



White Collar Crime & Investigations Update

Spring 2021

BREACH OF MiFID REGULATIONS

An internal investigation has commenced within Deutsche Bank to establish whether employees mis-sold investment products to clients in breach of MiFID rules, according to a report by Reuters. It is alleged that a number of clients were knowingly sold inappropriate or unsuitable products. A distributor of products is obliged to ensure that a product is distributed to the type of customer whose needs, characteristics and objectives it has been designed for.

MiFID firms authorised in Ireland should be aware that breaches of MiFID regulations come within the remit of the Central Bank's Administrative Sanctions Procedure. Regulation 33 of the European Union (Markets in Financial Instruments) Regulations 2017 deals specifically with assessment and suitability requirements. A contravention of this regulation will constitute a "relevant offence" which can carry a conviction on indictment pursuant to Regulation 5 of the Markets in Financial Instruments Act 2018.

[Reuters](#), 24 January 2021

IRISH HIGH COURT GRANTS ODCE APPLICATION FOR ADDITIONAL RESOURCE TO ASSIST WITH FAI INVESTIGATION

The Director of Corporate Enforcement (**Director**) successfully applied to the court in November 2020 for the appointment of a Barrister pursuant to section 795(6) of the Companies Act 2014 (**2014 Act**) for the purposes of examining materials over which an assertion of privilege has been claimed by Mr Delaney and the Football Association of Ireland (**FAI**), and to prepare a report for the court with a view to assisting the court in making a determination as to whether the materials constitute privileged legal material pursuant to section 795 of the 2014 Act.

On 2 March 2021, the High Court granted a further Order under section 795(6) of the 2014 Act on foot of an application by the Director for the appointment of additional persons for the purpose of examining the materials over which a claim of privilege was made. The application was opposed by Mr Delaney, who argued that the appointment of additional persons is not permitted under the wording of section 795(6)(b), which provides for

“the appointment of **a person** with suitable legal qualifications ... that the court considers to be appropriate”

Ms Justice Reynolds applied the rules on statutory interpretation and in particular relied on section 18 of the Interpretation Act 2005 whereby a word importing the singular shall be read as importing the plural. Reynolds J ordered the appointment of one further person to assist in the examination of the materials and preparation of a report for the court.

Director of Corporate Enforcement v Cumann Peile na hEireann “Football Association of Ireland” and John Delaney (Notice Party) [2021] IEHC 141.

CORRUPTION INDEX

The Corruption Perception Index, which ranks 180 countries and territories by their perceived level of public sector corruption, has been released for 2020. Ireland has slipped two places to 20th in the global ranking. However, Transparency Ireland has welcomed the publication of the Hamilton Review, the potential for the development of a national anti-corruption strategy and the creation of a stand-alone Anti-Corruption Bureau dedicated to the investigation of political and related offices.

See our update on the government’s recently published proposed implementation plan of the Hamilton Review below.

[Transparency International](#), 28 January 2021

[Transparency Ireland](#), 28 January 2021

ALLEGED BREACH OF OECD GUIDELINES

An Irish oil and gas company, San Leon Energy, is currently under an investigation by the Organisation for Economic Co-operation and Development (**OECD**) in relation to its activities in Western Sahara. An allegation was made by the Global Legal Action Network (GLAN) that the company was in breach of OECD guidelines, specifically the principle of meaningful engagement with stakeholders (Article A.14 Chapter II, OECD Guidelines) and the principle of respect for internationally recognised human rights (Article A.2, Chapter II and Chapter IV, OECD Guidelines).

The Ireland National Contact Point (NCP) is the lead NCP in assessing this complaint. In January 2021, the Ireland NCP issued an Initial Assessment for the OECD, deciding that there is a *prima facie* case to proceed to an offer of good offices to the parties to GLAN and San Leon Energy. Therefore, the Ireland NCP will formally ask the parties to engage in mediation/conciliation with the aim of reaching a resolution of the complaint. If a mediated solution is not possible, the Ireland NCP will conduct an examination of the case and issue a Final Statement.

[Initial Assessment by the Ireland National Contact Point for the OECD Guidelines for Multinational Enterprises](#). Department of Enterprise Trade and Employment, January 2021.

