

Sharing Ideas Shaping Policy
The Institute of International and European Affairs

European Criminal Justice Post-Lisbon: An Irish Perspective

Edited by
Eugene Regan SC

www.iiea.com



The Institute of International and European Affairs
8 North Great Georges Street,
Dublin 1,
Ireland
Tel: (353) 1-874 6756
Fax: (353) 1- 878 6880
www.iiea.com
e-mail: reception@iiea.com

European Criminal Justice Post-Lisbon: An Irish Perspective. © May 2012, The Institute of International and European Affairs.

ISBN: 978-1-907079-18-4
EAN: 9781907079184

The Institute of International and European Affairs grants permission for the reproduction of quotations from this text provided such quotations do not exceed 400 words in length, that they provide the reader with a fair context, and that due acknowledgment of the source is made.

As an independent forum, the Institute of International and European Affairs does not express opinions of its own. The views expressed in its publications are solely the responsibility of the authors.

Acknowledgements:

The Institute would like to acknowledge the indispensable contribution of Caitriona Heini, lead researcher for the IIEA's Justice Group, who co-ordinated and managed this project within the Institute, working closely with the authors, editing the content of the publication in conjunction with the editor, Eugene Regan and the IIEA Director of Research, Jill Donoghue, and liaising with the IIEA Creative Director, Brian Martin, and with Creative Officer, Mike Mahon to bring this publication to fruition. Thanks are also due to Joe Brosnan, former Secretary General of the Department of Justice, for peer reviewing the chapters.

The Institute of International European Affairs wishes to acknowledge the support it has received from the European Commission throughout 2012.

This publication was printed by Swift Print Solutions, Dublin, Ireland.

European Criminal Justice Post-Lisbon: An Irish Perspective

The Institute of International and European Affairs

Sharing Ideas
Shaping Policy



Contents

	List of Contributors	1
	Preface <i>Nora Owen, Former Minister for Justice</i>	3
	Introduction <i>Eugene Regan SC</i>	5
1	Criminal Justice Post-Lisbon: An Overview <i>Eugene Regan SC</i>	11
2	Criminal Justice Cooperation and Ireland's Opt-in Protocol <i>Brian Purcell, Secretary General of the Department of Justice and Equality</i>	35
3	Police Cooperation and Security in the EU <i>Martin Callinan, Commissioner of An Garda Síochána</i>	47
4	Prosecuting Crime - The European Context <i>James Hamilton, Former Director of Public Prosecutions</i>	63
5	Criminal Assets Bureau: A Case Study for Europe <i>Detective Chief Superintendent Eugene Corcoran, Chief Bureau Officer of CAB</i>	77
6	Judicial Protection in the EU <i>Paul Gallagher SC & Francis Kieran BL</i>	85
7	Data Protection and Citizens' Rights in the Fight Against Serious Cross-Border Crime <i>Billy Hawkes, Data Protection Commissioner</i>	99
8	Advancing Common Priorities: Combating Crime and Ensuring Global Security Through International Partnerships <i>Eric H. Holder, Attorney General of the United States</i>	111



List of Contributors

Nora Owen is Chair of the Justice and Home Affairs Group at the Institute of International and European Affairs. She was Minister for Justice for the period 1994 to 1997. She was appointed Deputy Leader of Fine Gael in 1993 and was a member of the British-Irish Parliamentary Body (1991-1992), which was involved in the peace talks in Northern Ireland leading to the Good Friday Agreement.

Eugene Regan is a Senior Counsel. He is Project Leader of the Justice and Home Affairs Group at the Institute of International and European Affairs. He was a member of the cabinet of former Commissioner Peter Sutherland in the European Commission in 1985-1988. He was called to the Irish Bar in 1985 and appointed as Senior Counsel in 2005. He served as Senator at the Seanad from July 2007 to April 2011, where he was appointed as the Fine Gael party Seanad spokesperson on Justice, Equality and Law Reform. He was also a member of the Joint Committee on the Constitution, the Joint Committee on Justice, Equality, Defence and Womens' Rights and the Joint Committee on the Scrutiny of EU legislation.

Martin Callinan is Commissioner of An Garda Síochána. Prior to this appointment in 2010, he was Deputy Commissioner in charge of Operations with responsibility for operational policing and national security within the State. He was appointed Deputy Commissioner with responsibility for Strategy and Change Management in 2007. On appointment to Assistant Commissioner in 2005, he assumed responsibility for National Support Services. He recently completed the National Executive Institute Programme for Chiefs of Police Worldwide at the FBI Academy, Quantico.

James Hamilton was the Director of Public Prosecutions for the period 1999 to 2011. The European Commission appointed him a member of the EU's Group of Experts on Corruption in December 2011. He was elected President of the International Association of Prosecutors in 2010. He is a member of the Council of Europe's Commission for Democracy through Law (Venice Commission). He was Senior Legal Advisor to the Attorney General in 1995.

Paul Gallagher is a Senior Counsel and former Attorney General of Ireland for the period 2007 to 2011. He is a Bencher of the King's Inns in Dublin and was formerly Vice-Chairman of the Irish Bar Council. He served as an observer on the High-Level Advisory Group on the Future of EU Justice Policy from 2007 to 2008 representing the UK, Cyprus and Malta. He is an Adjunct Professor of Law at University College Dublin, a Fellow of the International Academy of Trial Lawyers and a Fellow of the International Society of Barristers.

Francis Kieran is a practising barrister and is admitted as an Attorney-at-Law in New York. He holds a Masters in Law from Harvard University. He served as the Special Advisor to the Attorney General for the period 2007 to 2011.

Billy Hawkes is the Data Protection Commissioner of Ireland. He was appointed by the Irish government in 2005 and reappointed in 2010 for a further five-year term. The Data Protection Commissioner is independent in the exercise of his functions. Prior to his appointment, he worked in the Department of Finance, the Department of Foreign Affairs and Enterprise, and the Department of Trade and Employment.

Detective Chief Superintendent Eugene Corcoran is the Chief Bureau Officer of the Criminal Assets Bureau of Ireland. He previously held the post of Detective Superintendent in charge of Crime Policy in An Garda Síochána and for the period 2005 to 2010 he was Detective Superintendent of the Garda Bureau of Fraud Investigation, with further responsibility for the Financial Intelligence Unit in the Irish jurisdiction. He has over 25 years experience in the investigation of serious and organised crime, including white collar crime. He was called to the Irish Bar in 1998.

Brian Purcell is Secretary General of the Department of Justice and Equality. He previously served for seven years as Director General of the Irish Prison Service. Prior to these appointments he worked in the Department of Industry and Commerce, and the Department of Social Welfare.

Eric H. Holder was sworn in as the 82nd Attorney General of the United States on 3 February 2009 by Vice-President Joe Biden. In 1997, he was named by President Clinton to be the Deputy Attorney General. Prior to that he served as U.S. Attorney for the District of Columbia. In 1988, Mr. Holder was nominated by President Reagan to become an Associate Judge of the Superior Court of the District of Columbia. Prior to becoming Attorney General, Mr. Holder was a litigation partner at Covington & Burling LLP in Washington.

Preface and Acknowledgements

As a policy research institute, the Institute of International and European affairs analyses major developments in the fields of international and European affairs. The Institute's long-standing Justice Steering Committee acts as a neutral forum, bringing together major stakeholders and international experts to discuss issues of national, European and international significance in the criminal justice sphere.

Our discussions and reports are informed by experts including, amongst others, the current and former Directors of Europol, OLAF, Eurojust, and Frontex; the European Commission's Directorate-General for Justice and Directorate-General for Home Affairs; OSCE Special Representatives; Presidents, Prime Ministers, and Ministers for Justice and for the Interior across the EU and beyond; MEPs responsible for Civil Liberties, Justice, and Home Affairs; and Attorneys General, including most recently, of the UK and US.

This publication draws on the expertise of members of our Justice Steering Committee, Ireland's leading practitioners from across the criminal justice spectrum. Read as a whole the publication focuses on providing, from an Irish perspective, an informed analysis of the area in a forward-looking context. It aims to inform the policy debate, increase awareness, and bring about change where necessitated. Each chapter is also a stand-alone article, which expresses the personal views of each contributor in their respective area of expertise within the wider field of European criminal justice. Differing points of view are contained within the publication, adding only to its strength as they reflect the different backgrounds and experiences of our contributors.

Constructive suggestions, support or criticisms proffered by our contributors are leveled ultimately at improving the livelihoods of our citizens and securing the right of the individual, in all jurisdictions throughout the globe, to safety and freedom from the ripple effects of crimes which know neither boundary nor border. These include such heinous crimes of the most serious nature as terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking and arms trafficking, money laundering, corruption, counterfeiting, computer crime and organised crime. We hope that the recommendations contained within this publication and policies outlined therein will be an effective guide for those charged at the national and European level with the implementation of measures to improve the fight against these and other future cross-border crimes, and to further enhance the rights of individuals.

The Institute is extremely grateful to the contributors for their invaluable expert advice, and for their time in contributing to this publication. We are particularly privileged for the contribution of the United States Attorney General, Eric H. Holder.

Nora Owen, Chair, IIEA Justice Group

Jill Donoghue, Director of Research, IIEA

Introduction

The Lisbon Treaty provides that the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.¹ One of the primary objectives of the Union is to offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with measures such as the prevention and combating of crime.²

The creation of this area of freedom, security and justice within the European Union is for the first time defined in the Lisbon Treaty as a shared competence between the Union and the Member States.³ This represents an acceptance by Member States that, if they are to effectively combat serious crime – which invariably has a cross-border element - at national level, they can do so more effectively by working together at a European level and with the full involvement of the European institutions.

With a greater role for European institutions in the area of criminal law and policing, whether it is the Commission, Council of Ministers, Europol or Eurojust, it is essential that those institutions are subject to the rule of law and respect for fundamental rights. This is why the Lisbon Treaty defines a role for the Court of Justice of the European Union, incorporates the Charter of Fundamental Rights and includes a provision for the Union to accede to the European Convention on Human Rights.

To ensure more effectiveness, accountability and legitimacy, the Lisbon Treaty provides a greater role for the European Commission in ensuring that legislation in this area is properly implemented by the Member States, for the European Parliament in the adoption of legislation and for the Court of Justice in overseeing the validity and manner of implementation of such legislation.

Given the very significant changes introduced by the Lisbon Treaty in the area of freedom, security and justice, and in particular in the area of judicial cooperation in criminal law and policing matters, the Institute of International and European Affairs considers this publication opportune. This follows on two previous Institute publications in this area: *Justice Cooperation in the European Union (1997)*⁴ and *The New Third Pillar - Cooperation against Crime in the European Union (2000)*.⁵

This publication is particularly opportune not only because of the significant changes introduced by the Lisbon Treaty but also in light of the forthcoming Irish presidency of the European Union in the first half of 2013, the three-year review of Ireland's opt-out from EU criminal law and policing measures due to take place⁶ and the recent decisions of our Superior Courts⁷ which highlighted inconsistencies in one of the key legal instruments in the area of judicial cooperation, that of the European Arrest Warrant Framework Decision⁸.

This publication comprises chapters by many of the key players in Ireland, who are

directly involved in the formulation of criminal law policy, in the detection, investigation and prosecution of crime in this jurisdiction and in the protection of fundamental rights in our courts. Their contributions provide a deep insight into the work which is taking place in the formulation and implementation of legislation in the criminal law field within the European Union context. They also provide an analysis of the actions being undertaken in the detection and prosecution of crime with the aid of European institutions such as Europol and Eurojust; and they highlight the judicial protections available to the accused both in our national courts and in the Court of Justice of the European Union.

It is hoped that providing such insight into the manner in which we in this jurisdiction interact with our partners in other Member States and with European institutions in the criminal law and policing area, will inform and serve as a guide to policy makers and the legal professions on future policy in this area.

In Chapter 1, Eugene Regan, Senior Counsel, provides an overview of the new legal framework provided by the Lisbon Treaty for the development of policies in the area of policing and judicial cooperation in criminal matters. The detailed provisions of the Lisbon Treaty are outlined and their likely impact in fostering greater cooperation in the field of criminal law and by the policing authorities. The chapter highlights the significantly increased role for the European Commission, European Parliament and the Court of Justice of the European Union.

Brian Purcell, Secretary General of the Department of Justice and Equality, explains in Chapter 2 the background and the rationale for the special Protocol⁹ to the Lisbon Treaty which deals with Ireland's general opt-out in the justice area and the facility for opting into individual measures. He explores how the Protocol has been applied in practice and the extent to which Ireland has opted into measures in this area. It is suggested that this examination confirms Ireland's adherence to the political Declaration¹⁰ annexed to the Lisbon Treaty, which was formulated in a manner that commits Ireland to participate to the maximum extent possible in measures in the area of freedom, security and justice.

Garda Commissioner, Martin Callinan, in Chapter 3 outlines the role of An Garda Síochána in EU police and security cooperation following Lisbon. He highlights the increasing importance of Europol to Member States' police forces for both operational cooperation and strategic planning. He identifies some of the challenges facing EU police cooperation in terms of the complexity of the structures at EU level. The author also cites a number of specific examples where cooperation at EU level has had a material direct benefit to more effective policing in this jurisdiction.

Former Director of Public Prosecutions, James Hamilton, in Chapter 4 outlines the role the EU plays in assisting the effective prosecution of crime at national level and the important role of such legal instruments as the European Arrest Warrant. Important developments in European criminal law procedure are reviewed including changes in investigative procedures. He analyses the role of Eurojust in assisting national prosecution authorities

and discusses the implications of the Treaty provision on establishing a European Public Prosecutor, should the Member States deem it necessary.

Detective Chief Superintendent Eugene Corcoran, Chief Bureau Officer of the Criminal Assets Bureau, in Chapter 5 outlines the historical background to the establishment of the Criminal Assets Bureau and the origins of the civil remedy of forfeiture for recovery of criminal assets. The multidisciplinary model of the Criminal Assets Bureau is explained and the legal underpinning of the civil forfeiture procedure is outlined. The author highlights the leading role which Ireland played in the establishment of the Camden Asset Recovery Interagency Network (CARIN), which fosters European and international recognition of the principle of civil forfeiture of criminal assets on the basis of the Criminal Assets Bureau model. It is suggested that Ireland, through the Criminal Assets Bureau, can be regarded as a model of best practice for Europe in the recovery of criminal assets.

Paul Gallagher SC and Francis Kieran in Chapter 6 set out the structure of judicial protection in the European Union highlighting the diversity among Member States in the rights of the individual in the criminal process. They reflect on the importance of the Charter of Fundamental Rights and the European Union's accession to the European Convention of Human Rights and review new EU legislation in respect of minimum procedural rights. A central concept examined in detail in this chapter is that of mutual trust between Member States in relation to their respective judicial systems, which is the basis for progress in the area of cooperation in criminal law at a European level.

In Chapter 7, Data Protection Commissioner, Billy Hawkes, analyses the significant changes introduced following the entry into force of the Lisbon Treaty, new data protection legislation on data protection, and the importance of data protection in the context of policing activity and anti-terrorism measures. He examines the risk to individual freedom and the invasion of privacy, which results from inadequate data protection safeguards in legislation. The author points to a way forward to a more balanced approach between those charged with law enforcement on the one hand, and the protection of individual rights on the other.

Finally, in Chapter 8 the Attorney General for the United States, Eric H. Holder, outlines in his speech to the Institute of International and European Affairs the international dimension to combating crime and ensuring global security, and underlines the importance of the partnership between the U.S. and the European Union in advancing those common priorities. He suggests that, as organised criminal networks and cyber crime transcends national boundaries, the European Union and the United States must work together in dealing with these threats. In combating international terrorism, he highlights, however, the importance of safeguarding the commitment to the rule of law and respect for fundamental rights.

Eugene Regan SC

Endnotes

¹ Article 2 of the Treaty of the European Union

² Article 3.2 of the Treaty of the European Union

³ Article 4.2(j) of the Treaty of the European Union

⁴ Justice Cooperation in the European Union, Institute of International and European Affairs, 1997, edited by Gavin Barrett.

⁵ The New Third Pillar - Cooperation against Crime in the European Union, Institute of International and European Affairs, 2000, edited by Eugene Regan.

⁶ Declaration 56 by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, which states inter alia: "that Ireland in accordance with Article 8 of the Protocol may notify the Council in writing that it no longer wishes to be covered by the terms of the Protocol. Ireland intends to review the operation of these arrangements within three years of the entry into force of the Treaty of Lisbon."

⁷ Supreme Court, Minister for Justice, Equality and Law Reform v Ian Bailey [2012] IESC 16 Judgments delivered on 1 March 2012.

⁸ Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) 13 June 2002.

⁹ Protocol (no 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

¹⁰ Declaration 56 by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, which states inter alia: "Ireland declares its firm intention to exercise its right under article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice to take part in the adoption of measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union to the maximum extent it deems possible. Ireland will, in particular, participate to the maximum extent in measures in the field of police cooperation."

CHAPTER ONE

CRIMINAL JUSTICE POST-LISBON: AN OVERVIEW

EUGENE REGAN SC

CHAPTER ONE: CRIMINAL JUSTICE POST-LISBON: AN OVERVIEW

Introduction

The Area of Freedom, Security and Justice was the signal achievement of the Heads of Government in the Lisbon Treaty. The Treaty, which found its origins in the Laeken Declaration¹, largely performed the role of bringing greater efficiency to the workings of the institutions, and of providing greater democracy and transparency to decision-making. Its aim was to bring Europe closer to its citizens.

This aim was seen most clearly in the only policy area to be significantly developed in the Lisbon Treaty. The Treaty's objective of bringing clarity to the institutional architecture had the effect of moving areas of police and judicial cooperation in criminal matters previously constituted under the Third Pillar of the European Union into the new pillar-less European Union.

The consequence was that Union actions in the field of police and judicial cooperation in criminal matters would now use the 'Community' method of decision-making rather than the intergovernmental method. Notwithstanding the political and legal sensitivities in this area, the use of the intergovernmental method was ultimately seen as a particularly inefficient model for tackling cross-border crime.

In response to one of the questions posed in the Laeken Declaration: *Do we want to adopt a more integrated approach to police and criminal law cooperation?*, the Lisbon Treaty gives a definitive answer: yes.

The new 'Union' method of decision-making in this area now involves the Commission right of initiative of legislation, co-decision with the European Parliament, use of the double-majority voting system within the Council, and consultation with national parliament. Additionally, international agreements may now be concluded by the Union in respect of police cooperation and judicial cooperation in criminal matters.² Protections will from 2014 include full judicial control by the Court of Justice of the EU (CJEU) underpinned from the outset by a binding Charter of Fundamental Rights and accession by the EU to the European Convention on Human Rights.³ Enforcement from 2014 will be supplemented by Commission infringement actions. As a corollary of such significant developments, an emergency brake was introduced in respect of certain legislative developments, and Ireland and the UK availed of an opt-in arrangement in respect of legislation.

While there remain differences between the treatment of this and other policy areas, this represents a great leap forward for efficiency, democracy and rights protection within

an area of Union policy previously characterised by rare and unsatisfactory legislation, a lack of democratic participation, and an absence of judicial oversight (and, consequent substandard rights protection).

It is the purpose of this short introduction to briefly set out the background to and significant changes⁴ made by the Lisbon Treaty.⁵ Following Lisbon there are now two EU Treaties: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Background to Reform

The Convention on the Future of Europe, presided over by former French President, Valéry Giscard d'Estaing, made as a priority the reform of this area. Former Irish Taoiseach, John Bruton, was appointed President of Working Group X on Freedom, Security and Justice, the conclusions⁶ of which very much influenced the proposals of the Convention on this subject.⁷

Aside from the many concerns in relation to efficiency and human rights protection in the area of freedom, security and justice, perhaps the driving motivating factor was the effect of the single market, the free movement of persons within it and the creation of the Schengen Area. These were of course supplemented by developments in the Maastricht Treaty 1992⁸ and Amsterdam Treaty 1997⁹, and the Tampere European Council 1999¹⁰, which combined to encourage Member States to concentrate on measures to ensure that *"the free movement of persons would not also become a 'free movement of criminals'"*.¹¹

Furthermore, the variable geometry encouraged by the development of various stages of the Schengen Agreements¹² and the Pruem Convention¹³ outside the European Union framework also encouraged Member States to consider a mechanism which would ensure that while Member States would have the flexibility of enhanced cooperation, their future activities in the field could take place within the framework of the Union architecture. This desire also underpinned the very radical reforms made by the Convention on the Future of Europe, from which emerged the Constitutional Treaty text which was the basis of the 2003/2004 Intergovernmental Conference.¹⁴ A number of modifications were made to the 2004 IGC Constitutional Treaty text by the 2007 IGC Reform Treaty, later renamed the Lisbon Treaty.¹⁵

Principal Changes

The essential changes created by the Lisbon Treaty in the Area of Freedom, Security and Justice were:

- (a) the creation of a Union competence in respect of the area of freedom, security and justice;
- (b) the reform of the legislative procedure through the introduction of Qualified Majority Voting (QMV) in the Council and co-decision with the European Parliament, and the replacement of Framework Decisions with regulations, directives and decisions;
- (c) full judicial control over the Area of Freedom, Security and Justice (after a five year transitional period) including the full application of EU law, jurisdiction of the Union judicature and Commission powers of enforcement;
- (d) establishing the Commission's normal enforcement powers to ensure Member States comply with the EU law in the area of criminal law and policing matters;
- (e) defining the role of the European Council in setting the strategic guidelines for legislative and operational planning in the area of freedom, security and justice and the establishment of a new standing committee on internal security;
- (f) provision for the adoption of legislation laying down sanctions in relation to anti-terrorism;
- (g) enabling the European Union to enter into international agreements in the area of criminal law and policing matters.

Competence

The Establishment of the Competence

Part One, Title I (Articles 2-6) TFEU established, for the first time, a specific list of Union competences. Article 4(2)(j) TFEU gave to the new EU a shared competence in respect of an "area of freedom, security and justice" ('AFSJ'). This represented a considerable departure. Until the *Environmental Crimes case*,¹⁶ it was widely understood, in particular by the 11 Member States intervening in the proceedings before the Court of Justice, that the Community had no real competence in the area of criminal law.¹⁷ Even after that case, while the Community had competence to require criminal sanctions for breaches of Community law in the field of the environment, it could only require Member States to establish proportionate, effective and dissuasive sanctions, not to set the actual level of penalty.¹⁸

There is now a solid basis for Union legislation in the field.

There is one important qualification to this new competence of the Union set out in Article

72 which provides that *"this title shall not affect the exercise of the responsibilities incumbent upon Member States for the regard of the maintenance of law and order and the safeguarding of internal security."*¹⁹

Article 73 provides that *"it shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security."*

Article 74 provides that *"the Council should adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this title as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament."*

The Scope of the AFSJ Competence Generally

Unlike other competences, the shared competence of AFSJ is neither precise nor policy-based. The words establishing the AFSJ competence at Article 4(2)(j) TEU are little more than general values.

Part Three, Title V TFEU (entitled *"Area of Freedom, Security and Justice"*) provides little assistance in clarifying the scope of the competence. Chapter 1 deals with General Provisions; Chapter 2, Policies on Border Checks, Asylum and Immigration; Chapter 3, Judicial Cooperation in Civil Matters; Chapter 4, Judicial Cooperation in Criminal Matters; and, Chapter 5, Police Cooperation.

However, the General Provisions potentially widen the area beyond the delineated chapters. Not only is the EU competent in respect of the area, Article 67(1) TFEU provides that *"The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States."* Thus, the area is expressly to be understood not only as a power over policy granted to the Union, but rather as values which underpin a borderless Union. Article 67(2), (3) and (4) provide in particular for the objects (*"absence of internal border controls"*; *"a high level of security through measures to prevent and combat crime, racism and xenophobia"*; and, *"access to justice"*) which flow from the respective values of freedom, security and justice.

The pre-Lisbon Article 29 TEU provided that *"the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia"*. However, this was not expressed as a competence, nor was the objective the AFSJ itself, but rather the level of safety within it.

Therefore, the scope of the competence is unclear, and likely to be the subject of future academic debate and litigation. Given the use of general values in defining the area of freedom, security and justice, it may be considered difficult for the Union's Court of Justice to annul an act of the legislature or the Commission by reason that the jurisdictional limits of the competence have been exceeded – unless the Court decides the question of competence by reference solely to the legislative bases provided for in Title V of Part Three TFEU.

The Criminal Legislative Bases Expressly Provided For

The concern of this book is Chapters 4 and 5 of the Union Treaties – respectively, judicial cooperation in criminal matters and police cooperation.

