

# EU Criminal Law for Defence Counsel

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# Bunreacht Na hEireann

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- European Convention on Human Rights

# Brief History of EU & Criminal Justice

- Schengen
- Maastricht treaty 1992
- Amsterdam 1997
- Tampere 1999
- Hague programme
- Lisbon Treaty

# Post Lisbon...

- New legal framework –
  - Article 1(2) TFEU provide that the Treaty on the EU (TEU) and the Treaty on the Functioning of the EU (TFEU) *constitute the Treaties on which the Union is founded*
- Legal Personality on the EU
- Reform of Legislative procedure
- Union Competence in Freedom Security and Justice
- **Shift of decision making in respect of Criminal Justice from Intergovernmental  Community**
- Greater coherence in the development of EU criminal law
- Development of the role of the Court of Justice of the European Union (CJEU) including Art 267

# Post Lisbon continued....

- The Charter of Fundamental Rights and Freedoms
- EU accession to the ECHR

# Title I TFEU - Categories and Areas of Union Competence

- Article 4(2) Shared competence between the Union and the Member States applies in the following principal areas:
  - (j) area of freedom, security and justice

- **Article 67 (1) TFEU:**

"The Union should constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States"

- **Article 72 TFEU**

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

- **Article 82 (1) TFEU**

For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(d) cooperation in the taking of evidence;

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

(g) the development of alternative methods of dispute settlement;

(h) support for the training of the judiciary and judicial staff



## 56. Declaration 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

- 56. Declaration 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 Ireland affirms its commitment to the Union as an area of freedom, security and justice respecting fundamental rights and the different legal systems and traditions of the Member States within which citizens are provided with a high level of safety. Accordingly, 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 possible extent in measures in the field of police cooperation.**
- C 83/356 Official Journal of the European Union 30.3.2010 EN 356 Consolidated Treaties Furthermore, Ireland recalls that in accordance with Article 8 of the Protocol it 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.

**PROTOCOL**  
**ON THE POSITION OF THE UNITED KINGDOM AND IRELAND IN RESPECT**  
**OF THE AREA OF FREEDOM, SECURITY AND JUSTICE**

*Article 1*

*Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union....*

*Article 3*

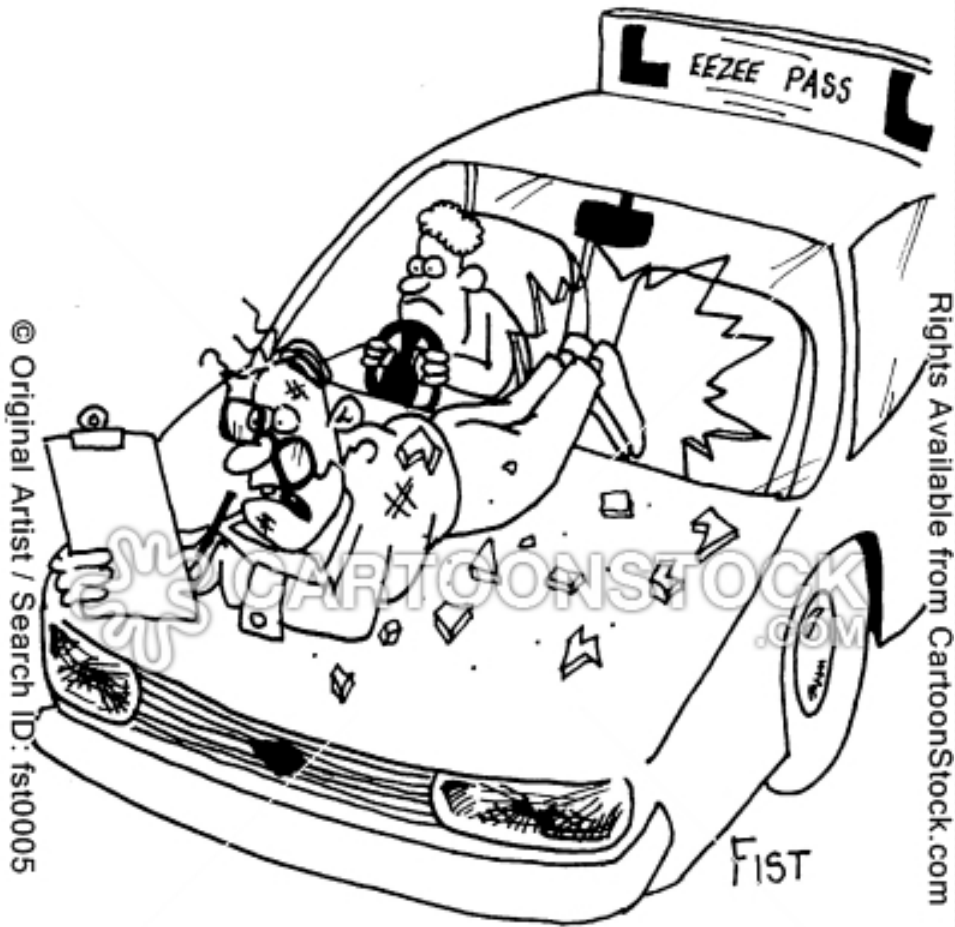
*The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so*

