



White Collar Crime & Investigations Update

Summer 2021

HIGH COURT GRANTS NORWICH PHARMACAL ORDER TO US BUSINESSMAN ATTEMPTING TO TRACE STOLEN CRYPTOCURRENCY

In the recent High Court case of *Williams v Coinbase Europe Ltd*, it was alleged that €1,500,000 worth of Bitcoin was misappropriated from a Blockchain cryptocurrency online wallet belonging to the plaintiff. With the aid of a cryptographic tracing firm, it was identified that €160,000 worth of the Bitcoin had been transferred to the account of an unknown individual which the defendant, Coinbase Europe Ltd, allegedly maintained.

The defendant maintained that due to contractual and GDPR reasons it could not disclose the identity of the unknown account holder without a court order. Following a successful application by the plaintiff, Mr Justice Allen granted a Norwich Pharmacal Order (**NPO**), requiring the defendant to disclose to the plaintiff all information in its possession that will identify the unknown account holder.

We recently published an article ([here](#)) charting developments in the use of NPOs as a litigation tool against a background of evolving technological advancements. We envisage the deployment of NPOs will increasingly feature in white-collar crime investigations involving crypto assets.

[The Irish Times](#), 30 April 2021

PROTECTED DISCLOSURES TO BE EXTENDED TO INCLUDE BREACHES OF EU LAW ACROSS FINANCIAL SERVICES AND PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING

On 12 May 2021, the government published the General Scheme of the Protected Disclosures (Amendment) Bill (**Bill**). The Bill, if enacted, will transpose Directive (EU) 2019/1937 (Whistleblowing Directive) into Irish law. Although Ireland already has strong legal protections for whistle-blowers the new legislation will bolster the current position under the Protected Disclosures Act 2014 (**2014 Act**) and go further than the requirements of the Whistleblowing Directive. We cover all aspects of this proposed legislation in more detail [here](#).

Significantly, regarding white-collar crime, the Bill proposes a broader definition of “relevant wrongdoing”, which are the types of wrongdoing about which an individual may make a protected disclosure. This more expansive definition will include specified breaches of EU law across financial services and the prevention of money laundering and terrorist financing.

[Department of Public Expenditure and Reform](#), 12 May 2021

INVESTMENT BANKS FINED €371 MILLION BY EUROPEAN COMMISSION FOR PARTICIPATING IN EUROPEAN GOVERNMENTS BONDS (EGB) TRADING CARTEL

Following a European Commission (**Commission**) investigation which started with an application by Natwest under the Commission’s 2006 Leniency Notice, it found that seven investment banks (**Investment Banks**), participated in a cartel through a group of traders working on EGB desks during the height of the financial crisis. The traders operated a closed circle whereby private chatrooms were used to exchange commercially sensitive information to inform each other on relevant prices and volumes operating in the market.

The Commission concluded that the behaviour of the Investment Banks violated EU rules prohibiting anti-competitive business practices such as collusion on prices (Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement). Under the Commission’s 2006 leniency notice, Natwest received full immunity for revealing the cartel and therefore avoided a fine.

The Commission decision constitutes binding proof that the behaviour took place and was illegal. As such, any person or company affected by the behaviour in question may seek damages in the courts of European member states with damages to be awarded without reduction on the basis of the Commission fine.

[European Commission](#), 20 May 2021

THE CRIMINAL PROCEDURE ACT 2021

The Criminal Procedure Act 2021 (**CPA**) was recently signed into law and is currently awaiting commencement. The CPA introduces preliminary trial hearings which will likely impact on the prosecution of certain white-collar crime offences. It is predicted that the introduction of preliminary trials could potentially expedite the hearing of criminal proceedings by enabling administrative issues and certain applications requiring legal rulings to be decided upon in advance of a trial.

This development is one which has been sought for some time, with the Hamilton Report (covered [here](#)) recommending the expedited publication and commencement of this legislation. According to the Hamilton Report, the CPA “includes provisions on pre-trial hearings which would be vital in ensuring the efficient and timely progress of criminal trials in complex economic crime and corruption cases”. The Minister for Justice, speaking in the [Dáil](#) in March 2021, observed that an objective of the CPA aim “is to ensure, as recommended in the Hamilton report, greater efficiencies for trials around economic crime, fraud and corruption.”

[Criminal Procedure Act 2021](#), enacted 24 May 2021

UK LAW COMMISSION OPENS CONSULTATION ON CORPORATE CRIMINAL LIABILITY

The UK Law Commission has invited submissions on how the law relating to corporate criminal liability can be improved to appropriately capture and punish criminal offences committed by corporations, their directors or senior management. The invitation arises out of difficulties in the prosecution of offences requiring *mens rea*, that engage the “identification principle”. Under this principle companies will only be found guilty if someone who represents the company’s “directing mind and will” has the requisite state of mind. Investigating large complex group structures can prove challenging as only a limited number of senior personnel can be considered to have sufficient autonomy to be directing a company’s mind and will.

