within a certain category *and* that the advantage be obtained in Ireland. Such an approach would have excluded the coverage of nationality jurisdiction where, for instance, an Irish company, citizen or resident bribed a foreign public official abroad on behalf of a foreign subsidiary, because an advantage would not necessarily be obtained in Ireland. In addition, this approach would not necessarily have covered the case where the foreign public official failed to deliver his or her side of the bargain. It would also not appear to have covered the case where the proceeds from bribing a foreign public official are applied to the purchase of assets abroad, such as a condominium for use by the company's directors or employees.

¹³ The Prevention of Corruption (Amendment) Act 2001 currently only establishes nationality jurisdiction over domestic public officials; whereas the Criminal Justice (Theft and Fraud Offences) Act 2001 establishes nationality jurisdiction where the offender is an Irish citizen.

55. During the Phase 2bis on-site visit, the Department of Justice, Equality and Law Reform stated that its explanation in the Phase 2bis responses reflects the need to show an “obvious connection with Ireland”. It was stated that this did not mean that the existence of nationality jurisdiction would depend upon the benefit derived from the bribe flowing back to Ireland in some form. While Irish authorities have repeated this position since the on-site visit, the differing explanations (between the Phase 2bis written responses and the oral explanations given) raise some doubt for the Working Group as to how this provision would operate.

Commentary

The lead examiners welcome the proposed amendment in the 2008 Bill to extend nationality jurisdiction beyond the restrictive application under the Prevention of Corruption (Amendment) Act 2001. However, they would prefer that the scope of nationality jurisdiction for the bribery of foreign public officials under the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 be harmonised in a way that does not restrict nationality jurisdiction, and recommend that future work on improving implementation of the Convention address this issue.

In addition, due to conflicting explanations provided in the Phase 2bis responses and during the on-site visit concerning the application of nationality jurisdiction to the bribery of foreign public officials under the 2008 Bill, the lead examiners recommend follow-up of this issue as practice evolves.

2. The foreign bribery offence

a. The Prevention of Corruption (Amendment) Bill 2008

56. On 10 June 2008, the Irish Government published the Prevention of Corruption (Amendment) Bill 2008 (the 2008 Bill), one day prior to the Phase 2bis on-site visit. The Department of Justice, Equality and Law Reform explained that the 2008 Bill has the full backing of the Government, and explained that its publication a little over one year after the Phase 2 examination was significant in light of the fact that there had been two changes in Government since the Phase 2 examination. The Joint Parliamentary Committee on the Constitution stated that the Bill would not go before both Houses until the end of September 2008, and that there was a fair chance that it would be enacted in December 2008.

57. According to the Explanatory Memorandum to the 2008 Bill, the main purpose of the Bill is to amend the Prevention of Corruption Act 1906 and the Prevention of Corruption (Amendment) Act 2001, to strengthen the law on corruption and ensure that Ireland is fully compliant with the OECD Anti-Bribery Convention. The Explanatory Note also states that the OECD made Recommendations to Ireland and that the 2008 Bill “gives fuller effect to certain provisions of the Convention”.

59. The Department of Justice, Equality and Law Reform similarly advised that the Prevention of Corruption (Amendment) Bill 2008 was introduced for the purpose of implementing the Recommendations of the Working Group in its Phase 2 report on Ireland. It is therefore surprising that key aspects of those Recommendations were either overlooked or not acted upon in the legislative reform taking place. This is especially the case concerning the lack in harmonisation and consolidation of the foreign bribery offences under Irish law (see section B.2.b below), in particular as this affects the continued use of the term “agent” and the continued need to prove “corrupt” intent (see section B.2.c below).

60. This part of the report also considers proposed amendments under the 2008 Bill concerning the coverage of non-pecuniary advantages (see section B.2.d below), and the question of the Attorney-General’s consent to foreign bribery prosecutions (see section B.2.e below).

(i) *Public consultation*

61. Neither the private sector nor civil society were consulted during the development of the Prevention of Corruption (Amendment) Act 2001. This was criticised in the Phase 2 Report, and the Irish authorities at that time advised that, since the development of the 2001 amendments, the Government prepared a White Paper (“Regulating Better”) to ensure that in the future new regulations and statutory instruments are more rigorously assessed and more accessible. The Irish authorities stated in Phase 2 that as a result, consulting with a wide population through appropriate channels is now a mandatory part of the process of developing legislation.

62. Despite this advice, Ireland stated in its responses to the Phase 2bis questionnaire that no consultations with the private sector had taken place in the development of the 2008 Bill, and did not indicate that such consultations were planned before submitting the Bill to Parliament. Indeed, during the on-site visit, the examination team learned that the Department of Justice, Equality and Law Reform does not feel that the 2008 Bill warrants consultation because of its limited and “technical” scope. While it stated that it will be open to the Parliamentary Select Committee to decide whether to consult with the public, authorities advised that they did not expect this to happen. Certain representatives of civil society also stated that they do not expect to be consulted because they believe that the Irish Government has not demonstrated a willingness to consult with the private sector and civil society on these kinds of issues.

63. It is notable that the Irish Parliament’s website lists a number of ongoing and recently completed public consultations that cover a wide range of issues.¹⁴ Consulting on the 2008 Bill therefore does not seem unprecedented, and would have provided an excellent opportunity to increase awareness of the foreign bribery prohibition. It would also signal that combating the bribery of foreign public officials is a matter of priority for the Irish Government.

(ii) *Openness to advice*

64. During the Phase 2bis on-site visit, the Senior Officials Compliance Committee explained that improvements to the Prevention of Corruption (Amendment) Act 2001 will continue, and that it hoped that there would be time to reflect upon the Recommendations in the Phase 2bis Report before the enactment of the 2008 Bill. The Department of Justice, Equality and Law Reform further stated that it would welcome new Recommendations from the Working Group concerning the steps that have been taken so far since the Phase 2 examination. The Department of Justice, Equality and Law Reform stated that the 2008 Bill, and other initiatives since the Phase 2 on-site visit, will not be able to meet all of the Phase 2 Recommendations, but that it has tried to respond to some of the more specific Recommendations, such as that concerning the definition of an “agent”.

65. The Joint Parliamentary Committee on the Constitution stated that the Joint Committee on Foreign Affairs is pressing for full implementation of the Convention. It also expressed interest in receiving the draft Phase 2bis Report in September 2008 for the purpose of considering the findings of the lead examiners. The lead examiners were told that the Joint Committee could not wait for the approval by the Working Group on Bribery in December 2008 of the final Phase 2bis Report on Ireland, since it was hoped that the 2008 Bill would pass the final stages of enactment in December 2008. The examination team therefore invited the Department of Justice, Equality and Law Reform to share the draft report with

¹⁴ Including: i) constitutional amendments (e.g. amendment on children); ii) adult literacy; ii) salmon drift netting, draft netting and angling; iv) community policing; v) recycling of household waste; vi) composition and functions of the *Seanad*; vii) proposed Broadcasting Bill; and viii) adverse side effects of pharmaceuticals.

the Committee when it receives it in September. Ireland subsequently informed the examination team that this report had indeed been shared with the Committee.

