

# Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The European Council and Parliament have just agreed on the selection of a Romanian prosecutor as the first European Chief Prosecutor. With an admirable reputation for success in combating corruption, she will be heading up a body that seems poorly designed for the challenging task of prosecuting fraud against the EU budget.**
- **The Irish Parliament has recently enacted the Criminal Justice (International Co-operation) Act 2019. Rushed through Parliament purportedly to enable the Garda Síochána assist inquests on deaths from the conflict in Northern Ireland, it reflects familiar weaknesses in law-making in Ireland in recent times.**

## The European Chief Prosecutor

### The appointment

The prospects of the European Public Prosecutor's Office (EPPO) being operational before the end of 2020 were significantly advanced last week when the ambassadors of 17 of the 22 participating EU Member States voted for the Romanian Laura Codruta Kovesi to head up the Office as the first European Chief Prosecutor. This broke the deadlock between the European Council and the European Parliament on the position. The former had backed the French candidate in an earlier vote in February, while the latter has been supporting Kovesi. It is reported that President Macron decided over the Summer to support Kovesi over the French candidate in order to promote alliances in Central Europe. A contributing factor was the desire among participating Member States to avoid delays in the already ambitious timetable to have the Office up and running by the end of 2020.

The ambassadors' vote was not binding. In the past few days, however European Parliament and Council negotiators have formally agreed on Kovesi as their choice. This paves the way for a confirmation vote at the October plenary session of the Parliament, and a formal vote among the Member State governments.

Unusually, to put it mildly, the Romanian government had been refusing to back its own candidate. Indeed, it had been actively lobbying against Kovesi. She had attracted powerful enemies during her five-year period as an anti-corruption prosecutor in Romania where she secured convictions against ministers and lawmakers among others. While that may have been instrumental in her removal from office at home, it helped mark her out as highly attractive for the sensitive EU job.

### EPPO remit

The EPPO will have the power to investigate, prosecute and bring to judgment crimes against the EU budget. These encompass a very wide range of fraudulent activities, including cross-border

VAT fraud and associated offences such as corruption and money-laundering, as prescribed in Directive (EU) 2017/1371. Currently, only national authorities can prosecute such offences which are estimated to be costing the EU in the region of €5 billion each year. It is widely believed that too many of the competent national authorities lack the necessary commitment to prosecuting these offences. National prosecution rates for cases referred by the EU's fraud agency (OLAF) are as low as 10% in some States, compared with 90% in Finland. In the UK, the rate is about 50%.

### The original proposal

Sharing national prosecutorial competence with the EU is surely one of the most fundamental and ground-breaking innovations in criminal law and procedure to date. It can be traced at least as far back as 1997 when Professor Mireille Delmas-Marty and others published the *Corpus Juris* project on a model criminal code for the protection of the financial interests of the EU through the criminal law.

The *Corpus Juris* proposed, among other things, the adoption of a single set of budgetary fraud offences throughout the EU in respect of which any national court would have jurisdiction irrespective of place of commission. This would be complemented by a common set of procedural rules which would apply in all Member States when these offences were being investigated and prosecuted. Critically, the project included a proposal for the establishment of a centralised EU public prosecutor's office (EPPO) which would exercise control over the prosecution of a wide range of fraud offences against EU funds. Its powers would extend to securing coercive investigation and pre-trial orders against persons and property

on application to a national judge designated for the purpose.

Inevitably, the EPPO concept entailed an unprecedented transfer of sovereignty in criminal law enforcement from national prosecutors to a supranational EU prosecutor. Although EPPO itself is now provided for in the Treaty on the Functioning of the EU, the original *Corpus Juris* proposal generated entrenched national political and institutional opposition which was not ameliorated by the compelling academic rationale for it.

### The Commission proposal

The Commission eventually tabled formal legislative proposals on the establishment of an EPPO in 2013. This retained the basic hierarchical structure of a centralised European Chief Prosecutor heading up a team of designated national prosecutors (European Delegated Prosecutors), each based in their own Member State. As a concession to opposition in some Member States, however, the proposal envisaged primary reliance on national criminal law and procedure (rather than an EU code) in the investigation and prosecution of offences against the EU budget.