Articles 82 and 83 TFEU set out the legal bases for judicial cooperation in criminal matters under Chapter 4 of Title V of Part Three TFEU:

- Article 82(1) TFEU provides that the Parliament and the Council acting under the ordinary legislative procedure shall adopt measures to: (a) lay down rules and procedures for the mutual recognition of judgments; (b) prevent and settle conflicts of jurisdiction between Member States; (c) support the training of judiciary and their staff; (d) facilitate cooperation between judicial authorities of the Member States in relation to criminal proceedings and the enforcement of decisions;
- Article 82(2) TFEU provides that: "*to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension*" the Parliament and Council shall establish minimum rules by means of Directives concerning: (a) mutual admissibility of evidence; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) "*any other specific aspects of criminal procedure*" (for which the Council must act unanimously). It is this last which is a new feature of the Lisbon Treaty;
- Article 83(1) TFEU provides that the Parliament and the Council may by directives establish minimum rules concerning the definition of criminal offences and sanctions in the areas of "*particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*" These areas are: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. However, "*on the basis of developments in crime*" the Council may, acting unanimously with the consent of the Parliament, identify "*other areas of crime that meet the criteria specified in this paragraph*". As may be seen, the ingredients of the criteria are sufficiently flexible to grant to the

Council considerable scope to expand the Union's law-making powers under Article 83(1) TFEU;

- Article 83(2) provides that if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to "*the definition of criminal offences and sanctions*". These are to be taken by either ordinary or special legislative procedures as appropriate. This is an extension of the previous Article 31(1)(e) TEC which provided only for approximation of "*minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking*";
- Article 84 TFEU provides that the Parliament and the Council may by the ordinary legislative procedure establish measures to promote and support the action of Member States "*in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States*";
- Article 85 TFEU provides the legislative base for the tasks of Eurojust, as does Article 88 TFEU in respect of Europol;
- Article 87(1) TFEU provides that the Council, by regulation adopted unanimously with the consent of the Parliament, may establish a European Public Prosecutor's Office from Eurojust. Alternatively, nine Member States may move forward if unanimity is impossible. Article 87(2) provides that the EPPO "*shall be responsible for investigating, prosecuting and bringing to judgment... the perpetrators of, and accomplices in, offences against the Union's financial interests*" in national courts. Article 87(3) provides that the Council shall, inter alia, set out "*the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.*" Article 87(4) provides that the powers of the EPPO in Article 87(2) may be extended to include "*serious crime having a cross-border dimension*";
- Article 87 TFEU sets out the legal base for police cooperation. Article 87(1) provides that the Union "*shall establish police cooperation involving all of the Member States' competent authorities*". Article 87(2) provides that the Union may establish measures concerning: (a) the collection, storage, processing, analysis and exchange of "relevant" information; (b) support for the training of staff and the exchange of staff, equipment and research into crime-detection; (c) common investigative techniques in relation to the detection of serious forms of organised crime. Police cooperation measures (other than measures concerning operational cooperation or measures in another Member State) will now be decided by the ordinary legislative procedure. By unanimity, after consulting the Parliament, the Council may establish

measures "*concerning operational cooperation*".

Future Possible Expansion of the Criminal Competence – (i) Anti-fraud

An existing provision in the Treaties, now Article 325 TFEU, provides a possible express Treaty base for criminal law provision in the field of fraud:

- Article 325(1) TFEU provides that: "*The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union*";
- Article 325(2) TFEU provides that: "*Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests*";
- Article 325(4) provides that the Parliament and the Council acting by the ordinary legislative procedure "*shall adopt the necessary measures in the fields of the prevention of and fight against fraud against the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies*".

Significantly, and importantly, the concluding text of the previous Article 280(4) TEC was deleted by the Lisbon Treaty – "*These measures shall not concern the application of national criminal law or the national administration of justice.*" This change reflects the importance of Chapter 6 "*Combating Fraud*".²⁰

However, it cannot be said to create a competence where none previously existed. Rather, it now permits the Union to (a) require Member States to adopt proportionate, effective and dissuasive sanctions within the field of fraud against the Union's financial interests and (b) measures to ensure equivalent protection in the Member States. It is the concept of equivalence which might provide the appropriate base for the Commission to propose and the Court of Justice to sanction future measures affecting national criminal law.²¹

Future Possible Expansion of the Criminal Competence – (ii) Article 114 TFEU and The Principle of Effectiveness

In the *Environmental Crimes case*, the principle of effectiveness required the Community legislature to have the competence to require criminal sanctions for breaches of Community law in the field of the environment. The Commission quickly sought to expand the application of the decision to a number of different areas in which Framework Decisions had been enacted or were being considered.²² After Lisbon, the principle of effectiveness remains as a basis for the Union legislature to require Member States to impose criminal sanctions, but not to set the level of penalties.

On the same basis, Article 114 TFEU, providing for approximation of laws, offers the potential for the Union to require criminal sanctions where the establishing and functioning of the internal market is at issue. As is provided for in Article 83(2), those sanctions may currently be defined.

Legislative Procedure

Adoption of the Ordinary Legislative Procedure

Unlike the Commission's sole right of initiative in other areas, under the pre-Lisbon Union the right of initiative of legislation was shared with any one Member State. Article 76 of the Lisbon Treaty provides that either the Commission or not less than a quarter of Member States can now propose legislation in this field.

In the field of judicial cooperation in criminal matters, and police cooperation, QMV and co-decision of the Parliament were introduced by the Lisbon Treaty in respect of: mutual assistance;²³ the definition of criminal offences and sanctions;²⁴ supporting measures in crime prevention;²⁵ certain aspects of police cooperation;²⁶ Eurojust;²⁷ and, Europol.²⁸

The QMV takes the form of the new double-majority system, albeit with a higher threshold of at least 72% of Member States representing at least 65% of the EU's population.

In respect of certain areas where unanimity remains the rule, such as the establishment of a European Public Prosecutor's Office²⁹ and the extension of its remit³⁰ or the extension of the list of serious crimes with a cross-border dimension³¹, the Parliament's consent nevertheless must be obtained. In the case of policing operational matters, however, there is only the requirement that Parliament be consulted.³²

Emergency Brake & Enhanced Cooperation

The so-called 'emergency brake' mechanism applies in respect of minimum rules: to facilitate mutual recognition of judgments and police and judicial cooperation in criminal matters;³³ with regard to the definition of criminal offences and sanctions either in areas having a cross-border dimension or where approximation is required due to harmonisation.³⁴

The brake operates as follows: a Council member requests that a draft directive be referred to the European Council by reason that it affects fundamental aspects of its criminal justice system; the ordinary legislative procedure is suspended; and, within four months –

- in the case of consensus, the European Council shall refer the matter back to the Council for the ordinary legislative procedure to continue; or,

- in the event of disagreement, and if at least 9 Member States wish to establish enhanced cooperation on the basis of the draft Directive, permission for enhanced cooperation shall be deemed to be granted upon notification of the institutions. While the emergency brake could be deemed a qualification on the new QMV procedure, the unanimity rule is also qualified by the enhanced cooperation facility, which allows nine or more Member States to proceed with a proposal if they so decide.³⁵

The European Public Prosecutors Office

Excepting the President of the European Council and the new High Representative, the EPPO is potentially the most significant new office established under the Lisbon Treaty.

It may be created in order to combat crimes affecting the Union's financial interests by unanimity. The Council must act unanimously after obtaining the consent of the European Parliament. However, should nine Member States wish to go ahead regardless, the draft regulation shall be referred to the European Council.³⁶ The same rules then apply as with the emergency brake. (A similar provision to this applies in respect of failure to reach unanimity on the adoption of measures on operational police cooperation).³⁷

The Lisbon Treaty empowers the Council, by unanimity and with the consent of the Parliament, to give the EPPO sufficient powers to bring to justice perpetrators of serious cross-border crime as well as perpetrators or offences against the Union's financial interests. The definition applicable as "*having a cross-border dimension*" is significantly broader than the narrow, and specific, list of cross-border crimes in Article 83(3) TFEU. Consequently, if fully effective, the EPPO has the potential to become the lead prosecuting agency for cross-border crimes in Europe.

The procedural and jurisdictional issues created by this are manifold. National courts will be used to try accused persons charged by the EPPO, but common rules of procedure, evidence and judicial review may apply. It is perhaps most likely that the EPPO will first be established by civil law Member States acting through enhanced cooperation. If so, their traditions will shape the procedures and rules of evidence.

Rather than being a completely new office, the EPPO will be formed "*from Eurojust*", a body consisting of national investigating and prosecuting authorities which may initiate criminal investigations at EU level, propose the initiation of prosecutions by competent national authorities, and coordinate those investigations and prosecutions. The future relationship between Eurojust and the EPPO remains to be worked out. The choice of Eurojust over OLAF (the other candidate) indicates a readiness to expand its role into crimes other than merely those affecting the Union's financial interests.

Subsidiarity, Proportionality & Role of National Parliaments

Article 69 TFEU expressly provides that "*national parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality*". Protocol 1 on the Role of National Parliaments in the European Union together with Protocol 2 on the application of the Principles of Subsidiarity and Proportionality provides for review of proposed legislation by national parliaments for the purposes of a subsidiarity check.

The Opt-ins & outs

The introduction of QMV heightened Member States concerns about the impact of legislation in this field on their own criminal legal system and led ultimately to the United Kingdom and Ireland securing an opt-out from the area of criminal law and policing.³⁸

The UK and Ireland have extended the scope of their previous opt-out to cover all of Title V. Under that opt-out, they can choose to opt-in to any proposal within three months of it being made³⁹; or, to the adoption and application of any measure at any time after it has been adopted.⁴⁰ Due to the extension of the opt-out in Lisbon, where the UK and Ireland do not wish to take part in a measure amending a previous one by which they are bound, they may in particular circumstances, be deemed to have left the pre-existing range of measures to which they were previously a party.⁴¹ Different rules apply to Schengen and non-Schengen matters. Ireland's opt-out does not apply to Article 75 TFEU (measures on freezing of assets to prevent and combat terrorism and related activities).⁴² The UK separately declared that it intended to opt-in to all proposals under this provision.⁴³

In reality Ireland and the United Kingdom have opted into most criminal law and policing measures proposed since Lisbon with one instance in which the UK has but Ireland has not opted-in to a measure.⁴⁴

Ireland is committed to reviewing this opt-out within three years of the entry into force of the Lisbon Treaty, which three year period ends on 1 December 2012, just prior to the Irish Presidency of the EU.

Denmark has a similar, but more extensive, opt-out/opt-in arrangement. It has opted out of the entirety of the Area of Freedom, Security and Justice title. It can opt-in to Schengen matters within six months of a proposal's adoption, but only as obligations of international law (and not EU law). Denmark has reserved to itself the possibility of adopting a new opt-in arrangement on the basis of the UK & Irish protocol.

Judicial Control

Under the Lisbon Treaty, the Court of Justice gained full jurisdiction over the Area of Freedom, Security and Justice. This judicial control is perhaps the single most significant development in the Lisbon Treaty's treatment of what was previously police and judicial cooperation on criminal matters.

Previously, Article 35(1) TEU provided that the Court had jurisdiction only to give preliminary rulings on the "*validity and interpretation*" of the instruments at issue and only if Member States opted individually for the Court to have such jurisdiction.⁴⁵ Ireland chose not to do so.

Allied to this is the panoply of individual and institutional remedies available previously to the Community which, as a result of Lisbon, are now available in respect of police and judicial cooperation in criminal matters. In particular, this includes the Commission's power to bring infringement proceedings and subsequent damages proceedings.

The Lisbon Treaty's developments in respect of the protection of human rights must also be considered. As in the *Pupino case*⁴⁶, fundamental rights were already required to be protected even in national implementation of Framework Decisions. However, the binding force of the Charter of Fundamental Rights and its specificity, together with the Union's future accession to the ECHR, will together better enable rights-based review of the implementation of Union law, including of institutions such as Eurojust and Europol which were previously exempt from judicial oversight. The Commission's power to bring infringement actions extends also to human rights, and the future evolution of European criminal law will undoubtedly provide ample opportunities for enforcement.

One important addition to the Court's increased role in the protection of fundamental rights is the special urgency procedure for Justice and Home Affairs. The Treaty of Lisbon added a new paragraph to Article 267 concerning preliminary rulings from national courts to the Court of Justice which provides that "*if such a question (for a preliminary ruling) is raised in a case pending before a Court or Tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with a minimum of delay.*"

This new provision has been used in relation to persons held in detention in and the subject of EU anti-terrorist sanctions. It obliges the Court to use the procedure currently contained within the Court's statute and rules of procedure in the cases which concern a person held in custody.

The United Kingdom (but not Ireland) has reserved the right to opt out of the powers of the Court and Commission by 1 July 2013. If it does so, the previously applicable acts will cease to apply to it. The UK will bear the direct financial consequence of its opting out.

The main exception to the Court's jurisdiction is that provided for in Article 276 of the Lisbon Treaty that *"in exercising its powers relating to the area of freedom security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."*

There are provisions set out in Protocol 36 on transitional provisions which provide that the pre-Lisbon rules on the Court's jurisdiction in this area continue to apply for a 5 year period up to 1 December 2014 unless measures are amended during that time.⁴⁷ Accordingly, where a pre-existing third pillar act is amended, the Court's new jurisdiction will apply to those Member States to which the amended Act applies.⁴⁸

A declaration to the Treaty provides that *"the conference invites the European Parliament, the Council and Commission within their respective powers, to seek to adopt in appropriate cases and as far as possible within a 5 year period referred to in Article 10(3) of the protocol on transitional provisions, legal Acts amending or replacing the Acts referred to in Article 10(1) of that protocol. The Stockholm Programme adopted in 2009 provided that the action plan to implement the programme should include a proposal for a timetable for the transformation of instruments with a new legal basis."*⁴⁹

The Action plan adopted to implement the Stockholm Programme did not contain such a specific timetable.⁵⁰

Implementing Measures and European Commission Enforcement Powers

Protocol 36 to the Lisbon Treaty on transitional provisions provides that, with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the Commission under article 258 to take infringement proceedings against Member States shall not be applicable.⁵¹ However, this restriction on the Commission's powers ceases at the end of a five-year transitional period.

Article 258 of the TFEU provides that:

"If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations."

"If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the EU."

This infringement procedure is the key instrument by which the European Commission ensures that Member States properly transpose EU legislation and otherwise adhere to and comply with their EU Treaty and legal obligations.

Given the past reluctance of Member States initially to have the Commission involved at all in criminal law and policing matters, it is not surprising that it is only now that member states have agreed to the Commission exercising its normal powers of enforcement under Article 258, albeit after a five-year transitional period.⁵²

The Commission has had to rely on the goodwill of member states and peer pressure through scorecards⁵³ and periodic evaluations⁵⁴ to ensure member states properly implemented legislation in this area.

The importance of greater coherence in national implementing measures is perhaps most evident in the case of the European Arrest Warrant Framework Decision,⁵⁵ a matter which has been highlighted most recently by the Irish Supreme Court in the case of the attempted extradition of Ian Bailey to France.⁵⁶

In that case, Judge Fennelly in his judgment stated that both the Framework Decision on the European Arrest Warrant and the European Arrest Warrant Act, 2003, which implements the Framework Decision, contain provisions relevant to the surrender of persons sought in respect of extra-territorial offences. The latter he stated “*contains an imperfectly expressed embodiment of the former*”. He went on to say that it is unclear whether the principle of reciprocity underlies the extradition of suspects accused of committing extra-territorial offences, which was a key issue in that case. But more importantly, he held, as did the majority of the Court, that s21 of the 2003 Act did not allow the extradition of a person where there was no decision “*to try the person*” in the requesting jurisdiction.⁵⁷

It has been observed that the decision in this case has significant consequences for warrants coming from a number of Member States, including France, Spain, Italy, Holland, and Belgium, who routinely send requests for surrender at the investigative or pre-trial stage of their respective criminal processes.⁵⁸

A further complication pointed out by Judge Fennelly in this case, was that while the implementing Act of 2003 had to be interpreted in conformity with the Framework Decision the Supreme Court had not been given authority to refer questions of interpretation to the Court of Justice, to which final interpretative authority had been assigned.⁵⁹ This means that not only is the Framework Decision being implemented but also interpreted in different ways by different Member States.⁶⁰

While serious criticisms have been made of the Framework Decision⁶¹, it has been stated that whatever criticisms might be made, “*the manner in which it has been incorporated in a partially directly effective manner in the 2003 Act is at best peculiar and in truth all but incomprehensible.*”⁶²

The new enforcement power of the Commission to bring infringement proceedings against Member States will be particularly important in the area of fundamental rights and may be used to deal with the failure of Member States to adhere to fundamental rights principles. The Commission enforcement powers in this area will be informed by the work of the EU Fundamental Rights Agency, which monitors respect for fundamental rights throughout the Union.⁶³

Institutional Changes

Article 68 sets out a specific role for the European Council which is to “*define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice*”.

This provision has already been applied to adopt the Stockholm Programme, the current multi-annual Justice & Home Affairs Action Programme in December 2009.⁶⁴ Previous multi-annual guidance programmes adopted by the European Council in the area of Justice & Home Affairs include the ground breaking Tampere Programme 1999⁶⁵ and the Hague Programme 2004.⁶⁶

Article 71 provides for the creation of a standing committee on internal security. “*A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States’ competent authorities. Representatives of the Union bodies offices and agencies concerned may be involved in the proceedings of this Committee. The European parliament and national parliament shall be kept informed of the proceedings.*”

This committee (called the COSI committee) was established by the Council following the entry into force of the Lisbon Treaty.⁶⁷ Its mandate is to facilitate and ensure effective operational cooperation and coordination in the field of internal security, to evaluate the general direction and efficiency of operational cooperation and to assist in reacting to terrorist attacks and natural or man-made disasters.⁶⁸ The Stockholm Programme provides for COSI to monitor and implement the Internal Security Strategy. COSI provides semi-annual reports to the European Parliament and National Parliaments on its activities.

Anti-terrorist Sanctions

Article 75 of the TFEU introduces a new provision on the adoption of legislation on anti-terrorist sanctions, providing that: “*where necessary to achieve the objectives set out in article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary*

*legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by natural or legal persons groups or non-State entities.*⁶⁹

Any Acts adopted pursuant to this article “shall include necessary provisions on legal safeguards”.⁷⁰

In addition Article 215 of the TFEU provides for economic and financial sanctions against a third country and against national, legal persons and groups or non-State entities.

External Relations

The Union gave formal recognition to the importance of external relations to the creation of an area of freedom, security and justice within the EU with the adoption in 2005 of *A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice in 2005*.⁷¹ This strategy included: aligning EU Standards in justice and home affairs with then candidate countries in Eastern Europe; prioritising the JHA aspects of the European Neighbourhood Policy; security cooperation in the context of the Strategic Partnership with the US.

The principles, which underlie the creation of an area of freedom, security and justice, are now reflected in the EU’s Common Foreign and Security Policy.

Article 21 of the TEU provides that:

“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law.”

“The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organizations which share (these) principles.”

In this connection it should perhaps be noted that the pre-Lisbon application within the EU of UN sanctions in relation to anti-terrorist measures has been the subject of a number of cases in the Court of Justice of the European Union, in which the Court has emphasised the necessity for the Union to adhere to fundamental rights in the implementation of such sanctions adopted at the level of the United Nations.⁷²

Article 47 of the TEU confers legal personality on the European Union. Prior to Lisbon the Union alone could not conclude international agreements in the area of criminal law or

policing. Member States had to be co-signatories.

With the entry into force of the Lisbon Treaty, the pre-existing community rules and procedures on entering into international agreements, which since the Amsterdam Treaty applied to the area of asylum and immigration, become applicable to policing and criminal law matters. The legal basis setting out the procedures for negotiating international agreements is set out in articles 216-219 of the TFEU.

Since Lisbon, a number of Treaties in the area of policing and criminal law have been concluded following the consent of the European Parliament, such consent being required post-Lisbon.

These include a Treaty with the US on the processing and transfer of financial information for the purpose of anti-terrorism, which in its original form was rejected by the European Parliament.⁷³

Another Treaty equally controversial is the Passenger Name Records (PNR) Treaty with the US of 8 December 2011 approved by Council Decision on 26 April 2012.⁷⁴ The European Parliament gave its consent to this Agreement on 19 April 2012, having passed a resolution on 5 May 2010 postponing a vote on the request for consent for the EU to conclude an agreement with the US.⁷⁵

Conclusion

The Lisbon Treaty provisions in relation to the Area of Freedom, Security and Justice represent a major improvement on the previous Treaties, in terms of efficiency of decision-making and subsequent implementation, democratic controls at Union and national level, and rights protection by the Union's Court of Justice.

However, the adoption of the Community method in respect of criminal law has been accompanied by compromises in such instances as the extension of the existing opt-out and emergency brake with the facility for enhanced cooperation.

A concern must be expressed that Ireland's opt-out over criminal matters has the potential to significantly hamper Ireland's effective participation in an area of core national interest.

The perceived need to protect our national legal system may have the unintended result of permitting, through our initial non-participation, the establishment of measures with wholly civil law principles of procedure and evidence, thereby posing considerable difficulties when Ireland ultimately decides that it wishes for policy reasons to participate in such measures.

In the interests of effective detection, investigation and prosecution of serious crime it

must surely be a core element of national legal policy to ensure we remain at the heart of the Union's decision-making in criminal law and policing matters.

Endnotes

¹ European Council Laeken Declaration on the future of the European Union of 15 December 2001 set out the principle matters to be debated at the Convention on the Future of Europe which commenced in Brussels on the 28 February 2002.

² International Agreements may be concluded in accordance with Article 216-218 of the TFEU.

³ Article 6(2) Treaty of the European Union

⁴ There are, of course, a series of more minor changes, such as the extension of peer review of implementation of the area by Member States (Article 70 TFEU).

⁵ In general, see Piris *"The Lisbon Treaty: A Legal and Political Analysis"*, Cambridge University Press, 2010. Mr. Piris was the Director-General of the Council Legal Service from the origins to the conclusion of the Lisbon Treaty. His work is an invaluable guide to the changes effected by the Lisbon Treaty, and a fuller treatment of the subject-matter of this chapter can be found at pp 167-203 of his text. A most comprehensive treatment of the area as a whole can be found in Peers, *"EU Justice and Home Affairs Law"*, 3rd edition, Oxford University Press, 2010.

⁶ CONV 426/02.

⁷ *"Le Traité de Lisbonne"*, Priollaud & Siritzky, La Documentation Française, Paris, 2010 which stated that the Working Group conclusions *ont très fortement influencé les propositions de la Convention sur ce sujet*.

⁸ The Maastricht Treaty 1992 provided for the development of close cooperation in justice and home affairs. It established the Third Pillar – Title VI identifying matters of common interest including asylum, external border control, immigration, drug addiction, international fraud, judicial cooperation in civil and in criminal matters, customs cooperation and police cooperation.

⁹ The *Amsterdam Treaty 1997* established the objective of developing the Union as an area of freedom, security & justice. This encompassed *First Pillar* measures on visa, asylum, immigration and other policies related to the free movement of persons, including judicial cooperation in civil law matters. It also encompassed police and judicial cooperation in criminal matters which remained within the *Third Pillar*.

¹⁰ The *Tampere European Council 15/16 October 1999* set out the justification for the creation of an area of freedom security and justice in the EU, as follows: *The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgement and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of member states must be achieved.* (paragraph 5 of *Conclusions of Tampere European Council*).

¹¹ Piris, p. 168.

¹² Schengen Agreement 14 June 1985 and Convention implementing the Schengen Agreement 1991 provides for the abolition of border controls among participating states.

¹³ The Pruem Convention of 27 May 2005 provides for the police forces of participating states to exchange data on such matters as fingerprints, DNA samples and vehicle registrations with a view to *"stepping up cross-border cooperation particularly in combating terrorism, cross-border crime and illegal migration."*

¹⁴ The EU Treaties can only be modified with the consent of all the Member States following negotiations within the context of an Intergovernmental Conference. The European Council decided in 2001 to convene a Convention to examine how the EU could be made more democratic, transparent and efficient. That Convention established a Constitution for Europe, to replace existing treaties, which was ultimately agreed in June and signed in October 2004. The failure of certain Member States to ratify the new Constitution for Europe Treaty resulted in the European Council at its 21/22 June 2007 meeting to convene a further Intergovernmental Conference and to agree a Mandate as a basis of its deliberations. That IGC commenced on 23 July 2007, completed its work on the 18 October and the resulting Treaty was signed in Lisbon on the 18 December 2007.

¹⁵ These included (as set out by Piris, pp 176-177): moving the legal basis for the adoption of passports and permits to the area of freedom, security and justice (Article 77(3) TFEU); the insertion of a declaration on personal data protection in the area of police and judicial cooperation (Declaration No 21, Article 6a of the UK and Ireland opt-out (Protocol No 21); and Article 6a of the Danish opt-out (Protocol No 22)); moving the provision on freezing of assets to combat terrorism from the chapter on capital to the area of freedom, security and justice (Article 75 TFEU); the introduction of a new provision on cooperation and coordination between Member States in the field of national security under the title on freedom, security and justice (Article 73 TFEU); the introduction of a blocking mechanism by national parliaments in relation to the passerelle clause on judicial cooperation in civil matters (Article 81(3) TFEU); the introduction of an emergency brake mechanism in relation to provisions on judicial cooperation in criminal matters and on police cooperation if a Member State did not wish to participate or if a consensus could not be obtained within four months, enhanced cooperation would come into play if at least nine Member States so decided (Articles 82(3), 83(3), 86(1), 87(3) TFEU); the extension of the scope of the UK opt-out to police and judicial cooperation, and its adoption by Ireland.