Commentary

The lead examiners are encouraged by the development of the Prevention of Corruption (Amendment) Bill 2008 (2008 Bill) and its publication on 10 June 2008, with an expected date of passage in December 2008. They also believe that by establishing the Senior Officials Compliance Committee (SOCC) to track the Phase 2 Recommendations, and responding to certain Phase 2 Recommendations through the 2008 Bill, Ireland has given the bribery of foreign public officials more priority than at the time of Phase 2. In addition, the lead examiners welcome the commitment of the SOCC to continue to improve the Prevention of Corruption (Amendment) Act 2001, and the interest of the Department of Justice, Equality and Law Reform and the Joint Parliamentary Committee on the Constitution to consider the Phase 2bis Recommendations in their future work in this area.

The lead examiners recommend that Ireland take into consideration the points and Recommendations made in this Report before the passage of the 2008 Bill. They believe this is important because the Phase 2bis Report is due to be approved by the Working Group on Bribery at about the same time that the 2008 Bill is expected to be passed by Parliament.

The lead examiners also believe that consulting with the private sector and civil society on the 2008 Bill would increase awareness of the prohibition against the bribery of foreign public officials in Ireland and signal that fighting foreign bribery is a priority of the Irish Government. The lead examiners would therefore support any initiative in this respect, even if it resulted in a short delay in the passage of the 2008 Bill.

b. Need to harmonise and consolidate the two foreign bribery offences

66. Despite criticisms in the Phase 2 Report and Recommendations by the Working Group to consolidate and harmonise the two foreign bribery offences,¹⁵ which are currently provided in two separate statutes [the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001] and contain overlapping and contradictory features, Ireland has chosen to maintain the two separate offences in the two statutes.¹⁶ Indeed, the nature of the amendments to the Prevention of

¹⁵ In Phase 2, the following main areas of non-harmonisation between the two foreign bribery offences were identified: i) “offers” is covered under the Prevention of Corruption (Amendment) Act 2001, but not under the Criminal Justice (Theft and Fraud Offences) Act 2001; ii) the Prevention of Corruption (Amendment) Act 2001 applies to the bribery of “agents” and the Criminal Justice (Theft and Fraud Offences) Act 2001 to “foreign public officials”; iii) a “corrupt” intent is only required under the Prevention of Corruption (Amendment) Act 2001; iv) the scope of extra-territorial jurisdiction is broader under the Criminal Justice (Theft and Fraud Offences) Act 2001 (i.e. under the Prevention of Corruption (Amendment) Act 2001 it only applies where the offender is an Irish public official or a member of the European Parliament); v) only “bodies corporate” are expressly liable under the Prevention of Corruption (Amendment) Act 2001, whereas the Criminal Justice (Theft and Fraud Offences) Act 2001 expressly applies to both incorporated and unincorporated bodies; and vi) the sanction under the Prevention of Corruption (Amendment) Act 2001 is up to 10 years imprisonment and/or an unlimited fine on indictment, and is up to 5 years imprisonment and/or an unlimited fine under the Criminal Justice (Theft and Fraud Offences) Act 2001.

¹⁶ The Prevention of Corruption (Amendment) Act 2001 implements the following conventions: i) OECD Anti-Bribery Convention; ii) Convention on Fight against Corruption by the European Union; and iii) Criminal Law Convention of the Council of Europe. The Criminal Justice (Theft and Fraud Offences) Act 2001 implements the Convention on the Protection of European Communities’ Financial Interests.

Corruption (Amendment) Act 2001 proposed under the 2008 Bill increase the lack of harmony between the two statutes in the following respects:

- The proposed new definition describing what constitutes a bribe is “consideration or advantage”. Although this definition is broader than the current definition, and responds to the Working Group’s Recommendation that it cover non-pecuniary advantages, it is still not consistent with the definition in the Criminal Justice (Theft and Fraud Offences) Act 2001(which refers to “an advantage of any kind whatsoever”). This is a matter considered further in section B.2.d below.
- The concept of an “agent” has been retained, and the definition enlarged (discussed further in section B.2.c below).
- Although the scope of nationality jurisdiction has been expanded, it is still not harmonised with the scope of such jurisdiction in the Criminal Justice (Theft and Fraud Offences) Act 2001 (discussed further in section B.1.b above).

67. It is recalled that at the Phase 2 on-site visit in September 2006, it was apparent that no attempt had been made to co-ordinate the legislative processes for the two statutes, even though both statutes were enacted in the same year (2001). No satisfactory rationale was provided at that time for having the two foreign bribery offences in two separate statutes. In addition, the Irish authorities were not able to justify the inconsistent terminology between the two offences. In written comments from Ireland on the draft Phase 2 Report, the Department of Justice, Equality and Law Reform stated that the inconsistent language “reflects the difference in the views of one parliamentary draftsman vis a vis another at the time of drafting”, and at the Phase 2bis on-site visit stated that it believes that there were very good reasons for having two different foreign bribery offences in two different statutes, such as the need to respond to different multilateral instruments as well as the need to move speedily. Since the on-site visit, authorities stated that this was not an issue concerning different drafting approaches, but was due to the fact that the Criminal Justice (Theft and Fraud Offences) Act (as the domestic instrument through which the EU Convention on the Protection of the European Community’s Financial Interest was incorporated) reflects the language of the EU Convention, which intends to cover both civil and common law concepts.

68. It was acknowledged during the Phase 2bis on-site visit that the existence of two non-harmonised foreign bribery offences is not ideal, but that there are at least eight or nine other duplicate offences in Ireland. The Office of the DPP has not yet prosecuted a set of alleged facts that constitute a foreign bribery offence, but stated that it would prosecute such a case under the most appropriate statute. The Office advised that it would be possible for it to initiate alternative charges, one under each of the Acts, allowing the fact-finder to convict under the most appropriate statute, and that it was also theoretically possible to indict under one statute but then convict and sanction the offender under the other. It admitted that the different sanctions under the two statutes [i.e. the sanction under the Prevention of Corruption (Amendment) Act 2001 is up to 10 years imprisonment and/or an unlimited fine on indictment, and is up to 5 years imprisonment and/or an unlimited fine under the Criminal Justice (Theft and Fraud Offences) Act 2001] could be taken into account if the facts could equally have been prosecuted under either statute, and that a judge would have to be sympathetic to the argument that the lower sanction should prevail in such a case.

69. Representatives of the Irish Bar expressed the view that the criminal law should not be applied in a “jigsaw puzzle” fashion. They also understood that it would be possible to prosecute a foreign bribery case under both statutes, and that such a strategy could be useful if it were difficult to prove the offence under one statute but not the other. For instance, it might be easier to prove that the person bribed was an “agent” under the Prevention of Corruption (Amendment) Act 2001 as opposed to a “foreign public official” under the Criminal Justice (Theft and Fraud Offences) Act 2001.

