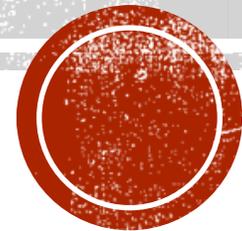


THE INVESTIGATION AND PROSECUTION OF FINANCIAL CRIME: A COMPARATIVE PERSPECTIVE ON INSTITUTIONAL ROLES AND RESPONSIBILITIES

Dr. Gerard Conway (Brunel Law School)

Brunel University of London



ABSTRACT - THE INVESTIGATION AND PROSECUTION OF FINANCIAL CRIME: A COMPARATIVE PERSPECTIVE ON INSTITUTIONAL ROLES AND RESPONSIBILITIES

- Nationally organised, dedicated prosecution entities are in historical terms quite recent
- Traditionally, victims of crime prosecuted in the majority of cases, though officials prosecuted certain offences, e.g. against the treasury
- Loosely conceived early role of bailiffs or sheriffs gave way gradually to adversarial system in common law, prosecution institutions emerged in France under Napoleon
- The focus of this presentation is the Republic of Ireland, with comparative references to the UK, France, Sweden & Brazil, and with a view to Ireland's possible participation in the EPPO



INTRODUCTION

- **Ireland as now the only predominantly common law country in the EU:**
 - **Key features**
 - (i) Adversarialism
 - (ii) Historically more recent trend to separation of powers between police, prosecution, judiciary
 - (iii) Admissibility of evidence much more regulated, largely due to jury tradition
 - (iv) Large majority of offences triable summarily
 - (v) Range of offences 'triable either way'
 - (vi) Use of jury-less Special Criminal Court
 - **Considering above and EPPO participation:**
 - (ii)-(iii) above are the major challenges for Irish participation
 - Irish government has announced in 2025 its intention to participate in EPPO
- **This presentation aims to:**
 - (i) illustrate the main distinctiveness – comparatively - in the EU of its criminal procedure
 - (ii) consider how to reconcile this with EPPO participation



IRELAND AND THE E.P.P.O. - CHALLENGES

- The Government **identified two main challenges**:
 - (i) Irish criminal procedure does not enable the prosecutor to instruct the police
 - (ii) Mutual admissibility of evidence is contrary to the common law and Irish constitutional tradition on the regulator of admissibility
- **Prosecutor/Police**:
 - Police investigate and submit file to prosecutor
 - Prosecutor can advise if requested, but cannot instruct
 - Police now have only limited power to prosecute in summary offences: GSA 2005, s. 8
 - Previously could in theory prosecute any offence as 'common informer'?
- This paper, mainly
 - Stricter than in the UK regarding unconstitutionally obtained evidence
 - Approach somewhat relaxed more recently
 - Apart from that point, general common law regime of admissibility much more restrictive (hearsay evidence etc.)?



IRELAND AND THE E.P.P.O.

- **Government statement:**

In considering Ireland's participation in the EPPO, it is important to note that the development of a supranational investigative and prosecution authority, even one with a relatively limited scope, presented particular difficulties in an Irish context. The fundamental difficulty that arises is that the Irish courts would not be entitled to exclude unconstitutionally obtained evidence. Under the EPPO regulation, evidence would potentially be admissible based on other member states' legal regimes and on the regulation itself. More generally, challenges arose in how the EPPO structures would have interacted with our common law regime and how institutions and practices have evolved. The EPPO [was] built primarily from a civil law base.

Ireland's non-participation in the EPPO notwithstanding, Ireland is still obliged to cooperate with the EPPO under existing mechanisms such as the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the European Arrest Warrant (Framework Decision 2002/584/JHA).

Legal Position in Ireland

It is important to emphasise that PIF crimes can and are investigated and prosecuted in Ireland. The PIF Directive has been implemented in Ireland under the Criminal Justice (Corruption Offences) Act 2018 and the Criminal Justice (Theft and Fraud Offences) (Amendment) Act 2021. PIF crimes in Ireland are therefore dealt with by the relevant agencies within the Irish criminal justice system, such as An Garda Síochána and the Director of Public Prosecutions.

Minister of State, James Browne TD, *Seanad Éireann Debate*, Wednesday - 21 January 2021:

[Criminal Justice \(Theft and Fraud Offences\) \(Amendment\) Bill 2020 \[Seanad\]: Second Stage – Dáil Éireann \(33rd Dáil\) – Wednesday, 27 Jan 2021 – Houses of the Oireachtas](#)



IRELAND AND THE E.P.P.O.

- **Government statement:**

The European Public Prosecutors Office (EPPO) was established in 2017 under the EU's enhanced cooperation measure to investigate and prosecute crimes against the financial interest of the European Union. These crimes are as set out in Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, otherwise known as the PIF Directive.