In Ireland, the Law Reform Commission (**LRC**) published its Report on Regulatory Powers and *Corporate Offences* in 2018. A key recommendation was for the establishment of a generally applicable scheme of attributing criminal liability to corporate bodies. Like the UK Law Commission, the LRC was critical of the common law “identification principle” and recommended different approaches depending on whether the offence involved subjective fault, objective fault or strict liability. As noted in the Hamilton report, Section 18 of the Criminal Justice (Corruption Offences) Act 2018 (covered [here](#)) addresses the difficulties around the “identification principle” but is limited to corruption offences only.

[Law Commission UK](#), 9 June 2021

OFFICE OF DIRECTOR OF CORPORATE ENFORCEMENT TO BE GRANTED THE POWER TO DEMAND PASSWORDS FOR PHONES, COMPUTERS AND OTHER DEVICES

Proposed legislation published by the Minister for Justice may enhance the investigatory powers of the Office of the Director of Corporate Enforcement (**ODCE**) by requiring individuals to provide passwords for devices when a search warrant is being executed. In accordance with the *General Scheme of Garda Síochána (Powers)* Bill, the Department of Justice confirmed that this new power would extend to white-collar crime investigations carried out by the ODCE and the Competition and Consumer Protection Commission.

This proposal is an example of increased legislative powers being extended to bodies investigating white-collar crime as the government implements recommendations contained in the Hamilton Report. The proposals under the General Scheme may, however, be diluted as it passes through the Oireachtas, given the likely concerns around constitutional rights such as the right to privacy.

[Department of Justice](#), 14 June 2021

UK SERIOUS FRAUD OFFICE ENTERS INTO A £103M DEFERRED PROSECUTION AGREEMENT WITH AMEC FOSTER WHEELER ENERGY LIMITED

Under a deferred prosecution agreement (**DPA**) entered into by Amec Foster Wheeler Energy Limited (**AFWEL**), it has accepted responsibility for ten corruption related offences in the oil and gas industry. Under the DPA, AFWEL were fined £103 million, and required to pay compensation to the people of Nigeria.

The Irish LRC previously recommended a statutory scheme for DPAs in Ireland, (covered [here](#)). However, the Hamilton Report recommended against the establishment of a DPA regime in Ireland, stating it was unconvinced it would yield any significant benefit based on the UK experience.

[UK Serious Fraud Office](#)

NEW POLICY ADOPTED BY REVENUE COMMISSIONERS COULD INCREASE THE RISK OF SELF-INCRIMINATION WHEN MAKING “QUALIFYING DISCLOSURE” ON UNDECLARED TAX LIABILITY

The Revenue Commissioners (**RC**) have updated the Collection Manual Guidelines for Exchanges of information between the ODCE and the RC under the Companies Act 2014. The updated Manual appears to suggest that the RC has adopted a new policy of initiating a referral to the OCDE where the information relates to the commission of serious offences. This policy could increase the risk of self-incrimination following a “qualifying disclosure” of undeclared tax liability by a director or employee of a corporate taxpayer to the RC.

The “qualifying disclosure” regime plays a central role in encouraging taxpayers to regularise their tax affairs voluntarily and to correct errors. The RC have stated they will inform the OCDE if the information has come from a qualifying disclosure. Additionally, the ODCE must have considered that the information was disclosed voluntarily when deliberating on actions to be taken in response to any offence. However, the new approach appears to heighten the risk of self-incrimination where a “qualifying disclosure” could involve a potential breach of the Companies Act 2014 (see our briefing note [here](#)). Taxpayers should consider legal advice to limit the risk of self-incrimination.

[Revenue Commissioners](#), 23 June 2021

FINANCIAL ACTION TASK FORCE PUBLISHES REPORT ON ENVIRONMENTAL CRIME AND MONEY LAUNDERING

The Financial Action Task Force (**FATF**), led by officials from the Irish Department of Finance, its Canadian counterpart and officials from the United Nations Office of Drugs and Crime has published a report containing its findings from a study into Money Laundering arising from environmental crime.

The report focused primarily on forestry crime, illegal mining and waste trafficking. It identified methods used by criminals to launder proceeds from environmental crime, and tools that government and the private sector can apply to disrupt these activities.

In a recent [press release](#), Minister for Finance, Paschal Donohoe TD said;

“I welcome this study as an important addition to the toolkit of policy makers internationally as collectively we look to address the serious criminal activities that are being perpetrated in Environmental crime. Not only does the report detail the full scale of these crimes, helping us to better understand the issue, but it provides a set of actions that Governments and the private sector can take to disrupt these financial flows.”

The FATF recommends as a priority that countries should:

1. Consider the money laundering threats posed by environmental crimes, even for countries without domestic natural resources. These risks should be considered alongside domestic vulnerabilities, such as the propensity of corruption, or dialogue with stakeholders that may not be traditional anti-money laundering (**AML**) entities (e.g. mining, logging companies and supply chain intermediaries).
2. Strengthen coordination between AML authorities and environmental crime experts. Ensure that AML authorities have sufficient powers to investigate and trace assets from environmental crimes.