70. Despite these views, the continued non-harmonisation and non-consolidation of the two foreign bribery offences is inconsistent with the long-term ambition of the Law Reform Commission. Representatives of the Commission stated that they wished to see the codification of the criminal law into a single criminal act. It is also opposed to the Law Reform Commission's concern articulated in a recent report on "corporate killing" (LRC 77-2005) that in the absence of such codification, the criminal law lacks "legal certainty". During the on-site visit, the Law Reform Commission explained that it was working on a "restatement" of corruption legislation. Since the on-site visit, authorities have advised that this work has been completed, bringing together all applicable law on one online site. Although this is an informal, non-statutory, process, the Law Reform Commission expressed the hope that this administrative consolidation would lead to legislative consolidation in the future. It stated that it was "very surprised" that the two foreign bribery offences in the two statutes had not already been harmonised, but assured the examination team that this work would happen somewhere down the road. The Commission advised that it had not been consulted by the Department of Justice, Equality and Law Reform on the 2008 Bill; nor had it requested such a consultation. Indeed there is no legal obligation for the Government to consult the Law Reform Commission regarding the development of laws. The Law Reform Commission explained that it has generally had very good co-ordination and co-operation with the Department of Justice, Equality and Law Reform.

71. The Criminal Law Codification Advisory Committee, which is responsible for overseeing the development of a programme for the codification of the criminal law, stated at the on-site visit that Ireland's codification process is "in its infancy".¹⁷ The Committee stated that it accepts the criticisms about the lack of harmonisation between the two foreign bribery offences in the two statutes, as it believes that overlapping and duplicate offences are undesirable. Although it has not had an opportunity to look at the codification and harmonisation issue in the specific context of the two foreign bribery offences, the Committee indicated that this may occur relatively soon. The Committee explained that the first phase of the codification project, aimed for completion in 2010, looks to codify the elements of fault in criminal law, and produce draft codes in discreet areas, one of which will be theft and fraud offences. This will require the Committee to look at the Criminal Justice (Theft and Fraud Offences) Act 2001, and will thereby prompt the Committee to also consider the Prevention of Corruption (Amendment) Act 2001 to see whether offences in the latter Act should be within the theft and fraud offences code. A representative from the Committee indicated that unless there is a rational reason to keep offences in the Act separate from that code, there would appear to be a strong argument in favour of consolidation of the two Acts into the code, particularly if the elements of the foreign bribery offence are essentially the same.

72. Since the on-site visit, Irish authorities explained that they are positively disposed to addressing some of the specific concerns raised by the lead examiners by making amendments to the Prevention of Corruption (Amendment) Bill 2008. Authorities explained that the 2008 Bill could not be used to address all matters of concern in order to achieve consolidation and uniform harmony between the two statutes. They nevertheless stated that this might be achieved in the future within the scope of Ireland's codification project.

Commentary

The lead examiners welcome the proposals under the 2008 Bill to amend the Prevention of Corruption (Amendment) Act 2001 in order to respond to certain Recommendations of the Working Group in Phase 2. While the lead examiners remain deeply concerned that Ireland

¹⁷ The Criminal Law Codification Advisory Committee is chaired by Professor Finbarr McAuley, and consists of representatives of the judiciary, legal profession, legal academia, Department of Justice, Equality and Law Reform, Office of the Attorney-General, and Office of the Director of Public Prosecutions.

has not yet acted upon the Phase 2 Recommendation to consolidate and harmonise the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, they are encouraged by Ireland's recent declaration that it is disposed to act on some of these recommendations by making changes to the 2008 Bill which would result in greater consistency between the two statutes.

The lead examiners recommend that the differences between the foreign bribery offences in the two statutes be rectified as a matter of priority in accordance with the Phase 2 Recommendations. The lead examiners strongly encourage the implementation of the intended changes to the 2008 Bill. They further recommend that Ireland continue with the work of the Criminal Law Codification Advisory Committee towards consolidation and harmonisation of corruption offences into a single piece of legislation.

c. Lack of clarity in terminology (“agent”; and “corrupt” intent)

73. Along with the United Kingdom, Ireland is the only common law country in the Working Group that continues to base its offence of bribing a foreign public official on the old common-law statutory scheme that originated in the United Kingdom (i.e. Australia, Canada and New Zealand established wholly new offences either in their criminal statutes or stand-alone legislation). It should also be recalled that during the Phase 2 on-site visit to Ireland, a representative of the Office of the DPP stated that the 1889-1916 statutory framework lacks clarity, and a representative of the All Party Committee on the Constitution stated that the old statutory scheme “may lack some validity in today’s world”. The continued use of the old 1889-1916 statutory framework results in two main anomalies concerning the foreign bribery offence under the Prevention of Corruption (Amendment) Act 2001. First, the offence therein applies to the bribery of an “agent”. Second, it requires proof that the bribe was “corruptly” given, offered or agreed to. Neither of these features exist in the foreign bribery offence under the Criminal Justice (Theft and Fraud Offences) Act 2001, which applies to the bribery of an “official” (rather than an “agent”) and does not require a corrupt intent.

74. Regarding judicial interpretation in Ireland of vague or uncertain terms in a criminal statute, it was explained during the on-site visit that authorities were not aware of any case where known or perceived dishonesty escaped liability due to an ambiguity in a statute. It was also stated that, under Irish law, if the interpretation of a criminal statute is in doubt, it will be interpreted in a way that is the most favourable to the accused. In addition, if the legislative intention is clear, the statute is interpreted in this way.

(i) Continued use of the term “agent”

75. The Convention, which promotes “functional equivalence”, seeks an equality of results rather than identical measures to attain those results. Indeed, Commentary 3 on the Convention envisages various approaches to establishing a foreign bribery offence, and states specifically that “a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official... could... comply” with Article 1 of the Convention.

76. However, in Phase 2 the Working Group was not satisfied that the use of the term “agent” in the Prevention of Corruption (Amendment) Act 2001 met the standards under Article 1 of the Convention. This position was arrived at for various reasons, including the absence of case law to support the Irish position that the term does not imply the need to prove that the person bribed was an agent or that by taking the bribe he or she violated the agent-principal fiduciary duty. The Working Group on Bribery has previously noted the difficulties involved in such a concept, including the difficulty in determining who an “agent” is, and in establishing the existence of a fiduciary relationship. The recent case in the United

Kingdom relating to members of the royal family in Saudi Arabia illustrated the latter point, involving the alleged bribery of a member of a royal family in a country where there are no elected representative institutions. Thus in Phase 2, the Working Group on Bribery recommended that Ireland “seriously consider” amending the Prevention of Corruption (Amendment) Act 2001 to remove any ambiguity concerning whether the prosecution must prove: i) that the foreign public official bribed was an “agent”; and ii) that the agent-principal fiduciary relationship was violated.

77. During the Phase 2bis on-site visit, Irish officials agreed that it would be preferable to do away with the term “agent”, but explained that the term has been retained because the Prevention of Corruption Act 1906 uses the expression. Thus, by reinterpreting the meaning of the word “agent” under the 2001 Amendment Act and the 2008 Bill, it was explained that any potential use of the agent-principal relationship as an element of the offence of foreign bribery has been removed. Clause 2(b)(i)(II)(x) of the 2008 Bill proposes to add to the existing definition of “agent” to include “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 any such State”.