### The adopted structure

The concessions were still not sufficient to assuage national sovereignty sensitivities. Further substantive amendments were necessary to secure sufficient agreement in the Council for the adoption of Regulation 2017/1939 on the establishment of the EPPO. This replaces the centralised hierarchical structure with a more complex collegiate structure combining centralised and decentralised elements. While there is still a European Chief Prosecutor, she operates as part of a Luxembourg-based College of European Prosecutors composed of one European Prosecutor from each

Member State. It is envisaged that the College will set up Permanent Chambers from among its own members. Collectively, the Chief Prosecutor (and Deputies), the College, the Chambers and the European Prosecutors constitute the centralised dimension. The decentralised dimension consists of the European Delegated Prosecutors based in their own Member States.

The actual investigation and prosecution of a case at national level will be performed in the first instance by the relevant European Delegated Prosecutors. They differ significantly from public prosecutors in common law States such as Ireland and England Wales. While the latter are confined to prosecuting a case through the courts, the European Delegated Prosecutors have powers to coordinate police investigations and to secure coercive investigation and pre-trial orders against persons and property. In this they reflect the model of a public prosecutor familiar in European continental jurisdictions.

Although they are also national prosecutors, the European Delegated Prosecutors are subject to EPPO oversight and direction in the discharge of their EPPO functions. The Chambers play a pivotal role in this. They monitor and direct investigations and prosecutions by the European Delegated Prosecutors, thus helping to achieve a consistent, centralised policy in these matters across Europe. The European Prosecutors supervise the investigations and prosecutions in their own State on behalf of the Chambers. The European Chief Prosecutor heads up the whole EPPO operation. She organises its work and directs its activities, but it seems that she lacks that sense of an individual, centralised European prosecutor envisaged in the original blueprint. The College of

European Prosecutors is responsible for general oversight and strategic matters.

#### Fit for purpose?

These concessions to national sensitivities have not been sufficient to persuade all Member States to come on board. Twenty-two EU Member States are participating, but six others have opted to remain outside for their own diverse reasons. In addition to the UK and Ireland, these comprise: Denmark, Sweden, Poland and Hungary. The fact that the EPPO does not have jurisdiction across all Member States will prove a significant impediment in its capacity to investigate and prosecute all serious fraud cases.

The concessions made to maximise participation have also exacted a heavy price in internal coherence, clarity and functional logic. Professor John Spencer, one of the architects of the original *Corpus Juris* project, has observed, "... it is hard to imagine this byzantine institution ever getting beyond lengthy internal arguments about which part of it does what." As the first Chief Prosecutor, Laura Codruta Kovesi faces an unenviable task. Prosecuting crime against the EU budget is inherently complex and challenging due to the diversity and rigidity of national criminal laws and procedures, the sophistication and creativity of fraudulent schemes and the effects of the supranational and cross-border dimensions. Attempting to overcome those challenges using the cumbersome and contorted structures of the EPPO seems like a bridge too far.

## Garda Cooperation with Inquests on Deaths from Northern Ireland Conflict

### The Legacy Inquests

One of the most enduring challenges of the Northern Ireland Peace Process is dealing with the legacy of the past; most notably those murders, many dating back to the 1970s, in respect of which there have been no prosecutions or inquests. The effect is that the families of the deceased have been left in the dark about how, why and by whom their loved ones were killed. This basic human need can be met by holding the inquests. In 2016, the Lord Chief Justice for Northern Ireland adopted a five-year plan aimed at completing 54 of the outstanding inquests encompassing 95 deaths (Legacy Inquests). These include some of the most high-profile and contentious killings at the hands of the security forces and paramilitaries.

In June 2019 the Presiding Coroner on the Legacy Inquests held a 'state of readiness' event with a view to commencing preliminary hearings on them in September 2019. Although the deaths all occurred in Northern Ireland, it is likely that the Garda Síochána is in possession of evidence relevant to some of the Inquests. For reasons outlined below, however, there is no legal basis for the Garda to give that evidence (or make it available) to the Inquests. In order to provide that legal basis, the Irish government rushed through the Criminal Justice (International Co-operation) Bill 2019 in the last few days before the Summer parliamentary recess. While the immediate objective was to facilitate the ensuing Inquests in Northern Ireland, the Bill goes significantly further than that. As the title suggests, it introduces

important and much wider provisions on international cooperation in criminal justice related matters.