# Opting in Opting out *ah-a*

- When a legislative proposal is made, the UK and Ireland have three months to decide whether they wish to opt in to discussions. If they do not opt in, they are deemed to have opted out, and discussions go ahead without them. Any legislation which is adopted then binds the other Member States. If the UK and Ireland opt in, then discussions go ahead with their full participation. But if the UK and Ireland block agreement on the proposed text, then the other Member States can go ahead and adopt the proposed legislation without them

# “Emergency Brakes”

- To balance the introduction of QMV in the area of judicial cooperation in criminal matters, the Treaty introduces a procedure called the “emergency brake”.
- Allows Member States to bloc the adoption of a legislative proposal and to send it to the European Council, if they feel that the proposal has an impact on fundamental aspects of their criminal law system.
- In such a case, co-decision procedure is suspended. After discussion, and if there is a consensus, the European Council, within 4 months of the date procedures were suspended, sends back the proposal to the Council, which then ends the suspension of the normal legislative procedure or co-decision. If there is no consensus, within the same timeframe, a minimum of 9 Member States can proceed with enhanced cooperation on the basis of the original proposal.



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"I won't be asking you to perform  
the emergency stop again  
Miss Harris."

# OPT Out Continued

- The Lisbon Treaty extends the policing and criminal law opt-out to Ireland, whereas the Treaty negotiating mandate had earlier left open the question of whether Ireland wished to join the UK in partaking of the extended opt-out.
- Ireland's opt-out does not apply to Article 75 TFEU (assets freezing measures to prevent and combat terrorism and related activities). The UK separately declared that it intended to opt-in to all proposals under this provision.




## 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

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- Denmark has opted out of the entirety of the Area of Freedom, Security and Justice title.
  - 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).
  - Has reserved to itself the possibility of adopting a new opt-in arrangement on the basis of the UK & Irish protocol

# ● Article 83 TFEU -

Sets out the *areas of crime*:

- terrorism, trafficking in human beings
- sexual exploitation of women and children,
- illicit drug trafficking,
- illicit arms trafficking,
- money laundering,
- corruption,
- counterfeiting of means of payment,
- computer crime
- organised crime.

On the basis of developments in crime, the Council **may adopt a decision identifying other areas of crime** that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

Directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

# Financial Crimes

- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
- Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime

# Counter Terrorism

- 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.*
- See also the CJEU decision of Kadi

# EAW/EEW

- Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
- European Convention on Mutual Assistance in Criminal Matters
- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
- Council Framework Decision 2008/978/JHA  
18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters

# Mutual Assistance

- 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”*
- Foreign Tribunals Evidence Act 1856
- Framework Decision on European Evidence Warrant  
*Framework Decision 2008/978/JHA of 18  
December 2008 on the European evidence warrant*
- Mutual Assistance Act 2008

# Section 62 Mutual Assistance Act 2008

## Evidence from person in designated state

- 62.— (1) Where it appears to a judge at a sitting of any court that criminal proceedings have been instituted or a criminal investigation is taking place in the State, the judge may issue a letter (a “ letter of request ”) requesting assistance in obtaining from a person in a designated state such evidence as is specified in the letter for use in the proceedings or investigation.
- (2) Application for a letter of request may be made by the Director of Public Prosecutions or a person charged in any such proceedings that have been instituted.
  - (3) The letter of request shall be sent to the Central Authority for transmission to the appropriate authority.
  - (4) Notwithstanding *subsections (1) to (3)*, where proceedings in respect of an offence have been instituted or a criminal investigation is taking place, the Director of Public Prosecutions may issue and transmit a letter of request directly to the appropriate authority.
  - (5) The letter of request shall include—
    - (a) a statement that the evidence is required for the purpose of criminal proceedings or a criminal investigation,
    - (b) a brief description of the conduct constituting the offence concerned, and
    - (c) any other available information that may assist the appropriate authority in complying with the request.
  - (6) Evidence obtained by virtue of this section shall not, without the consent of the appropriate authority, be used for any purpose other than that permitted by the relevant international instrument or specified in the letter of request.
  - (7) When any such evidence is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be returned to the appropriate authority unless the authority indicates that it need not be returned.



