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SUBMISSION TO THE ADVISORY COUNCIL AGAINST ECONOMIC CRIME AND CORRUPTION

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INTRODUCTION

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients, and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice, and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Council has prepared this submission in response to the invitation to provide a written submission to the Advisory Council against Economic Crime and Corruption ("**the Advisory Council**") on what ought to be addressed in its strategy to combat economic crime and corruption.

The submission aims to contribute, in particular, to two of the themes identified by the Advisory Council:

- Theme 1, on improving the Advisory Council's collection, analysis, and use of data to enable policymakers to develop evidence-informed policies to fight economic crime and corruption; and
- Theme 2, on ensuring that the Advisory Council has the resources and tools it needs for the effective investigation and prosecution of economic crime and corruption.

This submission considers the following matters:

1. Encouraging prosecutorial reliance on conspiracy as a means of prosecuting complex criminal trials involving fraud, corporate crime, or corruption;
2. Ensuring the facilitation of efficient trials of economic crime and corruption offences before juries.

[I] CONSPIRACY AS A MEANS OF PROSECUTING ECONOMIC CRIME

[A] The General Inchoate Offence of Conspiracy

Conspiracy at common law is an agreement *"to do an unlawful act, or to do a lawful act by unlawful means*"[1] and is recognised as a general inchoate offence. Conspiracy, unlike attempt and incitement, can attach to civil wrongs as well as crimes. In other words, there can be a criminal conspiracy to commit a merely tortious act.[2]

Section 71 of the Criminal Justice Act 2006 created the statutory offence of conspiracy, which now exists alongside the common law offence. However, it is limited to "*serious offences*", which are those offences carrying a penalty of four years' imprisonment or more. The 2006 Act does not provide a definition of what it is "*to conspire*" and focuses predominantly on the issue of extraterritorial competence.

Conspiracy criminalises the activity at the point of agreement rather than at the occurrence of any acts. The House of Lords has described the *mens rea* of conspiracy as including the intention of the parties that the act or acts agreed on be, in fact, carried out (as distinct from their intention as to the overall outcome).[3] Agreement in conspiracy holds an ordinary language meaning of "*agreement*". It is not prescriptive, which makes it flexible and therefore advantageous to prosecuting authorities. Nevertheless, it is necessary to show a meeting of minds, or a consensus to effect an unlawful purpose. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place. Similarly, negotiations and discussions are not sufficient, and a conspiracy does not arise if only one party intends it to succeed. That said, abandonment of an agreement does not affect criminal liability. It is also not a requirement that conspirators physically meet, nor for there to have been an express agreement, a definite plan, or for the agreement to have been executed in premeditated terms.

[1] ***R v Jones*** (1832) 110 ER 485, at 487.
[2] ***R v Parnell*** (1881) 14 Cox CC 508, at 518-519.
[3] ***R v Saik*** [2006] UKHL 18.

Two or more persons are needed for a conspiratorial agreement even though a conviction may only be achieved against one.[4]

[B] The Offence of Conspiracy to Defraud

Conspiracy to defraud contrary to common law can be considered a powerful weapon in the armoury of a fraud prosecutor, and its use is something which might be advocated for in the interests of the continued fight against economic crime and corruption.

It is a charge which might be preferred in complex cases in which the interests of justice can only be served by presenting to a jury an overall picture which cannot be achieved by charging a relatively small series of substantive offences.

In ***DPP v Bowe & Casey*** [2017] IECA 250, the Court of Appeal considered that the *mens rea* of the offence is the "*intentional participation in whatever act or scheme is said to constitute the conspiracy in circumstances where that act or scheme would be regarded, objectively, as being dishonest. It is the conduct which must be dishonest. The motivation of the relevant actor is irrelevant to liability*." (para. 175). The Court also stated, at para. 174:

> "*All of the jurisprudence relating specifically to this offence seems to us to indicate that it is sufficient for a conviction that the prosecution should prove merely that the accused intended to do the impugned act or to participate in the impugned scheme in circumstances where the relevant act or scheme would attract the value judgment, judged by the standards of ordinary reasonable men, that it was dishonest*."