78. Irish authorities explained that this new category of “agent” would include a member of a royal family. However, this might be equally interpreted as supporting the view that the person bribed must be in an agent-principal fiduciary relationship, as he or she must be “employed by or acting on behalf of the public administration”, and includes a person under the “direct or indirect control of the (foreign) government”. A “foreign public official” is not defined in Article 1(4) of the Convention in terms of control by the foreign government, but rather in terms of holding a particular office or “exercising a public function for a foreign country”. It is also not difficult to think of a situation where the person bribed did not breach the agent-principal fiduciary duty; for instance where the official who was bribed was authorised or directed to accept or solicit the bribe by his or her superior. In December 2008, Ireland indicated that it intends to propose, at the Committee stage, to substitute the expression “acting on behalf of the public administration” with “exercising a public function for a foreign country” in the 2008 Bill.

79. Since the on-site visit, Irish authorities have stated that “once the Law Officers of the State have stated the law in Ireland – in this case that there is no requirement for a fiduciary relationship in the [term] “agent” – then that is an end to the matter”. The lead examiners are unclear as to how this is compatible with the fact that Ireland is a common law jurisdiction and that, accordingly, the judiciary should have the authority to make any final determination of how legislation is to be interpreted. They therefore remain concerned that the proposed definition retains implications inherent to the agent-principal relationship (i.e. subordination, and relationship of trust) and, as a matter untested in Irish law, the courts might interpret the proposed definition as requiring proof of the agent-principle relationship. Irish authorities have expressed the very clear view that there is no risk whatsoever of such an interpretation. The lead examiners note that Ireland’s legislative codification project would be likely to do away with reference to the term “agent” and that any remaining doubt could thereby be removed entirely. The Working Group remains uncertain as to whether Ireland would be in a position to prosecute a bribery case with allegations analogous to those in the Al Yamamah arms sales contract.

(ii) *Continued need to prove “corrupt” intent*

80. In Phase 2 the Working Group recommended that Ireland clarify the term “corruptly” in the Prevention of Corruption (Amendment) Act 2001 in the absence of clear case law of what the prosecution must prove in this respect. In Phase 2, the Department of Justice, Equality and Law Reform explained that the term “corruptly” denotes that “the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain”, but was not able to provide jurisprudence on what constitutes a “corrupt bargain”. At the time of the Phase 2bis on-site visit, there was still no jurisprudence in Ireland on this issue.

81. The 2008 Bill does not repeal the requirement that a person “corruptly” give, agree to give or offer a bribe. This means that the lack of clarity regarding the meaning of this term continues, as well as the lack of harmony in this regard between the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001. Irish authorities state in the responses to the Phase 2bis questionnaire that they have not introduced such a clarification because they want to ensure that precedents in other common law jurisdictions can be drawn upon in Ireland, when necessary. The examination team questioned whether such an argument runs contrary to the notion of “legal certainty” and the overall goal of the Irish Law Reform Commission to codify and consolidate the criminal law.

82. In response, the Department of Justice, Equality and Law Reform stated at the on-site visit that it prefers the inclusion of “corruptly” in the Prevention of Corruption Act to its non-inclusion in the Criminal Justice (Theft and Fraud Offences) Act 2001, because it is more “domestically oriented”. The examination team is perplexed by this argument, since both statutes cover the bribery of domestic as well as foreign actors. Since the on-site visit, authorities have further stated that retention of the term “corruptly” in the Prevention of Corruption Act represents a formulation of the criminal intention requirement (*mens rea*) for the offence.

83. Other Irish authorities explained at the on-site visit that “corruptly” means anything done for a dishonest purpose, and that a jury would be instructed to determine whether the payment in question was an honest or dishonest payment. Representatives of the Irish Bar stated that the need to prove that a payment was made “corruptly” is not necessarily to the defendant’s advantage. However, they also acknowledged that all the elements of the offence, including that the payment was made “corruptly”, must be proved by the prosecution, and opined that no-one really knows what this entails. They added that English common law is not very helpful on this issue, and that it would be preferable to eliminate this element of the offence.

84. Since the on-site visit, the Department of Justice Equality and Law Reform advised that it is seeking further advice from the Office of the Attorney General on the question of a definition of the term “corruptly”. The Department stated that this point is being actively considered in the finalisation of the Prevention of Corruption (Amendment) Bill 2008.

Commentary

The lead examiners are deeply concerned that the 2008 Bill does not propose amendments to the Prevention of Corruption (Amendment) Act 2001 to respond to the Working Group’s Phase 2 Recommendations to: i) seriously consider amending the Act to remove ambiguities concerning the use of the term “agent” rather than “official” as under the Criminal Justice (Theft and Fraud Offences) Act 2001; and ii) clarify the term “corruptly” in the absence of clear case law.

The lead examiners continue to consider that the term “agent” is ambiguous, and potentially requires proof of additional elements, such as that the person bribed was an “agent” and that he or she violated the agent-principal fiduciary duty by accepting the bribe. In addition, due to the continued absence of clear case law concerning the interpretation of the term “corruptly”, the lead examiners have not changed their view on the need to clarify this term. The lead examiners are encouraged to learn that further consideration is being given to the latter issue by Ireland.

The lead examiners therefore recommend that Ireland address as a matter of priority the Working Group’s Phase 2 Recommendations regarding the terms “agent” and “corruptly”.

d. Non-pecuniary advantages

85. Clause 2(a) of the Prevention of Corruption (Amendment) Bill 2008 substitutes “consideration or advantage” for “or consideration”, thus clarifying that the offence of bribing a foreign public official under the Prevention of Corruption (Amendment) Act 2001 applies to non-pecuniary advantages as well as monetary ones. However, the new terminology is still not consistent with that under the Criminal Justice (Theft and Fraud Offences) Act 2001, which refers to “an advantage of any kind whatsoever”. In December 2008, Ireland indicated that the Department of Justice, Equality and Law Reform is positively disposed to addressing this recommendation by way of amendment of the 2008 Bill at Committee stage.

86. It is difficult to understand why the Irish authorities did not ensure harmony between the terminology in the two statutes, especially since this was the second opportunity to do so, and because Ireland was recommended to do so very strongly by the Working Group in Phase 2. Although the difference in terminology may not seem significant on the surface, in practice it raises questions about whether one is meant to be broader than the other.

87. The Department of Justice, Equality and Law Reform stated at the on-site visit that the terms “consideration or advantage” and “an advantage of any kind whatsoever” are “almost” the same, and that it is difficult to imagine a judge making a differentiation. The Department of Justice, Equality and Law Reform acknowledged that the language could be more harmonised, and agreed to consider this further with a view to amending the 2008 Bill prior to its second reading.