### An Inquest

It is important to appreciate at the outset that an inquest is not a criminal trial. It is essentially a fact-finding exercise aimed at establishing: who the deceased person was; how, when and where he or she died; and the details needed for the death to be registered. Accordingly, the inquest is inquisitorial in nature; in the sense that it is a search for the truth of the circumstances in which the deceased was killed, rather than an adversarial contest between two parties seeking to win their case. The Coroner (or judge) holding the inquest does not make findings of criminal or civil liability. The value for the family of the deceased is that it provides them with an opportunity to learn how their loved one was killed and who was responsible.

### Objective of the 2019 Act

Under the current EU and domestic law, the Garda can cooperate with criminal investigations and prosecutions by police services in Northern Ireland, Britain and other EU States. This extends to seeking and responding to requests for evidence and witness testimony. However, this only applies in respect of criminal investigations. It does not extend to the Garda providing or sharing information with civil bodies (such as a Coroner) outside the State. A primary objective of the new legislation is to plug that gap in respect of Legacy Inquests into the conflict-related deaths in Northern Ireland. For this immediate purpose, a conflict-related death is a death that may have occurred as a result of an act of violence or force connected with the conflict in Northern Ireland, and which occurred between 1 January 1966

and 10 April 1998, the date on which the 'Good Friday Agreement' was reached.

### Procedure under the Act

The Act does not make provision for a member of the Garda Síochána to give evidence directly at a Legacy Inquest in Northern Ireland. Instead, it enables the Coroner holding the Inquest to request the assistance of the Garda Commissioner in having evidence taken in Ireland from a member of the Garda. Any such request must be in writing and must specify the questions that the Coroner wants asked in taking the evidence of the member, and the purpose for which the evidence is requested.

It seems that the Commissioner can accede to such a request on his own initiative. However, he must refuse a request where, after consultation with the Minister for Justice, he is of the opinion that it is likely to prejudice the sovereignty, security or other essential interests of the State, or is likely to prejudice a criminal investigation or criminal proceedings in the State or is otherwise inconsistent with the statutory functions of the Garda.

The Commissioner's decision on a request must be in writing, and must specify the questions (if any) for which the Commissioner is accepting and those for which he is refusing the request. Where one or more questions are accepted, the evidence shall be taken by a nominated High Court judge directly from a member of the Garda not below the rank of Chief Superintendent designated for that purpose by the Garda Commissioner. The member in question shall not be compelled to give evidence that he could not be compelled to give in criminal proceedings in Ireland. He or she shall also be entitled

to the immunities and privileges of a witness before the High Court.

The judge shall put the specified question or questions to the Garda member who shall answer on oath. The Coroner (or his or her legal representative) may be present for the proceedings, as may the Garda Commissioner (or legal representative). Apart from that, the proceedings will be heard in private. At the conclusion of the proceedings, the judge shall see that a certified copy of the evidence is sent to the Coroner (and the Garda Commissioner). It is subject to the condition that the Coroner cannot, without the consent of the Garda Commissioner, use the evidence for any purpose other than that stated in his or her original request for the evidence to be taken.

### Other UK inquests

The provisions above apply automatically to Legacy Inquests in Northern Ireland. However, they can also be applied in respect of any other inquest in the UK. This can happen in respect of an inquest (other than a conflict-related inquest held in Northern Ireland) which has been designated for that purpose by the Minister for Justice. The Minister can only designate such an inquest where he is satisfied that there has been cooperation between the Garda and a police force or law enforcement agency in the UK in respect of the investigation into the death concerned.

### Limitations

It remains to be seen how effective these provisions will be in enabling an inquest in Northern Ireland (or Britain) to access and make use of relevant Garda evidence. At first sight, the procedure appears cumbersome, bureaucratic, rigid and formalistic. In essence, it is an exercise in

predetermined questions being put to a Garda witness, with no provision for follow up questions. Critically, the family of the deceased will not be able to put questions directly (or through their legal representative) to the Garda witness. Even the Coroner's capacity to secure the information he or she needs to establish the key facts is curbed by the Garda Commissioner's power to determine what questions are (and are not) acceptable. Moreover, transparency is not considered important. The proceedings are treated as a private matter between the Coroner, the Garda, their legal representatives and the High Court judge. Incredibly, the family of the deceased are excluded.