¹⁶ Case C-176/03 *Commission v Council* [2005] I-7879. However, Advocate General Jacobs did presage the issue in his opinion in Case C-240/90 *Germany v Commission* [1992] ECR I-5383.

¹⁷ The general view of the Court of Justice was that criminal legislation and the rules of criminal procedure are matters for which Member States are responsible but held that Community law sets certain limits as regards the measures which it permits the Member States to maintain in connection with the free movement of goods and persons. (Case C-203/80 *Criminal proceedings against Guerrino Casati* [1980]) While the choice of penalties remained within the discretion of Member States, they must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law; thereby making the penalties imposed effective, proportionate and dissuasive. Furthermore, national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws. (Case C-68/88 *Commission v Greece* [1989]).

¹⁸ Case C-440/05, *Commission v Council* [2007] ECR I-9097.

¹⁹ Article 4(2) of the Treaty of the European Union provides that *"the Union shall respect the equality of Member States before the treaties as well as their national identities, inherent in the fundamental structures, political and constitutional, inclusive of regional and local government. It shall respect their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."*

²⁰ Which appears under Title II *"Financial Resources"* of Part Six *"Institutions of the Union"*.

²¹ This proposition would appear to be borne out in the Commission Communication of 26 May 2011 on the protection of the financial interests of the European Union by criminal law and by administrative investigations (com (2011) 293 final).

²² COM(2005) 583 final/2, 24 November 2005.

²³ Article 82 TFEU.

²⁴ Article 83 TFEU.

²⁵ Article 84 TFEU.

²⁶ Article 87(2) TFEU.

²⁷ Article 85 TFEU.

²⁸ Article 88 TFEU.

²⁹ Article 86(1).

³⁰ Article 86(4).

³¹ Article 83(1).

³² Article 87(3) and Article 89.

³³ Article 82(3) TFEU in respect of 82(2) TFEU.

³⁴ Article 83(3) TFEU in respect of 83(1) TFEU and 83(2) TFEU.

³⁵ Article 86(1) and 86(3).

³⁶ Article 86(1) TFEU.

³⁷ Article 88(1) TFEU.

³⁸ Protocol 21 Article 1 provides that: *subject to article 2, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the Union.*

³⁹ Protocol No. 21, Article (3).

⁴⁰ Protocol 21 Article 3 provides that: *the United Kingdom and Ireland may notify the President of the Council in writing within 3 months after a proposal or initiative has been presented to the Council pursuant to title V of part 3 of the Treaty that it wishes to take part in the adoption and application of any such proposed measure whereupon the State shall be entitled to do so.*

⁴¹ Protocol No 21, Article 4a(2).

⁴² Protocol No 21, Article 9.

⁴³ Declaration No 65.

⁴⁴ Council document 9145/ 10: Initiative for a Directive of the European Parliament and Council regarding a

European Investigative Order in criminal matters.

⁴⁵ Article 35 of the Treaty of the European Union introduced by the Amsterdam Treaty, provided that: (1) *The Court of Justice of the European Communities shall have jurisdiction, subject to conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions, and decisions on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.* (2) *By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.* Ireland did not make such a declaration and thus the Irish Courts could not refer matters under this title for interpretation by the Court of Justice in Luxembourg.

⁴⁶ Court of Justice Case C-105/03 (2005) which ruled at paragraph 43 that: *...the Court concludes that the principle of interpretation in conformity with Community law is binding in relation to framework decisions adopted in the context of Title VI of the Treaty of the European Union. When applying national law, the national court that is called upon to interpret it must do as far as possible in the light of the wording of the purpose of the framework decision in order to attain the result which it pursues and thus comply with article 32(2)(b) EU.*

⁴⁷ Article 9.

⁴⁸ Article 10(2) of the protocol.

⁴⁹ .1.2.10 of the Stockholm programme.

⁵⁰ Com(2010) 171 the 20 of April 2010.

⁵¹ Protocol 36 on Transitional Provisions Article 10(1).

⁵² The Amsterdam Treaty in Article K8(2) provided merely that "the Commission shall be fully associated with the work referred to in this Title" (i.e. Title VI at that time).

⁵³ The idea of a scorecard was introduced in the Tampere Programme 1999.

⁵⁴ The Stockholm Programme calls for regular evaluations of Justice & Home Affairs policies and Article 70 of the TEU now provides measures to be adopted providing for Member States, in collaboration with the Commission, to conduct objective and impartial evaluation of the implementation of the Union policies. However, that Article specifically provides that such measures are "without prejudice to articles 258, 259 and 260."

⁵⁵ Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) implemented in Ireland by the European Arrest Warrant Act, 2003.

⁵⁶ Supreme Court Judgment of 1 March 2012 in Minister for Justice, Equality and Law Reform v Ian Bailey. [2012] IESC 16.

⁵⁷ Judgment of Judge Fennelly at paragraphs 112-115.

⁵⁸ Reflections on the Judgment in MJLR v Bailey by Remy Farrell SC, 24 April 2012, Irish Society of European Law.

⁵⁹ Judgment of Judge Fennelly Paragraphs 4 & 5.

⁶⁰ See Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States. Brussels 11 April 2011 Com(2011) 175 final. See also Commission Staff

working document accompanying document to this report, Brussels 11 April 2011 Sec(2011)430 final.

⁶¹ Judge Fennelly in *Dundon v Governor of Cloverhill Prison* [2006] stated: *It has to be acknowledged, at once, that the legislation presents unusual problems of interpretation. The European Arrest Warrant is itself a novel instrument. It was adopted in the wake of the devastatingly tragic events of the 11th September, 2001. The drafting is extraordinarily loose and vague particularly in the manner in which offences are defined.* (2006 1 IR 518 at 545.) Murray Chief Justice, as he then was, in *Minister for Justice and Law Reform v Ferenca* referred to the *somewhat vague language and curious construction* of the Framework Decision. (2008 4 IR 480). Judge Michael Peart in the foreword to the work of Remy Farrell and Anthony Hanrahan on the European Arrest Warrant in Ireland, questioned the manner in which the minimum gravity of offences had been defined in the Framework Decision, commented that: *While many warrants disclose serious crimes such as murder, rape, sexual assault, assault causing harm, and a myriad of different drugs offences, many on the other hand disclose offences at the lower end of seriousness, the most memorable being the theft of three chickens and one bicycle*” (page vii).

⁶² The European Arrest Warrant in Ireland, Remy Farrell and Anthony Hanrahan, page 12, paragraph 1.31.

⁶³ Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights of which Article 2 provides that: *The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.*

⁶⁴ The Stockholm Programme (2010-2014) – An open and secure Europe serving and protecting the citizen. 2010-2014 (2010 Official Journal C 115).

⁶⁵ Tampere European Council 15/16 October 1999 Presidency Conclusions.

⁶⁶ Annex to Conclusions of the European Council 4/5 November 2004, The Hague Programme – Strengthening Freedom, Security and Justice in the European Union.

⁶⁷ 2010 OJL 52/50.

⁶⁸ In implementation of the Article 222 solidarity clause of the TFEU.

⁶⁹ Article 215 also provides for the interruption of economic and financial relations with a third country and the adoption of restrictive measures against national, legal persons and groups or non-State entities.

⁷⁰ Article 75 paragraph 3.

⁷¹ Brussels 30 November 2005 114366/05 REV 3 Council of the European Union.

⁷² Cases concerning the application within the EU of UN anti-terrorist sanctions include: Joint cases C-402/05p and C-415/05 *Kadi and Al Barakaat* (Kadi 1)3 September 2008, Case T-85/09 *Kadi v European Commission* (Kadi 2) 30 September 2010 and Joined Cases T-439/10 and T-440 Fulmen 21 March 2012.

⁷³ Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (OJ L8/11 13/1/2010) and Council Decision of 13 July 2010 (OJ L195/3 27/7/2010.)

⁷⁴ Agreement between the US of America and the EU on the use and transfer of Passenger Name Records to the US Department of Homeland Security. Council of the European Union 17434/11, Brussels 8 December 2011. This agreement replaces an existing agreement provisionally applied from 2007.

⁷⁵European Parliament Resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) Agreements with the United States, Australia and Canada. Brussels B7-0244.2010. In Joined Cases C-317/04 and C-318/04 *European Parliament v Council of the European Union* the Court of Justice issued a judgment on the 30 May 2006 annulling Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, and Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection.

CHAPTER TWO

CRIMINAL JUSTICE COOPERATION AND IRELAND'S OPT-IN PROTOCOL

BRIAN PURCELL,
Secretary General of the
Department of Justice and
Equality

CHAPTER TWO: CRIMINAL JUSTICE COOPERATION AND IRELAND'S OPT-IN PROTOCOL

Introduction

Part Three, Title V of the Treaty on the Functioning of the European Union (TFEU) covers a wide range of Justice and Home Affairs (JHA) policy areas, which may be grouped within three distinct categories: immigration matters (including asylum and visas); judicial cooperation in civil matters; and criminal justice cooperation (specifically, police and judicial cooperation in criminal matters). This chapter is concerned with developments in the last of these three categories and, in particular, with the application of Ireland's 'opt-in' Protocol to legislative proposals in this field.

Cooperation between EU Member States on criminal justice matters has, over the years, reaped many benefits both for Ireland and for the Union as a whole. Instruments such as the European Arrest Warrant have ensured that criminals cannot escape justice by fleeing to another EU Member State. Framework Decisions on combating trafficking in human beings and the sexual exploitation of children have helped to tackle those particular evils; and agencies such as Europol provide invaluable practical support to cross-border police investigations in the fight against serious international crime and terrorism. Over the years, Ireland has supported and actively engaged in the negotiation of these and other legal instruments which have improved the level of practical police and criminal justice cooperation throughout the Union.

Main Provisions of the Protocol and Ireland's Associated Declaration

The Lisbon Treaty, which came into force in December 2009, created an Area of Freedom, Security and Justice under Part Three, Title V of the TFEU, building on earlier commitments to combat serious problems such as cross-border crime, illegal immigration, and trafficking in people, drugs and arms. In the interests of speeding up decision-making and bringing about greater transparency and accountability, the Lisbon Treaty also introduced some significant changes in how EU legislation in the area of criminal justice cooperation is dealt with. Most notably, proposed Directives and Regulations in this field are now generally adopted in the Council by qualified majority voting – rather than by unanimous decision as before – and generally by co-decision with the European Parliament. The Treaty also extends to the area of criminal justice cooperation the power of the European Court of Justice to judicially review EU and national legislation and the power of the Commission to initiate proceedings against Member States for infringement of their legal obligations

(these provisions are to take effect following a five-year transitional period, i.e. in December 2014).

Under the Lisbon Treaty, Ireland and the UK negotiated an 'opt-in' protocol - Protocol 21 to the Treaty on European Union and to the TFEU - in respect of measures proposed under the area of Title V (Freedom, Security and Justice). This Protocol extends to the field of criminal justice cooperation the flexible arrangements that were already applicable in the areas of immigration, asylum and civil law¹ – namely, the discretion to opt into such measures on a case-by-case basis.

Under Article 3 of the Protocol, Ireland may choose to opt into a draft measure within three months of its publication and thus take part in the negotiation and adoption process. Alternatively, under Article 4 of the Protocol, Ireland may notify its acceptance of the measure at any time after its adoption by the Council. In either case, prior Oireachtas approval is required in accordance with Article 29.4.7 of the Irish Constitution, as inserted by the 28th Amendment to the Constitution. Article 8 of the Protocol provides that Ireland may cease to apply the Protocol by notifying the Council that it no longer wishes to be covered by it. Under the terms of Article 29.4.7, this would require Oireachtas approval but would not necessitate a further constitutional amendment.

To reinforce Ireland's commitment to the Union's work in the justice area, a strong Declaration was published as an annex to the Lisbon Treaty, underlining Ireland's firm intention to participate to the maximum extent possible in Title V proposals, particularly those relating to police cooperation. The Declaration also stated that Ireland would review the operation of the Protocol arrangements within three years. The reason for this was to give Ireland the opportunity to evaluate how the new arrangements worked in practice.

The Rationale for the Protocol

It is no exaggeration to say that a country's justice system is one of the core components of its national identity. The laws and procedures of criminal justice systems are designed to reflect and enforce fundamental values of its citizens as well as the particular needs of the jurisdiction concerned. The Lisbon Treaty obliges the EU to "*respect... the different legal systems and traditions of the Member States*"², and provides that minimum rules in the field of criminal procedural law "*shall take into account the differences between the legal traditions and systems of the Member States*".³

The Government at the time deliberated carefully before deciding its position on the new arrangements for criminal justice cooperation as set out in the Lisbon Treaty. On the one hand, the Government was concerned that Ireland should not be marginalised when it came to developments in the JHA area; this was clearly a very important consideration. At the same time it had to be taken into account that, when it came to criminal law and procedure, important aspects of our legal system were quite different to those of the majority of EU

Member States.

Having considered all of the relevant factors, the Government decided that extending the existing opt-in arrangement to the area of criminal justice cooperation would be the best way to ensure the protection of key aspects of the Irish legal system while also ensuring that Ireland remained fully committed to working with our EU partners in tackling serious cross-border crime. These flexible arrangements in no way diminish the importance that Ireland places on EU measures in the JHA area, which is emphasised in the Declaration published with the Lisbon Treaty.

Application of the Protocol

In the specific area of criminal justice cooperation, the Department of Justice and Equality has at the time of writing dealt with some twenty-two measures to which Protocol 21 applies (see table). Ireland has so far opted into eighteen of these, including important proposals on: preventing human trafficking⁴; combating the sexual abuse and exploitation of children⁵; standardising certain procedural rights for accused persons in criminal proceedings⁶; minimum standards on the rights, support and protection of victims of crime; combating attacks against information systems⁷; and the use of Passenger Name Record (PNR) data for combating terrorism and other serious crime⁸. Ireland has opted into all but one of these eighteen measures under Article 3 of the Protocol, i.e. within three months of their publication as draft measures. Thus far, Ireland's only opt-in under Article 4 of the Protocol has been to an Agreement between the EU and the US concerning the Terrorist Finance Tracking Programme⁹. The Article 4 opt-in arose because Ireland had, in the interests of facilitating early Council approval for the agreement, waived the right to exercise its option under Article 3.

Decisions are pending on Ireland's participation in a further two proposals relating to criminal justice cooperation. One of these is a recently published proposal on the freezing and confiscation of proceeds of crime in the EU¹⁰, a policy area which is of particular interest to Ireland. The other is a PNR Agreement between the EU and the US¹¹. Arrangements are currently being made to seek Oireachtas approval for Ireland to accept this Agreement under the terms of Protocol 21.

The high rate of participation outlined above demonstrates Ireland's active commitment to advancing all forms of criminal justice cooperation within the EU. As the former Joint Oireachtas Committee on European Scrutiny has noted: "*Ireland continues to approach all issues within the Area of Freedom, Security and Justice from the perspective of wishing to opt-in unless there is a countervailing reason of merit to opt out*".¹²

All draft measures to which Protocol 21 applies are carefully considered, on a case-by-case basis, by the Department of Justice and Equality and by the Office of the Attorney General

in light of the Constitution and having regard to the Irish legal system. From time to time, particular provisions of draft measures may be found to pose legal or practical difficulties for Ireland's participation. This has resulted in Ireland having chosen, thus far, not to opt into three proposals in the area of criminal justice cooperation – namely, the European Investigation Order, the European Protection Order and the 'Access to a Lawyer' proposal.

*Initiative for a Directive on a European Investigation Order*⁴³: This legislative initiative by a group of Member States seeks to replace the current system of mutual legal assistance in the EU with a single regime for obtaining evidence located in another Member State. Ireland had concerns that the proposal might oblige a Member State to execute a European Investigation Order (EIO) even where the investigative measure in question could not be used in a similar domestic matter. The proposal also provides that a prosecutor or judge in one Member State may deal directly with an EIO request from a counterpart in another Member State. This civil law based 'direct contact' system would not be compatible with the Irish common law system, which requires a central authority to receive, approve, execute and transmit such requests.

*Initiative for a Directive for a European Protection Order*⁴⁴: This is another initiative by a group of Member States. It provides that a person affected by domestic violence in one Member State may obtain a European Protection Order so that if they move to another Member State they can continue to obtain court protection from the offender, should that offender also move to that State. The proposed measure will cover persons who have obtained court protection under criminal law. The proposal would raise certain difficulties for the current system of protection in Ireland (which is a civil family law mechanism), particularly as regards enforcement issues. In Ireland the criminal law is only invoked if the civil protection order is violated or when an incident has resulted in a criminal prosecution for assault. Ireland has, however, indicated its willingness to examine the feasibility and desirability of making legal provision for new criminal measures which would enable the State to consider opting into the Directive in the future.

*Proposal for a Directive on the right of access to a lawyer in criminal proceedings*⁴⁵: This proposal aims to set common minimum standards on the rights of suspects and accused persons in criminal proceedings, upon arrest, to have access to a lawyer and to communicate with a third person such as a relative, employer or consular authority. A number of Member States, including Ireland, have raised concerns about the impact of the proposal on the effective conduct of criminal investigations. These issues are currently being considered at EU Working Party level. Ireland supports the broad thrust of the proposal and is willing to opt into the measure under Article 4 of the Protocol if our concerns can be adequately addressed in the meantime.

Preliminary Observations on the Protocol in Practice

The question of Ireland retaining Protocol 21 in the future will, of course, be a matter for Government to consider (and, as mentioned earlier, any proposal for its revocation would require Oireachtas approval). However, from a legal and administrative perspective based on experience to date of Protocol 21 and of the earlier Fourth Protocol to the Amsterdam Treaty, it may be argued that the opt-in arrangement, if used appropriately, can work to the benefit both of Ireland and of other Member States. On the other hand, Protocol 21 has, at the time of writing, been in place for a little over two years. In this period only a small number of criminal justice proposals have been passed into law, still less come into force. In this context, it is too early to make any definitive judgement on the merits or otherwise of the Protocol, particularly as regards its application to criminal justice cooperation.

Future Developments

The adoption of the Stockholm Programme, which sets out the Commission's priorities for the JHA area over a five-year period, more or less coincided with the coming into force of the Lisbon Treaty and it will continue to set the agenda until the end of 2014. A central theme of the Programme is the creation of a citizens' Europe in the area of Freedom, Security and Justice, with a focus on providing a safer Union through police and criminal justice cooperation measures, protecting citizens' rights, and making the lives of citizens easier by standardising judicial cooperation procedures and access to justice across the Union.

A key strand of the Stockholm Programme, and of the associated Action Plan, focuses on the fight against organised crime and terrorism. Ireland has always been, and will continue to be, a very strong supporter of EU and wider international cooperation in this area. As terrorism and other serious cross-border crimes become more sophisticated, there is a need for constant vigilance and ongoing enhancement and expansion of the tools available to tackle these scourges on a coordinated, EU-wide basis. Planned measures to strengthen cooperation through Europol and information exchange between EU law enforcement agencies should assist Member States in carrying out complex cross-border investigations.

The Stockholm Programme also calls upon Member States to improve coordination between financial intelligence units in the fight against money laundering. This is a crime that knows no national boundaries, and further cooperation across the EU is essential to tackle this method of financing cross-border criminal activities.

Criminal asset recovery must also play a central role in the fight against serious cross-border criminality, and as mentioned above, the Commission has brought forward a proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union. It is Ireland's belief that the capacity of EU countries to ensure that those engaged in serious

crime do not benefit from their illegal activities would be greatly enhanced if a framework were put in place across the EU to facilitate the making and enforcement of civil court orders for the seizure of criminal assets.

In the specific field of criminal justice cooperation, the Commission's work programme for 2012 also includes proposed legislation concerning: a legal and technical framework for a European Terrorist Finance Tracking System; a comprehensive reform of the EU's 1995 data protection rules, which will include a proposed Directive on protecting personal data in police and judicial cooperation in criminal matters; and standardisation of offences and minimum sanctions in the area of drug trafficking.

It is too early to predict which of these proposals will be under negotiation during Ireland's next Presidency of the Council of the European Union (January to June 2013), or which further proposals in the criminal justice field will be introduced by the Commission in 2013 and beyond. What looks certain, however, is that criminal justice matters will continue to be a growth area in EU policy-making for the foreseeable future.

Conclusions

While cooperation on criminal justice matters has grown substantially over the years, there is a need for new and enhanced ways in which Member States can work together in tackling the increasing challenges posed by cross-border crime and enhancing citizens' access to justice across the Union. The importance of these policy concerns is reflected in their integration, under the Lisbon Treaty, into the Community method of decision-making. It is further illustrated by the ambitious agenda set out in the Stockholm Programme. Ireland will continue its policy of active and constructive engagement in these areas, and will continue to uphold the political Declaration annexed to the Lisbon Treaty to participate to the maximum extent possible in measures in the area of freedom, security and justice.

Endnotes

¹ Under the Fourth Protocol to the Treaty of Amsterdam.

² Article 67(1) TFEU

³ Article 82 (2) TFEU

⁴ Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

⁵ Directive 2011/92/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

⁶ Council document 16801/09: Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings; and COM (2010) 392: Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings

⁷ COM (2010) 517: Proposal for a Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA

⁸ COM (2011) 532: Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime

⁹ Agreement between the United States of America and the European Union on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Programme

¹⁰ COM (2012) 085: Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union

¹¹ Council document 17434/11: Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security

¹² Joint Oireachtas Committee on European Scrutiny Report no. 32: 'Police and Judicial Co-operation and the Fight Against Cross-Border Crime', December 2010

¹³ Council document 9145/10: Initiative for a Directive of the European Parliament and of the Council regarding a European Investigation Order in criminal matters

¹⁴ Council document 17513/09: Initiative for a Directive of the European Parliament and of the Council on the European Protection Order

¹⁵ COM (2011) 326: Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest

Criminal Justice Cooperation Proposals Dealt with by the Department of Justice and Equality under Protocol 21 to the TEU/TFEU

	Commission or Council Ref. no.	Proposal	Irish opt-in exercised?
1.	16801/09	Initiative for a Directive of the European Parliament and of the Council on the right to interpretation and to translation in criminal proceedings	Yes
2.	17513/09	Initiative for a Directive of the European Parliament and of the Council on the European Protection Order	No
3.	COM (2009) 704	Proposal for a Council Decision on the conclusion of an Agreement between the European Union and Iceland and Norway on the application of certain provisions of the Convention of 29 May 2000 on mutual assistance in criminal matters and the 2001 Protocol thereto	Yes
4.	COM (2009) 705	Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway	Yes
5.	COM (2009) 706	Proposal for a Council Decision on the conclusion of an Agreement between the European Union and Japan on mutual legal assistance in criminal matters	Yes
6.	COM (2009) 707	Proposal for a Council Decision on the conclusion of the Agreement on behalf of the European Union of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto	Yes
7.	COM (2010) 094	Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA	Yes

8.	COM (2010) 095	Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA	Yes
9.	9145/10	Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters	No
10.	n/a	Agreement between the United States of America and the European Union on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Programme	Yes
11.	COM (2010) 392	Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings	Yes
12.	COM (2010) 517	Proposal for a Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA	Yes
13.	COM (2011) 032	Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime	Yes
14.	COM (2011) 275	Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime	Yes
15.	COM (2011) 280	Proposal for a Council Decision on the signature of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service	Yes
16.	COM (2011) 281	Proposal for a Council Decision on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service	Yes
17.	COM (2011) 326	Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest	No

18.	COM (2011) 752	Proposal for a Regulation of the European Parliament and of the Council laying down general provisions on the Asylum and Migration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management	Yes
19.	COM (2011) 753	Proposal for a Regulation of the European Parliament and of the Council establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management	Yes
20.	COM (2011) 759	Proposal for a Regulation of the European Parliament and of the Council establishing for the period 2014 to 2020 the Justice Programme	Yes
21.	17434/11	Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security	Decision pending
22.	COM (2012) 085	Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union	Decision pending

CHAPTER THREE

POLICE COOPERATION AND SECURITY IN THE EU

MARTIN CALLINAN,
Commissioner of An Garda
Síochána

CHAPTER THREE: POLICE COOPERATION AND SECURITY IN THE EU

*"Whereas policing in many countries involves a mix of local and national police organisations supported by specialist agencies, the Garda Síochána is a unitary, national police service. ... In the world of contemporary transnational policing, this structure has the distinct advantage of affording a single point of contact for international police cooperation in combating terrorism and organised crime."*¹

Abstract

This chapter outlines the role of An Garda Síochána in EU Police and Security cooperation, post Lisbon Treaty. It describes the 'one-stop-shop' Garda Headquarters International Liaison section, as well as the various bilateral and multilateral cooperation channels used. It highlights Europol as growing in importance for both operational cooperation and strategic planning, at national and EU levels. It also describes how Europol operates complementarily with Interpol. It briefly outlines some of the challenges of EU police cooperation, as well as the most significant of the changes in EU cooperation structures since the Lisbon Treaty. It reviews the hierarchy and complementary nature of current EU instruments including the Lisbon Treaty, Stockholm Programme, and Internal Security Strategy. It describes a number of examples of operational and strategic cooperation.

