

Could Ireland opting-in to the European Investigation Order have a detrimental effect on Fair Trials and Fundamental Rights protections in Ireland?

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Abstract

Could Ireland opting-in to the European Investigation Order have a detrimental effect on Fair Trials and Fundamental Rights protections in Ireland?

Arthur Luke Gerard Griffin Dip Law. LLB. LLM.

The European Union has proposed a European Investigation Order to facilitate the transfer of evidence between member states. Ryan has suggested that “[t]he creation of a European Community wherein persons, goods and capital could move freely between borders brought with it new opportunities for the free movement of crime”¹. This thesis sets about investigating how the European Union institutions legislating for the transfer of evidence may affect the criminal process in Ireland and in particular the right to a fair trial and protection of fundamental rights.

The European Criminal Process is examined. The history of the criminal justice competency of the EU is detailed. The roles played by various European institutions in the criminal process are considered. Important principles such as mutual legal assistance and the stronger principle of mutual recognition are considered, as are human rights within the EU.

Evidence exchange and in particular the European Investigation Order is considered. A chapter considers the rationale/demand for the creation of the EIO including looking at the objectives of the European Investigation Order. This chapter outlines the current procedures in place at an EU level and compares them against the proposed operation of the EIO.

The Irish approach to the exclusion at trial of improperly obtained evidence is compared with that of other EU countries. The traditional modes of trial (inquisitorial and adversarial) are compared first. The exclusionary rule of evidence will be used to compare how numerous European jurisdictions deal with evidence which is improperly obtained.

It is hoped that by the end of the thesis, the reader will have an understanding of the developing European criminal process and the new European Investigation Order. It is intended to consider whether or not the EIO would be suitable for adoption by Ireland.

¹ Andrea Ryan, “The European Evidence Warrant: The Emergence of a European Law of Evidence?” (2006) Vol 16 ICLJ 8

Chapter 1: Introduction

Since the Treaty of Amsterdam in 1997, Ireland has had the option to 'opt-in' to EU legislation in criminal justice matters.² This means Ireland must actively choose to participate in procedures such as, for example, the European Arrest Warrant.

The European Investigation Order (EIO) was legislated for by Directive 2014/41/EU on the European Investigation Order in 2014, with a deadline of 2017 for commencement of operation. The Directive will allow one Member State (the issuing state) to issue an EIO to another executing state, requiring the executing state to carry out an investigative measure on behalf of the issuing state; for example require the search of premises in the executing state. Ireland has not opted to participate in the EIO. The Minister for Justice has explained that this is "on the basis that it was inconsistent with Irish law and practice".³

Question and Issues

Could Ireland opting-in to the European Investigation Order have a detrimental effect on Fair Trials and Fundamental Rights protections in Ireland?

This work will set out to examine the question of whether or not it is possible for Ireland to participate in the EIO without compromising the standard of protection for fundamental rights in a fair trial which the courts in Ireland have maintained. In particular it will consider how the issue of evidence which has been improperly obtained may be treated.

Thus it can be said that the following issues will be considered throughout the thesis:

- The European Union and criminal justice
- Specific EU protections for fundamental rights
- The operation of the European Investigation Order
- An understanding of the admissibility of evidence which may have been obtained in breach of fundamental rights. In particular to compare Ireland against two other major European jurisdictions.

²Treaty of Amsterdam/Protocol B on the position of the United Kingdom and Ireland

³ Minister Frances Fitzgerald, Dáil Éireann, June 4, 2014.

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014060400068?opendocument>

Basic principles

Since 1992 a European criminal justice process system has been developed. The European Investigation Order⁴ represents the criminal evidence gathering and sharing element of this European criminal justice system. The EIO is designed to aid the occurrence of cross border criminal investigation with the minimum of formality.

The investigation of crime and gathering of evidence can potentially leader to a breach of a suspect's fundamental rights. The 'rules of evidence' in each country serve to regulate the presentation of evidence to the courts; (though obviously these rules vary across European member states). Traditionally, Ireland has operated a very strong 'exclusionary rule' for evidence which has been obtained in breach of fundamental rights. Recent changes in the Irish exclusionary rule may make the application of the European Investigation Order more attractive and easier to implement in Ireland.

Background

There are numerous issues to consider throughout the thesis but broadly these can be said to be European Union criminal justice procedures (from an Irish perspective), the law of evidence and the protection of fundamental rights and the guarantee of fair trial for individuals who are subject to investigation in criminal matters.

EU Criminal Justice

As we shall see in the next chapter the tackling of crime at an EU level has led to a compromising of Member State's autonomy in cross-border criminal matters due to the adoption of the mutual recognition principle; this raises issues of mutual trust between states and restricts state sovereignty. The operation of mutual recognition is based on ensuring a solid common foundation on fundamental rights, Ireland initially did not participate in matters relating to Justice and Home Affairs, however, Ireland may now choose to 'opt-in' to criminal justice matters.⁵

European Investigation Order

The European Investigation Order is an instrument aimed at obtaining and transferring criminal evidence between EU Member States with the minimum of formality. Differing

⁴Directive 2014/41/EU on the European Investigation Order

⁵ Consolidated Treaty on European Union, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice

states will have differing approaches to the power that authorities have been given to assist in the investigation of criminal matters and thus the manner in which evidence can be obtained; what allowances are there in the EIO directive for the tailoring of EIOs to meet the issuing state's requirements under their national law? More importantly, the manner in which evidence which might have been improperly obtained or obtained in breach of fundamental/civil rights is treated differently between jurisdictions; the differences should be compared for a full understanding of the relationship between evidence law and the protection of fundamental rights.

The Exclusionary Rule of Evidence

The exclusionary rule of evidence is a very important element of this thesis as it is through the exclusion of improperly obtained evidence that Ireland has traditionally protected against the breach of fundamental rights. Indeed at the time when Ireland chose not to participate in the EIO, Ireland had one of the most severe exclusionary rules of evidence. If evidence was obtained in a manner unacceptable to the Irish Courts, the high standard of exclusionary rule applied in Ireland may cause the EIO to be unworkable in Ireland. Ireland has traditionally operated a very strict exclusionary rule of evidence in relation to improperly obtained evidence; will recent changes in evidence law in Ireland, bring the Irish law more into line with other EU Member States?

Protection of Fundamental Rights

The Irish Constitution provides citizens with many enumerated and unenumerated constitutional rights; however as we shall see, recent EU case law⁶ has suggested that the ECJ will consider the need to maintain the primacy of EU law as superior to domestic constitutional rights. This could obviously lead to a reduction in the protection of domestic constitutional rights in circumstances where Ireland has opted to participate in EU criminal justice instruments. Ireland signed and ratified the European Convention on Human Rights (ECHR) in 1953. As a result of the Good Friday Agreement in 1998, the Irish Government was compelled to introduce legislation to strengthen the position of the convention in Irish law. The European Convention on Human Rights Act 2003 'enhanced' the position of the ECHR in Irish law. The Act requires that, the Courts should interpret the law in a manner which is compatible with the Convention. All organs of the State must comply with the ECHR in their actions. Failure on behalf of the State to act in line with the ECHR will result in the State

⁶ See Chapter 2 on the *Melloni* case

being liable for compensation. A third provision of the Act allows the courts to make a declaration of incompatibility on legislation. This requires the Taoiseach to inform the Dáil of the fact that the legislation was not in compliance with the Convention.

The Right to a Fair Trial in Ireland

The 'Right to a Fair Trial' is surely a cornerstone to modern democracy. It is regarded as a basic Human Right. Former Lord Chief Justice of England and Wales, Tom Bingham, regarded the right to a fair trial as a requirement of 'the rule of law saying that it "is a cardinal requirement of the rule of law. It is a right to be enjoyed, obviously and pre-eminently, in a criminal trial."⁷ In the modern world, thankfully, the right to a fair trial is listed as a basic Human Right in the UN Universal Declaration of Human Rights. Article 10 of the UN Universal Declaration of Human Rights declares:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Daly has written of the significance of the right to a fair trial to an accused person in Ireland:

"It has been well established that the right to a fair trial protected under Art 38.1 of the Irish Constitution and under Article 6 of the European Convention on Human Rights, is one of the most significant rights afforded to an accused person."⁸

The right to a fair trial is fundamental to the rule of law, basic human rights and the protection of the innocent. Article 38.1 of the Irish constitution provides that: "No person shall be tried on any criminal charge save in due course of law". The phrase 'right to a fair trial' does not exist in Bunreacht na hEireann; however, Article 38.1 has been interpreted as meaning just that. In particular this view was expressed by Costello J in *Heaney v Ireland*:

"It is an article couched in peremptory language and has been construed as a constitutional guarantee that criminal trials will be conducted in accordance with basic concepts of justice. Those basic principles may be of ancient origin and part of the long established principles of the common law, or they may be of more recent origin and widely accepted in other jurisdictions and recognised in international conventions as a basic requirement of a fair trial."⁹

⁷ Tom Bingham "*The Rule of Law*", Penguin Books, London, (2010), page 91

⁸ Yvonne Marie Daly "There is such a thing as Bad Publicity: Modern Media Coverage and the Right to a Fair Trial", *Criminal Law and Procedure Review*, 2012, Volume 2

⁹ Costello J. in *Heaney v. Ireland* [1994] 3 IR 593 at pp. 605-606

Hogan & Whyte explain that Article 38.1 does not exist in a vacuum and has been developed to include a wider scope of rights due to the influence of a number of factors both external and internal to Ireland:

“Article 38.1 has been interpreted to embrace a range of both procedural and substantive rights the content of which has been influenced by common law tradition, the European Convention on Human Rights and the case law of the European Court of Human Rights, United States constitutional practice, international agreements and not least the views of the Irish Judiciary.”¹⁰

As mentioned above, Ireland is a party to the European Convention on Human Rights. As mentioned previously, Article 6 of the Convention guarantees the right to a fair trial.¹¹

This leads one to ask: What constitutes “a fair trial” in Ireland? The courts have developed rights which originate from Article 38.1. Conway, Daly & Schweppe give what they describe as an “inexhaustive” list of unenumerated rights which flow from Article 38.1:

- The presumption of innocence
- The right to privacy;
- The right to dignity;
- The right to bodily integrity;

¹⁰ Hogan & Whyte, *“JM Kelly: The Irish Constitution”*, 4th Edition, Tottel Publishing, Dublin, (2003), page 1042

¹¹1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

- The right to silence;
- The right to legal advice;
- The right to trial within a reasonable time;
- The right to bail; and,
- The right to proportionality in sentencing.¹²

Fennell writing about the elements of a fair trial overlaps with these rights, although she splits them into ‘pre-trial’ and ‘at trial’ rights:

“This has variously been interpreted to include in accordance with fair procedures in pre-trial process, expeditiously with access to a lawyer, the absence of oppression in interrogation, and fundamental fairness in the execution of search warrants, and at trial, the presumption of innocence, the right to counsel, the opportunity to cross-examine, and the opportunity to have access to access to information.”¹³

Chapter 3 will consider these rights as against the European Investigation Order.

Methodology and Structure

This thesis is based on careful analysis of both primary and secondary materials including legislation, case law, governmental reports, books, journal articles, newspaper articles and published lectures. Materials relating to domestic law as well as EU law and the law of differing member states have been consulted and considered. The outlines of the Chapters below should serve to explain the choice of study topic in each case and how they contribute to furthering the investigation into the law.

Chapter 1: Introduction

The present chapter serves to introduce the reader to thesis. It has posed the question and explained outlined the issues which will be considered throughout. The methodology used in the research of the work has been detailed. Now, we turn to consider the chapters ahead.

Chapter2: EU Criminal Justice Principles: Mutual Recognition and Fundamental Rights

The EU legislates in criminal justice matters, (including the European Investigation Order) using the principle of ‘mutual recognition’. This principle restricts the sovereignty of a

¹² Conway, Daly & Schweppe, *“Irish Criminal Justice Theory, Process and Procedure”*, Clarus Press, Dublin, (2010), page 4

¹³ Caroline Fennell, *“The Law of Evidence in Ireland”* 2nd Edition, Tottel Publishing, Dublin, (2003), page 25

country in criminal justice matters, in that it restricts the discretion a State has in its interaction with other States' criminal justice systems. In order for EU States to be willing to agree to mutually recognise the decisions of each other's jurisdictions there must exist a high level of trust between the parties; this trust is founded on common respect for fundamental rights. This chapter highlights the difficulties associated with the operation of EU Criminal Justice instruments and the protections being offered to underpin fundamental rights as a result.

Chapter 3: Evidence Sharing in the EU

This chapter considers the EIO directive itself. The first part of the chapter considers the operation of the EIO, safeguards and issues of concern in relation to the document. Part Two of the chapter considers the EIO and Ireland; it is a theoretical examination of how the EIO might affect fair trial rights in Ireland. Part Two will also examine the European Arrest Warrant in Ireland as an example of a similar instrument which is in existing operation in Ireland. This chapter deals with the understanding of issues and concerns connected to the EIO and presents a consideration of its potential operation in Ireland.