[Financial Action Task Force](#), 28 June 2021

SOUTHERN WATER (UK) SENTENCED TO RECORD £90 MILLION IN FINES IN “THE WORST CASE BROUGHT BY THE ENVIRONMENT AGENCY IN ITS HISTORY”

A case, described as the largest criminal investigation in the UK Environment Agency’s history, uncovered how a privately-owned company dumped untreated sewage into seas of some of the most protected marine environments in the UK. The UK Crown Court was told that Southern Water had also deliberately presented a misleading picture of compliance to the Environment Agency, hindering proper regulation of the company.

In sentencing in the Canterbury Crown Court, the Honourable Mr Justice Johnson handed down a record £90 million fine, stating:

“Each of the 51 offences seen in isolation shows a shocking and wholesale disregard for the environment, for the precious and delicate ecosystems along the North Kent and Solent coastlines, for human health, and for the fisheries and other legitimate businesses that depend on the vitality of the coastal waters”

[Environment Agency \(UK\)](#), 9 July 2021

EUROPEAN COMMISSION PROPOSES CREATION OF EU ANTI-MONEY LAUNDERING AUTHORITY

The European Commission has presented a package of legislative proposals to strengthen the EU's anti-money laundering and countering the financing of terrorism (AML/CFT) rules. The proposals include the creation of a new EU authority to transform AML/CFT supervision in the EU to enhance cooperation among member state financial intelligence units (**FIUs**).

The Commission stated that:

“The new EU-level Anti-Money Laundering Authority (AMLA) will be the central authority coordinating national authorities to ensure the private sector correctly and consistently applies EU rules”.

The proposed new agency will have three primary tasks:

1. Direct supervision of selected “obliged entities” which are otherwise described as some of the riskiest financial institutions operating across a large number of Member States;
2. Close cooperation with national supervising authorities; and
3. Cooperation with financial intelligence units in member states.

The proposed introduction of the AMLA will seek to bolster the EU framework for combatting money laundering and avoid scandals such as that involving Denmark's Danske Bank in 2019 ([here](#)). AMLA is expected to be active in 2024, with direct supervision beginning once the new legal framework is in place.

[European Commission](#), 20 July 2021

HIGH COURT REFUSES ORDER SOUGHT BY THE ODCE IN ITS INVESTIGATION INTO THE FAI

In an application to the High Court, the ODCE sought permission to allow it to examine 1,120 documents seized from the Football Association of Ireland (**FAI**). The former FAI CEO Mr John Delany, a notice party to the proceedings, opposed the application on the basis that the documents were covered by legal professional privilege. The ODCE argued it was in the public interest for the documents to be disclosed as the materials sought are relevant to its ongoing criminal investigation into the running of the FAI. The ODCE claims that the documents are subject to crime/fraud exemption, as such they are entitled to examine them even if protected by legal professional privilege.

Ms Justice Reynolds was not prepared to make any order in relation to the documents until hearing from Mr Delaney's lawyers. Reynolds J reportedly stated that any party seeking disclosure of privileged materials must demonstrate clear evidence of crime or fraud. With only limited knowledge of the nature of the investigation, it was premature for the court to engage in an assessment of the material to see if the crime or fraud exception arises.

The judgment is not yet available, but a report on the application is available here:

[The Irish Times](#), 11 August 2021

GOVERNMENT APPROVES LEGISLATION TO ESTABLISH THE CORPORATE ENFORCEMENT AUTHORITY

The government has approved the Companies (Corporate Enforcement Authority) Bill 2021, drafted on the basis of a general scheme published in 2018 ([see here](#)). If enacted, the legislation would transition the Office of the Director of Corporate Enforcement into an independent statutory body with increased resources to investigate and prosecute white collar crime offences.

This news was welcomed in a [statement](#) by Ian Drennan, the Director of Corporate Enforcement:

“The approval by Government of legislation paving the way for the establishment of the Corporate Enforcement Authority marks a watershed moment in Ireland’s strategic approach towards addressing economic and white collar crime..

Against the backdrop of a likely significant increase in corporate insolvencies resulting from the Covid pandemic, approval of the Bill at this juncture is a timely development.”

Mr Drennan also noted that the new agency is likely to gain additional investigative powers in surveillance, search warrants and participation by civilian investigators in suspect interviews as part of the government’s implementation plan of the Hamilton report.

[Office of the Director of Corporate Enforcement](#), 17 August 2021

NEW PERJURY LEGISLATION IS COMMENCED

The Criminal Justice (Perjury and Related Offences) Act 2021 (**Perjury Act**) came into force on 28 July 2021. The Perjury Act is significant because it makes perjury a statutory offence with clear penalties. It also provides for other related offences such as subornation of perjury and fabrication of evidence.

The offence of perjury is committed where a person gives a false material statement in or for the purposes of a judicial or other proceeding, knowing that it is false. The Perjury Act provides for the imposition of liability on directors, managers, secretaries and officers of body corporates where an offence is committed with their consent, connivance or wilful neglect.

See our briefing on the Perjury Act [here](#).

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