The Hamilton Review – *some views from outside the room where it happened*

On 3 December 2020, the Irish Department of Justice published the report of the Review Group into the "Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption" (the Report).

The Review Group, established in November 2017, was chaired by Mr James Hamilton (former Director of Public Prosecutions) and comprised, for the most part, representatives from various State bodies responsible for the prevention, investigation and prosecution of economic crimes and corruption.

Those outside the Hamilton Review Group can only imagine what went on in the room where it happened. Many of the Group's twenty-five recommendations are welcome, particularly those which focus on technology, funding and more efficient processes, all of which would have an immediate and positive impact on Ireland's ability to deal with the complex nature of modern economic crime cases. In the case of certain recommendations, however, some important ideas and principles were needlessly sacrificed, including recent recommendations of the Law Reform Commission and the rights of defendants in economic crime investigations.

This short article does not propose to examine all of the Report's contents and recommendations in detail. Rather, it seeks to draw attention to a number of the Report's headline recommendations and to voice some alternative or additional recommendations.

Terms of Reference

The Review Group was asked to take on the following tasks:

1. Look at the existing structures and agencies tasked with preventing, investigating and penalising fraud and corruption and identify what gaps exist;
2. Recommend options or potential solutions to any gaps or deficits identified;
3. Review the extent of potential cross-over of any new structure with existing agencies and make recommendations to minimise the risk of duplication;
4. Review the adequacy of the legal basis for sharing of information/evidence between bodies (national and international) and make recommendations for any additional legislation required; and
5. Assess the levels of resourcing and expertise or experience in relevant bodies and make any relevant recommendations.

The opportunity was given to the Review Group to re-imagine the existing structures and agencies currently tasked with investigating and prosecuting economic crime in Ireland. The members of the Review Group were undoubtedly senior and experienced representatives of the bodies responsible for the investigation and prosecution of some of the most complex criminal cases. They clearly merited their inclusion in the Review Group. However, to deliver on its remit to drag our often antiquated systems and procedures for investigating economic crime into the 21st century, it would have been beneficial to have more than one lone voice at the table representing those from outside the state sector. In particular, the Review Group would have benefited from the input of those involved in devising the recommendation contained in the 2018 Law Reform Commission report on Regulatory Powers and Corporate Offences; representatives from one or two relevant international bodies; and/or criminal law practitioners.

The Good

It is clear from the statistics contained in the Report that under-resourcing and under-funding of key State bodies such as the Garda National Economic Crime Bureau (the **GNECB**) and the

Office of the Director of Public Prosecutions (the **DPP**) continues today. The GNECB's dedicated and experienced officers valiantly fight a daily battle against the odds to progress investigations and to secure results. However, the GNECB appears woefully under-resourced to meet existing demands, let alone those which will arise in the future. We have good people but we do not have enough of them, and we do not give them enough resources.

The Review Group's recommendations seek to address these issues by recommending sensible steps such as ring-fencing resources and funding and providing specialised training to relevant personnel, from investigators right through to the judiciary. The Report also emphasises the need for better infrastructure across the relevant State bodies, in particular the implementation of a technologically up-to-date e-disclosure system. This can only be welcomed, given the increasing data-heavy nature of economic crime investigations. That relevant agencies do not currently have access to these critical technology tools is regrettable, given their fundamental and ongoing importance to large and complex investigations.

The recommendations to introduce more civilian specialists into the GNECB and to bolster the DPP's capability are also welcome and practical suggestions. If implemented, these steps will have a tangible positive impact on the capacity of state agencies to carry out large and complex investigations and prosecutions.

One particularly positive development is the Review Group's recommendation that Ireland, albeit belatedly, opts in to the more efficient mutual legal assistance framework offered by the European Investigative Order (EIO) Directive. Currently, Ireland and Denmark are the only EU Member States which have opted out of the EIO Directive, which replaced the often cumbersome letters of request system under the EU Mutual Legal Assistance Convention. The EIO process has been used across the EU for a number of years and is significantly faster and more streamlined than the old MLA system under the Convention. It provides for straightforward template request forms and fixed deadlines for responses and has driven efficiency in criminal mutual legal assistance across the EU. It has been frustrating for Irish agencies seeking assistance from their EU counterparts – and vice-versa – to have to use the more cumbersome 2005 system rather than its more efficient 2014 counterpart. This matter is currently under consideration by an inter-departmental working group. Hopefully, the Review Group's recommendation will have a positive impact on that consideration.