Chapter 4: Comparative treatment of improperly obtained evidence

Whereas chapters 2 & 3 deal primarily with EU law issues, Chapter 4 deals with evidence law in a domestic context. The collection of evidence can often lead to a breach or breaches of fundamental rights. "Most legal systems, irrespective of their exclusionary or inclusionary tendencies, provide for rules which prohibit in certain circumstances the use of particular types of evidence, regardless of its probative value."¹⁴ The extent to which the courts will act to exclude evidence which has been improperly obtained will vary from jurisdiction to jurisdiction. This variation could present difficulties for the implementation of the EIO. Ireland for example has traditionally operated a very strict exclusionary rule of evidence to protect against breaches of fundamental rights (although recent case law would appear to have changed this considerably). This chapter will explain the exclusionary rule of evidence in Ireland, compare it against other EU countries and speculate as to how the EIO might facilitate an exclusionary rule of improperly obtained evidence, where the evidence was obtained in breach of fundamental rights.

¹⁴ Jackson and Summers, *"The Internationalisation of Criminal Evidence"*, Cambridge University Press, Cambridge, (2012) p151

Chapter 5: Conclusion

The concluding chapter will summarise the information presented in the preceding chapters. It will restate the issues which are raised above in the instant chapter and address them through use of the information provided throughout the thesis. It will seek to provide a definitive answer as to possibility of Ireland entering the EIO scheme without damaging the right to a fair trial and the protections for fundamental rights in Ireland.

Summary

This thesis will serve to investigate whether or not Ireland could opt-in to the European Investigation Order without compromising fair trials and fundamental rights protections. Each of the next three chapters should serve to inform as to various elements of application of evidence law at a pan-EU level.

Chapter 2: EU Criminal Justice Principles: Mutual Recognition and Fundamental Rights

As the introduction made clear, the aim of this thesis is to establish whether or not Ireland could implement the European Investigation Order without having a detrimental effect upon the right to a fair trial and the protection of fundamental rights.

In 1999 the Finnish city of Tampere played host to a special European Council conference to reform Policing and Judicial Matters in the EU; since that council the principle of *mutual recognition* has become the bedrock of EU legislation in criminal justice matters. The principle has had a considerable impact on national sovereignty and the ability of states' to implement their own laws in relation to criminal matters, thus it requires a great deal of mutual trust between states. In order to ensure that this trust is maintained, States' must have faith that common levels of safeguards are maintained for fundamental rights.

Given the impact of mutual recognition in restricting state sovereignty and thus the restriction it may place on the ability of a state to resist external provisions (which in turn might affect fundamental rights e.g. the right to a fair trial in Ireland). It is important to understand what is meant by mutual recognition in EU criminal justice legislation and its effect. It is also important to understand how fundamental rights (many of which are elements of a fair trial) are protected at a pan-European level.

It is intended by the end of this chapter, that the reader will have an understanding of the mutual recognition principle and EU protections for fundamental rights and how they relate to Ireland.

Mutual Recognition in EU Criminal Law

The Principle of Mutual Recognition has been described variously as “the cornerstone”¹⁵, “the motor”¹⁶ and “the central principle”¹⁷ of EU criminal and judicial matters. There would seem to be no need to add to this list of adjectives but rather to explain what is meant by

¹⁵ Ilias Bantekas, ‘The principle of mutual recognition in EU Criminal Law’ [2007] ELR 365.

¹⁶ Valsamis Mitsilegas, ‘The Third Wave Pillar of Law. Which Direction for Criminal Justice?’ [2009] ELR 536.

¹⁷ Cian C Murphy, ‘The European Evidence Warrant: Mutual Recognition and Mutual (Dis)trust?’ in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice*, (Cambridge)

‘mutual recognition’. Several authors define mutual recognition as meaning that “*the judicial acts of one state will be recognised and enforced in another state*”.¹⁸ Meanwhile, Mitsilegas and Murphy separately describe mutual recognition as meaning that each Member State recognises the decisions of courts from other Member States “with a minimum of procedure and formality”.¹⁹

In adopting mutual recognition as the basis for criminal justice procedures, the EU has taken a principle, successfully implemented in Community law, and implemented it in the criminal justice sphere. The European Commission website explains the mutual recognition principle in trade law in the following terms:

“In intra-EU trade in goods, mutual recognition is the principle that a product lawfully marketed in one Member State and not subject to Union harmonisation should be allowed to be marketed in any other Member State, even when the product does not fully comply with the technical rules of the Member State of destination.”²⁰

In EU trade law the *Cassis de Dijon* case²¹ had brought the principle of mutual recognition to bear on national regulations for trade. That case concerned the sale of a liqueur called “Cassis de Dijon” in Germany by a German importer and retailer called Rewe. Crème de cassis is a blackcurrant liqueur produced in France containing 15% to 20% alcohol by volume. German government standards had a law stipulating that fruit liqueur had to contain at least 25% alcohol by volume. German authorities informed Rewe that the Cassis de Dijon could be imported but advised that its marketing was not allowed in Germany. Rewe argued that this represented a quantitative restriction on trade. It was held by the ECJ that the German legislation was a measure having an effect equivalent to a quantitative restriction on imports. This was a breach of Article 30 of the Treaty of Rome.²² The court held that there was no legal reason that a product lawfully marketed in one EU member state should not be introduced in another member state; thus applying the principle of mutual recognition. According to Craig and DeBurca:

¹⁸ Bantekas (n 14). See also Susie Alegre and Marisa Leaf, ‘*Mutual Recognition in European Judicial Co-Operation: A step too far too soon? Case Study – the European Arrest Warrant*’ (2004) 10 ELJ 200.

¹⁹ Valsamis Mitsilegas, *EU Criminal Law* (Hart Publishing 2009) 116; and Murphy (n 16).

²⁰ <http://ec.europa.eu/enterprise/policies/single-market-goods/free-movement-non-harmonised-sectors/mutual-recognition/#h2-1>

²¹ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

²² Treaty of Rome, Article 30

“(Member States) could no longer apply their trade rules to imported goods. These had to be admitted because of mutual recognition, unless they could be saved by the invocation of the mandatory requirements.”²³

The mandatory requirements in question were those which might be justifiable to provide for the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defence of the consumer.

The Adoption of Mutual Recognition in Criminal Justice Matters

To understand the rationale for the adoption of the principle of mutual recognition in criminal matters, one must look at the development of EU competency in criminal justice.

The Treaty on European Union was signed in the Dutch city of Maastricht in 1992. It was the signing of this treaty that created the European Union. Title VI of the Maastricht Treaty was entitled “Provisions on cooperation in the fields of criminal justice and home affairs”.

Mitsilegas notes that this portion of the Treaty established, for the first time, “...a Union competence in the field of Justice and Home Affairs, including judicial co-operation in criminal matters, customs co-operation and police co-operation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including the establishment of a European Police Office (Europol).”²⁴ EU competency in criminal justice was commonly known as the ‘third pillar’.

Despite being granted competency to legislate in criminal justice matters, the third pillar did not progress as quickly as the economic legislation of the community pillar. It is described by Craig and DeBúrca as having been:

“More like familiar creations of international law, not sharing the institutional structure, law-making processes, or legal instruments of the Community Pillar, largely beyond the jurisdiction of the European Court of Justice and lacking the key Community law characteristics of supremacy and direct effect.”²⁵

Thus, whilst there was an acknowledgment of the existence of Justice and Home Affairs powers for the first time in the EC/EU history; the member states were still relying on traditional instruments of international law to regulate cross border justice matters. A good

²³ Paul Craig and Grainne DeBúrca, *EU Law Text, Cases and Materials* 3rd edn, Oxford University Press, Oxford (2007) 677.

²⁴ Mitsilegas (n 18) 10.

²⁵ Craig and DeBúrca (n 22) 4.

example of this was the foundation of the European Police Office (Europol). It was founded by convention in 1995. However, the commencement of operation was delayed until 1999 as it took 3 years for the ratification of the convention by the (then) 15 member states.

In order to progress a Justice and Home Affairs agenda at EU level change was needed. This was attempted through the Treaty of Amsterdam in 1997.

“In respect of the third pillar, the Treaty of Amsterdam (TOA) introduced a new form of law making. Formerly, aspects of Justice and Home Affairs were regulated under Conventions signed by Member States, but rarely ratified, and hence were of limited value. Under 1997 arrangements, a ‘framework decision’ is introduced”²⁶

The ‘framework decision’ was a method of legislating designed to harmonise laws between member states. Under the pillar structure they were the third pillar equivalent of directives. Framework decisions were binding on States but did not have direct effect under Article 34 (2) b of the Treaty on European Union. This allowed the EU institutions to legislate without over-stepping the mark on issues of jealously guarded national sovereignty. (Framework decisions were abolished by the Lisbon Treaty and now legislation takes place in the ordinary fashion i.e. via directives).

After the Treaty of Amsterdam attention could be turned to progressing legislation in the JHA field. As mentioned in the opening paragraph, in 1999 the Finnish city of Tampere played host to a special European Council conference to reform Policing and Judicial Matters in Criminality. This conference was ground breaking. The Commission describes the Tampere Council thus:

“At Tampere the leaders of the European Union looked at all aspects of justice and home affairs to highlight the priorities that would define their action at a European level. They also pointed out who should do what, and by when.”²⁷

²⁶ Hillare Barnett, *Constitutional and Administrative Law*, 5th ed, Cavendish Publishing, Cambridge (2002) 209.

²⁷ Official Fact Sheet of the European Commission Directorate General on Justice and Home Affairs, ‘Tampere, Kick-start to the EU’s policy for justice and home affairs’ (2002) Accessed at: http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf on 06 June 2016.

Member States' created a five year agenda for Justice and Home Affairs at an EU level. The official conclusion of the Council endorsed the principle of mutual recognition and stated that it should become the cornerstone of judicial co-operation in criminal justice matters:

"The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities."²⁸

If the Tampere Council had been designed to 'kick-start' the Justice and Home Affairs agenda of the EU, then it could be seen as a success because according to Mitsilegas:

"This led in 2001 to the adoption by Member States of a very detailed Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, which called on the Council to adopt no less than 24 measures in the field."²⁹

The Presidency Conclusions from the Tampere Council specifically extended the concept of mutual recognition to pre-trial orders in order to facilitate search and seizure of assets and evidence.³⁰ Such pre-trial orders were included in the 2001 Programme and included the European Arrest Warrant³¹, Freezing Orders³² and the European Evidence Warrant (EEW)³³ amongst others.

According to Mitsilegas, at the European Council in Cardiff in 1999 the UK presidency had originally floated the idea of using the principle of mutual recognition in criminal law matters having been inspired by the way in which the mutual recognition principle was used to great effect in unblocking the internal market in the 1980s (see the *Cassis de Dijon* case mentioned

²⁸ Tampere European Council 15-16 October 1999 Presidency Conclusions. Accessed at: www.europarl.europa.eu/summits/tam_en.htm on 06 June 2016 Point 33.

²⁹ Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters' (2006) CML Rev 1277.

³⁰ Tampere European Council 15-16 October 1999 Presidency Conclusions. Accessed at: www.europarl.europa.eu/summits/tam_en.htm on 06 June 2016 Point 36.

³¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

³² Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

³³ Council 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.

above).³⁴ Bantekas also points out that the concept was not new in and of itself but rather the application of it in previous cases had been to private law matters such as trade:

“Mutual recognition of judicial decisions rendered in one state by the courts of another state is not a new phenomenon in international law. The concept already exists, *inter alia*, in the field of civil judgments and arbitral awards. *What is new in the present dimension is its extension and application to the field of criminal justice* because by doing so the aim is to replace a long standing tradition of employing particular legal instruments, albeit subject to a myriad of limitations, that is mutual legal assistance (MLA) and extradition treaties.”³⁵ (Emphasis added).

What the EU was attempting to do was apply a principle that had been successful in private/commercial law and implement it in the criminal law sphere. The application of ‘mutual recognition’ in criminal justice matters replaces the traditional practice under which ‘mutual legal assistance’ has formed the basis of support in cross-border criminal justice matters.

Mutual recognition is expressly mentioned in the Lisbon Treaty as an element of the EU’s efforts to tackle crime.

“The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.”³⁶

As this thesis relates to Ireland and whether or not Ireland could implement the European Investigation Order, it is worth noting at this point that Ireland and the United Kingdom had a protocol inserted in the Treaty after the Lisbon Treaty. Protocol 21 of the Treaty on European Union says that Ireland and the UK must choose to ‘opt in’ to legislation in the criminal justice area. This is why Ireland has an option as whether or not to implement the EIO. Since the Maastricht Treaty Denmark has opted not to partake in Justice and Home Affairs matters.