Ireland has transposed the PIF Directive and the full suite of measures to investigate and prosecute PIF offences are available to Irish authorities under our domestic structures. At that time, Ireland decided not to opt in to the EPPO Regulation, given that it represented a departure from our common law model of investigation and prosecution.

In October 2023, the Government approved the drafting of the General Scheme of legislation to allow Ireland to join EPPO. This detailed preparatory work will take some time to complete before the Government makes a formal decision to join EPPO.

In the meantime, co-operation with the EPPO as a non-participating Member State is now operational and working well. Legislative changes required to facilitate Ireland's cooperation with the EPPO are fully operational, as of 1 November 2023. This was effected by way of amendments to the Criminal Justice (Mutual Assistance) Act 2008. Since this date, there has been ongoing positive engagement between the Central Authority and the EPPO in relation to the processing of MLA requests.

Irish officials enjoy a positive and collaborative working relationship with the EPPO, and it is expected that this will continue as the work on the legislative and operational aspects of Ireland's future participation in the EPPO progresses. The Irish Government remains fully committed to protecting the Union's financial interests and to providing every support possible to the EPPO as it carries out its very important work.

Minister for Justice, Jim O'Callaghan TD, *Dáil Éireann Debate*, Wednesday - 5 February 2025 (Question 827):

[European Court of Justice – Wednesday, 5 Feb 2025 – Parliamentary Questions \(34th Dáil\) – Houses of the Oireachtas](#)



IRISH CRIMINAL PROCEDURE — ROLES: POLICE

- The Gardaí (Police) investigate crime independently of prosecutor
- Can prosecute in summary cases (i.e. minor offences not tried before a jury), but subject to direction of Director of Public Prosecutions (DPP): s. 8 of Garda Síochána Act 2005
- Garda powers set out across a range of legislation: s. 7 of 2005 Act sets out overall function in very general terms, e.g. crime prevention
- In other cases, the Gardaí submit a file to the DPP for direction
- DPP has in-house Solicitors' Division and also contracted State Solicitors in each county, who do considerable summary prosecution work



IRISH CRIMINAL PROCEDURE — ROLES: DPP

- Now an independent prosecution authority, prior to 1974 part of Attorney General's Office
- Prosecution of Offences Act 1974: defines function relative to previous practice of AG re prosecution
- No power to direct the police/Gardaí, though Gardaí sometimes request advice (more about a legal concern/question)



IRELAND — STANDARD PROSECUTION PROCESS

- Police/Gardaí investigate
- If summary offence, either DPP or Gardaí can prosecute, but latter subject to DPP direction
- In indictable cases (non-minor cases triable before a jury), Gardaí send file to DPP for direction
- For trial work, DPP mostly hires trial advocates (barristers) from a panel of privately employed barristers
- Gardaí and DPP work largely independently of each other



IRELAND – NON-STANDARD PROSECUTION PROCESS

- Residual authority of Attorney General for specific offences: Prosecution of Offences Act 1974, s. 5
- Revenue offences: not investigated by Gardaí, instead by Revenue Commissioners
- Ministerial prosecutions
- Corporate Enforcement Authority: power to prosecute summarily under Companies Act 2014 (as amended) (ss. 865, 944D)
- Competition and Consumer Protection Commission: may prosecute summary offences under the Competition and Consumer Protection Act 2014



EPPO REGULATION – INVESTIGATION

- Recital 22:

In addition, to ensure consistency in its action and thus an equivalent protection of the Union's financial interests, the organisational structure and the internal decision-making process of the EPPO should enable the Central Office to monitor, direct and supervise all investigations and prosecutions undertaken by European Delegated Prosecutors.

- Recital 30:

The investigations of the EPPO should as a rule be carried out by European Delegated Prosecutors in the Member States. They should do so in accordance with this Regulation and, as regards matters not covered by this Regulation, in accordance with national law. European Delegated Prosecutors should carry out their tasks under the supervision of the supervising European Prosecutor and under the direction and instruction of the competent Permanent Chamber.

- Recital 33

Notwithstanding their special status under this Regulation, the European Delegated Prosecutors should, during their term of office, also be members of the prosecution service of their Member State, namely a prosecutor or member of the judiciary, and should be granted by their Member State at least the same powers as national prosecutors.