Commentary

The lead examiners welcome the proposed amendment in the 2008 Bill to clarify that non-pecuniary advantages are prohibited by the Prevention of Corruption (Amendment) Act 2001. However, they are concerned that the proposed amendment under the 2008 Bill is still not entirely consistent with the corresponding language in the Criminal Justice (Theft and Fraud Offences) Act 2001. They therefore recommend that the remaining lack of harmony be addressed by revising the language in the 2008 Bill.

e. Attorney-General’s consent to foreign bribery prosecutions

88. In Phase 2 the Working Group was concerned that a foreign bribery prosecution could fail in the absence of the Attorney-General’s consent, because the requirement for the Attorney-General’s consent for the prosecution of cases under the 1906 Prevention of Corruption Act had not been expressly repealed by the Prevention of Corruption (Amendment) Act 2001. The Working Group was concerned that in the absence of the express repeal of the need to obtain the Attorney-General’s consent to prosecute a case under the Prevention of Corruption (Amendment) Act 2001, a defendant might be able to argue at trial that his or her right to only be prosecuted where authorised by the Attorney-General had been violated, resulting in an acquittal. In Phase 2, the Working Group therefore recommended that Ireland amend the current statutory framework to ensure that the Attorney-General’s consent is not required. However, the 2008 Bill does not expressly repeal the need for the Attorney-General’s authorisation to prosecute cases under the Prevention of Corruption Act, and the examination team therefore continued to consider this issue during the Phase 2bis on-site visit.

89. In Phase 2 Ireland argued that it is not necessary to expressly repeal the requirement in the 1906 statute because the Prosecution of Offences Act 1974 provides that “the Director of Public Prosecutions shall perform all the functions “capable of being performed in relation to criminal matters... by the Attorney-General immediately before the commencement of this section...”. The Department of Justice, Equality and Law Reform maintained this argument at the Phase 2bis on-site visit. The Office of the DPP

also expressed the view that it is sufficiently clear under the Prosecution of Offences Act 1974 that responsibility for providing consent to a foreign bribery prosecution has been delegated to the Director of Public Prosecutions. In addition, it was noted that the Prosecution of Offences Act 1974 specifies that it is still necessary to obtain the authorisation of the Attorney-General for the prosecution of offences under certain named statutes, and that the Prevention of Corruption Act is not mentioned in this regard. From what was said at the on-site visit, it seems clear that the Attorney-General's function under the Prevention of Corruption Act has been transferred to the Director of Public Prosecutions and that it is therefore not necessary to amend the 1906 statute.

Commentary

The lead examiners are satisfied that it is sufficiently clear that the responsibility for authorising prosecutions under the Prevention of Corruption Act 1906 has been delegated to the Director of Public Prosecutions, and are convinced that a defendant could not successfully argue in favour of acquittal due to an absence of an authorisation from the Attorney-General to prosecute a case under the Prevention of Corruption (Amendment) Act 2001.

3. Liability of legal persons

a. Standard of liability

90. With respect to the liability of legal persons for the offence of bribing a foreign public official, the Working Group recommended in Phase 2 that Ireland undertake a review of the relevant law with a view to codifying and clarifying its scope, and in addition: i) expand the scope of liability to cover bribery by a lower level person with the express or implied permission of a senior person; and ii) expressly provide for the liability of a senior person.¹⁸

91. In summary, the Irish authorities have not acted on either Recommendation in the Prevention of Corruption (Amendment) Bill 2008. Instead, they stated in the Phase 2bis responses that the “identification doctrine” is considered to be sufficient since it is difficult to specify with any degree of exactitude precisely the circumstances in which a corporate body may be liable through its officers or employees. Therefore, Ireland considers it preferable to keep the issue open by not legislating on it, and rather allow for its evolution by leaving it to the courts to decide on the facts of each case. The Irish authorities expressed the view that, depending on the circumstances of a particular case, the fact that a senior person in a company expressly or impliedly permitted a person at a lower level to make a bribe, could result in the liability of the company before the Irish courts. Furthermore, the Irish authorities consider that if they were to legislate for corporate liability generally, or in respect of corruption and bribery offences specifically, they would run the risk of excluding some circumstance in which a court would, were it not for the legislation, consider the corporate entity liable. This view is somewhat in contradiction with the long-term ambition expressed by representatives of the Law Reform Commission to codify and consolidate the criminal law in Ireland. Indeed, the position of the Irish Law Reform Commission in a recent report on “corporate killing” (LRC 77-2005) is that “the current state of law may fall afoul of the ‘legality principle’ which requires clear and precise legislative rules which effectively eliminate the need for creative interpretation by judges”. In addition, recent case law has criticised the case-by-case approach to determining whether a person constitutes the “directing mind” as contrary to the principle of “legal certainty” (See *King v AG* [1981] IR 233). The Irish authorities do not entirely reject this view, and indicated that, in time, it may be possible to formulate a description of when a corporate body will be criminally liable looking, for example, at the Law Reform Commission’s positions in its report on “corporate killing”.

¹⁸ See Recommendation 12a and 12b in Ireland’s Phase 2 Report.

92. The decision of Ireland to maintain the “identification theory” of corporate liability and allow the law to evolve through jurisprudence also contradicts the trend amongst some other common law countries that have recently codified such liability in criminal statutes (i.e. Australia, Canada, and South Africa). Indeed, the Irish Law Reform Commission stated at the Phase 2bis on-site visit that it is important to learn from the experience of these countries.

93. At the Phase 2bis on-site visit, the overall consensus of the Irish participants was that the liability of legal persons for criminal offences is an evolving area of the law in Ireland, and that the “identification theory” may no longer strictly apply. The Irish Law Reform Commission acknowledged that the international trend is to move beyond the “identification theory”, and also stated that the Irish Government is responding positively to its Recommendations on “corporate killing” in this regard. The Office of the DPP stated that it finds the “identification theory” an obstacle to effective prosecutions, but that it believes that this area of criminal liability is currently looked at on a case-by-case basis. The Irish Bar stated that this is a very complex area of the law in Ireland, but agreed that it is evolving. However, the Irish Bar also expressed its belief that, since this is not a very developed area of the law, prosecutors prefer to pursue company directors rather than companies themselves.

94. Summarising the situation, high level Irish legal experts stated that there is no clear standard of criminal liability for legal persons in Ireland, and that it is largely an evidentiary question. The standard may therefore not be as restrictive as the “identification theory”.

Commentary

The lead examiners welcome new information obtained during the Phase 2bis on-site visit that the “identification theory” of the liability of legal persons for the bribery of foreign public officials in Ireland is not strictly applied, and that cases are determined on a case-by-case evidentiary basis. However, in view of the evolving nature of such liability in Ireland and the absence of case law that provides certainty about when it would be applied, the lead examiners reiterate their Phase 2 recommendations, and recommend that Ireland adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery. In particular, Ireland should give serious consideration to undertaking a review of the relevant law on the criminal liability of legal persons with a view to codifying and clarifying its scope, and expand the scope of liability to cover, in addition to bribery committed personally by a senior person (e.g. directors and high managerial agents), bribery committed by a lower level person with the express or implied permission of a senior person.

b. Application to “bodies corporate”

95. In Phase 2 the Working Group also recommended that Ireland “expressly provide for the liability of unincorporated legal persons”. This is because the definition of “person” in the Interpretation Act 2005, which applies to both the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, is restricted to “bodies corporate”.¹⁹ In Phase 2, Ireland indicated that legislation occasionally covers unincorporated bodies and provided the decision of *DPP v Wexford Farmers Club* [High Court, 1993, No 351 SS] to support its position. In this case the Intoxicating Liquor Act 1988 was applied to an unincorporated body of persons (i.e. a registered club). In the Phase 2bis responses, Ireland again cited this case as supporting authority. However, this case does not appear to be relevant, because subsection 45.1(3) of the Intoxicating Liquor Act applies expressly to “registered clubs”. Ireland also explained that they did not consider there to be a need to provide for the specific criminal

¹⁹ Paragraph 18(j) of the Interpretation Act 2005 states that a reference to a “person” in relation to an offence shall be read “as including a reference to a body corporate”.

liability of unincorporated bodies, since, in any case, the members which constitute the unincorporated body could be held personally liable under the relevant legislation. Nevertheless, following the on-site visit, Ireland indicated that it would give active consideration to this recommendation.