³⁴ Mitsilegas (n 18) 116.

³⁵ Bantekas (n 14).

³⁶ Treaty of Lisbon, Article 61(3)

Mutual Legal Assistance in European criminal justice matters

European countries have to date rendered co-operation in criminal justice matters under the principle of mutual legal assistance. In 1959 the Council of Europe created the 'European Convention on Mutual Assistance in Criminal Matters' which addressed the issue of co-operation between European countries on issues of criminal justice. The Convention was designed to allow Justice Departments/Ministries to communicate and co-operate more easily and on an official basis. The Convention "was negotiated in the light of the general realisation of the inadequacy of the purely permissive approach of customary international law which imposed no restraints on the discretion of national courts to choose whether and how to respond to requests for assistance from courts in other States".³⁷

There was wide scope for 'declarations' and 'reservations' on matters relating to the Convention and participating States made full use of these. (According to Denza the list of reservations and declarations was twice as long as the Convention itself³⁸). Indeed many countries took over 30 years to ratify the Convention and full ratification was not achieved until 1991. In 2000 the EU created its own mutual assistance convention³⁹. This convention included rules in relation to specific forms of transfer of evidence. The corresponding provisions are now to be replaced by the European Investigation Order under Article 34(1) c of the EIO Directive.

In Ireland matters relating to Mutual Legal Assistance are legislated for under the Criminal Justice (Mutual Assistance) Act 2008. Under the Act other states' authorities may request Irish assistance in a wide range of matters, including pre-trial and investigative matters such as: taking of evidence in connection with criminal investigations, search for and seizure, serving a summons or any other court process on a person in Ireland to appear as a defendant or as a witness in another country, transfer of a person imprisoned in Ireland to another country to give evidence in criminal proceedings there, to be identified there or to assist proceedings there; all of these are provided for under the EIO as we shall see in the next chapter. The 2008 Act requires that requests under mutual legal assistance are sent to the Central Authority for Mutual Assistance.⁴⁰ Under the Act the Minister for Justice is the

³⁷ Denza, 'The 2000 Convention on Mutual Assistance in Criminal Matters' (2003) 40 CMLR 1051.

³⁸ *ibid* 1052.

³⁹ Convention on Mutual Assistance in Criminal Matters between Member States of the European Union [2000].

⁴⁰ s.8(1) Criminal Justice (Mutual Assistance) Act 2008

Central Authority, though he/she may designate any individual to carry out the functions of the Central Authority.⁴¹ The Department of Justice and Equality requires that all requests for mutual assistance are sent to the Central Authority for Mutual Assistance in the Department of Justice St Stephen's Green, Dublin.⁴²

Mutual Recognition versus Mutual Legal Assistance: A question of sovereignty

The difference between mutual recognition and mutual legal assistance can be summed up by saying that under mutual assistance one state is aiding another; whereas under mutual recognition one state is bound by the decision of another.

Under Mutual Legal Assistance 'State A' requests the assistance of 'State B' in executing some element of the operation of the criminal justice process. State B will consider the matter in the light of its own legal system. Whilst international agreements (such as the European Convention on Mutual Assistance in Criminal Matters or the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union 2000) will have an effect on the decision making process, it is still for State B to make the decision itself based on its own legal system and not that of State A; as Peers puts it "this fundamental distinction between the roles of the two States remains".⁴³ In the case of mutual recognition the decision of a court in State A is issued to State B and must be executed by State B as if it had been decided by its own legal system. This results from a voluntary limiting of sovereignty because as Walsh points out "state control over the enforcement of criminal law within its own territory is generally regarded as integral to state sovereignty".⁴⁴

As mentioned above various writers⁴⁵ have described mutual recognition as implementing decisions of one jurisdiction in another with a minimum of formality. A good example of this is the European Arrest Warrant (EAW). The EAW (which will be considered in the next section) was introduced by a Framework Decision in 2002 and transposed into Irish law by the European Arrest Warrant Act 2003. Farrell and Hanrahan write that the aim of the EAW

⁴¹ s.8(2) Criminal Justice (Mutual Assistance) Act 2008

⁴² http://www.justice.ie/en/JELR/Pages/mutual_legal_assistance accessed 24 June 16

⁴³ Steve Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?' (2004) CML Rev 5.

⁴⁴ Dermot Walsh, 'An Emerging EU Criminal Process' (2012) 2 Criminal Law and Procedure Review 61.

⁴⁵ Tom Bingham, *The Rule of Law* (Penguin Books 2010) 91.

is to remove the “middle man”⁴⁶ from surrender proceedings; in this case the middle man is the executive and diplomatic channels.

“Necessarily this means that questions of political or diplomatic expedience no longer feature in relation to surrender requests which are now dealt with purely on the basis of whether or not there is an obligation as between member states to surrender the requested person.”⁴⁷

This removal of political and diplomatic input into the decision making process reduces the formality of the process and illustrates perfectly what is meant by saying mutual recognition implements the decision of one State in another i.e. State A will issue the EAW and State B will comply, only pausing to ensure the legality of the instrument. Winter goes further in her view that rather than merely removing discretion from the decision making process, in a mutual recognition system, the executing state does not need to examine the legality of the request (in either jurisdiction) because there should be faith or understanding that the request is legal:

“Under the mutual recognition principle, the requested state, as a rule, will not check and is not allowed to check the grounds – level of suspicion, necessity or proportionality of the measure – that motivated the request, whereas under the system of mutual assistance the executing state has much more leeway to check the merits of the foreign judicial decision.”⁴⁸

This view is perhaps a little extreme and would require direct enforcement of a decision from the issuing state without any safeguard as to the legality or proportionality of the decision. The major EU criminal justice instruments such as the EAW, Freezing Orders and the EIO all provide for a degree of scrutiny on the part of the executing state; for example Article 11 of the EIO Directive provides several grounds for non-recognition such as breach of fundamental rights.

Having considered the loss of sovereignty under the mutual recognition process it can be seen that trust between states is vital to the successful operation of the mutual recognition principle; particularly as it applies to EU criminal justice. This requirement for trust and how it might be maintained will be considered anon. For the moment, the difference between

⁴⁶ Farrell and Hanrahan, *The European Arrest Warrant in Ireland* (Clarus Press 2011) 5.

⁴⁷ *ibid.*

⁴⁸ Lorena Bachmaier Winter, ‘European investigation order for obtaining evidence in the criminal proceedings, Study of the proposal for a European directive’ (2009) ZIS 9/2010 accessed at http://www.zis-online.com/dat/artikel/2010_9_490.pdf on 06 June 2016.

mutual recognition and mutual assistance should highlight the lack of autonomy that Ireland would have should the EIO be implemented and with it restrictions on how fundamental rights related to a 'Fair Trial' could be protected.

Arguments against the implementation of mutual recognition in criminal matters

Murphy⁴⁹ says that two main arguments are offered against introducing the mutual recognition principle to the criminal justice realm. These arguments are the 'qualitative difference argument' and the 'harmonisation argument'.

The 'qualitative argument' against mutual recognition is raised by both Murphy⁵⁰ and Mitsilegas. The latter describes the qualitative argument as a principled one and rates it as the main objection to mutual recognition being applied in criminal justice matters.

"The main objection that could be voiced against such transplant is one of principle, namely that criminal law and justice is an area of law and regulation which is qualitatively different from the regulation of trade and markets."

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In essence the qualitative argument is that criminal justice is much more serious in its effect on the individual than trade law is; therefore mutual recognition is too blunt an instrument to apply across the board. The criminal law regulates the relationship between the individual and the state and indeed the conduct of an individual. As a necessity in enforcing the criminal law the state may have to curb many freedoms; not just denying liberty in punishment but invading privacy during an investigation for example. In a democratic society citizens at least theoretically have elected people to debate and create such laws and in effect set the principles they live by, thus creating aims that individuals can trust in. Mitsilegas argues that such aims are not clearly defined at a trans-national level and that whilst this is also the case in commercial matters, in the latter case the market can dictate but that this is not acceptable in criminal justice matters:

While market efficiency requires a degree of flexibility and aims at profit maximization, clear and predictable criminal law principles are essential to provide legal certainty in a society based on the rule of law. The existence

⁴⁹ Murphy (n16).

⁵⁰ *ibid.*

⁵¹ Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' [2006] CMLR 1277.

of these publicly negotiated – rules is a condition of public trust in the national legal order. For these reasons, EU intervention in criminal matters may not be equated with intervention regarding the internal market.

As well as having an arguably more serious effect on the rights of the individual, the application of mutual recognition in criminal justice matters has an end goal that is different in nature from the application in the common market.

Mutual recognition in the internal market involves the recognition of national regulatory standards and controls, is geared to national administrators and legislators, and results in facilitating the free movement of products and persons, thus enabling the enjoyment of fundamental Community law rights. Mutual recognition in criminal matters on the other hand involves the recognition and execution of court decisions by judges, in order to primarily facilitate the movement of enforcement rulings. Moreover, the intensity of intervention of the requested authority is greater in criminal matters, as further action may be needed in order to execute the judgment/order (such as arrest and surrender to the requesting State.)⁵²

Murphy (citing the German courts in the *Europaischer Haftbefehl*⁵³ case) opines that national courts have tended to agree that there is an important qualitative difference between mutual recognition in the internal market and in criminal justice matters:

“Whereas the German Courts have accepted mutual recognition in relation to the internal market, they were reluctant to be as accommodating to the EAW – pointing to the special affinity that the German citizen has for their legal system.”⁵⁴

If one accepts Mitsilegas’ point above that trust existed to allow the internal market operate successfully on its own, it raises the question why? Murphy⁵⁵ argues that by the time the Cassis decision was handed down, Member States were already committed to harmonising their market. Such harmonisation of the criminal law, in itself represents the second argument against mutual recognition in the criminal justice sphere.

The harmonisation argument is based on the idea that mutual recognition was only successful in the internal market because of the high level of harmonisation that already

⁵² Ibid.

⁵³ [2005] 113 BVerfGE 273.

⁵⁴ Murphy (n16).

⁵⁵ Ibid.

existed. So if following the historical example from community law, it may be necessary to harmonise laws due to the qualitative difference between national laws. Yet, according to Mitsilegas one of the reasons given for the use of mutual recognition in criminal matters was to “reassure those sceptical of further EU harmonisation in criminal matters”.⁵⁶ This would appear to be self-defeating if true.

Prior to the implementation of mutual recognition in criminal matters the Commission had identified issues with the lack of harmonisation of criminal law. In its communication to the Council on the use of mutual recognition in criminal matters in the year 2000 the Commission said that “there is no strictly European criminal law: the criminal law of the Member States has not been harmonised”.⁵⁷ National courts applied their own national criminal law to the facts before them and based their judgments solely on domestic law. According to the Commission the need to enforce or apply judgment in a jurisdiction other than the one in which the judgment was delivered encountered difficulties such as “administrative barriers, slow procedures and even a lack of trust between Member States”.⁵⁸

If harmonisation was to be avoided by use of mutual recognition it has to a degree had the opposite effect. The European Arrest Warrant and the European Investigation Order contain a list of 32 standard offences, recognised by all participants, for which an EAW or EIO can be issued. Perhaps this proves the truth in the harmonisation argument. This issue of harmonisation is important to the Irish situation because, as we shall see in the next chapter, the abolition of a ‘dual-criminality’ provision in the EIO directive is the reason given by the government for not adopting the EIO. According to Minister for Justice Frances Fitzgerald:

“Ireland raised a number of issues concerning the proposal including the grounds for non-recognition and non-execution of an EIO and, in particular, the absence from those grounds of a dual criminality provision with regard to certain coercive measures.”⁵⁹

⁵⁶ Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’ [2006] CMLR 1277.

⁵⁷ ‘Judicial co-operation in criminal matters: mutual recognition of final decisions in criminal matters’ accessed at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l33131&from=EN> on 06 June 2016.

⁵⁸ Ibid.

⁵⁹ Minister Frances Fitzgerald, Dáil Éireann 04 June 2014. Accessed at <https://www.kildarestreet.com/wrans/?id=2014-06-04a.456&s=section%3Awrans+speaker%3A67#g457.q> on 06 June 2016.

The next chapter will consider this matter in greater detail.

As to the question of ‘fair trial rights’, the qualitative difference argument suggests that the blunt instrument of mutual recognition could perhaps bypass some fundamental rights in order to achieve its end goal. This may make states reluctant to adopt such measures. The harmonisation argument suggests that states will be ceding further sovereignty in order to implement criminal justice provisions. Both of these arguments re-enforce the idea that a great deal of mutual trust must exist between Member States in order for mutual recognition to operate successfully. Part 2 of this chapter will consider mutual trust; however, before then we turn to look at a piece of mutual recognition legislation in action.