The Report also recommends that the publication and enactment of the Criminal Procedure Bill be expedited. This Bill's main purpose is to introduce reforms to provide greater efficiency and fairness in the criminal trial process, and to reduce the often lengthy delays experienced in the Irish criminal justice system generally. It is therefore somewhat ironic and unfortunate that the Bill itself has not progressed since 2014.[1] The Review Group has correctly identified the benefits that the Bill would have on complex economic crime trials. The establishment of a preliminary pre-trial hearing procedure in criminal trials, in particular, would enable these cases to be progressed much more efficiently and more cost-effectively than they are today.

Each of the above recommendations, if acted upon, would undoubtedly have a positive impact on the way serious economic crime cases are investigated and prosecuted in this country. The Review Group is to be commended for its analysis in this regard.

The Bad

There are other recommendations of the Review Group which appear more questionable in terms of their rationale or their potential impact.

Who will be the driving force for change?

With many of its headline recommendations, it is clear that the Review Group appreciates the need to devise and co-ordinate a cohesive strategy to tackle economic crime in Ireland. It has recommended the establishment of an Advisory Council against Economic Crime and Corruption, the development of a multi-annual strategy and action plan to tackle economic crime, and the establishment of a forum of senior representatives from existing investigating and enforcement bodies. However, it is unclear from the Report who will lead the charge in bringing about the legislative, resourcing and structural changes set out in the Review Group's recommendations. It appears that, in general policy terms, the baton is intended to be passed to the recommended "Advisory Council". However, it is

[1] The Department of Justice indicated on 21 January 2021 that it will shortly publish a Criminal Procedure Bill and will seek to pass it during the first half of this year.

very difficult to see how such a large mandate could be achieved in an effective manner by a group of people which is recommended to meet *'at least once a year'*. The Advisory Council, if established on the basis suggested, is unlikely to possess much in the way of momentum, influence or power to be able to drive and co-ordinate the changes needed in this area.

Questionable need for legislative reform in the area of bid-rigging

The Report recommends enacting legislation to create a specific offence of bid-rigging. It is stated that this would be helpful to the work of the CCPC as bid-rigging is the most common form of cartel activity it encounters. However, a strong argument can be made that bid-rigging activity, as described in the Report, is already adequately criminalised under the Criminal Justice (Corruption Offences) Act 2018 and falls squarely within the definition of active corruption as set out in Section 5 of that Act. There may be no need to create a separate offence to deal with bid-rigging but there is certainly a need to ensure that the CCPC and An Garda Síochána work more closely together to make sure that bid-rigging cases are investigated and cases sent forward for prosecution. In this respect, the Review Group could perhaps have focused more on how the respective state agencies can make sure that these offences are identified and investigated effectively; a legislative change is not necessarily required. This is one of a number of instances where a standalone corporate crime agency, a concept rejected by the Report, would potentially have proven useful in tackling these complex crimes.

Ignoring or rejecting Law Reform Commission recommendations

Powers of agencies

In a number of instances, the Review Group has recommended that individual agencies be given additional powers in order to increase their effectiveness, e.g. the power to carry out surveillance on investigation targets and the ability to participate in the interviews of suspects detained by the Gardaí. Setting aside for a moment the substantive merits of such recommendations (which themselves are debatable), the Review Group did not address one of the central findings of the Law Reform Commission in its report on Regulatory Powers and Corporate Offences: that the varying nature of powers available to the different agencies charged with tackling economic crime has led to a confused regulatory landscape and gaps in the powers given to those agencies. The LRC's recommendation was that these issues be dealt with by way of a common regulatory "toolkit" which would contain core powers available to financial and economic regulators. The Review Group does not appear to have taken this sensible recommendation into consideration in its own discussions, preferring instead to recommend adding to the current confusion of powers distributed across the various agencies. It is not clear from the Report whether the LRC's recommendation was considered or analysed by the Review Group.

Establishment of a Corporate Crime Agency

The Irish government in 2017 recommended the establishment of a *"new independent Agency to greater enhance the State's ability to undertake modern, complex corporate law enforcement"*.[2] This recommendation was echoed by the LRC in its 2018 report on Regulatory Powers and Corporate Offences. The Report sets out the objections of the Review Group to the proposal, which can be summarised as follows:

1. There is nothing wrong with the existing structures, aside from a lack of funding;
2. A new agency would drive a wedge between it and existing investigators in the rest of An Garda Síochána and could result in different agencies investigating separate aspects of the same broader criminal activity (e.g. the financing of terrorism and terrorism itself);
3. The establishment of a new agency could result in turf wars between agencies over who investigates particular cases; and
4. It is unclear what powers the new agency's investigators would have and what its remit would be.