[C] Evidential Advantages

A potential major evidential advantage in the prosecution of conspiracy offences is the so-called 'Special Rule', which constitutes an exception to the rule against hearsay, and envisages the admission of "*the statements of any of [the co-conspirators] in pursuance of a common and unlawful enterprise*" into evidence (per McGrath, Evidence (3rd edn.; Round Hall, 2020), at

[4] ***DPP v Collins*** [2011] IECCA 64.

para. 5-363). While McGrath notes that the exception is "*long standing*", he also recognises that it has not yet been adopted in this jurisdiction.[5]

Regard should be had to the following *obiter* statements of Walsh J. in ***Ellis v O'Dea*** [1989] I.R. 503 (at p. 538):

> *"The special rules of evidence which apply to conspiracy have in the light of experience demonstrated that it is not always desirable in the interest of justice to have such a charge. It can, for example, result in wholly innocent persons being convicted on the untrue "admissions" of a co-accused. Thus if the courts of this country should at some future time decide that these special rules of evidence were such as to fall foul of the constitutional guarantees of fair procedures it is obvious that no court here could extradite a person from the protection of this jurisdiction to another where such protection would not be enjoyed."*

Recently, in the prosecution of two individuals for the offence of conspiracy to pervert the course of justice, the DPP relied on the so-called 'Special Rule' before the Special Criminal Court. While there has not been any further judicial comment in this jurisdiction on the question of an exception to the rule against hearsay in respect of the statements of co-conspirators, there is a large degree of judicial commentary and persuasive precedent available from comparative common law jurisdictions.

In the UK, the following is provided for by Section 118(1)(7) of the Criminal Justice Act 2003, under the heading "*Preservation of Certain Common Law Categories of Admissibility*" relating to hearsay: "*Any rule of law under which in criminal proceedings a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated*."

[5] This 'special rule' has also been referred to Charleton, McDermott, et al, Charleton and McDermott's Criminal Law and Evidence (2nd edn.; Bloomsbury, 2020) (at p. 308), and in the Law Reform Commission's Report on Inchoate Offences (at para. 1.50).

The principle of admissibility of statements made in furtherance of a conspiracy has long been established and developed in the UK. For example, in ***R v Donat*** (1986) 82 Cr. App. R. 173, the rule was considered as follows, at p. 179:

> "*The problem of to what extent documents made out in furtherance of a conspiracy and actions done in furtherance of a conspiracy by people other than a particular defendant are admissible is never an easy one to solve. The matter is dealt with in Cross on Evidence, 6th ed., 1985 , in a manner which seems to us to be helpful at p.527, and it reads as follows: 'In determining whether there is such a common purpose as to render the acts and extra-judicial statements done or made by one party in furtherance of the common purpose evidence against the others, the judge may have regard to these matters, although their admissibility is in issue, as well as to other evidence. This doctrine is obviously liable to produce circularity in argument […].'*
>
> *But the learned editor of Cross goes on as follows: 'The answer is that the agency may be proved partly by what A said in the absence of B, and partly by the other evidence of common purpose. It makes no difference which is adduced first, but A's statement will have to be excluded if it transpires that there is no other evidence of common purpose; it is another instance of conditional admissibility.'*"

More recently, in ***R v Sofroniou*** [2009] EWCA Crim 1360, the rule was succinctly stated, at para. 46:

> "*Under the common enterprise exception to the hearsay rule, conversations such as these may provide evidence not only of the existence, nature and extent of a conspiracy, but also of the participation in it of persons absent when those conversations took place. The common enterprise exception to the hearsay rule is* ***preserved*** *by section 118(1)(7) of the Criminal Justice Act 2003.* ***The first pre-condition to the operation of the exception is that there is admissible evidence of the existence of a conspiracy****.* ***Secondly, the judge must be satisfied that the conversations were made with the intention of furthering the agreed purpose during the currency of the common enterprise****.* ***Thirdly, there must***

<u>be some evidence that this appellant was a party to the conspiracy apart from the conversations</u>." [Emphasis added.]

This 'Special Rule' has also been recognised in Canada, where its existence was analysed in ***R v Mapara*** [2005] 1 SCR 358. As with all matters relating to hearsay in Canadian jurisprudence, regard must be had to the fact that a "*principled approach*" is followed (see, for example, ***R v Khan*** [1990] 2 SCR 531). Nevertheless, in ***Mapara***, argument was made that "*an exception to the rule against hearsay known as the co-conspirators' exception, which permits reception of evidence of what co-conspirators say out of court in furtherance of the conspiracy*" ought to be set aside in the instant case (para. 7). That exception has its basis in the Supreme Court of Canada's decision in ***R v Carter*** [1982] 1 SCR 938.