Part 2: Mutual Trust and the Protection of Fundamental Rights in a Mutual Recognition System

The first part of this chapter should have demonstrated to the reader that mutual recognition limits the sovereignty of participating states. It has been noted several times that a high level of trust must exist for mutual recognition to be successful. This second part of the chapter considers this trust and the fundamental rights’ instruments that underpin it.

Mutual Trust in Criminal Justice Matters

Although perhaps repeated herein ad nauseam, it is crucial to understand that the level of trust required between states to allow for the application of mutual recognition in criminal justice matters, must necessarily be very high. As mentioned above⁶⁰ Walsh regards control over criminal justice matters as integral to state sovereignty.

The Stockholm Programme, which is the successor to the Tampere Programme, regards mutual trust as an important tool for the successful implementation of the programme because mutual trust between Member States “is the basis for efficient cooperation in this area”.⁶¹ The Programme makes it clear that the challenge for the years ahead is to ensure

⁶⁰ Walsh (n 43)

⁶¹ Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens* (17024/09, 2009) 5.

trust and find “new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States”.⁶²

On a practical and human level, the programme continues the aim of Article 82(1) of the Lisbon Treaty which strives to increase mutual trust through the judicial process. The programme proposes judicial training and the development of judicial networks as a method of increasing trust. As it is put in the programme:

“One of the consequences of mutual recognition is that rulings made at national level have an impact in other Member States, in particular in their judicial systems. Measures aimed at strengthening mutual trust are therefore necessary in order to take full advantage of these developments. The Union should support Member States’ efforts to improve the efficiency of their judicial systems by encouraging exchanges of best practice and the development of innovative projects relating to the modernisation of justice.”⁶³

Eurojust is an EU agency dealing with judicial co-operation in the European Union. According to Walsh, “the establishment of Europol was coupled with calls to apply this model of promoting European integration in the sphere of police co-operation in the EU via an agency to the field of judicial co-operation in criminal matters”.⁶⁴

After Tampere, the Presidency Conclusions recommended that in order to reinforce the fight against serious organised crime, that a unit should be founded composed of national prosecutors, magistrates, or police officers of equivalent competence from each Member State (according to its legal system). Eurojust was set the task of facilitating coordination of national prosecuting authorities in the EU and of supporting criminal investigations in organised crime cases.

Article 12(c)⁶⁵ now requires National Parliaments to include Europol and Eurojust in their scrutiny of EU institutions. Eurojust was formally established by a Council Decision in 2002.⁶⁶ Eurojust’s headquarters is in The Hague and like Europol is operated by representatives from each member state.

⁶² *ibid.*

⁶³ *ibid* ch 3.2.

⁶⁴ Mitsilegas, *EU Criminal Law*, p187

⁶⁵ Consolidated Treaty on European Union, Article 12(c)

⁶⁶ Council Decision 2002/187/JHA: Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime

According to the Council Decision, Eurojust's objectives are:

“(a) to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in the Member States, taking into account any request emanating from a competent authority of a Member State and any information provided by anybody competent by virtue of provisions adopted within the framework of the Treaties;

(b) to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;

(c) to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective.⁶⁷”

In the precursor to the EIO, the European Evidence Warrant, Eurojust was intended to have consultative role, when Member States were considering rejecting an EEW. If a competent authority was to reject a request for an EIO it was required to consult Eurojust before taking the decision. Eurojust has no such designated consultative role under the EIO Directive. Eurojust is referenced in the Directive on the EIO as a potential conduit for the transmission of a European Investigation Order:

“the issuing authority may make use of any possible or relevant means of transmission, for example the secure telecommunications system of the European Judicial Network, Eurojust, or other channels used by judicial or law enforcement authorities.⁶⁸”

As with Europol, the existence of Eurojust should strengthen the trust which is the basis of mutual recognition through greater interaction between judicial systems. The Stockholm Programme, the successor to the Tampere programme has called for greater joint training of the judiciary in order to enhance trust. It is Eurojust which will carry out such work.

Whilst co-operation between Member States' agencies and judiciaries and the existence of Eurojust may increase trust on a human level, it is submitted here that a solid legislative base will have more effect in ensuring trust. This is supported by the view expressed by numerous commentators who suggest the trust on which mutual recognition is built should

⁶⁷ Article 3(1) Council Decision 2002/187/JHA

⁶⁸ Recital 13, Directive 2014/41/EU on the European Investigation Order.

come from the protections offered to human rights at a European level⁶⁹. For example, Alegre and Leaf state that “[t]he principle of mutual recognition is based on the assumption that member states meet the standards of human rights protection set out in the European Convention on Human Rights”.⁷⁰ Furthermore Article 6 of the Treaty on European Union (which will be considered anon), envisages the EU acceding to the ECHR.

At a pan-European level, as well as the ECHR, there is the Charter of Fundamental Rights of the EU, a human rights charter of the EU’s own creation. These documents would seem to at least theoretically provide a basis for the necessary guarantee of protection of individual rights which would ensure the successful operation of the mutual recognition principle. (Although just how effective they actually are in reality will be questioned further down).

As well as the two human rights documents which have been created, in recent times the EU has enacted a number of directives and proposed other directives which would guarantee individual rights in response to its own proposed roadmap of procedural rights.

It is interesting to observe from the perspective of this thesis that Ireland does not automatically participate in the criminal justice measures of the EU, as a consequence of protocol 21 of the Treaty on European Union. Ireland, the UK and Denmark, each have chosen not to partake automatically in criminal justice matters. Despite this, Ireland has participated in many of the criminal justice directives, including the European Arrest Warrant, the European Evidence Warrant and Framework Decision on Freezing Orders.

We now turn to consider the 3 documents mentioned above, the European Convention on Human Rights, the Charter on Fundamental Rights of the European Union and the Procedural Roadmap.

The European Convention on Human Rights

The Council of Europe was founded as result of the Hague Congress held in May 1948. The congress made a pledge as regards the future of Europe, in which it included its desire for “a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as

⁶⁹ Murphy (n16); Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) 655; Mitsilegas (n 18) 159.

⁷⁰ Alegre and Leaf, ‘Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant’ (2004) 10(2) *European Law Journal* Volume 200.

the right to form a political opposition”⁷¹ as well as a “Court of Justice with adequate sanctions for the implementation of this Charter”⁷². In May 1949 in London the Statute of the Council of Europe was signed and the Council of Europe came into being. The ten member states committed themselves to creating a European Convention on Human Rights. The European Convention on Human Rights came into effect in September 1953.

The European Convention of Human Rights (ECHR) was to be adjudicated by the establishment of a European Court of Human Rights. The judgments of the European Court of Human Rights have impacted upon Irish law in areas such as the decriminalisation of homosexuality⁷³ or the guaranteeing of the right to silence⁷⁴.

As stated above some commentators regard the European Convention on Human Rights as forming the basis for acceptance of mutual recognition by Member States in criminal justice matters; Murphy also takes this line, citing Articles 5 to 7 of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights as underpinning mutual recognition

“The most obvious minimum standard is that provided by the European Convention on Human Rights, which contains (amongst other rights) a right to personal liberty, a right to a fair trial and a principle of legality in criminal law. Each Member State’s criminal Justice system shares the safety net provided by the ECHR as upheld by the European Court of Human Rights.”⁷⁵

Section I of the ECHR lists the rights protected thereunder.⁷⁶ Articles 5-7 of the convention directly relate to the criminal justice process. Article 5 guarantees the right to liberty and security; this requires that no person shall be detained save in a situation which is prescribed by law and can be challenged in court. Article 6 guarantees the right to a fair trial (as considered in Chapter 1). Article 7 underpins the rule of law and prohibits punishment without law i.e. an individual may not be punished through retroactive legislation.

⁷¹ Alistair Mowbray, *Cases and Materials on the European Convention on Human Rights* (OUP 2007) 1.

⁷² *ibid.*

⁷³ *Norris v Ireland* (1989) 13 EHRR 186 – The State’s prohibition on homosexuality was found to be in breach of Norris’ human rights.

⁷⁴ *Heaney and McGuinness v Ireland* (2000) 33 EHRR 264

⁷⁵ Murphy (n16).

⁷⁶ Right to life, prohibition of torture, prohibition of slavery or forced labour, right to liberty and security, right to a fair trial, no punishment without law, respect for private and family life, freedom of thought, conscience & religion, freedom of expression, freedom of assembly & association, right to marry, right to an effective remedy, prohibition of discrimination.

All the member states of the EU have ratified the European Convention on Human Rights and the Treaty of Lisbon allows for the EU itself to accede to that Convention as well as basing the general principles of EU law upon it, (provided for under Article 6 of the Treaty on European Union). However, as we shall see when we come to consider the effectiveness of these documents in protecting Human Rights in the EU, the EU has not yet acceded to the Convention. Later this chapter will consider the *Melloni*⁷⁷ case, which will examine that there may be further legislative difficulties as to the EU's accession to the ECHR.

Charter of Fundamental Rights of the European Union

The second document we must consider, is the '*Charter of Fundamental Rights of the European Union*', (often referred to as the EU Charter of Fundamental Right. The Charter lists the civil, political, social and economic rights which are recognised by the European Union and have been derived from existing EU law (including case law of the ECJ), the Social Charters of the EU and the Council of Europe, the European Convention on Human Rights and the constitutional traditions of the member states. The rights are listed throughout the chapters of the Charter under the following headings:

- Dignity,
- Freedoms,
- Equality,
- Solidarity,
- Citizens' Rights, and,
- Justice

Again certain specific protections are offered in relation to justice matters under the Charter?

Chapter VI of the Charter deals with rights in justice matters. Articles 47-50 list these rights and explain their application. The rights in question are:

- Right to an effective remedy and to a fair trial⁷⁸
- Presumption of innocence and right of defence⁷⁹
- Principles of legality and proportionality of criminal offences and penalties⁸⁰

⁷⁷ Case C-399/11 (*Criminal proceedings against Stefano Melloni*), OJ EU 2013 No. C 114/16 [2013]

⁷⁸ Charter of Fundamental Rights of the European Union Art. 47.

⁷⁹ *ibid* Art. 48.

⁸⁰ *ibid* Art. 49.

- Right not to be tried or punished twice in criminal proceedings for the same criminal offence (ne bis in idem)⁸¹

The right not to be tried or punished twice in criminal proceedings is the formalising of the 'ne bis in idem' rule, often referred to as the rule against 'double jeopardy'. This rule is important as it should prevent States from chasing an individual through different jurisdictions in Europe until they get a result that they want i.e. a conviction.

Since the Treaty of Lisbon the Charter of Fundamental Rights (CFR) is intended to have the same legal value as the main treaties as a source of law⁸²; although we will consider in a moment the truth of this matter. The Charter is applicable to the EU institutions and also to the member states of the Union when their national/domestic laws are implementing EU law⁸³.

The original Treaties had avoided including references to individual human rights prior to Maastricht; although, Craig and De Burca suggest that the ECJ had taken initial steps towards fundamental rights in the area of economic rights because Community law had direct effect⁸⁴ and so any economic rights established under Community law were automatically granted to the citizen.

In the 1969 *Stauder*⁸⁵ Case the ECJ had referred to fundamental rights as being part of the general principles of European law and indicated that the court would protect them.

In the 1970s, the ECJ further developed the law in relation to fundamental rights. In the *Internationale Handelsgesellschaft*⁸⁶ case the Court proclaimed that fundamental rights which are general principles of European law, are inspired by the constitutional traditions common to the Member States.

In 1974 in *Nold*⁸⁷ the Court added that, apart from national constitutional traditions, Community fundamental rights can be based on international agreements to which the

⁸¹ ibid Art. 50.

⁸² Consolidated version of the Treaty on European Union [2008] OJ C115/13 Art. 6(1).

⁸³ Charter of Fundamental Rights of the European Union Art. 51(1).

⁸⁴ Craig and De Burca (n 22) 319.

⁸⁵ Case 26/69 *Stauder v. Ulm* [1969] E.C.R. 419

⁸⁶ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125

⁸⁷ Case 4/73 *Nold v. Commission* [1974] ECR 491

Member States are party to. The following year they specifically pointed to the ECHR in the *Rutili*⁸⁸ case.

In 1974 in the *Solange I*⁸⁹ case the German Supreme Court expressed the view that European law did not ensure a standard of fundamental rights which was equivalent to that of German Basic Law. Some years later however, and after several ECJ judgments strengthening its 'general principles' case law, the same court in the *Solange II*⁹⁰ judgment, conceded that the protection of fundamental rights ensured by the ECJ could be presumed to be equivalent to the protection granted by the German Constitutional Court. (This conflict is interesting to bear in mind in relation to the *Melloni*⁹¹ case considered later in the chapter in relation to sufficient protection of fundamental rights).

Over the years case law was used to develop various specific fundamental rights for example the right to protection of human dignity and personal integrity⁹², the right to freedom of expression⁹³ and the right to equality before the law⁹⁴.