INSIDER DEALING

The Court of Justice of the European Union (**CJEU**), in *DB v Commissione Nazionale per le Società la Borsa (Consob)*, (C481/19) in reply to a preliminary reference from Italy's Constitutional Court, has held that persons who are subject to an administrative investigation for insider dealing have the right to remain silent and to avoid self-incrimination when their answers are capable of establishing their liability for an offence which is punishable by administrative sanctions of a criminal nature or criminal liability.

The CJEU reminded member states that competent authorities cannot impose penalties on natural persons where they refuse to provide the authority with answers during an investigation that could establish their liability for certain offences that carry criminal sanctions.

[Court of Justice of the European Union](#), 2 February 2021

FRAUD AFFECTING THE FINANCIAL INTEREST OF THE EU

The Criminal Justice (Theft and Fraud Offences) (Amendment) Act 2021 (**Act**) has been signed into Irish law. A commencement order is awaited to bring the Act into operation.

The Act gives effect to EU Directive 2017/1371 on the fight against fraud to the EU's financial interests by means of criminal law (**Directive**). The Act includes an expanded definition of fraud affecting the financial interests of the EU. The offence is defined by reference to the Directive and expressly includes fraud involving revenue arising from VAT own resources where cross-border fraudulent schemes are involved and procurement-related and non-procurement-related expenditure. The Act also provides for a new offence of misappropriation by a public official.

Under the Act, a body corporate can be held liable where a "relevant offence" (fraud affecting the financial interests of the EU or misappropriation) is committed for the benefit of the body corporate. For this to arise, the offence must have been committed by a "relevant person" who is either director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, or an employee, subsidiary or agent of the body corporate.

A person who commits an offence under the Act is liable to prosecution on indictment and liable on conviction to a fine and/or to a term of imprisonment not exceeding five years for certain offences.

[Criminal Justice \(Theft and Fraud Offences\) \(Amendment\) Act 2021](#), Irish Statute Book.

ENVIRONMENTAL CRIME

In a move to further protect the environment through the use of criminal law, the European Commission has recently re-evaluated the Environmental Crime Directive (**Directive**) and found that, in its current form, its objectives were not being met. A public consultation has now been launched to review, amongst others, the scope of the Directive and the sanctions contained within. This, coupled with the European Union Agency for Criminal Justice Cooperation, Eurojust, publication on environmental crime, which stressed the need for further co-operation, highlights a more vigorous move towards tackling issues in this area.

[European Commission](#) and [Eurojust](#), 5 February 2021

CROSS- JURISDICTIONAL FRAUD

The UK's Supreme Court ruling, in *R (on the application of KBR, Inc) v Director of the Serious Fraud Office* [2021] UKSC 2021, will have implications for the Serious Fraud Office's (**SFO**) ability to conduct cross-jurisdictional investigations. The issue before the Supreme Court was whether the SFO could issue a notice under section 2(3) of the UK Criminal Justice Act 1987 (**1987 Act**) compelling foreign companies to produce documents held outside the jurisdiction, on pain of criminal penalty in the UK.

The Supreme Court overturned the UK High Court which held that the SFO could make a request for documents held outside the jurisdiction by a foreign company where that company had a "sufficient connection" to the UK. The Supreme Court held that the presumption against extra-territorial affect clearly applied to the 1987 Act in the circumstances of this case. It also found that this presumption was not rebutted having regard to the wording, purpose and context of the legislation.

[UK Supreme Court](#), 5 February 2021

THE EU COMMISSION'S STRATEGY ON TACKLING ORGANISED CRIME

The European Commission (**Commission**) has opened up a roadmap for its plan on tackling organised crime in the EU. The agenda will address, amongst other issues, the corruption and financial aspects of organised crime.

According to the Commission roadmap, there is a strong link between organised crime and corruption. It is roughly estimated that corruption alone costs the EU economy €120 billion per year. The Commission also noted that certain instruments of the relevant legal framework, such as the Framework Decision against organised crime, are more than ten years old and may not be up-to-date to address current challenges related to organised crime.

The Commission has proposed a Communication presenting an EU Strategy to tackle organised crime that will cover the period 2021-2025. This is intended to be the strategic guiding document for the EU's fight against organised crime for the next five years. It is proposed that the new EU Organised Crime Strategy will provide the overarching political framework and priorities for the EU policy and aim to support action by the Member States complementing national security and national/local action, as well as supporting effective collaboration and coordination cross-borders, cross-sectors and among relevant competent authorities, such as law enforcement and customs.