96. Moreover, the 2008 Prevention of Corruption (Amendment) Bill injects more uncertainty regarding this issue. Section 3(2) establishes nationality jurisdiction for the offence of bribing a foreign public official over “a company registered under the Companies Acts”, and “any other body corporate established under a law of the State”. “any other body corporate” refers to incorporated bodies. Thus the question remains regarding the coverage of unincorporated bodies such as unincorporated associations, foundations and partnerships. Following the on-site visit, in the course of the debate on the 2008 Bill in the Irish Parliament, the Minister for Justice Equality and Law Reform indicated that he would give further consideration to this point, depending also on advice to be provided in this regard by the Attorney-General.

97. At the Phase 2bis on-site visit, the examination team discovered that there is a certain amount of confusion in Ireland regarding the scope of the term “body corporate” in the Interpretation Act. The Department of Justice, Equality and Law Reform explained that bodies such as charities and NGOs would usually be incorporated in Ireland (if only to protect individual members from being personally liable for debts, etc.). Representatives of the Department added that most Irish bodies operating abroad are incorporated, so that any potential loophole is not serious. Nevertheless, the Department of Justice, Equality and Law Reform is willing to revisit this issue following further consideration. Discussions with other senior Irish legal experts revealed a certain level of uncertainty about when a body is considered incorporated for the purpose of the criminal law, but felt that societies, partnerships and associations might not be considered corporate bodies.

Commentary

The lead examiners are still not satisfied that the liability of legal persons under the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001 applies to unincorporated bodies, such as societies, partnerships and associations. The lead examiners therefore reiterate the Working Group’s Phase 2 Recommendation that Ireland expressly provide for the liability of unincorporated legal persons under the two statutes in relation to the bribery of foreign public officials.

C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

98. Pursuant to the Phase 2 Recommendations of the Working Group, the purpose of the Phase 2bis evaluation of Ireland was to (i) to provide the examination team with the opportunity to convene the panels that were not attended or were inadequately attended at the time of the Phase 2, and ensure an adequate assessment of the issues that should have been discussed during these panels; and (ii) to make an effective assessment of the implementation of Article 1 of the Convention.

99. Ireland made fully satisfactory efforts in terms of preparation and participation during the Phase 2bis process. The on-site visit on 11-13 June 2008 was attended by a high number of participants, from both the public and the private sector. The Irish authorities provided the examining team with all the necessary information, before, during and following the on-site visit.

100. Ireland accomplished some progress in strengthening its legal framework for fighting the bribery of foreign public officials, in particular through legislative amendments to be made to the Prevention of Corruption Act 1906 and the Prevention of Corruption (Amendment) Act 2001 through the Prevention of Corruption (Amendment) Bill 2008. While the Working Group welcomes this action, the amendments in the Prevention of Corruption (Amendment) Bill 2008 do not address all the Working Group concerns expressed in the Phase 2 Report and reiterated here. The Working Group is disappointed that Ireland did not seize the opportunity to act upon the Phase 2 recommendations to consolidate and harmonise the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001. The Working Group is concerned that, by failing to address these issues in the 2008 Bill, Ireland may now not have the opportunity to respond to these concerns in the near future. The legislative framework for fighting foreign bribery in Ireland therefore continues to require further strengthening in order to ensure full compliance with the relevant Phase 2 Recommendations, notably as concerns the foreign bribery offence. The Working Group is encouraged by Ireland's recent declaration that it is disposed to act on some of those recommendations by making changes to the 2008 Bill which would result in greater consistency between the two statutes.

101. With regard to the liability of legal persons, the Working Group welcomes additional explanations provided by Ireland, but notes that no changes have occurred since Phase 2.

102. The Irish authorities also initiated significant efforts to raise awareness of the foreign bribery offence among relevant officials in the Irish public sector, as well as within the business community.

103. Based on the issues of concern identified by the Working Group in the Phase 2 Report on Ireland's application of the Convention and the Revised Recommendation, the Phase 2bis Report and recommendations focus on awareness raising initiatives; detection and reporting; investigation and prosecution of foreign bribery cases; the foreign bribery offence, in particular as affected by the Prevention of Corruption (Amendment) Bill 2008; and the liability of legal persons. In view of this, the Working Group (I) makes the following recommendations to Ireland, and (II) will follow-up certain issues when there has been sufficient practice

I. Recommendations

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

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 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].

2. 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
- (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].

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

3. 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 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;
- (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
- (c) By taking the first possible opportunity to consolidate the corruption offences into a single piece of legislation.

4. 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
- (b) Expressly provide for the liability of unincorporated entities.

II. 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 1

PHASE 2 RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

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

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

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

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

5. In view of these circumstances, the Working Group welcomes and accepts an invitation by Ireland to carry out another two to three-day on-site evaluation of Ireland in approximately one year, which the Working Group feels is necessary to achieve two main purposes: (i) to provide the examination team with the opportunity to convene the panels that were not attended or were inadequately attended and ensure an adequate assessment of the issues that should have been discussed during these panels; and (ii) to make an effective assessment of the implementation of Article 1 of the Convention. Regarding the latter purpose, one year from now the examination team will also be able to assess progress made on reforming the legislative framework for implementing Article 1, due to the soon to be published Prevention of Corruption (Amendment) Bill. In addition, since Ireland recently introduced reforms to

improve the process for consulting on statutory instruments, a second on-site visit will enable the team to assess the effect of this new process on implementation of the Convention, in particular whether the private sector is actively engaged.

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

1. Recommendations

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

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

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

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

- a) Adopt comprehensive measures to protect public and private whistleblowers in order to encourage those employees to report suspected cases of foreign bribery without fear of retaliation [Revised Recommendation I];
- b) Establish procedures to be followed by public sector employees, and in particular employees of the Department of Foreign Affairs, and of trade promotion and development aid agencies, for reporting to law enforcement authorities in Ireland credible information about foreign bribery offences that they may uncover in the course of their work, and encourage and facilitate such reporting [Revised Recommendation I];
- c) Ensure that the necessary human and financial resources are made available (i) to the FIU for adequately dealing with suspicious transactions reports and forwarding them in due time to the investigative authorities; and (ii) to the Irish Financial Regulator and Self-Regulatory Organisations (non-financial sector) for an adequate enforcement of sanctions for non compliance with AML laws and regulations [Revised Recommendation I]; and
- d) Require external auditors to report all suspicions of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, regardless of whether or not the suspected bribery would have a material impact on the financial statements, and of whether the suspected offence falls under the Prevention of Corruption Act 2001 or the Criminal Justice (Theft and Fraud Offences) Act 2001; and consider requiring external auditors, where appropriate, to report such suspicions to the competent law enforcement authorities [Revised Recommendation V.B.].