In 1999 the Council began an initiative to create a Charter of Fundamental Rights. According to Craig and DeBurca, this development came after many years of discussion of whether the EU should accede to the ECHR or should have its own Bill of Rights".⁹⁵

At the European Council at Cologne created the 'European Convention', a forum to draft the Charter. The Convention adopted the draft in October 2000. In December 2000 it was proclaimed by the European Parliament, the Council of Ministers and the European Commission.

The Charter is addressed to the to the EU's institutions, bodies established under EU law and to member states of the EU when implementing EU laws.⁹⁶ Art 51(1) of the Charter states

⁸⁸ Case 36/75 *Rutili* [1975] ECR 1219

⁸⁹ Judgment of 29 May 1974, Case 2 BvL 52/71

⁹⁰ Judgment of 22 October 1986, *Solange II* (2 BvR 197/83)

⁹¹ Case C-399/11 (Criminal proceedings against Stefano Melloni), OJ EU 2013 No. C 114/16 [2013]

⁹² Case C-377/98, *Kingdom of the Netherlands v. European Parliament and Council of the European Union* [2001] ECR I-7079

⁹³ Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and Others v. Commissariaat voor de Media* [1991] ECR I-4007

⁹⁴ Case 283/83 *Racke* [1984] ECR 3791, Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961 and ECR 2000, I-2737

⁹⁵ *ibid* 358.

⁹⁶ Charter on Fundamental Rights of the European Union Art. 51(1).

that these institutions, bodies and member states shall “...respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

The scope only extends to Member States’ legislation when they are implementing Union law. This limits the grounds under which individuals will be able to take a member state to court for failing to uphold the rights in the Charter on the basis of domestic legislation. This, however would not appear to limit the individual in using the Charter to vindicate their rights against abuse on foot of a mutual recognition instrument such as the EAW or the EIO.

Lenaerts explains that the Charter assists in protecting rights in three manners, through interpretation of legislation, as providing grounds for judicial review and in providing authority for general principles of EU law:

Since from now on the Charter is primary EU law, it fulfils a triple function. First, just as general principles of EU law, the Charter also serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter. Second, just as general principles, the Charter may also be relied upon as providing grounds for judicial review. EU legislation found to be in breach of an Article of the Charter is to be held void and national law falling within the scope of EU law that contravenes the Charter must be set aside. Finally, it continues to operate as a source of authority for the ‘discovery’ of general principles of EU law.”⁹⁷

Of considerable interest to this thesis generally is Mitsilegas’ belief that the Charter will become increasingly important in EU criminal justice in ensuring that rights relating to criminal justice are protected. In particular he references the right to a fair trial.

“The application of the Charter of Fundamental Rights in the field of EU criminal law will lead to the need by EU institutions to take fully into account the Charter rights related to EU criminal justice (in particular fair trial and effective remedy rights) when legislating or interpreting legislation. The Court of Justice has already signalled in *Fransson* that the Charter will apply to a wide range of areas of national law deemed as implementing Union law.”⁹⁸

As we shall see in the next chapter, the EIO directive specifically references breaches of the CFR as grounds for non-recognition of an EIO in Article 11(1) g of the EIO Directive.

⁹⁷ Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *European Constitutional Law Review* 375.

⁹⁸ Valsamis Mitsilegas, ‘The Future of European Criminal Justice’ [2014] Paper prepared for the Commission Expert Group on EU Criminal Policy, Meeting of 12 March 2014. Accessed at: <http://www.law.qmul.ac.uk/docs/staff/departement/126096.pdf> on 16 June 2016.

The ECHR and the CFR both represent broad (almost constitutional perhaps) protections. The emergence of procedural rights directives look set to 'fill in the blanks' in terms of specifying treatment of individuals under the criminal justice system.

Procedural Rights Protections

Whilst the ECHR and CFR form a baseline of fundamental rights, another development within EU criminal justice legislation which may more directly address the issue of protecting the right to a fair trial is the "roadmap on procedural rights"⁹⁹. This section will consider the development of the procedural roadmap, its contents and the effect it may have in protecting fair trials in the EU.

In 2003 the Commission issued a Green Paper entitled *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*. The Green Paper described minimum standards of individual rights as being a "necessary counterbalance to judicial co-operation measures that enhanced the powers of prosecutors, courts and investigating officers".¹⁰⁰ Some 6 years later, a month before the adoption of the Stockholm Programme, the European Council passed a resolution which has become known as the procedural rights roadmap. The Stockholm Programme embraced the roadmap, stated that the roadmap would form part of the Programme and invited the Commission to examine minimum procedural rights with a view to extending them; this last part suggested that the roadmap itself was not an exhaustive list of procedural rights.

The roadmap called for the introduction of 6 measures:

- Translation and Interpretation,
- Information on Rights and Information about the Charges,
- Legal Advice and Legal Aid,
- Special Safeguards for Suspected or Accused Persons who are Vulnerable,
- A Green Paper on Pre-Trial Detention,
- Communication with Relatives, Employers and Consular Authorities.

⁹⁹ Council Resolution 2009/C 295/01 of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. (Hereafter 'The Roadmap')

¹⁰⁰ Green Paper from the Commission, 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union' /* COM/2003/0075 final */.

The ECHR and the CFR both guarantee fundamental rights and specifically the right to a fair trial. So why was it deemed necessary to create the roadmap on procedural rights? The roadmap itself recognises the ECHR as the basis for protection of the rights of suspected or accused persons in criminal proceedings.¹⁰¹ The ECHR is regarded in the Roadmap as an important foundation for Member States in having “trust in each other’s criminal justice systems and to strengthen such trust”¹⁰². According to Hodgson the answer is that in practice “the Convention does not provide a consistent level of safeguards and enforcement is on a case by case basis”.¹⁰³ This is backed-up by the Roadmap resolution which says that there is room for further action by the Union “to ensure consistent application of the applicable standards and to raise existing standards”¹⁰⁴.

The concept of ‘fairness’ and the right to a fair trial are also specifically mentioned in the roadmap. The resolution recognises the increased level of criminal proceedings that involve individuals in Member States other than the one in which they reside and that in those situations the roadmap regards procedural rights of accused persons as particularly important in order to safeguard the right to a fair trial. The resolution calls for specific action on procedural rights to ensure fairness in criminal proceedings. We can now consider the specific action that the EU has taken to advance matters in the roadmap.

To date three directives have been adopted in the field of protection of procedural rights. A Directive on interpretation & translation¹⁰⁵ was adopted in October 2010; in May 2012 a Directive on the right to information in criminal proceedings¹⁰⁶ was adopted; then, in October 2013, a new directive was adopted which aims to ensure that minimum standards on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest are applied throughout the EU¹⁰⁷. (We will consider these in a moment).

¹⁰¹ The Roadmap, Recital 1.

¹⁰²¹⁰² The Roadmap, Recital 2.

¹⁰³ Jacqueline Hodgson, ‘EU Criminal Justice: The Challenge of Due Process Rights within a Framework of Mutual Recognition’ (2011) 37 NCJ Intl L & Com Reg 307.

¹⁰⁴ The Roadmap, Recital 2.

¹⁰⁵ Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280.

¹⁰⁶ Council Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142.

¹⁰⁷ Council Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294.

The European Commission's "2014 report on the application of the EU Charter of Fundamental Rights"¹⁰⁸ reports that negotiations are underway on advancing procedural rights. This new package of measures consists of three new proposed directives on: 'the presumption of innocence and the right to be present at trial'; 'safeguards for children in criminal proceedings' and 'on provisional legal aid and legal aid in European arrest warrant proceedings'. The report also reports that two Commission recommendations on special safeguards for vulnerable suspects in criminal proceedings and on legal aid in criminal proceedings generally (as opposed to just EAW cases) are also being considered.

The first of the roadmap-inspired measures to be implemented was the Directive on the right to translation and interpretation which was passed in 2010. This fairly straightforward directive provides suspects and accused persons with the right to an interpreter¹⁰⁹ and translation of essential documents¹¹⁰ throughout the criminal justice process. The Directive places an onus on Member States to ensure that those involved in the criminal justice process (e.g. judges) are properly trained¹¹¹ in how to interact with an interpreter; as well as ensuring that states maintain a high a register of qualified interpreters¹¹².

The Directive on the right to information in criminal proceedings was passed in 2012. This Directive gives suspects the right to be made aware of their broader procedural rights in the criminal justice process. Article 1 of the Directive ensures that suspects must be informed of their right to a lawyer, informed of entitlements to free legal aid, to be informed of the accusation, informed of their right to an interpreter and the right to remain silent. The Directive places the onus on the state to make the suspect aware of their rights under arrest¹¹³ or detention for and execution of an EAW¹¹⁴ as well as information about the

¹⁰⁸ http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf
Accessed on 16 June 2016.

¹⁰⁹ Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280, art 2.

¹¹⁰ Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280, art 3

¹¹¹ Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280, art 6.

¹¹² Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280, art 5.

¹¹³ Council Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142, art 4.

¹¹⁴ Council Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142, art 5.

accusation¹¹⁵ and access to materials¹¹⁶ related to the case. As with the translation directive, States are required to train those in the Criminal Justice process on how best to comply with the directive.

Neither Directive presents anything of great controversy but they do require the Member States who have opted in to them to engage in best practice and they make access to the legal system easier for those who may not be normally resident or citizens of an arresting State; this of course should ensure that individuals are in a better place to vindicate their own right to a fair trial. Ireland has opted in to both of these Directives.

Whilst Ireland has opted into the first two 'roadmap directives', it has not opted into the Directive on the right to access to a lawyer. The directive provides that access must be granted to a lawyer without undue delay so as to allow "the persons concerned to exercise their rights of defence practically and effectively."¹¹⁷ The directive also provides for detained persons to communicate with third parties¹¹⁸ (the directive specifically envisages a relative). This includes the right to inform a third party of the detention; there are certain exceptions to this right such as in the instance where criminal proceedings may be jeopardised or if it may endanger lives¹¹⁹. Suspects are guaranteed the right to communicate with their country's consul. The Directive requires confidentiality be guaranteed to the suspect from the arresting state.¹²⁰

¹¹⁵ Council Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142, art 6.

¹¹⁶ Council Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142, art 7.

¹¹⁷ Council Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294, art 1(2).

¹¹⁸ Council Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294, art 6.

¹¹⁹ Council Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294, art 5.

¹²⁰ Council Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294, art 4.

The directive guarantees more than just legal advice; it guarantees the right for a lawyer to be consulted prior to questioning and to be present during questioning.¹²¹ It is possible that this is part of the reason Ireland has not signed up to the directive. The Directive was enacted in 2013 and up until recently (*People (DPP) v Gormley* and *People (DPP) v White* 2014¹²²) Ireland had not guaranteed the right to consult with a solicitor prior to questioning. Following this case it is now a requirement that a suspect be given access to a solicitor prior to questioning. As to whether this means a solicitor can be present during questioning as a right Clarke J avoided the answering the question directly but did note that “the jurisprudence of both the ECtHR and the United States Supreme Court clearly recognises that the entitlements of a suspect extend to having the relevant lawyer present”¹²³. The Gardaí must be envisaging that this is also the case because as of 2015 they have drawn up a Code of Practice on Access to a Solicitor by Persons in Garda Custody¹²⁴ which includes provision for the role of solicitor present during questioning. If access to a solicitor is now guaranteed in Irish law, it would seem that there is no barrier to Ireland opting-in to the directive. However, should Ireland continue to choose not to opt-in to the directive, this directive represents an example of where roadmap provisions are seeking to require a State to enhance its protections for accused persons beyond what they are domestically.

In November 2013 the Commission prepared a package of proposals to further enhance procedural rights. Currently proposals are being considered in relation to the presumption of innocence, the rights of children suspected in criminal proceedings and on legal aid. According to the Commission’s website these are being examined with a view to “guarantee fair trial rights for all citizens, wherever they are in the EU”.¹²⁵

Effectiveness of European Fundamental Rights protections

The rights guaranteed by these documents (the ECHR, the CFR and the roadmap directives) are admirable in their aims and goals, but in terms of guaranteeing the type of trust required

¹²¹ Council Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294, art 3(3)(b).

¹²² [2014] IESC 17.

¹²³ 2014] IESC 17, [9.10].

¹²⁴ Accessed at:

<http://garda.ie/Documents/User/Code%20of%20Practice%20on%20Access%20to%20a%20Solicitor%20by%20Persons%20in%20Garda%20Custody.pdf> on 16th June 2016.

¹²⁵ Accessed at http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm on 16th June 2016.

for mutual recognition, they must go beyond stating aims, they must have some effectiveness. In this section we consider just how effective these documents are.

To deal with the Roadmap first; the Roadmap is of course only aspirational. Nonetheless, as we have seen in the previous section, real efforts are being made to implement a set of protections for fundamental rights in criminal procedure. It is this writer's submission that if the protections sought by the roadmap are enacted fully, then there will be effective legal guarantees for those in the criminal justice system. However, there are a number of problems with relying on the roadmap as grounds for mutual trust just yet.