### Information-sharing agreements

Surprisingly, perhaps, the 2019 Act also significantly extends the power of the Garda Commissioner to enter into agreements for the exchange of information with persons or bodies outside this State. This has a much broader ambit than supporting the conduct of inquests. Prior to the 2019 Act, the Garda Commissioner could, with the consent of the Government, enter into information exchange agreements with police or law enforcement agencies abroad (not confined to such bodies in the UK). The essential purpose of such agreements is to provide for cooperation and the exchange of information in policing and criminal law enforcement matters. The 2019 Act takes this on to another level by enabling the Commissioner to enter into agreements with certain bodies, most of which are not engaged directly in policing and criminal law enforcement.

The immediate purpose of this provision, seemingly, is to enable the Garda Síochána contribute to the work of the 'Historical Investigations Unit' which has a

reporting function, separate from its criminal investigation function, in respect of unsolved murders from the historical conflict in Northern Ireland. The reality is that the power has a much broader reach. It envisages agreements with bodies outside the State discharging similar functions to: the Ombudsman Commission (an independent police complaints commission), the Garda Inspectorate (similar to the former HM Inspectorate of Constabulary), the Policing Authority (similar to current Police Commissioners or former Police Authorities in England and Wales), a Coroner, an independent Commission of Investigation, a Tribunal of Inquiry and the Criminal Assets Bureau (similar in relevant respects to the National Crime Agency). The Commissioner may enter into an agreement with any such body for the purpose of facilitating the performance by each party of their respective functions. Subject to the Data protection regulations, this can include providing information to, and receiving information from, the body in question.

### Ombudsman Commission

The Act confers a very similar, but novel, power on the Ombudsman Commission (the independent police complaints commission) to enter into an agreement with a person or body outside the State where that person or body is a police service, a law enforcement agency or a body or person discharging similar functions to the Ombudsman Commission. This is the first time that the Ombudsman Commission has been given power to enter into information-sharing and other cooperative agreements with bodies outside the State. Obviously, this can be used to enhance the investigation of complaints against the police. It should, be noted, however, that an agreement can be with police services and, as with the Commissioner's power

above, it is difficult to predict its full ramifications.

### **Hasty law-making**

Arguably, the substance and enactment of the 2019 Act reflects some of the most objectionable aspects of law-making in Ireland in recent times. The most striking of these is haste. The 'Stormont House Agreement' (partly aimed at breaking the logjam on dealing with legacy issues in Northern Ireland) was presented as the primary instigator of the Act. Although that Agreement was signed almost 5 years ago, the Act was introduced and rushed through all legislative stages in both Houses of the Irish Parliament in less than two days. Only five days were allowed from the publication of the Bill for the submission of proposed amendments. By any standards this is an insult to the principles of democratic law-making. It also invites a very high risk of unintended consequences flowing from hastily drafted provisions. Yet, nowhere in the legislative debates did the sponsoring Minister for Justice offer a cogent explanation for rushing the Bill through in a manner normally reserved for emergency legislation.

### **Legislating undercover**

The second objectionable aspect is that the Act is something of an omnibus collection of disparate international cooperation measures, even though it was presented as being necessary to fulfil the State's obligations in dealing with legacy issues arising from the conflict in Northern Ireland. It is patently clear, however, that Act goes far beyond that. Its provisions extend to British inquests that have nothing to do with the conflict in Northern Ireland. It confers powers on the Garda Commissioner and the Ombudsman Commission to enter into information-sharing agreements with a

range of bodies anywhere in the world. The Minister has even used the measure as a convenient instrument to effect disparate amendments to other unrelated Acts dealing with matters such as the European arrest warrant and the deployment of members of the Garda Síochána abroad (as, for example, with Europol or in Joint Investigation Teams). In the interests of transparency, such amendments should really be introduced as amending Acts bearing the title of their parent Act or Acts.

### **Lack of British reciprocity**

In enacting this legislation, the Irish government has displayed a willingness to address legacy issues associated with the Northern conflict. The British government, however, has persisted in its refusal to reciprocate by facilitating access to information on many murders in the Republic of Ireland, most notably those resulting from the Dublin-Monaghan bombings, in respect of which it is believed that the British security and intelligence establishments have vital information on who was responsible. There is no indication that the Irish government's initiative will prompt any change of heart on the part of the British in this matter.