Introduction

The current Garda Síochána Strategy Statement² sets out the medium term intentions of the organisation while prioritising, inter alia, both national security and the organisation's contribution to international security. The structures and processes of the EU allow for increasing police cooperation with our closest neighbours and partners, further enhancing the bilateral channels which have been built up over the years. Changing EU legislative instruments such as the Treaty on the Functioning of the EU (Lisbon Treaty), along with national changes such as the Garda Síochána Act of 2005, have facilitated this evolution.

International police cooperation, and in particular cooperation within the EU, continues to enable An Garda Síochána to identify and analyse the risks posed by international terrorist and organised crime groupings, both to Ireland and to the wider EU. Garda strategy is influenced by a strategic hierarchy emanating from the highest level EU instruments in the area of freedom, security and justice:

- Treaty on the Functioning of the EU (Lisbon Treaty) Title V

- The Stockholm Programme 2010 to 2014³
- Action Plan on the Stockholm Programme⁴
- The EU Internal Security Strategy⁵
- EU policy cycle for organised and serious international crime⁶

Garda International Liaison

Relatively recent changes to national demographics, as reflected in Garda priorities, have necessitated an increasing focus on international law enforcement and security cooperation. The volume of international information and intelligence being processed by and on behalf of An Garda Síochána has increased exponentially over the past decade, and is expected to continue to do so.

An Garda Síochána plays an active role in enhancing international security, and the sections below will set out several recent significant instances of this activity in the context of the post-Lisbon EU. Our national policing structures have allowed for the establishment of a best-practice 'one-stop-shop' for various forms of EU and international police cooperation – the International Liaison section at Garda Headquarters. This section consists of the following offices, co-located and with interchangeable staff and ICT facilities:

- Europol National Unit;
- Interpol National Central Bureau;
- Administration and coordination of the Garda Liaison Officer network across Europe;
- Bureau de Liaison for Security Service communications;
- A nascent SIRENE⁷ bureau, planning for enhanced information sharing under the Schengen Agreements; and
- An International Coordination Unit, facilitating contact with the EU institutions including the Council (Justice and Home Affairs) and the Commission (inter alia, regarding grant aided programmes promoting police training and cooperation).

Always operationally engaged with vast flows of information and intelligence, the Garda International Liaison section also has input into the strategic direction of the organisation – the flow of information to and from EU partners is vital for proper intelligence analysis

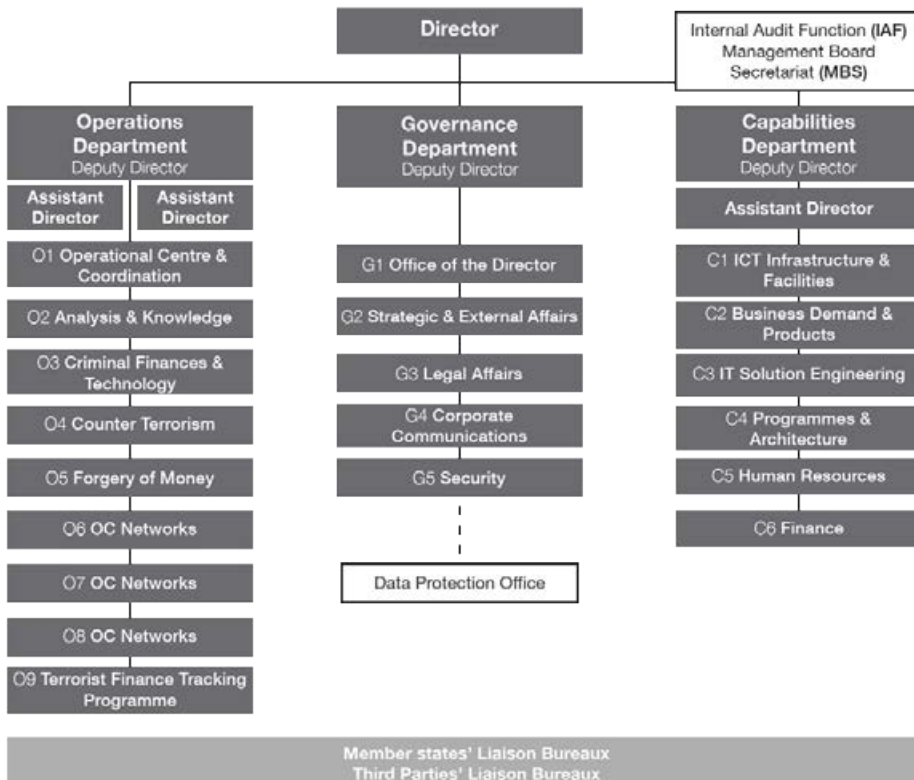
and threat assessment. This essential role continues to develop hand-in-hand with ICT innovations, and is currently gearing up to maximising the efficiency of the organisation during Ireland's forthcoming EU Council Presidency in the first half of 2013.

The Changing Role of Europol

The Europol Council Decision⁸ agreed in April 2009 and coming into effect on 1 January 2010 brought Europol within the operational and financial regulations of the Commission, and gave increased oversight to the European Parliament. The Europol Council Decision replaced the Europol Convention⁹, and broadened Europol's mandate to include all forms of serious crime, as well as organised crime and terrorism. Article 88 of the Lisbon Treaty refers to Europol, but its widened mandate and new status as an agency of the Commission slightly predated this reference.

The current Europol Strategy¹⁰ sets out the vision of Europol to grow in order to better fulfil its mission of supporting Member States in the fight against international serious crime and terrorism under its new legal status.

Organisational Structure of Europol ¹¹



Since the adoption of the Europol Council Decision, the volume of information and intelligence processed over Europol channels has greatly increased, and the operational focus of the organisation has proved beneficial to Irish investigations. Europol Analytical WorkFiles (AWFs) have facilitated some of the most successful organised crime investigations in which An Garda Síochána has been involved in recent years, and the facilities of Europol have added significant value to national intelligence operations. Europol has also increased its provision of operational support, via its 24/7 Operational Centre, and the deployment of the Europol Mobile Office to incident rooms and investigation headquarters.

Europol has also facilitated regular meetings of national experts on various crime and terrorism areas, including hosting informal meetings of the EU Police Chiefs Task Force, and an informal JHA Council meeting. It is also important to note that Europol is mandated to serve and include all national organisations with law enforcement competencies, and the Customs and Excise service of the Revenue Commissioners is represented at both the Europol National Unit and the Irish Liaison Bureau at Europol HQ. A number of former members of An Garda Síochána have also transferred to Europol HQ, further enhancing the image of Europol nationally. This network of all EU competent authorities, with English as a common working language, allows for a highly efficient and effective communication channel.

Europol's principal service to national law enforcement authorities continues to be the provision of strategic overviews of the EU organised crime and terrorism situation. Various manifestations of these overviews are produced, with some released to the public and some necessarily restricted. Three particular examples can be cited:

- i) Europol's Scanning, Analysis and Notification system (SCAN notices) have warned the public and law enforcement alike of new and emerging threats to EU and citizen security.
- ii) Early Warning Messages are regularly disseminated to law enforcement, relating to phenomena such as counterfeit currency and synthetic drugs.
- iii) Principal among Europol's strategic overviews is the annual Serious and Organised Crime Threat Assessment (SOCTA), which is issued in both public and restricted formats. SOCTA is a crucial component of the EU Policy Cycle on serious and organised crime, which will be described below.

Europol's strategic overviews are informed by the information and intelligence provided to it by the Member States, and by Europol's own analysis of that information.

Europol and Interpol – Distinctions and Compatibilities

The International Criminal Police Organisation, commonly known as Interpol, is the world's largest international police organisation, with 190 member countries. It was established in 1923 to enhance and promote cross-border police cooperation. Interpol is the preeminent channel for international cooperation on all police business. Its actions are taken in the spirit of the Universal Declaration of Human Rights, in compliance with its constitution which specifically prohibits "*any intervention or activities of a political, military, religious or racial character*", and within the limits of existing laws in different countries, even where diplomatic relations do not exist.¹²

Europol, on the other hand, is a more focused and specialised agency, with the following main distinctions in its legislative and operational framework:

- An EU agency, with co-located liaison officers from the national authorities in the Member States, neighbouring States, and some other third countries;
- A large permanent staff (ca. 700) with huge expertise and analytical capacity capable of adding value to Member States' intelligence submissions;
- The use of English as a working language;
- A mandate to cover serious and organised crime, including terrorism – and thus not *all* police business; and
- A predominant focus on intelligence analysis and dissemination.

While Interpol and Europol operate as totally separate entities, each careful not to compete with the other, every effort is made to ensure that the organisations actually complement each other, particularly within Europe. A cooperation agreement was initially signed between the organisations in 2001, and since 2007 each organisation has maintained permanent liaison offices in the other's headquarters¹³. Interpol also uses its network and experience to contribute to specific Europol activities, such as the compilation of the Serious and Organised Crime Threat Assessment (SOCTA); an initiative to combat the threats of maritime piracy; and cybercrime research and training.

More recently, in October 2011, the Directors of the two organisations agreed on the establishment of secure communication lines and endorsed a collaborative operational action plan in key security areas.

An Garda Síochána has sought to further address the aims of the Strategy for Europol by implementing a 'choice of channel' model across operational units, whereby a greater proportion of requests or investigations which fall within the Europol mandate are

processed through Europol channels.

Challenges to Law Enforcement Cooperation in Europe

While both Ireland and other Member States are beneficiaries of the evolving police and law enforcement cooperation structures in Europe, these structures pose a number of challenges to individual Member States. In the case of Ireland, beyond the obvious challenges of adapting to fast-changing threats and scenarios, there are less visible issues such as:

- Resource issues exacerbated by increasing numbers of expert groups, investigation teams, initiatives and research studies;
- Differences in emphasis and national interpretations of important concepts such as Data Protection;
- Differing national traditions, cultures and structures regarding policing, prosecution and information sharing;
- The dual role of An Garda Síochána in providing both national policing and security services; and
- Opt-ins and opt-outs vis-à-vis certain EU frameworks, including elements of the Schengen agreement.

There are also long-established and highly effective bilateral cooperation channels in place, particularly with certain Member States and institutions with which we have extensive dealings. In particular, and to an extent outside the EU structures, certain security issues continue to be dealt with bilaterally. The Working Party on Terrorism operates within JHA structures, but also encompasses security service interaction and coordination in its range of activities, inter alia via the Bureau de Liaison network.¹⁴

Post-Lisbon Reorganisation of EU Justice and Home Affairs Structures

The Lisbon Treaty has precipitated a number of important changes in EU structures, many of which are now firmly established and beginning to have significant impact. In particular, Article 71 of the Lisbon Treaty established a Standing Committee on Operational Cooperation on Internal Security, known as COSI. COSI has assumed many of the functions of the EU Police Chiefs Task Force (PCTF) in areas of operational cooperation for internal security. This brought the formal position of the PCTF within EU structures to an end. The

PCTF, founded during the Council meeting in Tampere in October 1999, originally operated on an informal basis and met once during each Presidency in the host country. Following the Madrid terrorist attack in 2004, the EU Council called for a reinforcement of the operational capacities of the PCTF resulting in 2005 in its activities being divided into two distinct parts, strategic and operational. Strategic meetings were held within JHA Council structures, and operational meetings were held at Europol HQ in The Hague. At a meeting in October 2010, it was agreed that the PCTF would informally meet once or twice per year, with continuing Europol support. PCTF meetings continue to lead to improved policing, and contribute to the security of EU citizens, complementing rather than duplicating the existing JHA Council institutional framework.

The new COSI formation oversees and coordinates the efforts of the various agencies operating in the Justice and Home Affairs area, including Europol; Eurojust (judicial cooperation); Frontex (operational cooperation at the external borders); CEPOL (European police training college); the Fundamental Rights Agency; and OLAF (fraud against the EU budget).

COSI has also made significant strides in identifying and agreeing on a set number of priority areas for the fight against organised crime. These priority areas will feed into national policing strategies, and EU-level action planning and implementation is being facilitated by the nomination of national experts to work with Europol and the Council Secretariat. Europol 'EMPACT' programmes (European Multidisciplinary Programmes Against Criminal Threats) have been designed for each specific priority area, in order to ensure measurable and systematic progress. The current EU organised crime priority areas, which make up the EU Policy Cycle – in no particular order of importance – are to:

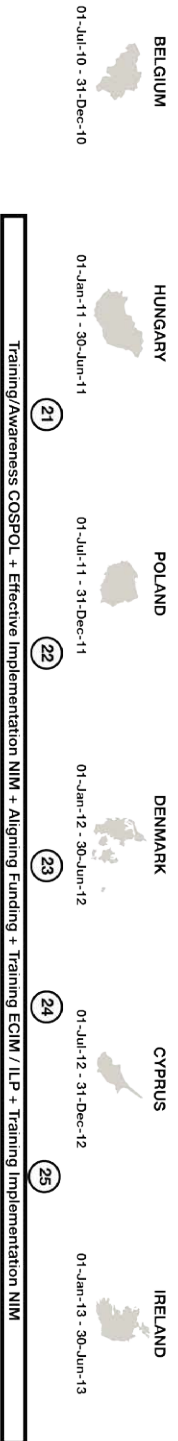
- (i) Weaken the capacity of organised crime groups active or based in **West Africa to traffic cocaine and heroin** to and within the EU;
- (ii) Mitigate the role of the **Western Balkans** as a key transit and storage zone for illicit commodities destined for the EU and as a logistical centre for **organised crime, including Albanian-speaking organised crime groups**;
- (iii) Weaken the capacity of **organised crime groups to facilitate illegal immigration to the EU**, particularly via southern, south-eastern and eastern Europe and notably the Greek-Turkish border and in crisis areas of the Mediterranean close to North Africa;
- (iv) Reduce the production and distribution in the EU of **synthetic drugs**, including new psychoactive substances;
- (v) Disrupt the **container shipments** to the EU, including via maritime and air traffic, of illicit commodities, including cocaine, heroin, cannabis, counterfeit goods and cigarettes;

- (vi) Combat all forms of **trafficking in human** beings and human smuggling by targeting the organised crime groups conducting such criminal activities at the southern, south-western and south-eastern criminal hubs in the EU;
- (vii) Reduce the general capabilities of **mobile (itinerant) organised crime groups** to engage in criminal activities;
- (viii) Step up the fight against **cyber crime** and the criminal misuse of the Internet by organised crime groups.

An intervention by the Garda delegation to COSI ensured that the following proviso was also added: [The Council] “*encourages Member States to use asset recovery and to target criminal finances to combat organised crime, including the laundering of financial assets illicitly gained by organised crime Groups*”.

An evaluation will take place of the initial 2-year trial of this policy cycle, and it will then be followed by a fully fledged 4-year policy cycle. Ireland will be chairing COSI during this crucial changeover period, which will require careful planning and consensus building.

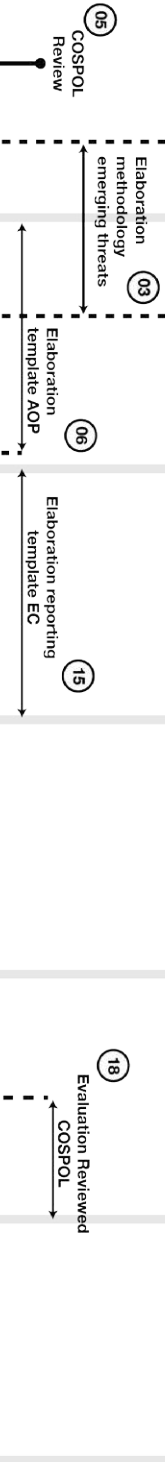
POLICY CYCLE 2011 - 2013



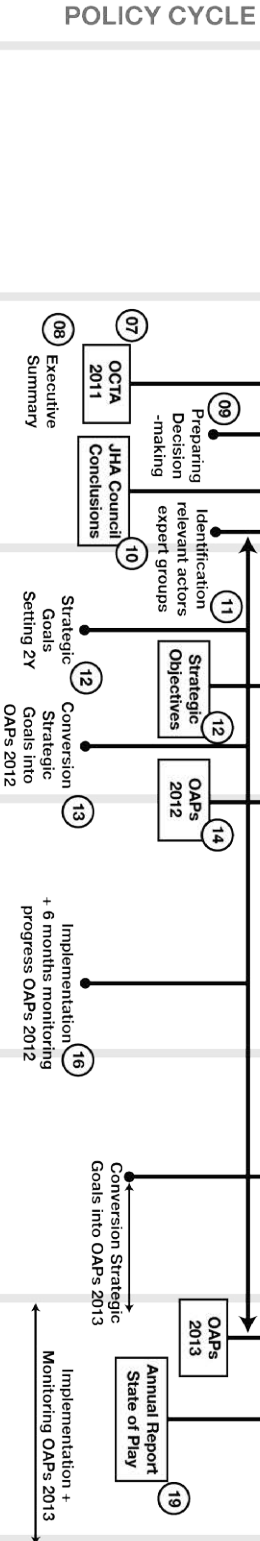
Supporting procedure to prepare the implementation of the fully fledged policy cycle



Supporting procedure to prepare the implementation of the initial and reduced policy cycle



Step in the policy cycle



Several other JHA Working Groups have also been reorganised, and continue to facilitate high level law enforcement cooperation. One example is the Working Party on General Matters including Evaluations (GENVAL), which continues to implement a series of structured 'mutual evaluations' of various aspects of EU law enforcement cooperation. An Garda Síochána benefits from this process through the participation of a number of expert evaluators in the process, who accompany other experts and Council Secretariat staff on evaluation visits thereby increasing their knowledge and building contacts. An Garda Síochána also benefits from being subjected to reviews of our structures and procedures by external experts, and by then addressing the various recommendations made.

Garda participation continues in several other JHA Council Working Groups, allowing for the mutual exchange of good practice and experience. These include the Law Enforcement Working Party and the Working Party on Schengen matters. The former group also oversees cooperation in relation to Major Sporting Events, the protection of public figures, and international vehicle crime.

The Internal Security Strategy

The Internal Security Strategy is a blueprint for action on organised crime and terrorism in accordance with the Stockholm Programme. It encompasses the period 2010 to 2014, and the period of the Irish Presidency will be crucial in the assessment of its implementation. The objectives of the Internal Security Strategy are being addressed by the developments in both Europol and the JHA Council as outlined above. The emerging European External Action Service (EEAS) is playing an increasing role in JHA Council Working Groups including COSI, by facilitating the coordination of positions and activities in non-EU states. The EEAS was established by Article 27(3) of the Lisbon Treaty, and assists the High Representative for Foreign Affairs and Security Policy in carrying out her duties. This is done in cooperation with the diplomatic services of the Member States.

Four of the EU Policy Cycle organised crime priority areas include specific reference to third states or regions (West Africa, Western Balkans, Albania, Turkey/North Africa), and the other priorities also have external dimensions. The global perspective of the Internal Security Strategy is also being progressed in part by Europol's series of cooperation agreements with external partners. Irish law enforcement operations have benefited from Europol's partnership with non-EU states, both bordering the EU and further afield. The Commission has also facilitated the involvement of both international partners (such as the USA and Canada) and international organisations (both NGO and private sector) in various Garda projects grant-aided under the 'ISEC' and other programmes.

The five strategic objectives of the Internal Security Strategy are:

1. Serious and organised crime

2. Terrorism
3. Cybercrime
4. Border security, and
5. Disasters

A major element of the Internal Security Strategy – Objective 1, Action 3 – relates to the confiscation of criminal assets. The Garda Criminal Assets Bureau has led the field in this area for over a decade, and has influenced the formation of Asset Recovery Offices across the EU. The role of CAB in the EU will be outlined further in a separate chapter in this publication, but it is noted that Ireland’s EU Presidency will coincide with CAB resuming the chairmanship of the Camden Assets Recovery Interagency Network (CARIN), established in Ireland in 2004 with the assistance of EU Commission ‘AGIS’ funding.

Another strand of the Internal Security Strategy is the necessity to raise levels of security for citizens and businesses in cyberspace, more of which below.

Examples of Successful Police Cooperation within EU Structures

Instances of cooperation between Ireland and the EU in the fight against serious cross-border crimes are too numerous to set out here, but some examples of successful cooperation via EU structures can be cited, both operational and in terms of capacity building:

- Some of the most successful **drug interceptions** in Ireland in recent years have been facilitated by the use of Europol and other EU structures, and while the assistance provided is acknowledged where possible, this is not always possible for operational reasons. Also worthy of mention is the Marine Analysis and Operation Centre – Narcotics (MAOC-N)¹⁶, an inter-governmental taskforce based in Lisbon and comprising seven EU Member States (including five with significant Atlantic coastlines): Ireland, Spain, France, Italy, The Netherlands; Portugal and the UK. MAOC-N, in continuing cooperation with Europol, enhances intelligence and coordinates police action on the high seas. MAOC-N incorporates police, customs and naval bodies, and is in existence since 2007.
- **Euro counterfeiting** is one of the first uniquely pan-European crime types, and Europol was specifically mandated to address this threat. Significant analytical and technical assistance has been provided to Irish investigations by Europol’s AWF ‘SOYA’ in this regard. Indeed in 2009, AWF SOYA highlighted the fact that Ireland had the highest number of forged Euro notes in circulation per capita of all the eurozone states. This was partially attributable to a very high degree of reporting

by Irish authorities, and to the associated fact that Ireland continues to be the EU's highest user of ATMs (on a per capita basis), with an annual figure of more than double the EU average.¹⁷

- Further to the **terrorism** related issues outlined above, Europol also provides dedicated analytical assistance related to other forms of terrorism and extremism, including extremists who may invoke Islam to justify their actions, and extremism related to race and xenophobia, animal rights, and 'lone wolf' type threats. Europol also publishes annual Terrorism Situation and Trend Reports (TE-SAT) based on submissions (which do not contain personal data) from the Member States. TE-SAT 2010¹⁸ was described as a major public awareness product, informing law enforcement, policymakers and the general public about facts, figures and trends. TE-SAT reports contain both quantitative and qualitative data from the Member States, including from both Ireland and the UK in relation to continuing terrorism investigations, arrests and convictions.
- **Human Trafficking** is a major priority for the various EU JHA structures described, and extensive assistance is provided to the Member States' actions to prevent and combat it. Trafficking is also a specific priority area under the COSI policy cycle. An Garda Síochána, in conjunction with the Anti-Human Trafficking Unit in the Department of Justice and Equality, maintains ongoing fruitful liaison with the JHA Working Groups involved, and with domestic and international NGOs working in this area. Europol's AWF 'Phoenix' channels information and intelligence in relation to suspected trafficking cases. In 2005 An Garda Síochána received EU Commission 'AGIS' grant funding to host a conference on best practice in preventing, detecting, and investigating Trafficking in Human Beings, and associated corruption.¹⁹ Important conclusions were drawn from the participating experts, and have been disseminated throughout the EU.
- **Child Abuse Material** is one of the most insidious crime areas being tackled in current times, and such material is being both produced and accessed in Ireland. By the very nature of modern communications technologies, child abuse material is a crime area which almost always has extensive international links. Europol, through its dedicated work file 'Twins', as well as its strategic planning forum "Circamp" has assisted in dozens of Garda investigations. Extensive training of specialist staff has also been provided by Europol, and in recent years the Garda organisation has been proud to be invited to send expert trainers to these international courses. Indeed, investigative capacity and technical ability has improved in Ireland to the extent that we are providing large numbers of intelligence packages for investigation by other Member States and third countries via Europol channels.
- **Cybercrime** is another increasingly prominent crime area in the age of modern commerce and communications, and **cybersecurity** is both an Irish and an EU priority. The Computer Crime Investigation Unit of the Garda Bureau of Fraud Investigation

has developed significant expertise in this area, and continues to issue advice to businesses and the public, in conjunction with the National Consumer Agency, Irish Bankers Federation, Irish Payment Services Organisation, and the Police Service of Northern Ireland. An Garda Síochána, in partnership with University College Dublin, has also developed cybercrime training programmes for law enforcement over the past ten years, with very significant grant aid from EU Commission 'AGIS' and 'ISEC' programmes. This training programme is now at the level of an accredited MSc 'train the trainers' award, equipping graduates to provide a high level of training in their home countries. A September 2011 graduation ceremony at UCD brought to twenty-seven the number of cybercrime trainers and investigators trained to MSc level to date.

Conclusions

EU and international police cooperation is an increasingly essential aspect of national policing, and will continue to be a strategic priority in challenging times – for both An Garda Síochána and the EU area of freedom security and justice.

Europol has become increasingly useful in the post-Lisbon EU, and this is reflected in increasing Garda participation and contribution. Europol analytical products are regular manifestations of the tangible benefits which can flow from effective information and intelligence sharing.

The COSI Committee in particular is playing an increasing role in coordinating EU security issues, and in planning an EU-wide policy cycle on serious and organised crime. An Garda Síochána has significant input into this policy cycle, and various national experts have been nominated.

The Stockholm Programme sets out the EU's priorities for the JHA area for the period 2010-14. The Stockholm Programme was preceded by the Tampere and Hague programmes, each of which aimed to meet future challenges and further strengthen the area of justice, freedom and security with actions focusing on the interests and needs of citizens. 2013 will be an opportunity to take stock of progress made to date, and to begin considering the successor to the Stockholm Programme.