To begin with, the 'destination' of the roadmap has yet to be reached i.e. all of the proposed procedural guarantees have yet to be enacted; as mentioned above of the three directives which have already been introduced, two of them are fairly uncontroversial, which leads to the next point. In the case of right to legal counsel, Ireland (and the UK) have not opted into it. It is possible that they will choose not to 'opt in' to other directives; this will reduce the effectiveness of the procedural guarantees and reflects poorly on mutual trust.

There are some promising directives in the pipeline, such as the directive on the presumption of innocence; but given the length of time it has taken to get to a situation where only the 2 least controversial proposals have full support, it may take some time before these further procedural rights directives are passed.

The roadmap has great potential to underpin mutual trust through protection of fundamental rights, but until it has been fully legislated for and until it has been acceded to by all Member States, it remains too weak to be a solid baseline for protection of fundamental rights. This situation leaves us to revert to the two broader human rights documents.

The Union itself has yet to accede to the ECHR even though the TEU allows for it and all Member States are signatories. In 2010, the Commission and the Council agreed to begin proceedings for the EU to accede to the ECHR. In 2013 a draft accession document was agreed. It was envisaged that the EU would accede to the ECHR before long, although Schilling writes that it is unclear how this would happen, whether the EU will have the status

of State or an International Organisation¹²⁶. However, in late 2014 this process was seemingly brought to a halt by an opinion of the ECJ.

In *Opinion 2/13 of the Court* in December 2014, the ECJ was asked by the Commission to consider the question:

“Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950 (“the ECHR”),] compatible with the Treaties?”¹²⁷

The ECJ held that the accession agreement was *not* compatible with the Treaties on several grounds. Most of these grounds would appear to involve the ECJ fearing its own role would be undermined or diminished. These grounds include: the potential effect EU accession may have on the role of the ECJ in judicial review matters, a vagueness as to the role of the ECJ in disputes prior to the ECtHR considering a case, and the possibility that the accession agreement could lead to Member States seeking to resolve disputes as to EU law in the European Court of Human rights – contrary to Article 344 of the Lisbon Treaty.

It is interesting in the context of mutual recognition that one of the reasons the ECJ objected to the agreement was that the Court was concerned the ECHR would damage mutual trust between Member States. The Court held that the agreement “is liable to adversely affect the specific characteristics and the autonomy of EU law in so far as it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter”.¹²⁸ The respective Article 53 in question in both the CFR and the ECHR reflect a desire that neither the CFR nor the ECHR would undermine existing fundamental rights protections. The ECJ fears that a lack of co-ordination between Article 53 ECHR and Article 53 CFR means that the agreement “does not avert the risk that the principle of Member States’ mutual trust under EU law may be undermined”.¹²⁹ Indeed as we shall in a moment, it could be argued that the ECJ itself has not implemented Article 53 of the CFR itself, at least not upon a literal reading, for the reason that it might affect the primacy of EU law.

¹²⁶ Theodor Schilling, ‘On Equal Footing: The Participation Rights Envisaged for the European Union After Its accession to the European Convention on Human Rights’ (2014) 14(2) Human Rights Law Review 197.

¹²⁷ Opinion 2/13 of the Court on 18 December 2014 accessed at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CV0002&from=EN> on 16 June 2016.

¹²⁸ *ibid* point 258.

¹²⁹ *ibid*.

Until the Union itself accedes to the ECHR it cannot be seen as a common base for the protection of rights and as a consequence is of limited value in terms of mutual trust. (Even though it is true to say that each individual Member State is party to it).

Finally we turn to consider the potential conflict between national and EU-level standards of protection for fundamental rights. The question as to which level of protection applies could be said to have an important role in determining the level of trust on offer between Member States. Recent case law could be said to have significant effect in this regard. In particular we look at judgments in the case of *Melloni*¹³⁰, the ultimate effect of this case appearing to be that the ECJ holds EU standards of rights to be the necessary threshold *even if* domestic standards of protection are higher.

In the *Melloni* case, M had been sought by authorities in his home country of Italy to answer charges of bankruptcy fraud in 1996. He fled to Spain. Italy requested extradition. M was arrested by the Spanish authorities but escaped whilst on bail awaiting the extradition hearing. Given that M had been made aware of his trial date and given that he nominated defence counsel, under Italian law he was allowed to be tried in absentia. He was duly convicted. In 2004 the Italian authorities issued an EAW. The Spanish authorities apprehended him in 2008 and he was scheduled to be sent back to Italy. M appealed to the Spanish Constitutional Court on the basis that under Spanish Constitutional law, the Spanish authorities could only surrender a person convicted in absentia if that person would be entitled to challenge the conviction upon return to the other country. Italian law made for no such allowance given that M was aware of the date of trial and represented in court. Thus there was a conflict between Spanish Constitutional Law and EU law; the national law gave a greater degree of protection to the individual than the CFR. The Court referred on to the ECJ on three grounds. The first question was whether the request for a ruling from the ECJ was admissible (essentially a locus standi question), this was resolved in favour of the ECJ hearing the case. The second issue was as to whether the right to present at trial was absolute, the court held that as long as the accused was given the choice as whether to attend or nominate representation, then the right to be present was satisfied. It is the third question that is of most interest to this work.

¹³⁰ Case C-399/11 (Criminal proceedings against Stefano Melloni), OJ EU 2013 No. C 114/16 [2013].

The third question before the court was whether there was any room for an executing state to grant a higher standard of rights than was provided for under EU law? The question was raised on the basis of Article 53 of the CFR. Article 53 of the CFR says:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

This would appear to mean that the Charter should not lead to a diminution of other rights guaranteed by Member States’ constitutions. The ECJ held that the Spanish Court was of the view “that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law”.¹³¹ Having taken this to be the argument of the Spanish Court, the ECJ then rejected it saying:

“That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution.”¹³²

From this we begin to see that the issue is that the ECJ will not allow national standards of constitutional law to undermine the primacy of EU law. The court cited the decision under the old Community Law from *Internationale Handelsgesellschaft*¹³³ case that said national law, even of a constitutional nature, cannot be allowed to undermine the effectiveness of EU Law even in the territory of the State itself. The court finally ruled as to this question of an Article 53 appeal that:

“Article 53 of the Charter of Fundamental Rights of the European Union must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.”¹³⁴

¹³¹ *ibid* para 56.

¹³² *ibid* para 58.

¹³³ [1970] ECR 1125.

¹³⁴ Case C-399/11 (Criminal proceedings against Stefano Melloni), OJ EU 2013 No. C 114/16 [2013] point 3.

The effect of the ruling on the Article 53 CFR appeal in *Melloni* is that the ECJ will not allow the application of a domestic standard of fundamental rights to be a condition for the issuing of an EAW, furthermore in a dispute between domestic constitutional rights and CFR rights the court will rule in favour of the CFR level of protection in order to maintain the primacy of EU law.

Returning to the earlier criticism of the application of mutual recognition to criminal justice matters, if one takes the qualitative argument approach that criminal justice is more serious than community law and thus the application of mutual recognition is not as straightforward as in community law; it is this writer's suggestion that perhaps given the nature of fundamental rights (and indeed the literal interpretation of Article 53) the principle primacy of EU law should have been considered as less significant than the protection of the higher standard of fundamental rights. If Member States feel that their national constitutional rights may be undermined by EU criminal justice legislation, then this may be damaging to mutual trust and ultimately the functioning of mutual recognition in criminal justice matters. This is perhaps a situation whereby the literal express wishes of the Council (in the form of the CFR) and the teleological interpretation of the ECJ of the CFR could come into serious conflict. Indeed as recent as August 2015 Professor Swoboda of [Ruhr-Universität Bochum](#) in Germany has criticised the judgment as meaning that the ECJ has now taken it upon itself to be "the final arbiter of the scope of applicability of the national constitutions"¹³⁵. This would be of significant impact on sovereignty issues.

De Boer articulates the problem with the Court's interpretation of Article 53 CFR as being a democratic one¹³⁶. He argues that with the expansion of EU law often there comes an inability for Member States to rely on domestic constitutional law provisions and thus that it is "highly important that change with an effect on such national standards is adopted as the result of inclusive democratic deliberation"¹³⁷. Such inclusivity is surely a crucial part of enhancing trust.

¹³⁵ Sabine Swoboda, 'The self-perception of the European Court of Justice and its neglect of the defense perspective in its preliminary rulings on judicial cooperation in criminal matters A small note on a fundamental misunderstanding' [2015] *Zeitschrift für Internationale Strafrechtsdogmatik*, ZIS 7-8/2015.

¹³⁶ Nik de Boer, 'Addressing rights divergences under the Charter: *Melloni*' (2013) 50 CMLR 1104.

¹³⁷ *ibid.*

Indeed the decision in *Melloni* could be said to have had an effect on the drafting of the EIO; as we shall see in the next chapter that the Parliament may have pushed back against the decision in *Melloni* through the wording of a recital in the EIO directive.

The decision in *Melloni* to apply the CFR standard of rights rather than the domestic one could be problematic for Ireland, given the level of protection that the courts have traditionally given against the improper obtaining of evidence in breach of constitutional rights, (this matter will be considered in Chapter 4).

Conclusions

The cross border freedoms which exist as a consequence of the European Union would appear to have indirectly led to criminal activity being more easily operated on a cross border basis.¹³⁸ The EU Member States realised the need to tackle crime on a cross border basis and under the Maastricht Treaty gave power to legislate in this area to the EU; however the method of legislating was restrictive and led to little progress being made. The Council agreed to proceed on the basis of mutual recognition due to the successful manner in which it had been applied to community law. Mutual recognition has certainly been successful in terms of leading to the production of more EU criminal justice instruments. These instruments have led to greater and more efficient co-operation between authorities in varying Member States due to the mandatory nature of such instruments, the reduction in formalities and the setting of time frames for action.

In terms of the relevance of this knowledge to further the investigation into the EIO and Fair Trial/fundamental rights protections, the reader is now aware that as a result of mutual recognition in EU criminal justice law States no longer have a significant level of discretion to decide upon whether or not to assist another state which has issued a criminal justice instrument such as an EAW or EIO. The executing state has effectively become an automaton, a tool of the issuing state. In order to agree to this encroachment on their national sovereignty, Member States must place a great degree of trust in each other. This trust is best protected by the use of common standards of fundamental rights.

¹³⁸ Andrea Ryan, "The European Evidence Warrant: The Emergence of a European Law of Evidence?" (2006) Vol 16 ICLJ 8

There are three documents which it would appear should form the basis for faith in a system of mutual recognition in EU law through the protection of fundamental rights; these are the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the Rights in Criminal Procedures Roadmap.

The existence of three separate frameworks for the protections of fundamental rights in EU criminal justice should go a long way to answering the question posed in the thesis i.e. they should reassure member states that the implementation of *any* criminal justice measure should not have a detrimental effect on fundamental rights. This is not the case however, as each of the three documents contains great flaws.

The procedural roadmap is only a guide to legislation that *should* be enacted to protect individuals in the criminal process and unfortunately, the course it plots has not been travelled too far yet. Since 2008 only two relatively uncontroversial directives have been fully subscribed to. A third directive has not been subscribed to by the UK or Ireland. Further, pieces of legislation are forthcoming but for the moment offer no protection. It is this writer's suggestion that if and once the entire programme of legislation is enacted, consideration should be given to collecting the roadmap directives in a single document (perhaps a Charter?); this would go a long way towards displaying a clear structure of rights Member States/citizens can believe in, although given the wide and varying aspects of the directives in question this may be impractical.

The EU has attempted to accede to the European Convention on Human Rights; however the ECJ has blocked the proposed effort on several grounds. In particular the supremacy of the ECJ as the final arbiter of EU law seems to have been an important factor. For the moment the ECHR offers little more beyond the aspirational for Member States/citizens at an EU level. (Though of course each Member State has individually signed up the ECHR).

Finally and perhaps most significantly the CFR has actually been seen to indirectly weaken domestic protections of fundamental rights despite an express provision (Article 53) which had aimed to avoid this scenario. The ECJ has said that for a national constitutional right to be used as reason to refuse to execute a mutual recognition measure would be to place the national provision above that of EU law and in the opinion of the court this would damage the primacy of EU law.

This chapter, whilst not addressing the EIO specifically, gives plenty of food for thought when considering the effect of any EU criminal justice measure on fundamental rights. It could be suggested that as result of the failings of the EU to protect fundamental rights Ireland was wise not to sign up for automatic “opt ins” to criminal justice legislation in the EU, it certainly leaves one concerned for the position of fundamental rights in domestic constitutions.