The Report comments that the Review Group did not think that a new agency having a broad remit to investigate fraud, corruption and economic crime matters would be wise, as such an organisation would need to be very large, would require specialists from different disciplines and would be difficult to manage. "*It is therefore not a*

[2] Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework: Ireland combatting "white collar crime" (November 2017), p.8

project which could be recommended unless all the existing agencies were seriously dysfunctional which the Review Group does not consider to be the case".

Equally, the Review Group foresaw issues if the proposed new agency had a narrower remit and focused on corporate crime only, questioning what that narrower remit would mean in practice. The Report comments: "*None of this is to say that these questions could not be answered. The onus, however, is on anyone who advocates such a solution to say what model they believe should be adopted and how such a solution would create a more workable solution than the arrangements which already exist*."

The Review Group has raised some valid questions and concerns about the Government and LRC recommendations. However, it is not obvious from the Report that anyone involved with the 2017 Government white paper, or the LRC's 2018 report, was consulted or approached by the Review Group to contribute to the discussions. The Report rejects the government and LRC's recommendations with arguments about why the status quo should be preserved. Unfortunately, the Report's readers are not given any insight into the Group's engagement with, or discussion of the idea, that some restructuring of existing agencies might result in efficiencies or a better way of doing things.

Deferred Prosecution Agreements

In its 2018 report, the LRC analysed the case for Deferred Prosecution Agreements and recommended that they be introduced in Ireland.[4] A tool used in the UK since 2015, DPAs have been entered into by the UK's Serious Fraud Office on nine occasions, involving investigations into companies like Rolls Royce, Airbus and Standard Bank. Since 2016, France has also adopted a form of court-sanctioned DPA in its legal system, known as a CJIP, which can be used in connection with fraud, corruption, money laundering and connected offences involving companies. To date, the CJIP mechanism has been deployed successfully in eleven high profile fraud and corruption cases, including those involving Airbus, UBS and HSBC. On each occasion, the DPA or CJIP has resulted in large fines paid by the companies involved to the state concerned and has avoided the need for lengthy, costly and complex corporate trials. The UK and French DPA mechanisms, which are subject to court scrutiny and approval, are to be distinguished from the US DPA mechanism, where the power to agree a DPA is largely given to US prosecutors. The LRC recommended that the judicially-scrutinised DPA model be adopted in this jurisdiction.

The Review Group considered representations received from its public consultations on the subject of DPAs and expressed concerns in the Report regarding the position of individuals who might be prosecuted as a result of a corporate DPA and potential reputational damage they may suffer. The report refers to the acquittal of individuals in one of the UK DPA cases to illustrate this. The Report also expresses concern about the potential lack of a mechanism to alter a statement of facts once a DPA has been entered into. The Report concludes that because of these two factors, the Review Group "*does not recommend the establishment of a DPA regime in this jurisdiction at this time as it is not convinced that [its introduction] will yield any significant benefit given the UK experience so far*".

Notwithstanding the acquittals in trials connected with previously-agreed DPAs, the view of the authorities in the UK is that the introduction of the DPA mechanism has been a positive addition to the options for prosecuting companies for economic crime offences in that jurisdiction;[4] DPA fines have certainly benefited the exchequer in a positive way. The Report is sadly lacking in the kind of detailed analysis of the advantages and disadvantages of DPAs that would be the prelude to a reasoned conclusion that they be dismissed as a viable tool for dealing with corporate liability. Just because a company agrees to a DPA on the basis of accepted facts, it does not follow that a successful individual prosecution will always result; such is the nature of criminal prosecutions and trials. A viewpoint from outside the State's investigation and prosecution agencies might have facilitated a more rigorous analysis of the LRC's 60 page dissection of this hugely important issue.