Ireland's forthcoming Presidency of the EU Council in 2013 – which will also include chairmanship of elements of the Europol Management Board in cooperation with our Trio partners Lithuania and Greece – represents both a challenge and an opportunity. In the area of Justice, Ireland – through An Garda Síochána – has established a track record of effective engagement and of proactive leadership in many law enforcement fields.

Endnotes

- ¹ Report of the Garda Síochána Inspectorate, “Policing in Ireland – Looking Forward”, 2007.
- ² Garda Síochána Strategy Statement 2010 to 2012, www.garda.ie
- ³ An open and secure Europe serving and protecting citizens, Official Journal C 115, 2010
- ⁴ Delivering an area of freedom, security and justice for Europe’s citizens – Action Plan Implementing the Stockholm Programme – COM (2010) 171, www.europa.eu 2010
- ⁵ Communication from the Commission to the European Parliament and the Council – COM (2010) 673, 2010
- ⁶ Council of the European Union, Brussels, 14 October 2010, COSI 67 ENFOPOL 286
- ⁷ Supplementary Information Request at the National Entry – i.e. the provision of supplementary information on Schengen Information System alerts, and coordination of related operations – see <http://www.consilium.europa.eu/policies>
- ⁸ Council Decision of 6 April 2009 establishing the European Police Office (Europol), 2009/371/JHA.
- ⁹ Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention); referring to the Council Act of 26 July 1995 and the Treaty on European Union of 7 February 1992.
- ¹⁰ Europol Strategy 2010 to 2014, File Number 1424-73r1, Europol Management Board, 17 & 18 November 2009.
- ¹¹ www.europol.europa.eu
- ¹² www.interpol.int
- ¹³ Interpol press release 27 August 2007 – Interpol opens liaison office at Europol headquarters.
- ¹⁴ Council of the European Union, Working Party on Terrorism, *Presentation of a Presidency initiative for the introduction of a standard form for exchanging information on terrorist incidents*, 5712/02 (Brussels, 29 January 2002)
- ¹⁵ Council of the European Union, *Council conclusions on the creation and implementation of a EU policy cycle for organised and serious organised crime*, 3043rd JHA Council meeting, Brussels, 8 and 9 November 2010.
- ¹⁶ www.emcdda.europa.eu – International partners.
- ¹⁷ Irish Payment Services Organisation Limited – www.ipso.ie – cash facts and figures.
- ¹⁸ Europol TE-SAT 2010, EU Terrorism Situation and Trend Report, ISBN: 978-92-95018-80-8.
- ¹⁹ EU AGIS Conference, 17 & 18 November 2005, *Improvement of Best Practice in the Prevention, Detection and Investigation of Trafficking in Human Beings*, www.garda.ie.

Acronyms and Working Titles

AGIS	Internal Security Fund of the EU Commission (pre 2007)
ATM	Automated Teller Machine
AWF	Analytical Work File of Europol
CAB	Criminal Assets Bureau
CARIN	Camden Assets Recovery Interagency Network
CIRCAMP	COSPOL Internet Related Child Abuse Material Project
COSPOL	Comprehensive Operational and Strategic Planning for Police
EEAS	European External Action Service
EU	European Union
CEPOL	European Police Training College
COSI	Committee on Internal Security
EMPACT	European Multidisciplinary Programmes Against Criminal Threats
GENVAL	Working Party on General Matters including Evaluations
ICT	Information and Communications Technology
ISEC	Internal Security Fund of the EU Commission (post 2007)
JHA	Justice and Home Affairs Council
MAOC-N	Marine Analysis and Operation Centre - Narcotics
NGO	Non-Governmental Organisation
OLAF	European Anti-Fraud Office
PCTF	Police Chief's Task Force
SCAN	Scanning, Analysis and Notification system of Europol
SIRENE	Supplementary Information Request at the National Entry
SOCTA	Serious and Organised Crime Threat Assessment
TE-SAT	Europol Terrorism Situation and Trend Reports
UCD	University College Dublin

CHAPTER FOUR

PROSECUTING CRIME - THE EUROPEAN CONTEXT

JAMES HAMILTON, Former
Director of Public Prosecutions¹

CHAPTER FOUR: PROSECUTING CRIME - THE EUROPEAN CONTEXT

Since its accession to the European Communities in 1973, Ireland has regularly used criminal law to enforce its obligations under the Treaties and the subordinate legislation of the Communities and, more recently, the Union. Member States decided on the precise method of enforcement provided that it was effective. Many Member States enforce the obligations of membership by means of administrative sanctions. Ireland, lacking any system of administrative courts, usually enforces its obligations by creating criminal offences.

Until relatively recently the European Union had little impact on Irish criminal procedure or the core substantive criminal law, by which I mean offences such as homicide, assault, rape, arson, burglary, robbery or theft. These are universally regarded as crimes against society itself as well as against the individual victim, which form the central element of criminal law in all civilised societies.

The European Union's progress towards its objective of the free movement of people, services, goods and capital was bound to have profound implications for criminal law. There are a number of reasons for this. Firstly, the achievement of free movement without measures to facilitate international cooperation to combat cross-border crime would facilitate the activities of criminals. They could plan a crime in one jurisdiction, carry it out in a second and move the proceeds of crime to a third. Three different law agencies would be responsible for dealing with the crime, operating under three different sets of law, having perhaps to gather evidence in one jurisdiction and use it in another. Evidence lawfully obtained in one place needs to be capable of use in another and effective extradition is necessary. While free movement carries enormous benefits for the European citizen, we must take the right measures to prevent such free movement leading to an increase in serious trans-frontier crime.

Before the introduction of the European Arrest Warrant (EAW) in 2002² there were substantial obstacles to extradition both to and from Ireland. Ireland operated two different systems. For extradition to the United Kingdom, there was a system based on the issue of a warrant by a judge in the requesting jurisdiction to be acted upon by the District Court. It was not necessary to establish a *prima facie* case but extradition could be refused for many reasons - absence of correspondence between the offences in the two jurisdictions, abuse of procedures, a risk that the extradition subject's rights would not be respected by the requesting jurisdiction, or where the offence was a political or a revenue offence.

In one case the High Court expressed the view that where a defendant was charged with an offence relating to fraud concerning monetary compensation amounts affecting the

revenues of the European Communities, the Extradition Acts should in any case of ambiguity be construed in a manner consistent with the State's obligations to the European Union.³

A second procedure for extradition, modelled on the provisions of the European Convention on Extradition 1957, was used for extradition requests from states other than the United Kingdom. Under this second procedure the extradition of Irish citizens to Member States of the European Union other than the United Kingdom was in practice not possible, since extradition of Irish citizens could be permitted only to states prepared to extradite their own citizens to Ireland, which no other Member State of the European Union was at that time prepared to do.

The Development of European Criminal Law

Considering the various obstacles to cooperation it may seem surprising that the Union took so long to act, although the requirement of unanimity pre-Lisbon made agreements in the area of criminal justice difficult to achieve. Criminal law and procedure can prove highly resistant to moves to harmonise it. Van den Wyngaert⁴ explains that:

"...criminal procedure, more than any other legal discipline, resists harmonisation. A political reason for this phenomenon may be that criminal procedure is essentially linked to State sovereignty and the rules of criminal procedure belong to those rules which set the limit of the powers of the state vis-à-vis its citizens. As such, they regulate the State's monopoly on the use of power, not only in respect of convicted criminals but also in respect of suspects, who may be subjected to such matters as arrest, search and seizure and telephone surveillance. From this perspective, criminal procedure is a standard to measure the degree of democracy of a given society. It is hardly surprising that states have a tendency, not only to be chauvinistic about their own criminal justice systems, but also to be suspicious about foreign systems. Efforts towards harmonisation in this field are therefore very often considered as an unacceptable interference in their domestic affairs."

From time to time there were failed attempts to develop European criminal law. In the 1980s a possible treaty amendment aimed at the protection of the financial interests of the European Communities through the use of criminal proceedings was discussed over a period of years. It included as a key provision the transfer of criminal proceedings from one jurisdiction to another. A major obstacle to achieving this, though not the only one, was the difference between common law and civil law procedures. In 1995 a Convention on the protection of the financial interests of the EU and related acts⁵ was agreed, but fully implemented by only five Member States. Eventually provisions on the protection of EU financial interests were included in the Lisbon Treaty.⁶

Despite this the European Commission in its Communication to the European institutions

issued on 26 May 2011⁷ stated that the level of protection for EU financial interests still varied considerably across the EU:

"Criminal investigations into fraud and other crimes against the financial interests of the Union are characterised by a patchy legal and procedural framework: police, prosecutors and judges in the Member States decide on the basis of their own national rules whether and, if so, how they intervene to protect the EU budget."

The Commission's Communication emphasised a number of particular shortcomings, commenting that:

"Fifteen years after the signing of the Convention on the protection of financial interests and as a result of an incomplete implementation in Member States, inconsistencies and loopholes in the applicable criminal and procedural laws hamper effective action in the protection of the financial interests allowing criminal offences to go unpunished in some Member States."

The Commission went on to refer to other shortcomings, including insufficient cooperation among authorities, complex procedures in the field of mutual assistance, procedural rules limiting or preventing the use of evidence gathered in another jurisdiction, and the failure of some national authorities to become involved in cases not occurring wholly in their own jurisdiction.

I have emphasised these problems because the Union's programme for reform in criminal law can only be understood and must be evaluated in the context of the problems identified in the Commission's Communication. The problems identified by the Commission are real difficulties, which we need to tackle successfully if we are to come to grips with transnational crime within the EU.

The principal obstacles to practical cooperation lie in the area of procedures, both in relation to investigations and the trial process itself, and in questions relating to the gathering of and the use of evidence. Where an offence has a transnational character, by which I mean that the offence is committed or partly committed in a number of jurisdictions, or evidence is to be found in more than one jurisdiction, or the offence has effects in a place other than where it is committed, or the perpetrators and the victims are not all located in the same jurisdiction, then inevitably evidence will have to be gathered in one or more jurisdictions other than the jurisdiction where the trial is to take place, and will have to be transmitted to the place of jurisdiction in a form that renders it both usable and admissible. Defendants may need to be extradited to another jurisdiction to face trial if the problem of multiple trials in different jurisdictions is to be avoided (and it may not always be possible to avoid this).

However, rules concerning the gathering and admissibility of evidence differ from place to place. Rules concerning the taking of statements, the admissibility of confessions,

compulsory powers of detention, the drawing of inferences from silence, the circumstances under which persons and property may be searched and real evidence seized are not everywhere the same. Therein lies the problem. There are two possible solutions: Harmonise the rules to make them the same everywhere, or provide for mutual recognition of the effect of something done or evidence gathered elsewhere provided there is no breach of fundamental principles involved.

In practice solutions tend to involve an approach, which combines a bit of both. International cooperation has also led to the creation of international organisations designed to encourage and facilitate cooperation between investigators and prosecutors. At the EU level these include Eurojust, the European Judicial Network, Europol and perhaps, in the future, a European Public Prosecutor's Office.

Changes to substantive law are less important than changes to procedural law and the law of evidence, except in relation to the offences which always, or nearly always, involve cross-border elements, or, in the words of Article 83(1) of the Treaty following its amendment by the Treaty of Lisbon⁸, "*the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis*". Article 83(1) goes on to provide:

"These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime."

In fact, many of these areas of crime are already substantially harmonised, at least insofar as they have a cross-border element, not only as a result of the EU's endeavours but also because of the adoption of international instruments drawn up under the auspices of international organisations including the Council of Europe, the OECD and the United Nations and its specialised agencies.

It is often assumed that the divide between common law and civil law systems presents an insuperable obstacle to international cooperation. It certainly can present a barrier but the gulf is not always as wide as one might suppose. Firstly, the civil law is not one homogenous mass, as anyone who has experienced the different approach of lawyers from France, the Netherlands, Scandinavia or Germany could testify. Secondly, there is no common law lawyer who will not first look at the statute to see what the law says except when dealing with one of the few and dwindling legal areas where pure common law holds sway. Likewise it would be a strange civil lawyer who thought it unnecessary to know the case law concerning the problem he or she was dealing with.

The truth is that despite their different origins there are no pure civil or common law systems but all are mixed to a greater or lesser degree. One has only to reflect that the idea of the public prosecutor, now universal, had a civil law origin unknown to the common law, and

that the common law invention of the jury has now been introduced in some form in many civil law jurisdictions including France and Italy. Over the centuries there has been a marked degree of convergence between systems and despite the natural conservatism of criminal lawyers, prosecution services have not escaped from this trend.

There are serious obstacles to judicial cooperation between different systems but they should not be reduced to a crude approach which sees everything across the English Channel as alien, and such an approach seems strangest of all when it comes from an Irish lawyer.

There are other differences which can present obstacles to cooperation between prosecutors, and which often operate across different fault lines to that between civil and common lawyers. These include the distinction between systems where prosecutors are part of the judiciary and those where they are part of the executive, between those prosecution services which are independent and those which are controlled by government to a greater or a lesser extent. There are differences between prosecution services organised on hierarchical lines and those where each prosecutor has individual independence similar to that of a judge. There are distinctions between systems where the prosecutor controls the investigators and those where he or she does not, between those where the prosecutor has other - sometimes extensive - non-prosecutorial powers, and distinctions between systems practising mandatory prosecution (the legality principle) and those operating discretionary prosecution (the opportunity principle).

Last but not least is the gap between countries with a highly constitutionalised criminal law system, such as Ireland, Canada, and the United States, and many other jurisdictions in the common law world. In relation to that gap we seem to fall on the same side as many countries with a civil law tradition.

It is too facile in my view to sit on our hands and opt out of international cooperation, as has sometimes seemed to be the case, because of some common law exceptionalism, and the false idea that cooperation cannot work for us.

Reforms in Criminal Procedure - The European Arrest Warrant

The changes in criminal law and procedure introduced or proposed by the European Union fall into three broad categories: reforms in criminal procedure (both at the investigative and the trial stage), changes in substantive law, and reform of the institutions dealing with cooperation to fight transnational crime. Because of its particular importance, discussed above, I shall concentrate on the reforms to criminal procedure and the gathering and use of evidence, which have been, or are being, introduced to facilitate the fight against cross-border crime.

Undoubtedly the single most important and the most successful reform in criminal procedure has been the introduction of the European Arrest Warrant. The EAW was introduced using the pre-Lisbon Third Pillar procedure under which action in criminal matters required unanimity. The instrument involved was a Framework Decision,⁹ which required implementing legislation in the Member States. It was not subject to the supervisory jurisdiction of the European Court of Justice.

The EAW proposal had been under discussion for a considerable time prior to its adoption and was adopted in some haste following the 9/11 atrocities as part of the European Union's response.

The EAW system is more akin to the old UK/Ireland backing of warrant system than to the European Extradition Convention system still in use for extradition outside the EU. It was designed to operate directly between judges and in this respect was clearly inspired by systems where magistrates have a supervisory role at the investigative stage. Of course in Britain and Ireland judges have no such role nor is the prosecutor a judicial officer. EU instruments often appear to be drafted as though the French criminal justice system represents the EU standard despite the fact that on other occasions EU officials proclaim the diversity of European legal traditions as a strength. In this case the Irish implementing legislation¹⁰ provided that the Director of Public Prosecutions should apply to the Irish court for the issue of a warrant.

The EAW system has no requirement for the issuing state to set out or establish the factual basis underlying the charge. Once a judge has issued a warrant the judge in the requested state has no function to question its basis. The system is founded on the principle of mutual respect. Secondly, because the system uses an application from judge to judge rather than the diplomatic channel, the possibilities of a political decision to refuse extradition are reduced. Thirdly, there is no requirement to show correspondence, that the act for which extradition is sought is an offence under the law of both states. Instead there is a list of categories of extraditable offences.

The EAW procedure is simple and quick. After the 2005 London Tube bombings the United Kingdom secured the return of one suspect from Italy within a matter of days, something which would previously have been unthinkable. The Irish experience with outgoing requests has been good. The EAW could not have come at a more opportune time since extradition and mutual assistance have grown greatly in recent years due principally to the large number of foreign nationals now living in Ireland. The growth in requests for mutual assistance to other countries has been striking.

It should however be noted that some argue that the EAW went too far in facilitating extradition. Some maintain that it should still be necessary to prove correspondence because in principle we should not cooperate in punishing something which is not a crime in our own jurisdiction. Others argue that those who choose to visit or live in another country should be prepared to obey its laws.

One unanticipated result of the new system has been requests from countries that apply the 'legality' principle seeking extradition in cases, some of which are trivial or stale. Under the legality principle, commonly applied in eastern Europe, the prosecutor must prosecute where there is sufficient evidence to establish an offence, whereas under the opportunity principle, applied in many places including Ireland, the United Kingdom, France and the Netherlands, the prosecutor need not prosecute where to do so is not in the public interest. Prosecutors may therefore have to spend time and scarce resources dealing with cases from another jurisdiction, which they would not have prosecuted had the events occurred in their own country.

The fact that the EAW has speeded up the extradition process does not mean that the investigator and the prosecutor are no longer handicapped when a fugitive absconds. Under Ireland's system it is not possible to question a suspect once he is charged. The purpose of extradition is to get the suspect back for the purpose of charging and trying him. One cannot therefore seek the issue of an EAW until there is a case ready to proceed. In some civil law systems it is possible to issue an EAW and commence the judicial process without the need for a completed investigation and before a decision to proceed to trial has been taken.¹¹

Reforms in Criminal and Investigative Procedure - Mutual Legal Assistance and Mutual Recognition

The need for an investigation to be complete before the issue of an EAW emphasises the importance of effective procedures to gather evidence abroad for use in one's own jurisdiction. This is an area which until recently was regulated solely by the Council of Europe's Mutual Assistance Conventions,¹² which allow for the issue of a request by a judicial authority, which is defined to include the prosecutor. The DPP may issue a request without the necessity for a court application. This is logical within the Irish system since the court is not involved in the investigation. Any testimony gathered in this manner without a court application would not be used in court since under our procedures virtually all evidence has to be presented *viva voce*. Real evidence is gathered so as to enable it to be proved in accordance with Irish law.

The drawbacks in the system include the following: firstly, one is at the mercy of the priorities of the person dealing with the matter in the receiving state. Secondly, there is no means to compel a witness who is abroad to come to Ireland to give evidence. The Irish court can receive testimony given abroad in its discretion and these provisions are usually used to deal with relatively formal or uncontested evidence. Where a witness gives contested evidence it is likely that in many cases Irish courts would insist this be done before the jury. Thirdly, there is still no clarity as to what rule is to govern the admissibility of evidence obtained abroad. We need a rule which would allow the admissibility of real evidence or confessions valid according to the European Charter of Fundamental Rights

and the European Convention on Human Rights and the law of the place where they were obtained.

The EU has enacted two Framework Decisions, one on orders freezing property or evidence¹³ and the other providing for the issue of a European evidence warrant (EEW) to obtain objects, documents and data.¹⁴ The EEW can be used, therefore, only for evidence already in being. The intention was, and might still be, to introduce a second stage of the EEW to cover other matters where the evidence does not yet exist but can be obtained (for example, the taking of witness statements, wiretaps, covert surveillance, controlled deliveries, monitoring bank accounts, analysing things as distinct from handing over the thing itself, or the taking of fingerprints or tissue samples to provide DNA).

In effect the current system is something of a mess. There are currently two parallel systems because the Council of Europe system still governs mutual assistance with European states outside the Union, of which there are still nearly twenty. It still also governs evidence not yet in being so that the prosecutor seeking assistance from another EU Member State might have to issue separate requests under both systems. Furthermore, in Ireland every application for assistance will require the intervention of a judge, which will complicate rather than simplify the system. Once again a Community instrument ignores the fact that in not every Member State is the prosecutor a judicial officer. This is not merely a difference between civil and common law - there are many civil law jurisdictions where the prosecutor is an executive officer rather than a magistrate. The failure to recognise this distinction appears gratuitous but I suspect is born of ignorance rather than any Franco-Belgian hubris.

In 2010 a group of Member States¹⁵ put forward a new proposal, which in the case of mutual assistance between Member States, would simplify the system. The proposal is for the issue of a European Investigation Order (EIO), which could be issued by the authority in the requesting state competent to order the gathering of evidence. For example, if it requires a judicial order in the requesting state to order the search of a dwelling house then it will require a judge to issue an EIO to search a house in the executing state. On the other hand, if the police can decide on a particular investigative measure they can then issue an EIO. Similarly, in the executing state the decision to undertake the investigative measure must be made by an authority, which could order that measure in the state concerned. The measure must be carried out in accordance with the law of the executing state. Where the measure sought does not exist in the executing state the latter has an option to take alternative measures to achieve the same or a similar result.

The system is designed to combine both mutual assistance and mutual recognition in a single procedure. In my view this proposal is both sophisticated and subtle and has the potential to achieve a real simplification of procedures in a way that the EEW proposal did not. An added bonus is that it is respectful of existing national legal traditions without seeking to impose any unnecessary harmonisation or approximation, which regrettably cannot always be said of proposals emanating from the Commission. Ireland has not opted into the Initiative for a Directive regarding the EIO. Perhaps it has some downside of which I

am not aware. If this Initiative succeeds, Ireland would need to consider the implications of staying outside it. At this stage, however, it would be premature to make any assumptions about how matters will transpire.

Rights of the Individual

At present there are a number of other procedural proposals at various stages in the system. It is beyond the scope of this chapter to discuss them in any detail. There is a body of EU legislation concerning the procedural rights of suspects and accused persons, with further proposals in the offing. These proposals cover such matters as the right of detained persons to communicate with relatives, employers and legal advisers, the right to legal advice and legal aid, special safeguards for vulnerable suspects and defendants, as well as the right to an interpreter, to consular assistance, and to information concerning proposed charges.

There is a draft Directive on access to lawyers¹⁶, which envisages the right to have a lawyer present throughout the whole of questioning. In this respect the draft goes further than the European Convention on Human Rights. This would severely restrict the admissibility of evidence obtained in breach of this proposed new right and would hamper the effective prosecution of crime in that credible and probative evidence against an accused could be excluded for reasons which have nothing to do with the search for truth. As a side issue this has the potential to increase the cost of legal aid without any beneficial side effects for anyone but lawyers prepared to undertake unnecessary work.

The draft Directive on victims of crime¹⁷ envisages that in every case a victim would be entitled to be told the reason for a decision not to prosecute. Most criminal lawyers would agree that there are some cases in which the reason could not be given without prejudice to third party rights. Ireland has exercised its opt-in for the Proposal for a Directive establishing minimum standards on the rights of victims of crime, and the Minister for Justice, Equality and Defence recently expressed his strong support for the draft EU Directive on victims of crime.¹⁸

Eurojust and the European Public Prosecutor

Eurojust has been very successful within a very limited brief. I can personally testify to its effectiveness in facilitating cooperation between prosecutors' offices and its value when quick action is required. However it was always intended to be a lot more than this – it was intended that it would form the nucleus of a European Public Prosecutor's Office. In its tenth anniversary we seem no nearer to that elusive goal. While the present Commissioner for Justice, Viviane Reding, has indicated her intention to proceed with the proposal to create a European Public Prosecutor's Office "*from Eurojust*", as envisaged in the Lisbon Treaty,¹⁹ it remains to be seen how this will be done and when concrete proposals will be

brought forward. Both Ireland and the United Kingdom have stated their opposition to any such proposal in the past.

My personal view is that if there is to be a European Public Prosecutor, there should also be a European Criminal Court. In my view there is a range of important practical questions about how the EPP proposal would work if the European Prosecutor operates through the national courts. These were not addressed in the Commission's Green Paper and they remain outstanding.²⁰

The problems with this approach are not mere matters of detail but raise important questions of principle. How should we deal with mixed cases where some of the charges relate to offences against EU financial interests and others do not? Are there to be two prosecutors, the EPP and the national prosecutor? What happens if they disagree on how to run the case, for example, over whether to accept a compromise proposal to plead guilty to some offences? Bear in mind that all VAT fraud is an offence against EU financial interests but to an even greater extent against national funds. In such a case which prosecutor will call the shots? Will the EPP have a presence in each Member State or will he or she act through the agency of the national prosecutor? If the latter, how is this compatible with the national prosecutor's independence? In the absence of a unified European appellate system how can a coherent jurisprudence be established and maintained? If it cannot, there will be a differential application of the law throughout the EU, which rather undermines the whole rationale behind the idea.

A European Criminal Court with power to establish its own procedure and with a jurisdiction confined to offences against EU financial interests would in my opinion represent much less of a threat to the national legal traditions in which every Member State takes a justifiable pride than would a poorly thought-out hybrid system.

Conclusion

During the past ten years there has been a great deal of EU activity in the field of criminal law and procedure. Reform in this area is necessary in order to combat transnational crime and if the EU is not to benefit the criminal more than the law-abiding citizen. Despite solid achievements, particularly the creation of the EAW, much needs to be done in the field of mutual legal assistance and mutual recognition. EU legislation, if it is to be effective, must show greater recognition of the reality of different legal systems and find solutions that respect this diversity.