Chapter 3: Evidence Sharing in the EU

The previous chapter explained key elements of the development of EU criminal procedure. It explained that the principle of ‘mutual recognition’ has been used as the cornerstone of the EU criminal process since the Tampere Council in 1999. This chapter will consider the efforts being made to improve evidence transfer at a pan-European level. The primary focus of the chapter is the European Investigation Order (EIO) a document based on the principle of mutual recognition.

The first part of the chapter will introduce the reader to the European Investigation Order. It will define the EIO, explain the development of the instrument, outline its proposed operation, highlight concerns that have been expressed and explain some of the safeguards in place to address these concerns. It should leave the reader with an understanding of the EIO.

The second part of the chapter will examine the possible relationship between Ireland and the EIO. It will explain the current position as to why Ireland has chosen not to opt in to the EIO, it will consider the possible impact upon Fair Trial rights as defined in the first chapter. The operation of the European Arrest Warrant more than 10 years after its adoption in Ireland will be examined as being the closest tangible example of how the EIO might operate.

Part 1: The European Investigation Order

What is the European Investigation Order?

The European Investigation Order is an instrument created by EU directive “to be issued for the purpose of having one or several specific investigative measure(s) carried out in the State executing the EIO with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority”.¹³⁹

The EIO was legislated for by directive in April 2014.¹⁴⁰ The Commission’s official press release described the EIO directive thus:

¹³⁹ Council and Parliament Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1, Preamble, Recital 7 (Hereafter the ‘EIO Directive’).

¹⁴⁰ *ibid.*

The new rules will replace the current patchwork of legal provisions in this area, with a single new instrument aiming to make judicial cooperation on investigations faster and more efficient. It will introduce automatic mutual recognition of investigation orders and limit the grounds for refusal by another EU state to execute the order, while at the same time providing legal remedies to protect the defence rights of concerned persons. Finally, it sets deadlines for carrying out the investigative measures and requires that the recognition or execution should be carried out with the same priority and speed as for a similar domestic case.¹⁴¹

In essence the EIO is about improving cross border policing by allowing for the transfer of evidence across borders/jurisdictions with ease and enhancing police co-operation in matters of criminal investigation.

Article 1(2) of the EIO Directive states that the EIO is operated on the principle of mutual recognition (as was stated in the previous chapter); this differentiates it, as we shall see, from existing provisions in the area of evidence transfer/investigative assistance.

Under the Directive, not only prosecuting authorities can request an EIO but requests can also be made by an accused person or their defence lawyer (as long as it is allowed for by national procedures)¹⁴²; this clarifies the 'equality of arms' position that was unclear in the predecessor document the European Evidence Warrant.

The scope of the EIO is dealt with in Article 3 of the Directive; it states that the EIO will cover *any* investigative measure other than the setting up of a Joint Investigation Team. A "Joint Investigation Team" is provided for under the EU's convention on mutual assistance "which provides for two or more Member States to set up a joint investigation team 'for a specific purpose and limited period' where one Member State is conducting a 'difficult and demanding' investigation with links to other Member States, or where conducting overlapping investigations which should be co-ordinated"¹⁴³.

Whilst the Directive does cover the details of certain types of specific investigative measure (as discussed below), it does not limit the scope of potential investigative measures; as a consequence of the wide range of powers available to Member States under the EIO various safeguards have been put in place in the directive (which will be discussed later on).

¹⁴¹ Council of the European Union, 'Council adopts the 'European Investigation Order' directive,' (2014).

¹⁴² EIO Directive, Art 2(c)(ii).

¹⁴³ Steve Peers, *EU Justice and Home Affairs Law* 3rd edn, Oxford University Press, Oxford (2011) 939.

Nonetheless, Mangiaracina has expressed concern about the wide range of powers as being potentially injurious to civil liberties and human rights:

(The term) 'investigative measures' is a general one and potentially includes coercive measures, a wide expression which cannot be merely identified with measures that imply the use of coercive power. Indeed, there are measures which do not involve the use of coercion but interfere with fundamental rights (for instance, intercepting communications).¹⁴⁴

To understand the need for the European Investigation Order one must look at the question in two parts:

1. Where did the idea for a pan-European evidence sharing instrument originate?
2. What is different about the European Investigation Order from existing measures?

The next two sections should answer these questions.

The Objectives & Development of the EIO

This section will explain the demand for the EIO and the objectives it is intended to meet.

The creation of the EU led to a Europe which allowed for the free movement of goods, capital, services and labour (in other words: people). This in effect led to new opportunities for what Ryan calls "the free movement of crime".¹⁴⁵ Yet again the EU was creating a new legal order and policing and justice powers needed to react to it. As Walsh puts it, the EU was "dismantling internal legal and political borders more rapidly than it was replacing them with its own distinct political entity and police competence".¹⁴⁶

Thus, it could be said, the need to tackle crime on a cross-border basis was self-evident. The European Arrest Warrant has been regarded as successfully implemented to tackle crime on a cross-border basis. (Successful in the sense that it is fully operational). However, the development of EU-wide mechanisms to tackle criminal justice issues had to go beyond just 'extradition' proceedings. The ability to transfer evidence across borders quickly would be a

¹⁴⁴ Annalisa Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order' (2014) 10 Utrecht L. Rev 113.

¹⁴⁵ Andrea Ryan, 'The European Evidence Warrant: The Emergence of a European Law of Evidence?' (2006) 16 ICLJ 8.

¹⁴⁶ Dermot PJ Walsh, 'Police Co-Operation across the Irish Border: Familiarity Breeding Contempt for Transparency and Accountability' (2011) (38(2) Journal of Law and Society 301.

considerable tool in bringing criminals to justice. This view is re-enforced by a 2009 Commission Green Paper on evidence exchange between Member States which points out that the original intent in the *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*¹⁴⁷ “is to ensure that the evidence is admissible, to prevent its disappearance and to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case”.¹⁴⁸ This issue of speed is also raised by Head and Mansell who regard the ability to be able to share evidence quickly as very valuable, particularly in the EU with its relaxed borders:

“In the fight against international crime, few weapons are more valuable than the ability for law enforcement agencies to share evidence with each other quickly and with minimum fuss. This is particularly important in the EU, where the relaxation of national borders has increased the risk of criminals evading justice by moving between countries.”¹⁴⁹

Mangiaracina’s contention that traditional methods were considered to be slow and inefficient would seem to be backed up by Murphy¹⁵⁰ when he writes that prior to 2003 the Commission considered existing means of transferring evidence to be “too slow, complicated and subject to too many limitations for a jurisdiction such as the EU”.

This desire to minimise the formalities in evidence sharing, (which has we have seen in the previous chapter is central to the mutual recognition principle), led to the creation of numerous pre-trial orders such as ‘Freezing Orders’¹⁵¹ and the ‘European Evidence Warrant’¹⁵². (Although the European Evidence Warrant never came into operation).

Based on Articles 1 and 11 of the Framework Decision on EEW, Garlick explains the European Evidence Warrant (EEW) thus:

¹⁴⁷ Accessed at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001Y0115\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001Y0115(02)&from=EN) on 17 June 2016.

¹⁴⁸ European Commission, ‘Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility’ COM(2009) 624 final.

¹⁴⁹ Head & Mansell, ‘The European Investigation Order: Changing the Face of Evidence Gathering in EU Cross-Border Cases’ (2011) 2(4) New Journal of European Criminal Law 354.

¹⁵⁰ Cian C. Murphy, ‘The European Evidence Warrant: Mutual Recognition and Mutual (Dis)trust?’ in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice A European Public Order* (Cambridge University Press 2011).

¹⁵¹ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

¹⁵² Council 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.

“[t]he EEW is a request issued by a judge, investigating magistrate or prosecutor of one member state to obtain objects, documents or data from another member state, for use in proceedings in criminal matters. It will be transmitted via a single European Document and directly recognised and executed – on the basis of the principle of mutual recognition – in the same way as a domestic procedural measure.”¹⁵³

The Commission drafted a proposal for a European Evidence Warrant in 2003. In 2004 The Hague Programme (successor to the Tampere programme) set out a five year plan for the progression of legislation in EU criminal matters. The Hague programme proposed that the EEW Framework Decision should be adopted by 2005. This deadline was missed and the Framework Decision was not introduced until 2008. It was ultimately side-lined by the introduction of the EIO.

A major problem with the EEW (and a difference between it and the EIO) was that it only covered evidence already in existence. As the preamble to the EIO explained “the EEW is only applicable to evidence which already exists and covers therefore a limited spectrum of judicial cooperation in criminal matters with respect to evidence”.¹⁵⁴

Ireland did not enact enabling legislation for the EEW.

The other pre-trial measure which the EIO will replace is the Framework Decision 2003/577/JHA. This was introduced in 2003 to apply the principle of ‘mutual recognition’ to ‘Freezing Orders’. Former DPP James Hamilton described the purpose of EU freezing orders as being to “establish the rules under which Member States will recognise freezing orders issued for the purpose of securing evidence or the subsequent confiscation of property in the framework of criminal proceedings.”¹⁵⁵ The Framework Decision requires the freezing order to be executed as a matter of priority and in the same manner as it would be executed had it been made by the domestic authority of the executing State. This of course is a feature of the mutual recognition principle and reflects the comments of Head and Mansell above about the value of sharing evidence quickly with minimum fuss.

¹⁵³ Paul Garlick ‘The European Evidence Warrant’ (2004) 154 NLJ 858.

¹⁵⁴ EIO Directive, Preamble, Recital 4.

¹⁵⁵ James Hamilton, ERA-ICEL Conference Speech. Accessed at: https://www.dppireland.ie/filestore/documents/ERA-ICEL_Seminar_Speech_021107_Amended.pdf on 17 June 2016.

However, it would appear that the FD on Freezing Orders was simply not fit for purpose; the preamble to the EIO directive recognised that Freezing Orders had served a purpose but that the FD had been limiting in allowing for transfer. The Preamble to the Directive it is asserted that:

“Council Framework Decision 2003/577/JHA1 addressed the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, since that instrument is restricted to the freezing phase, a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the State issuing the order ("the issuing State") in accordance with the rules applicable to mutual assistance in criminal matters. This results in a two-step procedure detrimental to its efficiency.¹⁵⁶

In the Preamble of the EIO directive much of the philosophy behind the EIO and the aims it is hoped will be achieved by its implementation are outlined. Of particular interest are the references to the framework decisions on EEW and Freezing Orders. The preamble gives some of the grounds behind the decision to abandon the two previous documents. In essence the preamble claims that the previous existing procedures are failing and that “the existing framework for the gathering of evidence is too fragmented and complicated. A new approach is therefore necessary”¹⁵⁷

The European Council at Stockholm in 2009 prepared a successor to the Tampere and Hague programmes, it was intended that the Stockholm Programme would set the direction of EU criminal law matters for the years 2010-2014. The Stockholm Programme considered that the development of a system for obtaining evidence, based on mutual recognition, for cross-border cases should be continued. In the programme the European Council invited the European Commission to make an assessment on whether the traditional system of mutual legal assistance in criminal matters was still sufficient in an area of freedom, security and justice and to make proposals to improve evidence sharing.

The programme suggested:

“- a legal instrument laying down uniform European rules on the collection of evidence, and in particular electronic evidence;

¹⁵⁶ EIO Directive, Preamble, Recital 3.

¹⁵⁷ EIO Directive, Preamble, Recital 5.

- a legal instrument containing minimum principles to facilitate the mutual admissibility of evidence between countries, including scientific evidence;
- a comprehensive instrument to replace the Framework Decision on the European evidence warrant, covering all types of evidence, including orders to hear persons by way of videoconferences, and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.”¹⁵⁸

In 2010 seven Member States proposed the EIO as a replacement for Freezing Orders and the European Evidence Warrant (which had yet to take effect) in a single instrument.¹⁵⁹

Another rationale for creating the EIO is the assertion that existing “mutual assistance” provisions are not suitable for purpose. Szilvia frames it thus:

“The main idea, which lies behind the European Investigation Order (EIO), is that in the opinion of the Commission a single instrument is needed in the judicial co-operation of the Member States with which the gathering, transferring and securing the admissibility of evidence may be ensured. Though some instruments exist already, their application is difficult and lengthy, and their scopes do not cover all kinds of evidence that may be used in criminal procedure”¹⁶⁰.

In summation it can be said that the genesis of the EIO was a result of the changing nature of European borders and as a response to the shortcomings of the original instruments of both mutual assistance and mutual recognition intended for this purposes. Mangiaracina suggests that the objectives of mutual recognition instruments are “accelerating the procedure, ensuring the admissibility of evidence, simplifying the procedure, maintaining a high level of protection of human rights (especially procedural rights), reducing the financial costs, increasing mutual trust and cooperation between the Member States and preserving the specificities of the national systems and their legal culture”.¹⁶¹

However, it is now worth considering the nature of the measures which are currently in place to deal with evidence sharing within the EU.

¹⁵⁸ ‘The Stockholm Program: An open and secure Europe serving the citizen,’ accessed at: eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:jil0034&frm=EN on 26 June 2016.