While rejecting that the argument that the exception was unconstitutional, the Supreme Court also highlighted that the rule does not infringe the Canadian pre-requisite conditions of necessity and reliability. At para. 19, it was stated: "*The appellant raises the concern that co-conspirators' statements tend to be inherently unreliable because of the character of the declarants and the suspicious activities in which they are engaged."* In this vein, it was noted, at para. 22, that *"[t]he Carter process allows the jury to consider a hearsay statement by a co-conspirator in furtherance of the conspiracy only after it has found (1) that the conspiracy existed beyond a reasonable doubt and (2) that the accused was probably a member of the conspiracy, by virtue only of direct evidence against him*."

In Australia, existence of the rule has been affirmed in ***Ahern v R*** (1988) 80 ALR 161.The exception also exists in New Zealand: see ***R v Qiu*** [2008] 1 NZLR 1; Sean Kinsler, The Co-conspirators Exception to the Hearsay Rule in New Zealand: R v Qiu [2007] 13 Aukland University Law Review 200. It is now contained in Section 22A of the Evidence Act 2006, as inserted by Section 8 of the Evidence Amendment Act 2016.[6]

<u>[D] Practical Considerations</u>

Having regard to the foregoing, there are some practical matters which can be considered at the earliest stages of the investigation of potential economic crime and corruption offences.

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6 For an application of this legislative provision, see ***R v Pasilika Naufuhu*** [2022] NZSC 22.

At the outset, given that the offences concerned will, by and large, occur within a corporate environment or a company, investigative agencies (in most cases, An Garda Síochána) ought to seek out suitable employees within that company who can outline the essence of the impugned scheme and identify key participants. In some cases, these employees may seek immunity from prosecution, and strong consideration should be given to the non-prosecution of these individuals in order to ascertain key information (or evidence) that might otherwise be difficult to obtain. There may be reason to consider the adoption of a formal immunity scheme of general application to economic crime and corruption offences, along the lines of the scheme operated by the Competition and Consumer Protection Commission.

Thereafter, given the vast amounts of data that is held by companies in the modern day, investigators ought to appropriately search and seize servers and digital data, all the while having regard to the limitations and procedures referred to by the Supreme Court in ***CRH plc v Competition and Consumer Protection Commission*** [2018] 1 I.R. 521 and ***People (DPP) v Quirke (No. 1)*** [2023] 1 I.L.R.M. 225, for example. Also worth bearing in mind at this point is the probability of privileged material being seized when large amounts of data are accessed by investigative authorities; in this vein, the comments of the Supreme Court in ***Corcoran v Commissioner of An Garda Síochána and DPP*** [2023] 2 I.L.R.M 237 will be of importance. On foot of such searches and seizures, authorities should interrogate the company database with a view to building the case to further establish 'intentional participation in an objectively dishonest act or scheme', to paraphrase ***Bowe.***

In this regard and at this juncture, it should also be borne in mind that the company itself is capable of committing the offence of conspiracy to defraud.[7]

It might be noted that certain investigative steps, such as waiting for an 'injured party' to make a complaint, the proof of completed transactions, or the proof of movement of monies are not required to prove the offence of conspiracy to defraud. As long as there is a continuing overall dominant plan, there may be changes in methods of operation, personnel, or victims which do not result in the bringing to an end of the conspiracy. While each participant must have a conscious understanding of the common design, the conspiracy may involve any number of

[7] ***R v ICR Haulage Ltd*** [1944] KB 551.

persons, and additional persons may join the scheme or others may withdraw without the conspiracy ending, and without negating criminal liability.

Furthermore, while forensic accountants may ultimately be of assistance, it may be the case that engaging prosecuting counsel at a far earlier stage could be more beneficial. As prosecuting counsel will ultimately be the persons who present the case to a jury, it seems appropriate in this specific context, which can be fraught with complexity, that counsel assists in the investigatory stage. Allowing for this can greatly assist in the shaping of the prosecution case at an early stage. Relying on conspiracy can also prevent undue resources being spent on trying to seek out and establish the elements of other, less appropriate offences. Relying on conspiracy and shaping the investigation and subsequent prosecution from an early stage may be advantageous in this regard, and the offence of conspiracy itself may better encapsulate the offending behaviour.