Endnotes

¹ The views expressed in this Chapter are made in a personal capacity and do not necessarily represent the

views of the DPP or her Office.

² European Arrest Warrant Act 2003, No. 45 of 200 [Extradition to non-EU Member States from Ireland is governed by the Extradition Act 1965 as amended]

³ *Byrne v Conroy* [1997] 2LRM 99. *The point is obiter since Kelly J held that the statute was not in fact ambiguous as MCAs were not a tax or customs duty.*

⁴ Criminal Procedure Systems in the European Community, Van Den Wyngaert, Butterworths, 1993, page i.

⁵ Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [Official Journal C 316 of 27.11.1995].

⁶ The Lisbon Treaty has considerably reinforced available tools to act in this regard (Articles 85, 86 and 325 of the Treaty on the Functioning of the European Union - TFEU). Articles 310(6) and 325 TFEU oblige both the EU and its Member States to counter all forms of illegal activity affecting the EU financial interests.

⁷ COM (2011) 293 final, 26 May 2011, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, On the protection of the financial interests of the European Union by criminal law and by administrative investigations - An integrated policy to safeguard taxpayers' money

⁸ Article 83(1) TFEU (ex Article 31 TEU)

⁹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

¹⁰ European Arrest Warrant Act 2003, No. 45 of 200 [Extradition to non-EU Member States from Ireland is governed by the Extradition Act 1965 as amended]

¹¹ In the recent case of *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16, the Supreme Court declined to extradite a suspect to France on foot of an EAW where the French judicial authorities had decided to open a criminal investigation but had not decided that the suspect would be charged with an offence.

¹² Council of Europe European Convention on Mutual Assistance in Criminal Matters, 20 April 1959; Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 17 March 1978; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 08 November 2001.

¹³ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

¹⁴ Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

¹⁵ 9288/10 ADD1 3 June 2010, proposal by Austria, Belgium, Bulgaria, Estonia, Slovenia, Spain and Sweden.

¹⁶ Proposal for a Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest, COM(2011) 326/3

¹⁷ Proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime, 18 May 2011, COM(2011) 275 final

¹⁸ Speech by Mr. Alan Shatter T.D., Minister for Justice, Equality and Defence at Dublin Castle, 12 April 2012, available at <http://www.inis.gov.ie/en/JELR/Pages/SP12000101>

¹⁹ Article 86 TFEU

²⁰ Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (presented by the Commission), 11 December 2001, COM (2001) 715 final

CHAPTER FIVE

CRIMINAL ASSETS BUREAU: A CASE STUDY FOR EUROPE

DETECTIVE CHIEF
SUPERINTENDENT EUGENE
CORCORAN, Chief Bureau
Officer, Criminal Assets Bureau

CHAPTER FIVE: CRIMINAL ASSETS BUREAU: A CASE STUDY FOR EUROPE

Introduction

The appropriation by a State of the profits of criminal conduct, over and above the application of a sanction for the moral reprehensibility of such conduct, is of itself an important and effective deterrent in the fight against crime. While the concept is not without precedent, the remedies of deodand¹, forfeiture of a felon's assets to the Crown² or restitution³ being recognised in many common law jurisdictions, it had fallen into disuse as an effective criminal remedy in the late 19th and most of the 20th Century. The United States, seeking to limit the effect such proceeds were beginning to have on its political and administrative systems, enacted, in the 60's and 70's, a series of legal remedies designed to confiscate the proceeds of criminal conduct, collectively known as the RICO (Racketeering Influenced and Corrupt Organisations) code. The success of this code resulted in criminal proceeds migrating to other jurisdictions which led to the recognition of money laundering as an international problem. The United Nations Convention against illicit trafficking in narcotic drugs and psychotropic substances (Vienna Convention, 1988) proposed an international initiative whereby the high contracting parties agreed:

- To cooperate internationally in relation to the tracing and confiscation of proceeds of crime;
- The introduction of an offence of money laundering;
- The adoption of domestic legislation providing for restraint and confiscation; and
- International recognition and enforcement of restraint and confiscation orders.

The Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime (Strasbourg Convention, 1990) adopted similar remedies, albeit not limited to drug trafficking offences. The Council Framework Decision of 26 June 2001⁴ required all Member States to enact domestic legislation in line with the Strasbourg Convention. The Criminal Justice Act of 1994 constitutes Ireland's compliance with the above international and EU obligations.

Criminal Model - v - Civil Model

While this approach is a significant development, all remedies under these legislative measures require pre-trial conviction; a confiscation order being tied directly to a specific

charge and conviction. There are, however, major criminal operators who have the capacity, either through fear or significant financial muscle, to evade the criminal process. It became a concern in Ireland due to the development, in the 1990s, of a number of organised criminal groups involved in drug trafficking, the senior members of which were able to protect themselves from the operation of the ordinary criminal code. In June 1996, a member of An Garda Síochána and an investigative journalist reporting on the activity of these organised crime groups were both murdered. These dramatic and horrific incidents provided the catalyst and political will to secure the enactment of the necessary legislation for the establishment of the Criminal Assets Bureau and the adoption of a civil forfeiture remedy in Ireland.⁵

The civil forfeiture remedy makes it possible to target the proceeds of crime, as an action *in rem*⁶, using civil procedures in Court, without the necessity of a pre-trial conviction.

Multi-disciplinary Agency Model

The Criminal Assets Bureau is a multi-disciplinary agency, allowing revenue, customs, social welfare and the Gardaí to cooperate and share information, and, with the assistance of in-house accountants, lawyers and experts, investigate and instigate any and all legal remedies capable of denying criminals the proceeds of crime.

This ability to share information did, at a stroke, remedy a natural difficulty experienced by all large bureaucracies. In this regard, all information, be it prior criminal activity, returns to revenue, social welfare history, or net worth/asset value regarding persons under investigation, were correlated and the composite of this information was available to each operative in the application of their specific statutory power. This approach ensured a comprehensive strategy could be applied towards denying or depriving the persons targeted of the proceeds of their criminal conduct by the use of all remedies available, be they the revenue/social welfare code, a criminal prosecution or, if necessary, civil forfeiture. An unexpected and beneficial by-product was the co-mingling and cross-migration of differing investigative techniques and skills.

Non-Garda members of the Bureau are entitled to anonymity when exercising their powers and giving evidence. The Bureau has available to it its own civil warrant. Over the years, the Bureau has also developed its own 'Bureau Analysis Unit', comprising forensic accountants and analysts developing the skill level and qualification required to give 'expert testimony'. The agency, while statutorily independent, operates within the overall Garda strategy. It is a relatively compact unit operating nationally, with the assistance of Garda Divisional Profilers within each Garda District. History has proved it to be a very effective model.

Civil Forfeiture

At the time many legal commentators had voiced concern at the 'draconian' nature of the civil forfeiture remedy, contending the legislation was repugnant to the Irish Constitution. That Constitution, adopted by plebiscite in 1937, is the cornerstone of the Irish legal system and acts and includes a 'Bill of Rights', in like manner to that of the European Convention on Human Rights. It permits the High Court, and on appeal the Supreme Court, to analyse the practical effect of legislation and can render such legislation void where it, without just cause, violates fundamental human rights. The Proceeds of Crime Act, 1996 was found to be constitutional by the High Court in 1997⁷, the judgment of which was upheld by the Supreme Court in 2001⁸.

It was contended that the Act provided in essence for a criminal procedure by another name, i.e. a civil procedure which applies a criminal sanction without ensuring the usual protections required in a criminal trial. Such protections would include the presumption of innocence, proof beyond reasonable doubt, a right to a trial by jury, none of which are contained in the Act. The Court concluded these forfeiture proceedings are civil, not criminal in nature, stating "*in general such a forfeiture is not a punishment and its operation does not require criminal procedures*". The Court also noted there is no prohibition on any court, in the course of a civil proceeding, to make findings or determinations on issues of fact, which might also constitute elements of a crime.

It was also contended that the Act constitutes a reversal of the onus of proof. Following an analysis of the procedures and safeguards contained in the Act, the Court noted that such a reversal of the onus of proof only operates after the establishment to the Court's satisfaction of certain issues and there is a right to cross-examine. The Court concluded that it was constitutionally permissible to enact legislation that required an individual to explain the provenance of property, which the State had demonstrated, on *prima facie* evidence, came from the proceeds of criminal conduct.

It was argued that the Act, in its operation, breaches rights to private property. While acknowledging that the Proceeds of Crime Act, 1996, might affect the property rights of a citizen, it was held that its provisions did not constitute an unjust attack given that the court must be satisfied, before making a forfeiture order, that the property in question represents the proceeds of crime. It was held that the exigencies of the common good include measures to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities.

The Court held that Parliament was justified as a matter of proportionality in passing the Act, thereby restricting certain rights protected by the Constitution, and that the restriction was balanced by safeguards in the Act.

Some fifteen years later, the remedy is no longer seen as draconian, being acknowledged

as an integral part of an overall statutory code, which includes forfeiture of cash or instrumentalities of crime⁹ and criminal confiscation¹⁰, all designed to deprive a person of the benefit of criminal conduct.

Camden Asset Recovery Inter-Agency Network (CARIN)

Shortly after the establishment of the Bureau, a meeting of similar agencies from a number of other jurisdictions, including the United Kingdom, Belgium, the Netherlands, France, and EUROPOL was co-hosted in Dublin by the Criminal Assets Bureau and EUROPOL. The practical problems of international cooperation, including understanding the complexity of the law of another jurisdiction, knowing the appropriate person to contact and finding out whether proceeds of crime are held in that jurisdiction, were identified. Clear benefits to the establishment of an inter-agency network with the following features were acknowledged.

- Each member would provide a thumbnail sketch of its domestic legislation regarding the investigation, tracing and forfeiture of the proceeds of crime;
- Each member would provide names of one or two contacts who are prepared to give advice and provide all assistance necessary to an investigation instigated within another State;
- There should be regular plenary sessions to correlate ideas and develop recommendations as to best practice; and
- The Secretariat would be provided by EUROPOL.

The Camden Court Hotel, Dublin, was the location for the initiative, hence the name. The first meeting was held in The Hague, the Netherlands in September 2004 and the second in Ireland in May 2005. Ireland, represented by the Criminal Assets Bureau, was on the Steering Group for the first seven years.

As CARIN appeared to fill an international administrative void, its membership expanded rapidly. CARIN established relationships with international bodies such as the European Commission, Egmont, and the Financial Action Task Force (FATF) in order to establish a conduit for ideas and recommendations made at its plenary sessions. Among the significant developments which occurred thereafter were the introduction of Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property and evidence, Council Framework Decision 2005/212/JHA on the confiscation of crime related proceeds, instrumentalities, and property, and Council Framework Decision 2006/783/JHA applying the principle of mutual recognition to confiscation orders.

The steering group of CARIN, and many of the Member States, were keenly interested in

Ireland's approach to this issue, in particular, the adoption of the multi-agency concept with its aligned information exchange procedures and the civil or non-conviction based recovery model. No other Member State has implemented identical provisions to those in this jurisdiction. However, aspects of the Irish provisions have been enacted elsewhere.

Asset Recovery Offices

One primary focus of CARIN was to improve the sharing of information between states. With the assistance of the Criminal Assets Bureau (including a presentation on the legal implications at its plenary session in Austria in 2006), a draft Framework Decision was framed by Austria in conjunction with the European Commission, which was ultimately adopted. This is No. 2007-845-JHA, which established a requirement that each Member State have at least one, if necessary two, Asset Recovery Offices within their jurisdiction, properly resourced and with access to appropriate information. Furthermore, they were required, within the limitations of their domestic law, to exchange this information with their counterparts in other Member States. While it replicated much of what members of CARIN were already doing on an 'Ad Hoc' basis, it was now on a formal legal basis.

It is noted that the Stockholm Programme now encourages Member States *"to pursue a proactive approach to investigation and provide a central coordination of activities by appropriate specific structures, taking the cue from the most successful experience of some Member States"*. One would expect that the experience of CAB would be very relevant in this context and possibly provide a model for an EU-wide approach in the area.

International Recognition of Civil Forfeiture

Many jurisdictions have concerns about recognising orders where the Criminal Assets Bureau has identified the assets and obtained orders forfeiting such assets, in particular where such orders were based on 'non-conviction based' forfeiture remedies. The concerns include whether it breaches fundamental rights to property, whether appropriate safeguards are in place, the reversal of the onus of proof and domestic constitutional provisions as to forfeiture legislation within certain jurisdictions. These are the very same concerns that had been expressed in Ireland and addressed by the Irish Supreme Court. There is an argument that those concerns may be more apparent than real and it is hoped that an in-depth analysis of their own legal processes may identify a form of non-conviction based remedy which might be domestically acceptable and assist the recognition of external orders.

The Bureau first sought to overcome these difficulties in a practical manner by exchanging relevant intelligence and information directly with the jurisdictions involved. Council Framework Decision No. 2006/960/JHA on simplifying the exchange of information and

intelligence between law enforcement authorities of Member States was the guiding international instrument. It had been noted that different Member States often have different ways of addressing issues, which ultimately achieve the same results. Consideration was also given as to whether there was a requirement to recognise and enforce such 'civil orders', pursuant to Council Regulation (EC) No. 44/2001, commonly known as the Brussels Regulation. However, these regulations applied to 'civil and commercial' matters. The Bureau is a statutory governmental authority effecting public policy. Accordingly, while orders obtained by it might be termed 'civil', they do not address 'commercial matters' within the terms of the meaning of that Regulation.

With the assistance of the European Commission, the Bureau took a leadership role in seeking to have civil or non-conviction based orders recognised internationally. On many occasions presentations have been made at international conventions, at the Asset Recovery Offices platform and within expert groups, outlining the analysis of the Supreme Court judgments and seeking to identify, and hopefully alleviate, the concerns other Member States have with the concept of non-conviction based remedies. While initially the concept met significant opposition, there are indications that the intensity of such opposition is fading. Furthermore, the issue has now become centre stage within the European Commission, and the European Parliament, and it is referred to in the Stockholm Programme.

With this in mind, the Bureau has reapplied to become a member of the steering group of CARIN and is seeking to host the 2013 plenary session, in the course of Ireland's Presidency of the European Union. The primary subject for consideration will be identifying and hopefully addressing the barriers which other Member States have to adopting domestic legislation that will recognise and enforce non-conviction based orders from other jurisdictions.

Conclusion

Ireland, through the Criminal Assets Bureau, has become a 'best practice model' for utilising the multi-disciplinary agency concept and non-conviction based forfeiture remedies, and has been viewed as such by authorities in other jurisdictions.

The Bureau has publicised the effectiveness of its model to prosecution agencies in other jurisdictions and invited those agencies to analyse, examine, and if acceptable, adopt its procedures. A number of those jurisdictions, most notably the United Kingdom, in changing their existing system, have adopted certain elements of the Irish model. Ireland still remains a leader in the field of targeting and depriving criminals of the proceeds of their ill-gotten gains, and hopes through the continued adoption of best practice, to remain at the forefront in this area.

Endnotes

¹ Deodand constitutes a procedure whereby an Instrument, whether it be an animal or an inanimate thing, which caused the death of a man, is forfeited to the King and was formally applied to pious or charitable purposes. It was abolished in 1862.

² Also, in times past in common law a person convicted of a felony found his Real Property forfeited to the Crown, again a remedy that has been repealed for sometime.

³ The Law of Restitution provided for the forfeiture of goods that are the proceeds of, or connected with, criminal events. The remedy is rooted in the common law as it was perceived as an important policy of common law that a criminal should not be entitled to benefit from his wrongdoing and that neither the criminal nor the innocent recipient can obtain any title of the proceeds of crime (see Goff and Jones, the Law of Restitution; 4th edition; 1993 page 703). The principle has been recently restated and applied in the Attorney General –v- Blake [1998] 1 old English reports 833.

⁴ (2001-500-JHA)

⁵ Criminal Assets Bureau Act, 1996 and Proceeds of Crime Act, 1996

⁶ “In rem” as opposed to “in personam”. A legal action in rem (against the thing) focuses on the item of property itself, with the resultant order affecting only the property. An action in personam (relating to the person), on the other hand, will act on that person, such as a conviction or a judgment debt, where the person themselves suffers the sanction or is liable to pay the debt as the debt can be executed against any part of their property, irrespective from whence the property derives.

⁷ Gilligan-v-Criminal Assets Bureau [1998] 3 IR 185

⁸ Murphy-v-GM PB PC Ltd [1997] IEHC 5

⁹ “Instrumentalities” of a crime constitute items of property which have been used to facilitate the commission of the offence, for example a motor vehicle or yacht used to transport or import prescribed drugs. There are legislative provisions which permit the forfeiture of such items, following conviction.

¹⁰ Criminal confiscation on the other hand constitutes the profit, or “benefit” that has been made from an offence and, as a court order, becomes a judgment debt payable to the Minister for Finance. It is important to note that neither order constitutes a sanction but mere reparation or restitution of the profit made from the criminal conduct. There exists significant European case law to the effect that this distinction between sanction, which requires criminal protections in the course of a trial, and reparation, which is a civil matter, is critical.

CHAPTER SIX

JUDICIAL PROTECTION IN THE EU

PAUL GALLAGHER SC

FRANCIS KIERAN BL

CHAPTER SIX: JUDICIAL PROTECTION IN THE EU

Introduction

*"By criminal law, a legal community gives itself a code of conduct that is anchored in its values ..."*¹ So held the German Constitutional Court in its 2009 judgment on the compatibility of the Lisbon Treaty with that country's Basic Law. The same is true of a legal community's adoption of criminal procedural rights, which, in free societies, are integral to the very concept of criminal law. Judicial protection of the rights of the accused can be traced back to the Magna Carta, which stated: *"... We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land."* Criminal procedural rights have evolved since then, and continue to evolve. One recent indication of how such rights are evolutionary rather than frozen is the 2001 Supreme Court decision in *Braddish v D.P.P.* which, drawing on earlier authorities, ruled that *"It is the duty of the Gardaí, arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence."*²

Although membership of the EU does not mean that all countries must have identical values in the fields of criminal law and criminal procedure - a fact recognised by the Treaties³ - there are nonetheless certain minimum rights which are the subject of judicial protection in all Member States. In this Chapter, we wish to discuss the protections for suspected and accused persons that exist and are being adopted at EU level, in the context of policing and judicial cooperation in criminal law matters. Relevant in this regard are the protections which exist under the EU Charter of Fundamental Rights, under the European Convention of Human Rights, and under emerging EU legislation governing procedural rights. The latter legislation is a product of an appreciation that mutual recognition of judgments and mutual legal assistance depend upon mutual trust among Member States, which in turn requires consensus on a core of minimum rights for those who are the subject of the criminal process. We wish to discuss this important concept of mutual trust, including limits to the extent to which Member States can presume that other Member States are in compliance with their obligations to protect fundamental rights. This has recently been given clear expression by the Court of Justice of the EU in an important judgment in the asylum field,⁴ which may conceivably have ramifications regarding police and judicial cooperation in criminal law matters. Despite the importance of mutual trust, placing limits upon its boundaries may not be undesirable and could be considered an important element of judicial protection in the EU.

Rights of the Individual in the Criminal Process: Diversity among Member States

The European Union expresses itself to be "... founded on the values of ... respect for human rights",⁵ and, in common with other legal orders, recognises the rights of the suspect in the criminal process. Initially, this was not of concern to the market-focused European Economic Community. However, a process of cooperation began in 1975 with the creation of the TREVI group of Member States' justice and home affairs ministers, and continued in 1990 with the signing of the Schengen Implementing Convention and the Dublin Convention.⁶ The Maastricht Treaty instituted a Justice and Home Affairs 'pillar' (the Third Pillar) in 1993, now 'depillarised' with the coming into force of the Lisbon Treaty in 2009. Under Article 10 of Protocol 36 on transitional provisions, the full powers of the Court of Justice and the Commission become applicable to the existing *acquis* of the third pillar legislation five years after the entry into force of the Treaty of Lisbon, i.e. on 1 December 2014.

The Treaty provisions on the area of freedom, security and justice do not apply automatically to all Member States. Protocol 21 annexed to the Treaty of Lisbon provides that Ireland and the UK have a right to opt in to measures adopted within three months of the presentation of the instrument to the Council.⁷ Under the Constitution both Houses of the Oireachtas must resolve to opt in. Ireland sought this Protocol on account of its common law legal system, which differs in significant respects from civil law systems, particularly with regard to criminal law.

The European Council has recognised that protecting the rights of the individual in criminal procedure is essential to the mutual trust on which police and judicial cooperation in the EU is based, and will also help to remove obstacles to free movement.⁸ It has been noted that "*the removal of internal borders and the increasing exercise of the rights to freedom of movement and residence have, as an inevitable consequence, led to an increase in the number of people becoming involved in criminal proceedings in a Member State other than that of their residence.*"⁹

As a supranational entity, the EU must grapple with the fact that all European Member States do not protect the same rights or in the same way – differences in when the right to trial by jury applies being one obvious example. Historic efforts to 'transplant' criminal procedure from certain parts of Europe to others have had mixed results. Mirjan Damaska, Professor Emeritus at Yale Law School, refers to an attempt to transplant the English criminal jury onto the Continent after the French Revolution and also to a more recent attempt to make the Italian Code of Criminal procedure more adversarial.¹⁰ From such attempts he draws the lesson that institutional and cultural resistance may prove too strong to transplant legal process or procedural rights from one tradition into another. On the other hand, Professor John Jackson has observed:

"The 'mixed' type of procedure that European scholars developed in the 19th Century in

order to instil accusatorial features into the old inquisitorial processes that dominated Continental European countries from the 13th Century may be viewed as a positive example of the ability of European procedure to adapt to the changed political and social climate of the time even though there continued to be a mismatch between aspiration and reality.”¹¹

The fact of legal pluralism is recognised in the Treaty on the Functioning of the EU (TFEU). According to Article 67(1) TFEU, the Union shall constitute an area of freedom, security and justice, respecting the different legal systems and traditions of the Member States.

It is possible to combine a common core of minimum protections with legal diversity. Thus, what is important on the supranational plane is that a trial is fair, not the precise mode of trial. Commonly shared norms need not entail uniformity in precisely how they are applied. This was recognised by the German Constitutional Court’s **Lisbon Treaty** judgment, which stated, with regard to “*the preconditions for criminal liability as well as the concepts of a fair and appropriate trial*” that “[t]he common characteristics in this regard, but also the differences, between the European nations are shown by the relevant case law of the European Court of Human Rights concerning procedural guarantees in criminal proceedings.”¹² The same insight might also be considered to underlie the Judgment of the European Court of Human Rights in November 2010 in **Taxquet v Belgium**,¹³ in which the Grand Chamber made clear it was not holding that juries comprised of laypeople violated Article 6 of the Convention on account of not giving reasons for their decisions.

The Charter of Fundamental Rights and the ECHR

The Charter of Fundamental Rights and the European Convention on Human Rights are sources of minimum standards for all Member States – subject to the caveat that the Charter (which has the same legal status as the Treaties) applies to Member States “*only when they are implementing Union law*”.¹⁴

Several of the Charter’s provisions deal with procedural rights of persons in the justice system. Article 6 stipulates that “*Everyone has the right to liberty and security of person.*” Chapter VI of the Charter is entitled ‘Justice’ and recognises a number of rights. Article 47 protects the right to “*a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*” and the right to be represented. It further provides that “*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*” Article 48 guarantees the presumption of innocence and respect for the rights of defence of any person who is charged. Article 49 provides safeguards against retrospective penalisation, and further states that “*The severity of penalties must not be disproportionate to the criminal offence,*” while Article 50 deals with double jeopardy.

The Charter draws significantly upon the ECHR, which also provides protection for accused persons and suspects. Thus, the Explanations relating to the Charter of Fundamental Rights state that Article 48 has the same meaning and scope as the rights guaranteed by Article 6(3) of the ECHR. As is well known, the latter provision catalogues a number of "*minimum*" rights of anyone charged with a criminal offence, including translation rights, the right to examine witnesses, adequate time and facilities for the preparation of one's defence, and the right to legal aid "*when the interests of justice so require*".

The same Article in both the Charter and the ECHR (Article 53) provides that nothing in either instrument shall be construed as limiting the level of protection of fundamental rights under States' national laws.

EU Legislation in Respect of Procedural Rights

Although judicial and police cooperation in the EU has seen considerable progress made on measures which facilitate prosecution authorities, there is a view that: "*It is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual.*"¹⁵

The Union has competence to this end, with Article 82(2) TFEU providing that in order to facilitate mutual recognition of judgments and police and judicial cooperation in criminal matters, directives may establish minimum rules concerning, inter alia: "*the rights of individuals in criminal procedure*".

In 2004, the Commission made an 'all in one' proposal on fair trial procedural rights.¹⁶ However, six countries, including Ireland,¹⁷ were opposed to advancing the matter in this way, and a step-by-step approach was deemed more apposite.