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

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

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

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

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

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

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

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

- a) Amend its tax legislation to clarify that bribes to foreign public officials are not tax-deductible; and expressly communicate to tax examiners the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, through the issuance of guidelines or manuals, and training programmes [Revised Recommendation I and IV];

- b) Ensure that false accounting offences are sanctioned in an effective, proportionate and dissuasive manner [Convention, Article 8];
- c) Amend the double criminality exception for the money laundering offence under section 31(7) of the Criminal Justice Act 1994, in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred [Convention, Article 7]; and
- d) Maintain more detailed statistics on (i) sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets, and whether bribery is the predicate offence; and (ii) on suspicious transaction reports that result in or support bribery investigations, prosecutions and convictions [Convention, Article 7].

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

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

2. Follow-up by the Working Group

15. The Working Group will follow-up on the issues below, as practice develops, in order to assess:

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

ANNEX 2

PREVENTION OF CORRUPTION (AMENDMENT) BILL 2008

(as published on 10 June 2008)

As initiated

ARRANGEMENT OF SECTIONS

Section

1. Definition.
2. Amendment of section 1 of Prevention of Corruption Act 1906.
3. Amendment of section 7 of Act of 2001.
4. Insertion of new section 8A into Act of 2001.
5. Amendment of section 9 of Act of 2001.
6. Insertion of new Schedule into Act of 2001.
7. Short title and collective citation.

BILL

entitled

AN ACT TO AMEND THE PREVENTION OF CORRUPTION ACT 1906 AND THE PREVENTION OF CORRUPTION (AMENDMENT) ACT 2001, AND TO PROVIDE FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

- 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 definition:

“ ‘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 2008) of the Act of 1906.”.

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

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 2008 has been or is being committed unless it is proved that the person has not acted reasonably and in good faith in forming that opinion and communicating it to that appropriate person.

(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 states to an appropriate person that a person has committed or is committing an offence under the Prevention of Corruption Acts 1889 to 2008 knowing the statement to be false commits 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, or any person acting on behalf of an employer, shall not penalise 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 if the employee has acted reasonably and in good faith in forming that opinion and communicating it, or

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

(6) The Schedule shall have effect for the purposes of subsection (5). 5

(7) An employer who contravenes subsection (5) commits 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) For the purposes of this section dismissal includes—
- (a) a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2007, 30 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.
- (11) Paragraph (b)(iii) of the definition of ‘penalisation’ in subsection (12) shall not be construed in a manner which prevents an employer from ensuring that the business concerned is carried on in an efficient and effective manner.
- (12) 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;
- ‘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’ includes—
- (a) any act or omission by an employer, or 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
 - (b) without prejudice to the generality of paragraph (a)—
 - (i) suspension, lay-off or dismissal, or the threat of suspension, lay-off or dismissal,
 - (ii) demotion or loss of opportunity for promotion,
 - (iii) transfer of duties, change of location of place of work, reduction in wages or change in working hours,
 - (iv) imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty),
 - (v) unfair treatment, including selection for redundancy,
 - (vi) coercion, intimidation or harassment,
 - (vii) discrimination, disadvantage or adverse treatment,
 - (viii) injury, damage or loss, and
 - (ix) threats of reprisal.”.

5.—Section 9(1) of the Act of 2001 is amended by substituting “*Prevention of Corruption Acts 1889 to 2008*” for “*Prevention of Corruption Acts 1889 to 2001*”.

6.—The Act of 2001 is amended by inserting the following Schedule after section 10:

“SCHEDULE
REDRESS FOR CONTRAVENTION OF SECTION 8A(5)

1. (1) An employee (or, in the case of an employee who has not reached the age of 18 years, his or her parent or guardian) may present a complaint to a rights commissioner that his or her employer has contravened

section 8A(5) in relation to the employee and it shall not be necessary for the employee to have at least one year's continuous service with the employer concerned in order to present such complaint.

(2) Where a complaint under subparagraph (1) is made, the rights commissioner shall—

- (a) give the parties an opportunity to be heard by the commissioner and to present to the commissioner any evidence relevant to the complaint,
- (b) give a decision in writing in relation to it, and
- (c) notify the parties of that decision.

(3) A decision of a rights commissioner under subparagraph (2) shall do one or more of the following:

- (a) declare that the complaint was or, as the case may be, was not well founded;
- (b) require the employer to take a specified course of action;
- (c) require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding 104 weeks' remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Unfair Dismissals Act 1977;

and the references in clauses (b) and (c) to an employer shall be construed, in a case where ownership of the business of the employer changes after the contravention to which the complaint relates occurred, as references to the person who, by virtue of the change, becomes entitled to such ownership.

(4) A rights commissioner shall not entertain a complaint under this paragraph if it is presented to him or her after the expiration of the period of 6 months beginning on the date of the contravention to which the complaint relates.

(5) Notwithstanding subparagraph (4), a rights commissioner may entertain a complaint under this paragraph presented to him or her after the expiration of the period referred to in subparagraph (4) (but not later than 6 months after such expiration) if he or she is satisfied that the failure to present the complaint within that period was due to a reasonable cause.

(6) A complaint shall be presented by giving notice of it in writing to a rights commissioner and the notice shall contain such particulars and be in such form as may be specified from time to time by the Minister for Enterprise, Trade and Employment.

(7) A copy of a notice under subparagraph (6) shall be given to the other party concerned by the rights commissioner.

(8) Proceedings under this paragraph before a rights commissioner shall be conducted otherwise than in public.

(9) A rights commissioner shall furnish the Labour Court with a copy of each decision given by the commissioner under subparagraph (2).

2. (1) A party concerned may appeal to the Labour Court from a decision of a rights commissioner under paragraph 1 and, if the party does so, the Labour Court shall give the parties an opportunity to be heard by it and to present to it any evidence relevant to the appeal, shall make a determination in writing in relation to the appeal affirming, varying or setting aside the decision and shall communicate the determination to the parties.

(2) An appeal under this paragraph shall be initiated by the party concerned giving, within 42 days (or such greater period as the Court may determine in the particular circumstances) from the date on which the decision to which it relates was communicated to the party, a notice in writing to the Labour Court containing such particulars as are determined by the Labour Court under clauses (e) and (f) of subparagraph (4) and stating the intention of the party concerned to appeal against the decision.

(3) A copy of a notice under subparagraph (2) shall be given by the Labour Court to any other party concerned as soon as practicable after the receipt of the notice by the Labour Court.

(4) The following matters, or the procedures to be followed in relation to them, shall be determined by the Labour Court, namely:

- (a) the procedure in relation to all matters concerning the initiation and the hearing by the Labour Court of appeals under this paragraph;
- (b) the times and places of hearings of such appeals;
- (c) the representation of the parties to such appeals;
- (d) the publication and notification of determinations of the Labour Court;
- (e) the particulars to be contained in a notice under subparagraph (2); and
- (f) any matters consequential on, or incidental to, the foregoing matters.