(8) A statement of the evidence of a witness—

(a) taken in accordance with a letter of request, and

(b) certified by or on behalf of the court, tribunal or authority by which it was taken to be an accurate statement of the evidence,

is admissible, without further proof, in proceedings relating to the offence concerned as evidence of any fact stated therein of which oral evidence would be so admissible.

(9) A court, when considering whether any evidence taken from a person pursuant to a letter of request should be excluded in the exercise of its discretion to exclude evidence otherwise admissible, shall, where appropriate, have regard to—

(a) whether the law of the state concerned allowed the person and any other party concerned, when the evidence was being taken, to be legally represented and cross-examined, and


(b) any other respects in which the taking of the evidence may have differed from the taking of comparable evidence in the State.

(10) Nothing in this section prevents the Director of Public Prosecutions from issuing a letter of request for assistance in obtaining a statement of evidence or taking possession of material evidence in a designated state for the purposes of criminal proceedings or a criminal investigation where the witness or witnesses concerned will give evidence in those proceedings or any proceedings that may be instituted after the investigation.

(11) In this section, “ appropriate authority ”, in relation to the place where the evidence is to be obtained, means—

(a) a court or tribunal specified in the letter of request and exercising jurisdiction in that place, or

(b) any other authority recognised by the government of the state concerned as the appropriate authority for receiving the letter.

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- European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders
  - Convention on the Transfer of Sentenced Persons

# Stockholm Programme

- 30 November 2009 – Roadmap
- **Measure A:** the right to translation and interpretation
- **Measure B:** the right to information on rights and information about the charges
- **Measure C:** the right to legal advice and legal aid
- **Measure D:** the right to communication with relatives, employers and consular authorities
- **Measure E:** special safe guards for suspects or accused persons who are vulnerable

- The Stockholm Programme provides for COSI to monitor and implement the Internal Security Strategy.
- ISS: *Organised Crime, Terrorism; Cybercrime; Border security; Dictators*
- COSI provides semi-annual reports to the European Parliament and National Parliaments on its activities.
- COSI –Overseas and coordinates various JHA agencies:
  - *EUROPOL, EUROJUST, FRONTEX, OLAF*

# OLAF

- The European Anti-Fraud Office (OLAF) established in 1999
- to protect the financial interests of the EU.
- The EU budget provides considerable sums in financial support, and thus has become a target for fraud criminal groups.
- OLAF is part of the Commission, but has been granted the independent status required to carry out investigations together with competent national authorities.
- mandate restricted to offences directed against the financial interests of the EU,
- can carry out so-called internal investigations (i.e. within EU structures) or, on the basis of cooperation with national law enforcement agencies, so-called external investigations.

# Theft and Fraud Act 2001


- Fraud affecting European Communities' financial interests.

42.—A person who—

- (a) commits in whole or in part any fraud affecting the European Communities' financial interests,
  - (b) participates in, instigates or attempts any such fraud, or
  - (c) obtains the benefit of, or derives any pecuniary advantage from, any such fraud,
- is guilty of an offence and is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

# Recent Directives ...

- Directive on the Right to Information in Criminal Proceedings
- Transposition date 2<sup>nd</sup> June 2014
- IE & UK opt in
- DK opt out
  - Subject -Right of information of suspects and accused persons
  - Scope – from time a person is a suspect to determination of any appeal
  - Information relating to details of allegation, notification of rights, access to case file

- 
- Victims Directive – on the standing of victims in criminal proceedings
  - Transposition date 16<sup>th</sup> November 2015
  - IE & UK opt in
  - DK opt out
  - Minimum rights, supports and protections for victims across EUMS



# Directive on the Right of access to a lawyer

- right of access to a lawyer for suspects and accused persons (when, under which conditions);
- principle of confidentiality of communications between the lawyer and the suspect or accused person;
- right for a suspect or accused person to have a third person informed of his deprivation of liberty;
- right for a suspect or accused person who is deprived of liberty to communicate with third persons and with his country's consular authorities;
- possibility of making temporary derogations to certain rights in exceptional circumstances and under strict conditions only;

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- *Salduz v. Turkey ECtHR*
  - Right of access to a solicitor during interview
  - Extension of Legal aid

# European Public Prosecutor

- Article 86 TEU

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

# Conclusion

- Effect of Lisbon bringing Criminal Justice within Union competence
- Increase in legal instruments that serve to enhance cooperation between prosecutors and police
- Increase in legal instruments safeguarding the rights of the suspect/accused
- Defence Counsel
  - Role of Defence Counsel develops
  - Invoke the Charter!



*Thank you*