In light of the above, investigative authorities ought to consider the 'Special Rule' providing that evidence of acts and declarations in furtherance of a conspiracy may be admissible against each of the parties to the conspiracy. In this regard, it is likely that the examination of emails will play a significant role. Email correspondence often contains candid comments and conversations which clearly set out the intentions of individuals in a contemporaneous fashion. This may obviate the need to rely on potentially revisionist answers given in interview at a later stage.

Furthermore, as was the case in ***DPP v Timmons*** [2011] IECCA 13, text messages may constitute real evidence in furtherance of a conspiracy. Naturally, the same can be said for social media or email exchanges, for example.

Finally, a person can be tried in Ireland for conspiracy even if they are located outside Ireland, where that person enters into a conspiracy in furtherance of an act done in Ireland, and does an act that has the effect of completing a criminal offence in Ireland.[8] The extra-territorial competence of the Irish courts to try conspiracy offences is confirmed in statute by Section 71 of the Criminal Justice Act 2006.

[8] ***Ellis v O'Dea (No.2)*** [1991] 1 I.R. 251.

In light of the foregoing, and in particular having regard to the suggestion that counsel should be engaged during the early stage of investigation of alleged economic crime so as to advise whether and how best to prosecute the conduct in question, and to advise on the appropriate evidence which should be sought out, it is more important than ever that sufficient funding for the Special Financial Crime Unit of the Office of the Director of Public Prosecutions is provided. Furthermore, given the complexity of the investigation, prosecution, and defence of economic crime and corruption offences, strong consideration should be given to augmenting the fees payable to counsel acting in such cases. It is trite that the fees payable are paltry by reference to the nature and quantity of the work undertaken to bring these matters to trial.

It is noteworthy that other investigative authorities, such as the Corporate Enforcement Agency, the Competition and Consumer Protection Commission, the Revenue Commissioners, and the Garda Síochána Ombudsman Commission, regularly brief counsel at an early stage of investigations with a view to shaping the presentation of cases are the earliest opportunity. It is perhaps not unreasonable to suggest that the work conducted by the Office of the DPP in economic crime cases can involve an even greater level of complexity and seriousness. This is partially attributable to the nature of trial by jury.

Encouraging the prosecution of economic crime and corruption offences in the suggested manner may greatly benefit the overall fight against these matters by affording prosecution authorities with a greater chance of successfully presenting these cases to juries in a strong, clear, and coherent manner.

[II] FACILITATION OF EFFICIENT JURY TRIALS

The presentation of complex fraud investigations and the traditional forum of a jury trial involves significant challenges for prosecution and defence practitioners alike. In general terms, these trials can be lengthy and costly. Measures which enhance the efficiency of such trials should be advocated for in strong terms. Furthermore, measures which assist juries in the assessment of the vast amounts of material presented to them during the course of such trials should equally be encouraged.

Section 6 of the Criminal Procedure Act 2021 introduced the 'Preliminary Trial Hearing' procedure. This was introduced with a view to reducing the occurrence of *voir dires* to determine the admissibility of certain evidence (for example) *after* a jury was empanelled. Among the aims of this procedure was to reduce unnecessary delays and disrupted trial processes.[9]

From the perspective of a complex, economic crime prosecution specifically, some matters introduced are of significant assistance, including:

- The binding effect of rulings made during the course of preliminary trial hearings;
- The fact that rulings made by the judge during the course of preliminary trial hearings survives the collapse of a trial or the disagreement of a jury;

However, notwithstanding the introduction of these helpful provisions for the purposes of reducing unnecessary waste of court and jury time insofar as possible, the Court of Appeal has recently denigrated the clarifying of certain matters in the absence of the jury. In ***People (DPP) v Sweeney, Beirne, and O'Toole*** [2024] IECA 205, Charleton J. stated at para. 24:

> "*Essentially, the standard of proof is beyond reasonable doubt. A trial judge has no legal capacity to interfere with the production of relevant evidence. Facts are for the jury and as to whether an object is, by reason of labelling or by reason of transmission from Garda A to an international agency for forensic examination and identification by someone familiar with the object or labelling, the same object is a question of fact. That does not admit of a voir dire.* ***A trial-within-a-trial is not available as to questions of fact.*** *Security of a trial is maintained by the trial judge having the duty to direct a jury to acquit where there is no evidence establishing a particular charge or where, because of examination in front of the jury, the evidence has become so contradictory or so tenuous that a jury properly instructed could not properly convict. That is the relevant safeguard*." [Emphasis added.]