The Ugly

Rights of Suspects and Defendants

Detention Periods

The Review Group has recommended a quite startling extension of s.50 of the Criminal Justice Act 1997 (as amended) to ***all*** arrestable offences (any offence that carries a term of imprisonment of five years or more), which would allow suspects

[3] A&L Goodbody made a submission to the LRC at the time, calling for their adoption: www.algoodbody.com/insights-publications/regulatory-powers-and-corporate-offences-a-new-dawn

[4] Lisa Osofsky commented a the Cambridge International Symposium on White Collar Crime in September 2020 that DPAs drive better corporate citizenship and make "better companies".

to be detained for questioning for up to seven days. It is briefly stated that this is intended to address the difficulty faced by An Garda Síochána in putting vast amounts of evidential matter to suspects within the 24 hours currently available for questioning. However, it is not obvious that any detailed consideration was given to the dramatic implications this extension would have for the constitutional and human rights of suspects, nor indeed does there appear to have been any consideration given to alternative means by which longer interviews might be facilitated that would not require suspects to be deprived of their liberty for a 7 day period. To take one example, representatives of the UK's Serious Fraud Office are permitted to interview suspects under caution without arresting or detaining them; this can often be an appropriate mechanism for questioning suspects where an arrest is not necessary and means that cautioned interviews can take place over a number of days, allowing ample time for putting large quantities of documents to suspects. In this instance, the Review Group appears to be wielding a metaphorical sledgehammer to crack a nut, considering the very serious consequences this recommendation would entail for suspects and for our criminal justice system more generally.

Duration of Freezing Orders

The Review Group also recommends that s.17 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 be amended to allow judges to exercise a discretion to impose a timeframe of up to six months for a freezing order, based on evidence presented in Court as to the scale and complexity of the criminal investigation concerned. Essentially, the Review Group's members have complained that every required court renewal of a freezing order is a significant drain on their investigative resources. However, given the draconian nature of freezing orders and the deprivation of property they entail for individuals and companies, it is absolutely necessary and appropriate that their continued deployment be regularly analysed and justified. If this poses a resourcing issue for the authorities then perhaps it ought to have been considered whether increased resources or an alternative renewal system might have provided a more appropriate response to this particular puzzle, rather than the recommendation of a troubling solution from a due process and human rights perspective.

Statements regarding privilege and privacy rights

In a section of the Report headed "*Other Policy considerations*", the Review Group notes that "*issues*" associated with legal professional privilege contribute to the complexity of their investigations. While acknowledging that legal professional privilege is "*a fundamental aspect of the rule of law*", the Report goes on in its very next sentence to state that "*the risk of unjustifiable claims being used to hinder or delay investigations is a real one*" without citing any evidence to support this view. While the Review Group does not make any recommendations in this respect, it is concerning that a statement alluding to unjustifiable privilege claims was included in the Report without evidence to support it. Indeed, the statement is again repeated later in the Report.[5] While the right to legal professional privilege is not absolute and is subject to certain exceptions, the subjects of or suspects in investigations should be permitted to rely on their rights and have confidence that these will be respected, rather than being automatically treated with suspicion by the authorities.

Equally, in relation to privacy rights, while the constitutional nature of these is acknowledged by the Review Group, the Report criticises the practical impact of the Supreme Court judgment in the CRH case and points out the shortcomings in the solutions proposed by the Court. One cannot help but have some sympathy with the authorities in relation to this thorny issue which bedevils any investigation involving large amounts of data. However, the reader is left with the impression that the legitimate privacy rights of individuals are considered an inconvenient blockage which needs to be circumvented. While it may be that a legislative solution holds the key to resolving the competing interests of swift and effective criminal investigations on the one hand, and the human rights of individuals on the other, the tone of the Report does not adequately reflect the serious and justifiable concerns of individuals whose devices and data are regularly seized en masse and combed through by investigating agencies.

Conclusion

Nobody could seriously argue that Ireland's investigation and prosecution agencies currently possess anything like the sufficient human, financial or technological resources that they

[5] At p.63: "…it remains to be seen how effective the relevant provisions in the three pieces of legislation will be in assisting the investigative and prosecutorial work of the agencies by ensuring that evidence needed to prosecute economic crimes are not withheld on unjustified claims of privilege".

need to effectively fulfil a mandate of taking on and successfully prosecuting complex, data-heavy and multi-jurisdictional economic crimes. The plea for additional support and resources in the Hamilton Report is justified and well-founded. However, this author believes that an opportunity was missed to imagine and design a more ambitious, efficient and modern way of tackling these investigations that would have reaped even greater rewards for those agencies and for society in future.

Our current system is creaking under the triple weights of workload, expectation and inadequate resource. Let's just hope that we have not given up our chance to make the kinds of deep systematic improvements which would benefit the investigation and prosecution of these serious crimes in Ireland for the years and decades ahead.

For further information contact Louise Byrne, Partner[6], or any member of the White Collar Crime team.

[6] Louise Byrne worked previously as a lawyer at the UK Serious Fraud Office

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