(5) The Labour Court may refer a question of law arising in proceedings before it under this paragraph to the High Court for its determination and the determination of the High Court shall be final and conclusive.

(6) A party to proceedings before the Labour Court under this paragraph may appeal to the High Court from a determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive.

3. (1) The Labour Court shall, on the hearing of any appeal referred to it under paragraph 2, have power to take evidence on oath or on affirmation and for that purpose may cause persons attending as witnesses at that hearing to swear an oath or make an affirmation.

(2) Any person who, upon examination on oath or affirmation authorised under subparagraph (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 commits an offence.

(3) The Labour Court may, by giving notice in that behalf in writing to any person, require such person to attend at such time and place as is specified in the notice and—

(a) to give evidence in relation to any matter appealed to the Labour Court under paragraph 2, or

(b) to produce any document specified in the notice relating to the matter in the person's possession or power, or both.

(4) A person to whom a notice under subparagraph (3) 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 commits an offence.

(5) A witness at a hearing of an appeal before the Labour Court has the same privileges and immunities as a witness before the High Court.

(6) Where a decision of a rights commissioner in relation to a complaint under this Schedule has not been carried out by the employer concerned in accordance with its terms, the time for bringing an appeal against the decision has expired and no such appeal has been brought, the employee concerned may bring the complaint before the Labour Court and the Labour Court shall, without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the decision.

(7) The bringing of a complaint before the Labour Court under subparagraph (6) shall be effected by giving to the Labour Court a written notice containing such particulars (if any) as may be determined by the Labour Court.

(8) The Labour Court shall publish, in a manner it considers appropriate, particulars of any determination made by it under any of clauses (a), (b), (c), (d), (e) or (f) of subparagraph (4) of paragraph 2 (not being a determination as respects a particular appeal under that paragraph) and subparagraph (7).

(9) In proceedings under this Schedule before a rights commissioner or the Labour Court in relation to a complaint that section 8A(5) has been contravened, it shall be presumed, until the contrary is proved, that the employee concerned acted reasonably and in good faith in forming the opinion and making the communication concerned.

(10) If a penalisation of an employee, in contravention of section 8A(5), constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts 1977 to 2007, relief may not be granted to the employee in respect of that penalisation both under this Schedule and under those Acts.

(11) A person guilty of an offence under subparagraph (2) is liable on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both.

(12) A person guilty of an offence under subparagraph (4) is liable on summary conviction to a fine not exceeding €5,000.

(13) Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act 1851, summary proceedings for an offence under subparagraph (2) or (4) 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 later, provided that no such proceedings shall be commenced later than 2 years from the date on which the offence concerned was committed.

(14) For the purposes of subparagraph (13), a certificate signed by or on behalf of the person initiating the proceedings as to the date on which evidence referred to in that subparagraph came to his or her knowledge shall be evidence of that date and, in any legal proceedings, a document pur-

under this subparagraph 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.

4. (1) If an employer fails to carry out in accordance with its terms a determination of the Labour Court in relation to a complaint under paragraph 1 within 28 days from the date on which the determination is communicated to the parties, 50 the Circuit Court shall, on application to it in that behalf by—

(a) the employee concerned, or

(b) with the consent of the employee, any trade union of which the employee is a member, without hearing the employer or any evidence (other than in relation to the matters aforesaid), make an order directing the employer to carry out the determination in accordance with its terms.

(2) The reference in subparagraph (1) to a determination of the Labour Court is a reference to a determination in relation to which, at the expiration of the time for bringing an appeal against it, no such appeal has been brought or, if such an appeal has been brought, it has been abandoned and the references to the date on which the determination is communicated to the parties shall, in a case where such an appeal is abandoned, be read as references to the date of such abandonment.

(3) In an order under this paragraph providing for the payment of compensation, the Circuit Court may, if in all the circumstances it considers it appropriate to do so, direct the employer concerned to pay to the employee concerned interest on the compensation at the rate for the time being fixed by the Minister for Enterprise, Trade and Employment for the purposes of section 4(2) of the Prompt Payment of Accounts Act 1997 under section 10 of that Act for each day or part of a day beginning 28 days after the day on which the determination of the Labour Court is communicated to the parties and ending on the day immediately before the day on which the order of the Circuit Court is complied with.

(4) An application under this paragraph to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the employer concerned ordinarily resides or carries on any trade, business or occupation.

5. Section 8A(12) shall apply to the interpretation of this Schedule as it applies to the interpretation of section 8A.”.

7.—(1) This Act may be cited as the Prevention of Corruption (Amendment) Act 2008.

(2) The Prevention of Corruption Acts 1889 to 2005 and this Act may be cited together as the Prevention of Corruption Acts 1889 to 2008.

ANNEX 3

LIST OF PARTICIPANTS IN THE PHASE 2BIS ON-SITE VISIT

- Government and Public Agencies
 - *Senior Officials Compliance Committee*
 - *Department of Justice, Equality and Law Reform*
 - *Dept of Enterprise, Trade and Employment*
 - *Department of Finance*
 - *Department of Foreign Affairs*
 - *Attorney General's Office*
 - *Chief State Solicitor's Office*
 - *Revenue Commissioners*
 - *Irish Financial Regulatory Authority*
 - *Criminal Law Codification Advisory Committee*
 - *Irish Law Reform Commission*
 - *Garda Ombudsman Commission*
 - *Standards in Public Office Commission*
 - *Civil Service Training and Development Committee*
 - *Irish Aid*
 - *Companies Registration Office*
 - *Enterprise Ireland*
 - *Industrial Development Authority (IDA)*
 - *Business Access to State Information and Services (BASIS)*
 - *Forfás*
 - *Shannon Development*
- Law Enforcement Authorities
 - *Garda Bureau of Fraud Investigation*
 - *Garda Mutual Assistance and Extradition Division*
 - *Garda Districts/Division including Dublin Metropolitan Region*
 - *Criminal Assets Bureau (CAB)*
 - *Office of the Director of Public Prosecutions*
 - *Office of the Director of Corporate Enforcement*
- Judiciary
 - *Judges*
 - *Courts Service*
- Parliament (House of the Oireachtas)
 - *Joint Committee on the Constitution*

- Private Bar
 - *Incorporated Law Society*
 - *Bar Council*
- Academics
- Private sector
 - *Irish Auditing and Accounting Supervisory Authority*
 - *Chambers of Commerce*
 - *Irish Business and Employers Confederation (IBEC)*
 - *Irish Auditing and Accounting Supervisory Authority (IAASA)*
 - *Irish Small and Medium Enterprise Association*
 - *Small Firms Association*
 - *Irish Exporters Association*
 - *Large corporations*
 - *SMEs*
- Trade Unions
 - *Irish Congress of Trade Unions*
- Civil Society
 - *Transparency International Ireland*
 - *Christian Aid Ireland*
 - *Debt and Development Coalition*
 - *Dóchas*