- Recital 34

The European Delegated Prosecutors should be bound to follow instructions coming from the Permanent Chambers and the European Prosecutors. Where a European Delegated Prosecutor considers that an instruction would require him/her to undertake any measure that would not be in compliance with national law, he/she should ask for a review of that instruction by the European Chief Prosecutor



IRELAND – ADMISSIBILITY OF EVIDENCE

- Common law countries generally more restrictive, e.g. rule against hearsay
- *DPP v. JC*, 15th April 2015, Clark C.J. re unconstitutionally obtained evidence:
“... (i) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:
 - (a) that the evidence was not gathered in circumstances of unconstitutionality; or
 - (b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such basis. ...

(ii) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the constitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned. ...



EPPO REGULATION – MUTUAL ADMISSIBILITY

- Recital 65

The investigations and prosecutions of the EPPO should be guided by the principles of proportionality, impartiality and fairness towards the suspect or accused person. This includes the obligation to seek all types of evidence, inculpatory as well as exculpatory, either motu proprio or at the request of the defence.

- Recital 80

The evidence presented by the EPPO in court should not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State, provided that the trial court considers its admission to respect the fairness of the procedure and the suspect or accused person's rights of defence under the Charter. This Regulation respects the fundamental rights and observes the principles recognised by Article 6 TEU and in the Charter, in particular Title VI thereof, by international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by Member States' constitutions in their respective fields of application. In line with those principles, and in respecting the different legal systems and traditions of the Member States as provided for in Article 67(1) TFEU, nothing in this Regulation may be interpreted as prohibiting the courts from applying the fundamental principles of national law on fairness of the procedure that they apply in their national systems, including in common law systems.



COMPARATOR – U.K.

- Serious Fraud Office under Criminal Justice Act 1987 (as amended)
- Has both power of investigation under s. 2 of 1987 Act + ‘conduct of criminal proceedings’ under s. 1
- Section 1 3 of 1987 Act: “The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.”
- Fraud now defined in Fraud Act 2006 (previously in Theft Act 1968)



COMPARATOR – FRANCE

- General prosecution institution: le procureur général
- Articles 62-71
- Parquet Financier: La loi du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière
- Appointed by le procureur general: Article 704 CPP inserted by Article 63 of 2013 Law
- Exclusive competence regarding specific offences: Art. 705 CPP inserted by Article 65 of 2013 Law
- Relationship with police complicated by different police functions, but generally subject to prosecution direction



COMPARATOR – SWEDEN

- The office of Prosecutor General (*Åklagarmyndigheten* or *Rikslågåre*) was established relatively late, in the 20th century (1965), prior to this police prosecuted and local prosecutors were established in 1948
- Powers are set out in:
 - Code of Judicial Procedure (CPJ), chaps. 7, 20, 23 mainly
 - Prosecution Ordinance SFS 2004:1265
- It is relatively powerful; it is independent of the Ministry of Justice (Instrument of Government or *Regeringsformen*, chap. 11, sec. 7) and directs the police in investigation except for minor cases (CPJ, chap. 23, sec. 3)
- The Chancellor of Justice or Attorney General has sole competence in cases relating to freedom of expression and the media and Parliamentary Ombudsman in some cases: Instrument of Government, chap. 12, secs. 6 and 8
- Private prosecution is only possible where the Prosecutor General does not prosecute: CJP, chap. 20, secs. 8-9



COMPARATOR – BRAZIL

- Some distinctive features, while mixed system overall
- The Public Prosecutor's Office is solely responsible for initiating prosecutions (Article 129(I) of Constitution 1988)
- Prosecutor also:
 - (i) directs the police (Article 129(VII)-(VIII))
 - (ii) can conduct own investigation (Article 129(III)) re civil suit
 - (iii) caselaw and doctrine support Article 129(I),(III) as basis for prosecutor to conduct investigation itself
- Article 127(1) of Constitution 1988: 'Unity, indivisibility and functional independence are institutional principles of the Public Prosecution'
- Article 5, LIX, of the Constitution: "private prosecution in the cases of crimes subject to public prosecution shall be admitted, whenever the latter is not filed within the period established by law"
- Elements of adversarialism: litigants in legal proceedings or in administrative proceedings, and defendants in general, have the right to challenge the evidence and to be legally represented under Article 5, section LV, of the Constitution of 1988, but judge is active in trial and can ask questions
- All evidence is admissible except when it is illegally obtained under Article 5, section LVI, of the Constitution of 1988, but reforms under Law 13,964 / 2019 mean evidence must be produced in court (i.e. less reliance on hearsay evidence) + investigating judge separate to trial judge



CONCLUSION

- **Adversarial-inquisitorial distinction indicative only**
- **Mixing of features possible**
- **Reconciling Irish practice with EPPO?**
 - **i. appointment of Delegated EPP**
 - **ii. Delegated EPP being subject to prosecutor**
 - **iii. Evidence issue**



REFERENCES

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- [Unlawfully Obtained – Irish Legal Blog](#)
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