[European Commission](#), 14 April 2021

ENVIRONMENTAL BREACH

In the UK in February 2021, Thames Water, a UK water and wastewater services company, was fined £2.3m for foreseeable stream pollution. An investigation conducted by the Environmental Agency found that ammonia levels in areas under Thames Water's control were double the permitted levels. Thames Water pleaded guilty to a charge under regulation 12(1) (b) of the Environment Permitting (England & Wales) Regulations 2010 of causing discharge of partially-treated effluent without a permit in April 2016. The incident was reportedly described in court as 'foreseeable' because it occurred as a result of faulty equipment at a sewage-treatment plant. Judge Sheridan at Aylesbury Crown Court described the actions of Thames Water in failing to react to warnings of Thames Water as showing 'high negligence'.

[Gov.uk](#), 2 March 2021

WIRECARD'S ALLEGED FRAUDULENT CORPORATE STRUCTURE EXPOSED

The Irish Times has reported that a former executive of Wirecard AG, the now insolvent German payment processor and financial services provider, has reportedly provided evidence to German prosecutors that the company operated a network of offshore shell companies to conceal millions of euro since 2010. Wirecard AG, a German FinTech company, attracted much media attention when it admitted that €1.9 billion recorded in its accounts did not exist. This followed reports in the Financial Times of accounting irregularities at the firm, and whistleblower fraud complaints. German prosecutors are investigating executives of Wirecard for fraud and other offences.

On 23 March 2021 a public hearing was held by the Legal Affairs (JURI) and Economic and Monetary Affairs (ECON) Committees of the European Parliament in relation to fraud allegations surrounding Wirecard AG. At the hearing JURI stressed that smaller shareholders should be able to initiate joint legal action and raised the issue of collective redress rules at EU level.

[Irish Times](#), 23 March 2021

[European Parliament](#), 23 March 2021

INTERNATIONAL INVOICE REDIRECT FRAUD

The Garda National Economic Crime Bureau (GNECB) has uncovered an elaborate international invoice redirections fraud scheme. Targeted companies from across Europe received a fictitious email claiming to be a current legitimate supplier to the business. The email contained a request for all future payments to be directed to a new bank account which the fraudster controlled. With electronic transfers now at the forefront of most business operations, it is vital that companies have a robust system in place to safeguard against fraudulent activity.

On 15 April 2021, Gardaí attached to GNECB arrested four individuals suspected of involvement in the scheme.

[An Garda Síochána](#), 15 April 2021

GUILTY PLEA IN PROSECUTION FOR FRAUDULENT TRADING AND FRAUD OFFENCES

On 16 April 2021 at the Drogheda Circuit Court Pearse O'Connor pleaded guilty to one count of Fraudulent Trading under section 297 of the Companies Act 1963 and five counts of the use of a false instrument under section 26 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The proceedings were brought by the DPP on foot of an investigation carried out by the Office of the Director of Corporate Enforcement. Mr O'Connor has been remanded on bail to his sentencing hearing on 5 October 2021.

It was alleged that for a period in 2015 Mr O'Connor was knowingly a party to the carrying on of a business for a fraudulent purpose, namely dishonest solicitation of payments from another company by furnishing false or misleading invoices. The false instrument charges arose out of the use of false documents, which included the false and misleading invoices.

[Office of the Director of Corporate Enforcement](#), 16 April 2021

PUBLICATION OF AN IMPLEMENTATION PLAN TO TACKLE ECONOMIC CRIME AND CORRUPTION

The Minister for Justice has published an implementation plan (**Plan**) to address the recommendations set out in the Hamilton Review on Economic Crime and Corruption, which was published in December 2020. We previously discussed the Hamilton Review Group's recommendations to combat white collar and economic crime in Ireland [here](#).

The Plan concerns the review of structures and strategies to prevent, investigate and penalise economic crime and corruption. It adopts a thematic plan for the implementation of the Hamilton Review Group's recommendations and provides a clear timeline for achieving stipulated steps within the Plan across government departments and State agencies.

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