[9] See, Heffron, *Impact of the Criminal Procedure Act 2021* (2023) 29(1) Bar Review 23.

In ***People (DPP) v McHugh*** [2024] IECA 176, Charleton J. on behalf of the Court of Appeal stated the following, at para. 2:

> "*The rules of evidence remain unchanged by [the Criminal Procedure Act 2021]. That includes the rules as to when a voir dire, a trial-within-a-trial whereby it is necessary for a judge to hear evidence in order to ascertain if it is admissible, may appropriately take place. Nothing in the 2021 Act enables issues of fact for a jury to be transmogrified into issue of law requiring the ruling of a judge in advance of trial. The purpose of the legislation was to facilitate issues requiring judicial ruling to be decided in advance of the participation of a jury in a criminal trial. Thereby such matters as the admissibility of confession evidence and the admissibility of illegally obtained evidence might be decided so that the hearing before the jury, as tribunal of fact, might not be interrupted for substantial periods*."

At para. 11, it was further stated: "*The 2021 Act cannot have the purpose of excluding from the province of jury fact-finding that which is properly within the province of their assessment. Increased efficiency is the objective of the legislation, which it is the duty of judges to give effect to*." Similar comments were made by Charleton J. on behalf of the Court of Appeal in ***People (DPP) v O'Neill and others*** [2024] IECA 204.

What appears from these cases is that the province of a trial judge ought to be limited and that the use of pre-trial, non-jury procedures relating to the admissibility of evidence should be rare. This development is to be lamented, having regard to the potential benefits of seeking clear rulings from judges who, in the absence of a jury waiting in the wings, can make binding decisions which survive the collapse of trials, for example.

Aside from the preliminary trial procedure, Section 12 of the Criminal Procedure Act 2021 also dealt with the provision of information to juries. It permits a trial judge to make available to the jury materials in a form which he/she considers appropriate. The materials can include any document admitted in evidence at the trial, transcripts and audio recordings of evidence, counsel's speeches, or the judge's charge, any charts, diagrams, graphics, schedules or summaries of evidence produced at the trial, and any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations. This latter category can include

an affidavit by an accountant or other suitably qualified person summarising any transactions by the accused or other persons which are relevant, in a form which is likely to be comprehended by the jury. This provision was similar in nature to pre-existing Section 57 of the Criminal Justice (Theft and Fraud Offences) Act 2001, but had the effect of widening the category of criminal trials in which this facility could be afforded to the jury.

Notwithstanding this helpful development, there remain challenges to the efficient and coherent presentation of material to juries in the course of oral evidence. Despite technological improvements in criminal courtrooms across the country, the manner in which soft copy material can be presented to trial judges, witnesses, opposition counsel, and ultimately the jury can cause confusion and result in inordinate amounts of time being spent ensuring that the right things are displayed on the right screens. This is to be compared, for example, with the procedures adopted in inquiries conducted by the Central Bank of Ireland wherein practitioners/representatives, concerned persons, and chairpersons/decision-makers operate off a centralised and coordinated system which ensures that when documents are sought to be produced, all relevant parties in the room are, quite literally, on the same page. This is especially beneficial from a point of view of efficient presentation where complex, financial matters are concerned. Some other inquiries use the TrialView system as a means of enhancing presentation in this regard.

When compared with the procedure in criminal courtrooms where either hard copy materials or USB keys with large amounts of material are provided to juries, or where a junior counsel, solicitor, or member of An Garda Síochána attempts to co-ordinate what goes on screen from the Registrar's computer, without the ability of the presenting counsel (or the witness giving evidence) to control the presentation of the material themselves or effectively provide direction while the jury is in situ. The possibility of having a central archive of material produced and exhibited at trial which is accessible to practitioners, witnesses, the judge, and the jury would be of enormous assistance in the presentation of cases of economic crime and corruption.

In any event, it is vital that when reforms are being considered in the context of combatting economic crime and corruption, serious regard is had to the fact that these cases will ultimately be presented to a jury of twelve laypersons, who may be required to serve for a significant amount of time. Any measures which assist juries in their understanding and assessment of these cases are to be welcomed.

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