In December 2009, the European Council adopted a five-year plan in respect of justice and home affairs for the years 2010 through 2014 called the Stockholm Programme. It calls upon the Commission to present appropriate proposals for the implementation of the 'Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings'. The Roadmap envisages legislative measures, on a step-by-step basis, to secure rights in respect of:

- Translation and Interpretation
- Information on Rights and Information about Charges
- Legal Advice and Legal Aid
- Communication with Relatives, Employers and Consular Authorities

- Special Safeguards for Suspected or Accused Persons who are Vulnerable

Interestingly, the Stockholm Programme states that, in addition to “*the foreseen proposals in the Roadmap*”, the European Council invites the Commission to “*examine further elements of minimum procedural rights for accused and suspect persons, and to assess whether other issues, for instance the presumption of innocence needs to be addressed, to promote better cooperation in this area*”.¹⁸

Since the Stockholm Programme was agreed, Directive 2010/64/EU on interpretation and translation was adopted on 20 October 2010. The Commission in July 2011 tabled a Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.¹⁹ Ireland and the UK, pursuant to Art. 3 of Protocol 21 to the Lisbon Treaty, decided in September of that year not to opt in to the Directive. This does not mean that they cannot opt in at a later stage. The proposal was discussed by the Council of Justice and Home Affairs Ministers at the end of October 2011, where different views surfaced on the appropriate degree of protection of this right. Some Member States took the view that the right of access to a lawyer should give the suspect or accused person a right which results in the actual assistance of a lawyer if that is the person’s wish.²⁰ Other States maintained that the right does not necessarily imply that the person will be assisted, but merely that they would have the opportunity to be assisted (which, incidentally, better accords with the Irish constitutional approach).

An important development was the adoption, on 26 April 2012, of the Directive on the right to information in criminal proceedings,²¹ which Ireland has opted into. Applying the insight often attributed to Caius Titus that *verba volant, scripta manent* (spoken words fly away, written words remain), the Directive provides that anyone arrested will be given a ‘letter of rights’ listing their basic rights in the criminal process in clear and accessible language. Ireland already goes some way towards this end with Form C72(S) which is given to persons in Garda custody. The Annex to the Directive includes an indicative model for a letter of rights, with Member States free to use this model or instead to draw up their own document. Article 4 provides that the letter of rights shall contain information about various rights as they apply under national law, including the right of access to the materials of the case, the maximum period of detention before the person must be brought before a judicial authority, the right of access to a lawyer, the right to remain silent and the right to information about the criminal act which the arrested person is suspected or accused of having committed. The letter of rights must also contain basic information about any possibility, under national law, of challenging the lawfulness of the arrest, of obtaining a review of the person’s detention or of making a request for provisional release. Article 4 also provides that arrested persons shall be given time to read the letter of rights and to retain possession of it throughout the period of their deprivation of liberty. Member States are required to transpose the Directive within two years of its publication in the Official Journal.

Although victims’ rights are not the focus of this Chapter, it may be noted that EU legislation

in the field of criminal procedure has not overlooked the same, which is to be welcomed. In 2001 a Framework Decision on the standing of victims in criminal proceedings²² was adopted, followed by a 2004 Directive in relation to compensation.²³ At its December 2011 meeting, the Justice and Home Affairs Council adopted a general approach on a Directive establishing minimum standards on the rights, support and protection of victims of crime, based on a Commission proposal submitted in May of that year.²⁴ Ireland and the UK decided to participate. The proposals aim to amend and expand the existing provisions on the standing of victims in criminal proceedings and include provisions on information and support, participation in criminal proceedings, and recognition of the vulnerability and need for protection of victims. The proposals are consistent with the Irish tradition in that they recognise that the victim is not a party to the proceedings.

Mutual Trust and Commission Statements on the Need for Legislation

Francis Fukuyama has commented:

"Trust is the expectation that arises within a community of regular, honest, and cooperative behaviour, based on commonly shared norms, on the part of other members of the community."²⁵

Fukuyama is clear that trust does not just spring into being; its creation is an organic process. Building mutual trust is also an organic process within the EU – notwithstanding that all Member States are signatories of the ECHR and are bound by the Charter when implementing Union law. In the field of justice and home affairs, there is an obvious dynamic between mutual trust and EU legislation, in that a level of mutual trust is a necessary prerequisite for some legislative measures facilitating cooperation, whereas measures in the field of procedural rights can serve to augment levels of trust.

Although there is always scope to further strengthen mutual trust, some statements of the Commission unfortunately appear to sit uneasily with the degree of mutual trust which is already presumed to exist among Member States. In addressing the need for the Directive on interpretation and translation in criminal proceedings, the Commission stated:

"To date, EU countries have complied to differing degrees with their fair trial obligations, deriving principally from national law and the European Convention of Human Rights, which has led to discrepancies in the levels of safeguards. The EU by way of legislation could clarify the legal obligation to guarantee the right to a fair trial in the context of EU criminal law. The existing standards under international law are unevenly complied with, even in the EU. If someone is subject to criminal proceedings in another Member State, there is a risk that the person will not be treated in the same manner as nationals would be. As a result, there is a growing perception, as seen by press coverage, that foreign

suspects will not receive justice."²⁶

What is somewhat worrying about the foregoing is the Commission's statement that EU countries are complying "to different degrees with their fair trial obligations" and its suggestion that non-nationals might not be receiving the same rights as nationals. If this is so, it significantly undermines the whole basis of mutual trust. Nothing could be more calculated to undermine the system of mutual trust than the discriminatory treatment of non-nationals.

Through statements like the foregoing, the Commission suggests that because the existing foundation of trust is inadequate, a firmer foundation must be laid in the form of EU legislation. However, that begs the question of what the Commission believes the position to be regarding existing instruments in the field of police and judicial cooperation in criminal matters. For example, Recital 10 to Council Framework Decision 2002/584/JHA on the European Arrest Warrant states: "*The mechanism of the European arrest warrant is based on a high level of confidence between Member States.*"²⁷ Such confidence is extremely important when one considers that surrender pursuant to a European Arrest Warrant (EAW) amounts to a significant intrusion upon a person's life; indeed it was characterised as a "*forcible delivery*" by Hardiman J. in his recent judgment in *Minister for Justice Equality and Law Reform v Bailey*.²⁸ However, the risk, asserted to exist by the Commission, that a citizen of another EU State might "*not be treated in the same manner as nationals would be*" could be read by some as suggesting that the "*high level of confidence between Member States*" in the EAW context is misplaced. In *Advocaten voor de Wereld*,²⁹ the Court of Justice held that while the EAW Framework Decision dispensed with verification of double criminality for certain categories of offences, the definition of those offences and of the penalties applicable continued to be determined by the law of the issuing Member State. The Court reiterated that, in that context, the Member States must, as stated in Article 1(3) of the Framework Decision, respect fundamental rights and fundamental legal principles, including the principle of the legality of criminal offences and penalties.

Questioning the justifications which the Commission has proffered for some legislation in the field of procedural rights is not at all to suggest that such legislation, or the legal basis for it in Article 82(2) TFEU, serves no purpose. On the contrary, directives can stipulate with precision how suspected and accused persons are to be treated, and may thus be more accessible to such persons than the corpus of Strasbourg jurisprudence. There is an opportunity for the Commission and Member States to be user-friendly in their design of legal instruments in a way that judges cannot be when interpreting the Convention or Charter, unless they risk assuming the role of the legislator.

Limits upon Mutual Trust and Recent Judicial Decisions

In December 2011, the Court of Justice of the EU handed down judgment on preliminary

references from Ireland and the UK in *N.S. v Secretary of State for the Home Department* and *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*.³⁰ The case concerned the Dublin II regulation (Regulation No 343/2003) which provides for the transfer of asylum seekers to the country responsible for processing the asylum application, which, in this case was Greece as the point of entry in the EU of the applicants. Greece was on a list of 'safe countries', which list is provided for by the Dublin Regulation. An issue which arose in the case was whether the deporting country was entitled to conclusively presume that other Member States would comply with EU law and observe asylum seekers' fundamental rights, especially where good reason existed for considering that these rights were not in fact being observed. In 2010 Greece was the point of entry in the EU of almost 90 per cent of illegal immigrants, resulting in a disproportionate burden being borne by that state. This meant the Greek authorities were unable to cope with the situation, leading to the denial of asylum seekers' fundamental rights.

The key part of the Court's judgment began by stating that "*it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR*"³¹ and by noting that it was not the case that "*any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003*".³² The Court emphasised the importance of the principles at stake:

*"At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights."*³³

However, the judgment then shifted approach, holding that, "*if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment*", the transfer of asylum seekers to the country concerned would violate Article 4 of the Charter.³⁴ Importantly, the Court held that a "*conclusive presumption of compliance with fundamental rights, could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States*".³⁵

Breach of the right to protection against inhuman or degrading treatment is so serious that it can be argued to be a special case, and one detects an eagerness on the Court's part to underscore that the situation in *NS* was an exceptional one. Nonetheless, it cannot be excluded that litigants will seek to employ this decision to bolster arguments that mutual trust ought not impede national courts from entering into an assessment of the compliance of other Member States with the Charter. It is questionable, however, whether any such jurisdiction could be argued to extend to other Member States' compliance with EU law generally. In *Short v Ireland*³⁶ the Supreme Court sensibly suggested that it was the function of the UK courts, rather than the Irish courts, to pronounce on the conformity of

UK law and administrative decisions with EU environmental legislation, and noted that this was justified both by points of principle and by practical considerations.³⁷

Only time will tell what consequences, if any, the *NS* judgment will have for police and judicial cooperation in criminal law matters, and the mutual trust on which it is based. Like the common policy on asylum, police and judicial cooperation is housed under Title V of Part 3 of the TFEU (Area of Freedom, Security and Justice), and is also an area to which fundamental rights are central.

Regarding the European Arrest Warrant, the Irish courts already take a not dissimilar view of the limits of mutual trust to that expounded in *NS*. ***Minister for Justice, Equality and Law Reform v Rettinger*** was concerned with extradition to Poland in circumstances where reports and a judgment of the Strasbourg Court had cast doubt on the compatibility of that country's prison system with human rights standards. Section 37 of the European Arrest Warrant Act, 2003 set out grounds on which surrender of a person could be refused, including if there were reasonable grounds for believing that they would be subjected to inhuman or degrading treatment. Fennelly J stated:

*"The normal presumption is, as I said in my judgment in Minister for Justice v Stapleton that the courts, 'when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6(1) of the Treaty on European Union 'respect human rights and fundamental rights and fundamental freedoms.'"*³⁸

Although the courts "*must proceed*" on this assumption, the use of the words "*normal presumption*" suggest that, like *NS*, it is far from a universal one and cannot be a conclusive one. Fennelly J continued: "...*the appropriate standard is 'substantial grounds for believing' that the person 'would be exposed to a real risk' of ill-treatment*"³⁹ which again resonates with *NS*. The Supreme Court remitted the decision on whether to surrender to the High Court for reconsideration in the light of the principles it had expounded.

Such case law does not mean that the courts ought not to accord significant weight to the statements of other Member States on how they are dealing with, or will deal with, a particular problem which gives rise to a breach of fundamental rights. After all, as the Strasbourg Court re-emphasised in January 2012 in ***Othman (Abu Qatada) v UK***,⁴⁰ diplomatic assurances against torture of a particular individual furnished by a non-Convention country can render lawful an otherwise unlawful extradition. If anything, even more trust must be reposed in sincere statements of other EU Member States, which are party to the Convention and bound, when implementing Union law, by the Charter.

Conclusion

A limit upon the degree of mutual trust to be afforded to other EU States, and in particular the stipulation that presumptions are not uniform or absolute, can be considered an important aspect of judicial protection in the EU. It amounts to a statement of the centrality of the human person in the European project, and a recognition that the same transcends comity and concerns about causing diplomatic offence. It also amounts to a prudential approach, echoing a phrase regularly employed by US President Reagan: “*Trust but Verify*”.

More generally, the emergence of EU action in the field of procedural rights of accused and suspected persons marks a new and interesting stage in the continuing evolution of such rights, which evolution has been ongoing over centuries. Although Member States have different legal traditions, which are respected by the TFEU, existing and future EU legislative initiatives establishing minimum standards, such as the letter of rights, serve an important function and will contribute significantly to the protection of accused and suspected persons.

Endnotes

¹ Judgment of the German Constitutional Court on conformity of the Lisbon Treaty with the German Constitution: 2 BvE 2/08, 30 June 2009 at para 355.

² *Braddish v D.P.P* [2001] 3 IR 127 at 133.

³ See, for example, Articles 67 and 82 TFEU which refer to the different legal systems and traditions of Member States.

⁴ Joined Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (21 Dec 2011).

⁵ See Article 2 TEU.

⁶ See “Area of Freedom, Security and Justice: Introduction” http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/01_en.htm (last accessed 28 April 2012).

⁷ Although Article 75 TFEU on sanctions against terrorism and related matters does apply directly to Ireland without any need to opt in.

⁸ See “The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens” (2010/C 115/01).

⁹ Recital 3, Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01).

¹⁰ See Damaska, “The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiences” 45(4) *American Journal of Comparative Law* 839 (1997).

¹¹ Jackson, "Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries" in Jackson et al eds., *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska* (2008) 221 at 224.

¹² 2 BvE 2/08, n1 above, at para 253.

¹³ *Taxquet v Belgium*, judgment of the Grand Chamber of 16 November 2010 (Application no. 926/05).

¹⁴ Article 51(1) of the Charter.

¹⁵ Recital 10 to the Roadmap on Strengthening Procedural Rights, n 9 above.

¹⁶ Proposal for a Framework Decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union COM (2004) 328 of 28 April 2004.

¹⁷ The others were Malta, the Czech Republic, Cyprus, Slovakia and the UK.

¹⁸ Stockholm Programme, n 8 above, at page 18.

¹⁹ Proposal COM(2011) 326/3 for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest.

²⁰ See "Proposal for a Directive of the European parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest – State of Play" 2011/0154(COD) at p.6.

²¹ Directive 2012/.../EU of the European Parliament and Council of 26 April 2012 on the right to information in criminal proceedings (adopted, but not yet published in the Official Journal, at the time of writing).

²² Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

²³ Council Directive 2004/80/EC of 29 April 2004 relation to compensation to crime victims.

²⁴ See Press Release, 3135th Council Meeting, Justice and Home Affairs, 13-14 December 2011 <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1706.pdf> at 19 (last accessed 28 April 2012).

²⁵ *Trust: The Social Virtues and the Creation of Prosperity* (Hamish Hamilton, 1995) at 26.

²⁶ Commission, "Right to interpretation and to translation in criminal proceedings – frequently asked questions" Memo 10/70 (9 March 2010) at p.1.

²⁷ However, a "high level of confidence" does not necessarily suggest unlimited confidence. This is arguably apparent from Recitals 12 of the Framework Decision (which provides that refusal is not prohibited where there are objective reasons to believe that the EAW has been issued for the purposes of punishing a person on account of their race, sex, religion etc.) and Recital 13 (which states: "No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment").

²⁸ *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16 per Hardiman J.

²⁹ C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

³⁰ Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, n4 above.

³¹ Para 80.

³² Para 82.

³³ Para 83

³⁴ Para 86. Article 4 provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

³⁵ Para 100.

³⁶ *Short v Ireland (No. 2)* [2006] 3 IR 297.

³⁷ *Short (No. 2)* at paras 59-60.

³⁸ *Minister for Justice, Equality and Law Reform v Rettinger* [2010] 3 IR 783 at para 71.

³⁹ Para 86.

⁴⁰ *Othman (Abu Qatada) v. the United Kingdom* (17 January 2012) (application no. 8139/09).

CHAPTER SEVEN

DATA PROTECTION AND CITIZENS' RIGHTS IN THE FIGHT AGAINST SERIOUS CROSS- BORDER CRIME

BILLY HAWKES, Data Protection
Commissioner

CHAPTER SEVEN: DATA PROTECTION AND CITIZENS' RIGHTS IN THE FIGHT AGAINST SERIOUS CROSS-BORDER CRIME

Introduction

The Lisbon Treaty, which entered into force on 1 December 2009, has increased the relative importance of data protection in the European legal order. This has particular significance for the area of police and judicial cooperation. New legislative proposals based on the Treaty are likely to impact significantly on the use and exchange of personal data for law enforcement purposes.

There has long been acceptance that, as crime becomes more international, there is a need for international cooperation to combat it. Even before the EU was established, INTERPOL had been acting as an international clearing-house for cooperation in tracking down persons wanted for serious crime. But that organisation has also recognised that such cooperation must be accompanied by safeguards by way of independent oversight to protect the rights of individuals.¹

As EU activity in the police and criminal justice area has gradually expanded, ad hoc data protection safeguards have been built into the co-operation arrangements. In the case of cooperation between EU police forces through EUROPOL², this takes the form of specific data protection rules, including provision for an independent oversight body. Similar arrangements apply in relation to judicial cooperation through EUROJUST and through EU-mandated bilateral exchanges³. Decision 2008/977/JHA⁴ represented a first attempt to lay down a common data protection standard for exchanges between Member States for law enforcement purposes.

The Lisbon Effect

The Lisbon Treaty provides a solid basis for an expansion of EU activity in the area of law enforcement cooperation. It also provides a strong basis for a uniformly high level of protection of fundamental rights, including the right to protection of personal data.

The Treaty gives an enhanced status to the EU's Charter of Fundamental Rights in the European legal order.⁵ Article 8 of the Charter recognises data protection as a right separate to the general right to privacy and sets out the core principles of data protection.⁶ The Treaty also provides for EU accession to the European Convention on Human Rights⁷, with the rich jurisprudence of the Court of Human Rights on the balance to be struck between individual liberties – including the right to privacy – and State interest in public safety and security.⁸

More significantly, from an institutional perspective, the new Article 16 of the Treaty on the Functioning of the European Union expressly states that: *“Everyone has the right to the protection of personal data concerning them”* and that *“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data”*. Finally it provides that *“Compliance with these rules shall be subject to the control of independent authorities”*.⁹

Article 16 of the Treaty is horizontal in effect – it is binding on all EU institutions and bodies and on Member States when they are applying EU law. Since the Treaty abolishes the former ‘pillar’ structure it brings the area of police and judicial cooperation in criminal law matters within the scope of normal EU legislation, though Declarations¹⁰ attached to the Treaty recognise the particular characteristics of these sectors. For Ireland¹¹, Protocol 21 provides that the provisions of Article 16 will only apply to those areas of police and judicial cooperation to which Ireland has ‘opted in’.

Post-Lisbon, we therefore have a separate Treaty basis for data protection, applicable also to the areas of police and justice cooperation, as well as a clear recognition of data protection as a fundamental human right. This should mean that the EU legislator will pay greater attention to data protection when formulating policy. There is recognition of this – at least at the level of aspiration - in the ‘Stockholm Programme’ approved by the European Council and setting out legislative priorities in the area of justice and home affairs for the period 2010 to 2014.¹²

New EU Data Protection Legislation

Following a lengthy period of consultation, the European Commission has brought forward its proposals for revised EU data protection legislation. It has proposed two separate legal instruments: a directly applicable Regulation on general data protection; and a separate Directive on data protection in the areas of police and criminal justice.¹³

The substantive provisions of the Regulation and Directive are broadly similar, though the Directive is less prescriptive.¹⁴ The legal basis for both is the new Article 16 (data protection) of the Treaty on the Functioning of the European Union. The Regulation would replace the present Data Protection Directive 95/46/EC.¹⁵ The Directive would replace the present Decision 2008/977/JHA¹⁶ on data protection in the area of police and criminal justice.

In opting for a separate instrument in the justice area, the Commission is reflecting the Declarations made at the time of the signing of the Lisbon Treaty.¹⁷ However, it is significant that the substantive provisions of the draft Directive reflect key data protection principles,

while giving appropriate recognition to the reality that certain data protection rights should not be exercisable in a manner that would prejudice police investigations.¹⁸ Unlike the Decision that it will replace, the draft Directive not only applies to data transferred between Member States but also to processing of such data within Member States. Its substantive provisions¹⁹ in many respects go beyond the requirements of the Decision and those that at present apply to An Garda Síochána under the Data Protection Acts.

If approved in its present form, the draft Directive will provide a uniform level of protection of the personal data of individuals when such data are being processed by EU law enforcement authorities. It will also further facilitate the exchange of personal data between such authorities.

Data Protection and Police Activity

Routine police activity targeting suspected criminals does not normally give rise to major data protection challenges. Data protection laws acknowledge the need to restrict data protection rights in a proportionate manner where such restriction is necessary to permit the police to do their work in protecting society from crime – for example, in limiting the right of a suspect to have access to personal data while a criminal investigation is in progress. General human rights principles, as enumerated in the European Convention and the EU Charter, together with the laws of evidence, are meant to ensure that the police do not abuse the leeway given to them in this area. This does not prevent areas of conflict – for example, in relation to how the principle that personal data should not be retained any longer than necessary should be reconciled with the maintenance of a criminal records system and the extent to which such records should be disclosable.²⁰

At EU level, the area of police activity which has given rise to most controversy is the granting of access to non-police data sources as a means of preventing and detecting crime, leading to accusations of a 'surveillance society' undermining basic civil liberties. This area of activity has also given rise to data protection conflicts with other countries, most notably the United States.

Challenges of the 'Surveillance Society'²¹

The terrorist outrages of New York ('9/11': September 2001), Madrid (March 2004) and London (July 2005) put huge pressure on governments to improve their systems of intelligence in order to anticipate and prevent such incidents. This has resulted in systems of so-called *dataveillance*, where personal data of masses of individuals are collected and analysed by police and security services with the aim of identifying individuals who might be a threat. The terrorist threat also sharpened the focus of existing *dataveillance* systems, such as those for combating money-laundering.

The examples of *dataveillance* are many and all have generated some controversy at EU level. Airline passengers, apart from being subjected to increasingly intrusive physical security measures - including use of body scanners - are now subject to various types of advance screening. This can include the passenger having to give extra information at the time of booking, with most such reservations information (PNR data) provided in advance to immigration authorities for advance screening purposes and with passengers potentially denied boarding based on suspicion of past or intended criminal activity. It can also involve collection of biometric data (fingerprints, photographs) at border posts, in addition to such data already contained in passports. While the EU initially offered some resistance to PNR data demands from third countries and succeeded in negotiating some data protection safeguards²², it has subsequently moved to introduce such a system for inbound flights to the EU (and potentially for intra-EU flights).²³ The necessity and proportionality of the use of such PNR data systems for security purposes has been questioned by EU data protection authorities.²⁴

In the telecommunications area, the EU has controversially 'led the field' in introducing legislative measures through the Data Retention Directive,²⁵ which was adopted in the wake of the bombing of the London Underground in July 2005. This – described by Peter Hustinx, the European Data Protection Supervisor, as “*the most privacy invasive instrument ever adopted by the EU in terms of scale and the number of people it affects*”²⁶ – puts a legal obligation on telecommunications companies to retain information on electronic communications between individuals for periods ranging from 6 to 24 months so that it is available to law enforcement authorities if required for the prevention, detection or investigation of 'serious crime'. As the Commission evaluation²⁷ of the Directive has clearly shown, the Directive has failed to achieve the desired harmonisation of practice in EU Member States. There are widely different definitions of what constitutes 'serious crime', with some Member States having gone beyond any common understanding of 'serious'; the retention periods are different; and the procedures required to gain access to retained data are also different. Ireland, which had controversially introduced data retention legislation in advance of the Directive, is, perhaps not surprisingly, among the Member States with the most liberal definition of 'serious crime', longest retention periods, least restrictive access regime and most liberal use of the access facility.²⁸

The degree of concern about the proportionality of the measure is evident from the successful challenges to national transpositions in a number of Member States, the failure to transpose in others and the challenge to the Directive itself sponsored by Digital Rights Ireland which the High Court has decided to refer to the European Court of Justice.²⁹ The Commission, while defending the principle of data retention and pointing to evidence of its usefulness in combating serious crime, has signalled an intention to present a revised Directive in 2012 which should address some of the criticisms directed at the present Directive.

Another area of controversial *dataveillance* is the system of tracking of financial transactions through the SWIFT inter-bank messaging system with a view to identifying evidence of

financing of terrorism and other serious crime. This was originally done through a secret arrangement between the US Treasury and SWIFT as part of the US Terrorist Financing Tracking Program (TFTP). Following its discovery, restrictions - including independent oversight - were imposed at the insistence of the EU.³⁰ As with the PNR arrangements, there are now plans for an EU version of this tracking system.³¹ As with PNR, the necessity and proportionality of a TFTP has been questioned by European data protection authorities.³²

For some, such intrusions into the lives of the innocent are the price that must be paid to protect society from new threats, with the oft-repeated mantra 'nothing to hide, nothing to fear'. Experience shows that this mantra need not always reflect the practical experience of individuals. What are the major risks for the individual?

A first category of risks is that data processing related to broad categories of individuals (e.g. airline passengers, electronic communication services users, users of financial services) and adoption of 'preventive measures' involves the risk of discrimination and stigmatisation of individuals or groups (especially through ethnic profiling).

Second, reliance on automated decision-making, often based on data mining techniques, involves a high risk of 'false positives', with negative consequences for the innocent individuals thus targeted.

Third, increasing partnership between law enforcement authorities and private organisations (such as internet service providers, financial institutions and transport companies) results in an increasing erosion of the principle that personal data should only be used for the purpose for which it was originally collected. This is also evident in the blurring of the law-enforcement objective being pursued, with, for example, data collection originally designed to weed out persons suspected of crime or criminal intent now being used for routine immigration control purposes. Often, what were presented as measures to combat terrorist threats have been used in practice in relation to ordinary crime, often not the most serious. The number of agencies permitted access to such data has also often been expanded – in the case of Ireland, for example, the right to access telecommunications data without a court order under our data retention legislation has been extended to the Revenue Commissioners. Such 'function creep' has tended to be a significant feature of measures of this nature, both in terms of the range of crimes covered and the agencies permitted to use personal data.

Opportunities for Ireland

Ireland will hold the EU Presidency in the first half of 2013. While significant progress could be expected on the negotiation of the new EU data protection laws during the preceding Danish and Cypriot presidencies, it is unlikely that such negotiations will have concluded in the Council and Parliament by 2013. This may offer an opportunity for Ireland to help

achieve consensus on the legislative package – particularly on the draft Directive on data protection in the police and criminal justice area. Since the Minister for Justice and Equality has political responsibility for police and justice issues and data protection, this should make it easier for Ireland to act as 'honest broker' in this sensitive area. As many of the most contentious data protection issues in recent years have arisen as a result of actions by the United States, Ireland should also be well placed to achieve a binding transatlantic consensus in this difficult area.³³

A Way Forward: Need for a Balanced Approach

Society rightly demands of the State measures to protect individuals against the criminal intentions of a minority. Pressures on governments become particularly intense when faced with politically motivated crimes against civilian populations. In an era of instant communication, the pressure on governments to 'do something' is intense. This can lead to responses which are both disproportionate and, once introduced, difficult to roll back. This is where legally-binding constraints, backed up by Court action, are essential.

What is needed is evidence-based policy-making and proportionality in response. The apparent 'dialogue of the deaf' between those charged with law-enforcement on the one hand and the protection of individual rights on the other would be greatly lessened, were both sides of this divide to accept that Member States have a legal obligation to balance these objectives.

An outcome based on careful presentation and consideration of the evidence on which action is based would be of great assistance, with a Privacy Impact Assessment being a routine part of policy-making and with built-in safeguards in accordance with a 'Privacy by Design' approach.

Where privacy-invasive action is considered necessary, it should meet the tests of necessity and proportionality. The interference with personal liberties should be the demonstrable minimum necessary to achieve the public safety objective.

There should be a clear statement of the precise objectives of the measures, with a view to avoiding 'function creep', and also a clear description of what personal data may be accessed. Evaluation of the necessity of the measures should be built into the proposals – for example, through 'sunset clauses' that result in the restrictive measures expiring unless they are renewed. There should be effective and transparent measures for oversight of the implementation of the privacy-invasive mechanisms, including effective rights of appeal for those who believe they are being improperly targeted through such measures.

Such measures, if implemented properly, should lead to a greater acceptance of the legitimacy of measures taken to protect society from the threats of terrorism and other

forms of serious crime.

Sometimes security and data protection are presented as mutually exclusive. What is needed instead is security *and* data protection measures: a balance that meets the test of proportionality, with minimum interference with the rights of the individual to achieve the goal of security for all.

Endnotes

¹ Independent oversight is provided by the “Commission for the Control of INTERPOL’s files”, which oversees the application of rules governing the processing of data (see www.interpol.org)

² Chapter V of Council Decision 2009/371/JHA establishing EUROPOL (*Official Journal L 121,15.5.2009, P. 37 – 66*) provides that EUROPOL is bound to comply with the general principles of data protection. It must appoint a Data Protection Officer to ensure compliance with these rules. Independent oversight is carried out by the Joint Supervisory Body (JSB), a body composed of a representative of each Member State’s data protection authority. The JSB’s functions include providing general advice on data protection issues, carrying out inspections and dealing with appeals from individuals who are dissatisfied with EUROPOL’s response to requests for access to personal data (see <http://europoljsb.consilium.europa.eu/about.aspx>). Similar arrangements apply in relation to data protection in EUROJUST (judicial cooperation) (<http://www.eurojust.europa.eu/jsb.htm>), in the SCHENGEN Information System (<http://www.schengen-jsa.dataprotection.org/>) and in the CUSTOMS Information System (http://europa.eu/legislation_summaries/customs/l11037_en.htm). In contrast, data protection oversight of EURODAC (database of fingerprints of asylum-seekers) is primarily the responsibility of the European Data Protection Supervisor (EDPS) (<http://www.edps.europa.eu/EDPSWEB/edps/site/mySite/Eurodac>). The EDPS is also responsible for data protection oversight in other EU bodies in the broad justice and home affairs area, such as FRONTEX. The draft Police and Criminal Justice Data Protection Directive (Article 61) provides for a review of the separate supervision arrangements in bodies such as EUROPOL: “ ... in order to assess the need to align them with this Directive and make, where appropriate, the necessary proposals to amend these acts to ensure a consistent approach on the protection of personal data within the scope of this Directive.”

³ For example, the automated exchange of DNA profiles, fingerprints and car registration data under the “Prüm Decision” 2008/615/JHA (*Official Journal L 210, 6.8.2008, P. 1 – 11*)

⁴ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (*Official Journal L 350, 30.12.2008 P. 60 – 71*). The Decision only applies to the protection of data that is transferred between Member States.

⁵ New Article 6.1 of the Treaty on European Union: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”.

⁶ Principals of protection of personal data

- *Everyone has the right to the protection of personal data concerning him or her.*
- *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
- *Compliance with these rules shall be subject to control by an independent authority*

7 New Article 6.2 of the Treaty on European Union

⁸ Relevant ECtHR cases involving Article 8 of the Convention (right to respect for private life) and criminal justice include: *Sciaccia v. Italy* (50774/99) (release of an accused's photograph to the Press); *Amann v. Switzerland* (27798/95) (phone interception); *Klass and Others v. Germany* (5029/71) (surveillance); *S. and Marper v. United Kingdom* (30562 & 20564/04) (retention of DNA samples and fingerprints of non-convicted individuals); *Haralambie v. Romania* (21737/03) (access to police files); *Khelili v. Switzerland* (16188/07) (accuracy of police data). Full listing of data protection cases at: http://www.echr.coe.int/NR/rdonlyres/4FCF8133-AD91-4F7B-86Fo-A448429BC2CC/0/3276313_Press_Unit_Factsheet__Data_protection.pdf

⁹ Oversight of data protection in most EU institutions is the responsibility of the European Data Protection Supervisor (EDPS) (www.edps.europa.eu). Each Member State has one or more independent data protection authority (DPA) – in Ireland, the Data Protection Commissioner. The need for such authorities to be fully independent was underlined by the European Court of Justice in *Commission v. Germany* (C 518/07): “That independence precludes not only any influence exercised by the supervised bodies, but also any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities of their task consisting of establishing a fair balance between the protection of the right to private life and the free movement of personal data.”

¹⁰ Declaration 20: “The Conference declares that, whenever rules on protection of personal data to be adopted on the basis of Article 16 could have direct implications for national security, due account will have to be taken of the specific characteristics of the matter. It recalls that the legislation presently applicable (see in particular Directive 95/46/EC) includes specific derogations in this regard.” Declaration 21: “The Conference acknowledges that specific rules on the protection of personal data and the free movement of such data in the fields of judicial cooperation in criminal matters and police cooperation based on Article 16 of the Treaty on the Functioning of the European Union may prove necessary because of the specific nature of these fields.”

¹¹ Ireland and the United Kingdom.

¹² “The area of freedom, security and justice must, above all, be a single area in which fundamental rights and freedoms are protected. The enlargement of the Schengen area must continue. Respect for the human person and human dignity and for the other rights set out in the Charter of Fundamental Rights of the European Union and the European Convention for the protection of Human Rights and fundamental freedoms are core values. For example, the exercise of these rights and freedoms, in particular citizens' privacy, must be preserved beyond national borders, especially by protecting personal data. Allowance must be made for the special needs of vulnerable people. Citizens of the Union and other persons must be able to exercise their specific rights to the fullest extent within, and even, where relevant, outside the Union.” (extract from The Stockholm Programme — An open and secure Europe serving and protecting citizens (*Official Journal C 115, 04/05/2010, P. 0001 – 0038*))

¹³ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (*Com(2012) 10 final, 25.1.2012*) The legislative package does not apply to measures under the Common Foreign and Security Policy (Title V of the Treaty on European Union). In accordance with the (post-Lisbon) Article 39 of the Treaty on European Union, data protection under the CFSP is to be the subject of a Decision by the Council.

¹⁴ The Directive has been criticised by European Data Protection Commissioners as “disappointing in its lack of ambition compared to the Regulation” in their Opinion 01/2012 of 23 March 2012 (http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2012/wp191_en.pdf)

¹⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*Official Journal L 281, 23.11.1995, P. 31-50*). The Directive is transposed into Irish law through the Data Protection Acts,

1988 and 2003

¹⁶ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (*Official Journal L 350, 30.12.2008 P. 60 – 71*). The Decision only applies to the protection of data that is transferred between Member States.

¹⁷ See note xi

¹⁸ This is recognised in the Irish Data Protection Acts – which already include An Garda Síochána and the Courts in their scope – by providing that the restrictions in the Acts do not apply where they would be likely to prejudice the prevention, detection or investigation of offences. Data Protection in An Garda Síochána is further reinforced by a Code of Practice approved under the Data Protection Acts (<http://www.garda.ie/Controller.aspx?Page=136&Lang=1>)

¹⁹ Police and Criminal Justice Draft Data Protection Directive: Key Provisions

- Applies to processing of personal data by police and other authorities involved in the “prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties”
- Personal data processed by police etc must be collected and used in accordance with general data protection principles, including data minimisation and “Privacy by Design”
- Restrictions on processing of sensitive data categories (race or ethnic origin, political opinions, religion or beliefs, trade-union membership, genetic data and data concerning health or sex life)
- Restrictions on profiling using electronic means
- Right of individual to access personal data held by police etc and have it corrected if inaccurate; these rights may be restricted by law where this “constitutes a necessary and proportionate measure in a democratic society” for the prevention etc of crime and subject to the right of the data protection authority to verify that personal data is being processed in accordance with the law and to so inform the individual
- Requirement on police authorities etc to appoint a Data Protection Officer and to keep relevant records on categories of data processed including “the purpose, date and time of such operations and as far as possible the identification of the person who consulted or disclosed personal data”
- All processing to be overseen by an independent data protection authority who can carry out investigations as necessary; data breaches must be reported to this authority and normally to affected individuals
- Right of the individual to a judicial remedy and to compensation in the case of a person who has suffered damage
- Restrictions on transfers of personal data to Third Countries (non-EEA)

²⁰ Issues that arise include the “right to be forgotten” – to have a criminal record erased after a certain time – as applies to some extent in most European countries and is promised in Ireland through the planned Spent Convictions Bill. How useful is such legislation in the Internet era where news reports of such a conviction will be available indefinitely – or should the right also extend to deletion of such reports?

²¹ This section draws on a speech *Counter-Terrorism Policy and Data Protection* by the Assistant European Data Protection Supervisor, Giovanni Buttarelli (http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2011/11-02-09_Counter_terrorism_EN.pdf)

²² The EU has signed bilateral PNR agreements with the United States, Canada and Australia containing data protection safeguards. The agreements are negotiated in accordance with a strategy set out by the Commission (*COM(2010)492, 21.9.2010*)

²³ *COM(2011) 32, 2.2.2011*

²⁴ Opinion 10/2011 of the Article 29 Data Protection Working Party, 5 April 2011 (http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp181_en.pdf)

²⁵ Directive 2006/24/EC (*Official Journal L 10, 13.4.2006, P. 54 – 63*)

²⁶ Speech "The moment of truth for the Data Retention Directive", Brussels, 3 December 2010 (http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2010/10-12-03_Data_retention_speech_PH_EN.pdf)

²⁷ COM(2011) 225, 18.4.2011

²⁸ In the *Communications (Retention of Data) Act 2001 (Number 3 of 2001)*, "Serious Crime" is defined as any offence punishable by imprisonment for 5 years or more plus certain specified offences which do not attract such a penalty (Section 1); Telecommunications companies must retain specified data for the maximum period (2 years) permitted by the Directive in relation to telephone data and for 1 year in relation to Internet data (Section 3); Access to such retained data must be granted on the basis of a request from a Garda Chief Superintendent, a Defence Forces Colonel or a Principal Officer of the Revenue Commissioners (Section 6). 11,283 requests for access to data were made by the designated Irish authorities in 2009 (*COM(2011) 225, 18.4.2011 - Annex*)

²⁹ *Digital Rights Ireland Ltd v. Minister for Communication and Others* ([2010] IEHC 221)

³⁰ The most recent version of the EU-US Agreement is in OJ L 195, 27.7.2010, P. 5- 15

³¹ COM(2011) 429, 13.7.2011

³² Letter of 29.9.2011 to Commissioner Malmström from Chair of Article 29 Data Protection Working Party (http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2011/20110929_letter_to_commission_tfts_en.pdf)

³³ The 2009 EU-US Joint Statement on "Enhancing transatlantic cooperation in the area of Justice, Freedom and Security" (<http://www.regeringen.se/content/1/c6/13/43/59/8542bc06.pdf>) notes that: "The European Union (EU) and the United States of America (U.S.) share common values of democracy, rule of law and respect for human rights and fundamental freedoms. We recognize that transnational crime and terrorism pose a threat to these shared values. We thus seek to deepen transatlantic cooperation in the pursuit of greater justice, freedom and security....We have important commonalities and a deeply rooted commitment to the protection of personal data and privacy albeit there are differences in our approaches. The negotiation of a binding international EU-U.S. agreement should serve as a solid basis for our law enforcement authorities for even further enhanced cooperation, while ensuring the availability of full protection for our citizens."

CHAPTER EIGHT

ADVANCING COMMON PRIORITIES: COMBATING CRIME AND ENSURING GLOBAL SECURITY THROUGH INTERNATIONAL PARTNERSHIPS

ERIC H. HOLDER, Attorney
General of the United States

CHAPTER EIGHT: ADVANCING COMMON PRIORITIES: COMBATING CRIME AND ENSURING GLOBAL SECURITY THROUGH INTERNATIONAL PARTNERSHIPS

Below are the remarks delivered by Attorney General Eric H. Holder, Jr., to the Institute of International and European Affairs in Dublin on 21 September 2011.

Thank you, Chairperson Nora Owen. I appreciate your kind words and I want to thank you all for welcoming me this afternoon. It is a pleasure to be in Dublin and to bring greetings from President Obama, who very much enjoyed his visit to this beautiful city just a few months ago.

I'm especially grateful for this opportunity to applaud the work that each of you and the Institute's growing network of international supporters are leading to help strengthen the critical ties that bind the United States and Europe. In this time of unprecedented challenges and evolving global threats, the contributions of organizations like this one and the importance of the discussion forum you provide can hardly be overstated.

So, on behalf of my colleagues at the Department of Justice and across America's government, I am grateful for your commitment to the priorities and values that our nations share. And I am proud to stand with you in confronting the challenges we continue to face.

During the two and a half years I've had the privilege of serving as my nation's Attorney General, I have frequently had occasion to work hand-in-hand with, and to consult with and learn from, many of my counterparts on this side of the Atlantic. Just yesterday, I had the honor of appearing before members of the European Parliament to discuss the steps that we must take to improve law enforcement cooperation and information sharing between the United States and EU Member States. And on Monday, I addressed a United Nations Symposium, convened by the Secretary General, to reinforce and to build upon our international efforts to combat terrorism.

Of course, I've also been fortunate to welcome many of your leaders and elected officials to Washington. And, together, we have extended a tradition of cooperation that stretches back nearly two and a half centuries to the time when America was little more than a grand, improbable idea.

In 1772, before the American Colonies had declared their independence, members of the Irish Parliament were among those who graciously welcomed the envoy of the American Revolution, Benjamin Franklin, to this continent. Among the Irish people, the burgeoning American nation found a strong ally. After meeting with leaders here in Dublin, Franklin reported to his fellow patriots that the Irish were "*disposed to be friends of America*" and he

predicted correctly that: *"By joining our interest with theirs, a more equitable treatment . . . might be obtained for both nations."*

Our interests as well as our progress have been joined ever since. Today, we can all be encouraged that ties between the United States and Ireland as well as our bonds with nations across Europe have never been stronger.

But I also know that we cannot and must not take these relationships for granted.

Even though unlike President Obama, a distant, but very proud, son of Moneygall I cannot trace my roots to the people of this Emerald Isle, I certainly recognize and am consistently reminded that the structure of the justice system I am honored to serve and to help lead owes a great deal to the sons and daughters of Eireann.

The Irish body of law stretches back more than 700 years. From this foundation springs much of the basis for the principles that underlie the founding documents of the United States, as well as Ireland's modern Republic – a commitment to liberty, to security, to privacy, to opportunity, and to justice.

As surely as our values are shared and our histories intertwined, the future progress of our nations is clearly, and permanently, connected. And today, the responsibility of extending our long legacy of collaboration and of strengthening a partnership that dates back to the 18th century falls squarely on our shoulders.

As transnational organized criminal networks and cybercrime have transcended national boundaries, so, too, must we be united in combating these threats. Of course, no aspect of this work is more important or more urgent than advancing the global fight against terrorism. Just last week, we observed the tenth anniversary of the September 11th attacks against the United States, a day when nearly 3,000 innocent victims, including 6 Irish citizens, and hundreds of Irish-Americans, were killed; and a stark reminder of the threats we face, and the vulnerabilities that are common to all nations.

Even though our efforts to thwart attacks, to investigate potential plots, and to vigorously prosecute terrorists have met with increasing success over the years, the need to remain vigilant and to face these threats together has never been more apparent. And we can all be encouraged and proud that the United States and Ireland have established a strong record of cooperation in carrying out this critical work.

Almost exactly two years ago, in September 2009, an American woman named Jamie Paulin-Ramirez travelled, with her young child, to Ireland, intending to join a jihadist training camp and learn to carry out acts of violence.

Had she been allowed to proceed with her plans, the consequences could well have been deadly. But, thanks to a meticulous investigation that was carried out by my colleagues at

the Justice Department in close cooperation with Irish law enforcement this woman was stopped. She voluntarily returned to the United States, to stand trial in federal court for supporting terrorism. And six months ago, she pleaded guilty.

This is merely one high-profile example of the type of cooperation that has become commonplace in our efforts to investigate and prosecute those who seek to do us harm. And it's just one of hundreds of cases in recent years in which America's criminal justice system has proven its effectiveness in combating terrorist threats.

As we chart our course for the days ahead, I want to assure you that America's commitment to utilizing this system and every other lawful counter-terrorism tool at our disposal will continue; as will our dedication to being flexible, pragmatic, faithful to the rule of law, and dedicated to moving in a direction that is guided, not by fear but by fact, by reason, and by our essential and enduring values.

As President Obama has acknowledged and as many of your nations have lamented in the aftermath of the 9/11 attacks there were times when, in an attempt to respond to terror threats, our government veered off course, and failed to live up to our most sacred principles.

But, as I hope you have seen, this administration has worked vigorously, and tirelessly, to turn the page on past mistakes and missteps. In fact, among the very first actions that President Obama took two and a half years ago was directing government leaders not only to redouble our focus on preventing and combating terror threats, but also to return to an era in which the costs and benefits of every action taken in the name of national security were carefully weighed. He called us to work in close consultation with our allies to rebuild the bonds of trust that had been frayed, and to renew and reaffirm America's commitment to the rule of law and to the ideals that have strengthened our nation and sustained our most cherished international partnerships.

Today, although the struggle has been far more difficult than anyone might have predicted, and although some of you have not agreed with every decision this Administration has made, I am pleased to report that, as a nation, we have found our footing once again.

And I am especially proud of the contributions that the Department of Justice has made in fulfilling our paramount responsibility: to protect the American people.

In meeting this obligation, the Justice Department has led with strength and by example. Even as we've confronted unprecedented, and increasingly sophisticated, national security threats, we've made historic progress without giving in to fear, or compromising our values as Americans.

We have made critical revisions to detention and interrogation policies, renounced the use of torture, and strengthened our ability to bring terrorists to justice in our civilian

courts. And despite the internal obstacles we have been forced to meet, we are continuing to work, and to engage the help of international partners, to advance efforts to close the Guantanamo Bay Detention Facility.

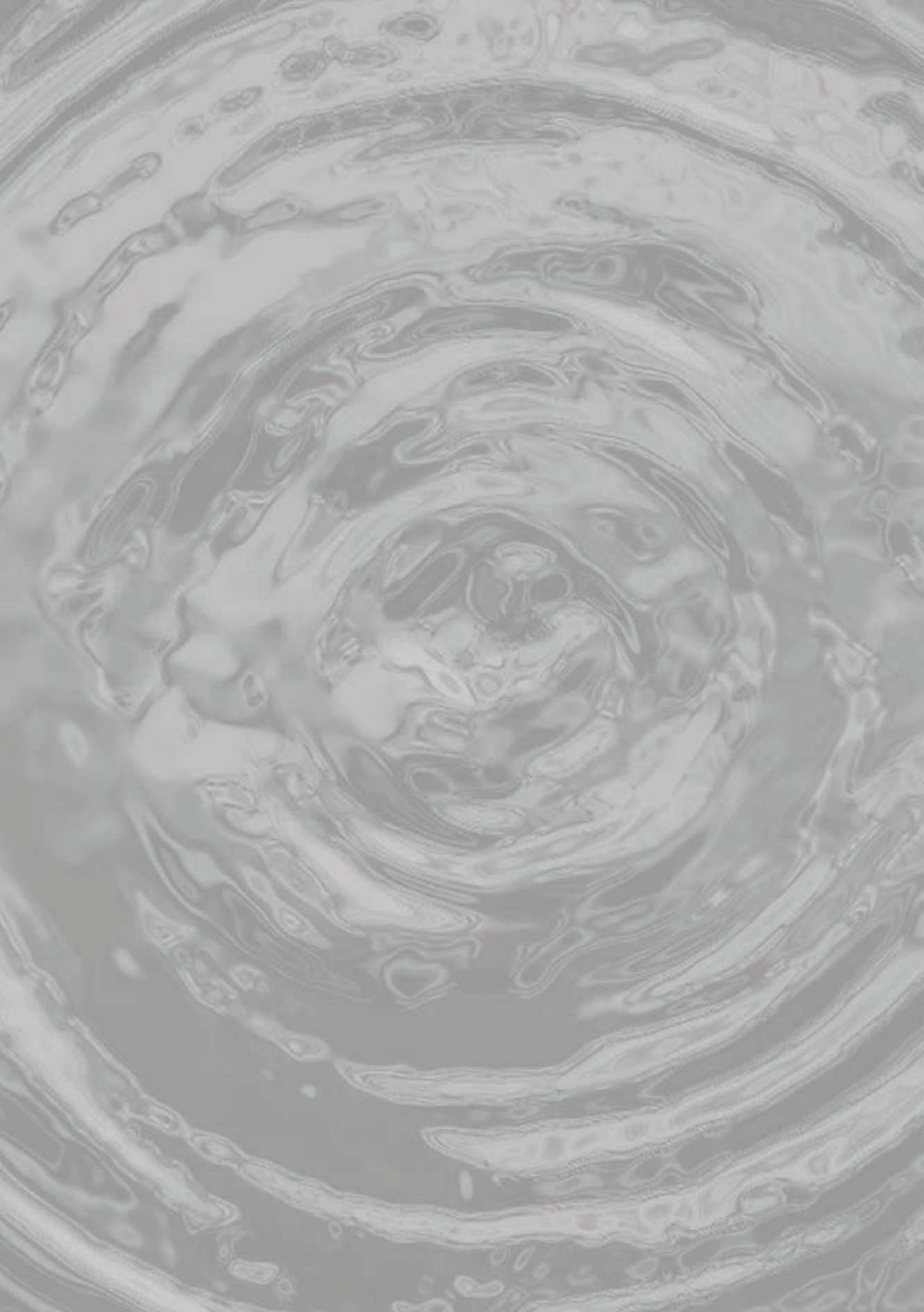
This has long been part of a comprehensive international security plan and the need for it has never been greater.

I am reminded of this unfortunate fact each morning as I begin each day with a briefing on the most urgent global terror threats. I know that in distant countries, and within our own borders there are people eager to, and actively plotting to, harm the citizens we serve.

Like every person in this room, I am determined to defeat our enemies. I know we can, and I am certain we will. But victory and security will not come easily. And they won't come at all if we fail to meet national challenges with international solutions; or if we allow differences in perspective, in ideology, or methodology to divide us.

So, let us seize this moment of promise. Let us stand together in common cause. And let us signal to all the world that our joint efforts to ensure security, opportunity, and justice for all will not only continue; they will expand; and they will succeed.

I look forward to working with you, to hearing from you today and to all that we will accomplish, together.



Sharing Ideas Shaping Policy
The Institute of International and European Affairs