¹⁵⁹ The seven states were Austria, Bulgaria, Belgium, Estonia, Slovenia, Spain and Sweden.

¹⁶⁰ Dobrocsi Szilvia, ‘Brief Overview of the Proposal for Directive on the European Investigation Order’ (2011) 39 *Studia Iuridica Auctoritate Universitatis Pecs Publicata* 148.

¹⁶¹ Annalisa Mangiaracina, ‘A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order’ (2014) 10 *Utrecht L. Rev.* 113.

Changes between existing mutual assistance procedures and the EIO

Other than the aborted EEW and the EU Freezing Orders, the current rules for evidence exchange are governed by a number of conventions: the Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (and its two additional protocols); the Schengen Convention & the 2000 EU Convention on Mutual assistance in criminal matters (and its Protocol).

The 1959 Convention was designed to allow Justice Departments/Ministries to communicate and co-operate more easily and on an official basis. It covered areas such as evidence and service of writs but specifically did *not* include extradition. The Convention did not include military offences and allowed for discretion to refuse assistance in political offences. Furthermore there was a wide scope for declarations and reservations on matters relating to the Convention and signatory states made full use of this; (according to Denza the list of reservations and declarations was twice as long as the Convention itself¹⁶²). Indeed many countries took over 30 years to ratify the Convention and full ratification would not be achieved until 1991. The 1959 Convention does also contain a provision allowing for the summons of a witness outside of the state but again complicated rules apply, whereby the witness must have set foot in the requesting state and ignored a second summons before the second state can be called upon to act.

The Schengen Agreement led to the creation of Europe's borderless Schengen Area in 1995. The Agreement was signed in 1985 between five of the then ten member states; now all but 6 EU states have fully signed up to Schengen. A portion of the agreement, Articles 48-53, refers to the operation of mutual assistance in criminal matters but Ireland is not party to the Schengen agreement.

Protocol B to the Treaty of Amsterdam allows Ireland and the United Kingdom to take part in some or all of the Schengen arrangements, if the Schengen Member States and a representative of the country in question vote unanimously in favour within the Council.

The United Kingdom asked in 1999 to cooperate in some aspects of Schengen, namely police and judicial cooperation in criminal matters, the fight against drugs and the SIS. In 2000 the European Council approved the UK's request subject to later confirmation. The Council

¹⁶² *ibid.*

Decision 2000/365/EC approving the UK's request as adopted on 29 May 2000. The Council place some conditions before the UK could accede to the portions of Schengen it wished to apply to. In 2004 after evaluating the conditions precedent to UK becoming a part member of Schengen, the Council agreed to UK membership.

Following, the UK's example Ireland made an initial request to accede to portions of the Schengen acquis. In a 2002 decision the Council granted initial approval to Ireland. However, to date no second decision has taken place and Ireland remains outside of the Schengen acquis.

In May 2000 the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union was enacted and is now ratified by 22 Member States (including Ireland).

Peers states that the most important criminal law provisions of the Convention specify:

- a) The Schengen Provisions on posting documents and contacting judges directly have become the normal rule.¹⁶³
- b) The state where the evidence is located must normally comply with the formalities and procedures which the home state requests.
- c) The Home State may request that a state with custody over a person transfer that person (possibly without his or her consent) to be a witness in the trial in the home state. And
- d) The home state may request a hearing by videoconference with a witness, an expert, or the suspect in the territory of the host State; a summons to such a conference will be mandatory for a witness or expert.¹⁶⁴

The process in both the 1959 and 2000 conventions is complicated and filled with formalities, the antithesis of mutual recognition procedures. As illustrated in this example that is created here by this author:

The prosecution in "State A" wish to obtain evidence in "State B". The relevant judge in State

¹⁶³ The Schengen provisions for posting documents, come from Article 52 and dictate rules and procedures for posting documents to potential witnesses. These rules essentially give the witnesses rights and protections.

¹⁶⁴ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) 712.

A sends a formal request (a letter rogatory) to the relevant ministry or department in State B. The officials there, then forward the request to an appropriate judge in State B who will adjudicate on the matter.

In the case of Ireland, other states are asked to forward requests to the Central Authority for Mutual Legal Assistance in Criminal Matters (a section of the Department of Justice). Upon receipt of such a request the Minister for Justice will ask the President of the District Court to appoint a District Judge to consider the matter. The District Judge will have the power to receive evidence in the manner which he/she would do in the District Court. They may for example refuse to compel a witness to give testimony if Irish law in a similar case would not permit such compulsion. The law and procedure in Ireland is based on the Criminal Justice (Mutual Assistance) Act 2008. The law includes provisions that allow Ireland to:

- take evidence in connection with criminal investigations or proceedings in another country
- search for and seize material on behalf of another country
- provide mutual assistance in relation to revenue offences
- serve a summons or any other court process on a person in Ireland to appear as a defendant or as a witness in another country
- serve a document recording a court decision on a person in Ireland
- enforce, in Ireland, confiscation and forfeiture orders made in another country
- transfer a person imprisoned in Ireland to another country to give evidence in criminal proceedings there, to be identified there, or to assist proceedings there¹⁶⁵

The Department of Justice has an office to deal with such requests and they must be communicated through diplomatic channels, this office is given the self-descriptive title of the 'Central Authority'.

Having considered the objectives and development of the EIO as well as the current arrangements for evidence transfer, we now to turn to look at the operation of the EIO.

Operation of the EIO

The EIO is not scheduled to be implemented until 2017, thus the operation of the instrument is for the moment theoretical. This section will examine how it is proposed an EIO would operate, based on the contents of the Directive.

¹⁶⁵ Accessed at http://www.justice.ie/en/JELR/Pages/Mutual_legal_assistance on 17 June 2016.

The types of proceedings in which an EIO may be issued are covered under Article 4 of the EIO directive. These include:

- criminal proceedings,
- infringements of administrative proceedings which are punishable by law,
- proceedings brought by judicial authorities in respect of acts which are punishable under law, and,
- offences “which a legal person may be held liable or punishable for”¹⁶⁶. (*The use of the phrase ‘legal person’ suggests that corporations could be included in an EIO*).

In mutual assistance provisions, such as the 1959 and 2000 Conventions, in order for agreement for assistance to be granted there needed to exist ‘dual-criminality’ between the states. That is to say that whatever alleged crime was in question, it must be reciprocally a crime in the executing state before the executing state would be in a position to assist the issuing state. As mentioned in the previous chapter a novel development key to the application of the mutual recognition principle is the creation of a list of 32¹⁶⁷ offences agreed by Member States which apply to instruments such as the EIO or EAW. This list of offences is so inclusive, it is hard to imagine too many crimes outside of the scope of the standard 32; however, should an offence fall outside the 32, then the traditional dual-criminality process kicks in. This is significant in the Irish context as we shall see.

States are instructed as to how they should conduct the transmission of an EIO in Article 7 of the Directive. The issuing state is required to communicate the EIO via “any means capable

¹⁶⁶ EIO Directive, art 4(d).

¹⁶⁷ These 32 offences as listed are: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities’ financial interests (9), laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.

of producing a written record” to the central authority designated by the executing state as having responsibility for dealing with EIOs. Article 5 of the Directive provides for a form (annexed to the directive) which will be the written record of the request. The form will be translated into one of the official languages of the executing state and include:

- Data about the issuing authority
- The object of the EIO (the person or evidence it is issued about) and the reasons for issuing it
- The necessary information available on the person subject to the EIO
- A description of the act subject to investigation
- A description of the investigative measures requested and what evidence is to be obtained.

Of course, as has been repeatedly said throughout this thesis, minimal formality for execution is an important part of the principle of mutual recognition. The executing state is required to treat the EIO with the “same celerity and priority as for a domestic case”¹⁶⁸ and upon receipt of an EIO, time limits are set, requiring the executing state to carry out the investigations by a deadline.¹⁶⁹ There is an obligation placed upon the executing state to acknowledge the receipt of the EIO within a week of receipt.¹⁷⁰ Farries describes the imposition of deadlines as “a major advance” and notes that “(t)he executing authority must refuse the request within 30 days, or take possession of the evidence requested within 60 days after receipt. The executing authority must take account of any request by the issuing authority for execution within a shorter deadline if possible. There are limited circumstances in which the executing authority could postpone execution and these are specified”.¹⁷¹

A key procedural development under the EIO (as compared with Freezing Orders) deals with the transfer of evidence. Article 10 of the FD on Freezing Orders dealt with the transfer of frozen property, it required that the original transmission of a Freezing Order request be accompanied by a separate request detailing how the property should be dealt with. This complex requirement to set specifics is removed by the EIO. The EIO Directive streamlines

¹⁶⁸ EIO Directive, art 12.

¹⁶⁹ EIO Directive, art 12.

¹⁷⁰ EIO Directive, art 16(1)

¹⁷¹ Anthony Farries, ‘The European Investigation Order: Stepping Forward with Care’ (2010) 1 New J. Eur. Crim. L. 425.

the process, simply requiring that “the executing authority shall, without undue delay, transfer the evidence obtained or already in the possession of the competent authorities of the executing state as a result of the execution to the issuing state”.¹⁷²

Specific Investigative Measures

The novel development in the EIO (and the main difference between the EIO and the formerly proposed EEW) is the ability for the issuing state to request that an executing state not just transfer evidence already in existence, but also carry out “investigative measures” on behalf of the issuing state. Mangiaracina has raised the possibility that such investigative measures may include others beyond those mentioned within the EIO directive:

The draft does not define the concept of an 'investigative measure' so it is questionable which measures, other than those enumerated in Chapter IV, are covered by the text. Legal certainty and uniformity across the Member States would require a clear definition on this point.¹⁷³

This section examines the powers which *have* been specified under the EIO directive. It will consider the improvements and modifications that have been made to the EIO from draft to final enactment. This will highlight some of the safeguards included to ensure a fair trial.

Chapter Four of the EIO directive deals with the provision of investigative measures. These include:

- Temporary transfer of persons in custody
- Hearing of evidence by telecommunications
- Provision of financial/banking information
- Gathering of evidence in “real time” i.e. monitoring
- Covert investigations

The temporary transfer of a person already in custody is provided for under the EIO directive. Articles 22 & 23 allow a person to be transferred to either the issuing or executing state in order to ‘carry out an investigative measure’. This would perhaps be providing a

¹⁷² EIO Directive, art 13.

¹⁷³ Annalisa Mangiaracina, ‘A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order’ (2014) 10 Utrecht L. Rev. 113.

DNA or blood sample. These provisions for transfer only apply to those already in custody, in order for an arrest to be carried out an EAW would be required.

Various commentators initially criticised these articles for failing to provide safeguards for persons in custody. Blackstock was particularly critical of the failure to provide for parity of prison conditions of the person in custody. She offered the opinion that this could be dangerous to the prisoner or the prison population:

“The article should go further and require prisoners to be kept in the same prison conditions in the other state, irrespective of the length of their transfer; if the prisoner has been in secure conditions they ought not to be held in an open prison, and vice versa, to maintain both their sentencing requirements, and any degree of liberty that may have been granted. This safeguard would also aim to protect the suspect from the prison population where they are a minor offender/remand prisoner, and conversely, the prison population where the suspect is a serious offender.”¹⁷⁴

Blackstock further offers the view that failing to meet these conditions leaves the states in question open to accusations of being in breach of European human rights legislation.

This is a necessary pre-requisite to ensure Articles 3 and 5 ECHR/ 4 and 6 Charter (on the prohibition of torture, inhuman and degrading treatment and right to liberty and security respectively) are not violated.¹⁷⁵

Head and Mansell were also critical of the failure to mention anything about prison conditions in the EIO Directive. They are further critical of the failure to provide for time limits in the directive.

Provisions are designed for “temporary” transfer. However, no limit is set on the time the transferred person can spend in the executing State. Furthermore, the Article is silent on the protection of transferred persons from poor prison conditions post-transfer, or how this risk should be assessed by executing States.¹⁷⁶

The final draft however did provide a possible answer to these problems. Article 22 section 5 provides that:

The practical arrangements regarding the temporary transfer of the person including the details of his custody conditions in the issuing State, and the dates by which he must be transferred from and returned to the territory

¹⁷⁴ Jodie Blackstock, ‘The European Investigation Order’ (2010) 1 New J Eur Crim L 481.

¹⁷⁵ *ibid*

¹⁷⁶ Head & Mansell, ‘The European Investigation Order: Changing the Face of Evidence Gathering in EU Cross-Border Cases’ (2011) 2(4) New Journal of European Criminal Law 354, 363.

of the executing State shall be agreed between the issuing State and the executing State, ensuring that the physical and mental condition of the person concerned, as well as the level of security required in the issuing State, are taken into account.

This places an onus upon the executing state to ensure it seeks the proper conditions from the issuing state for the time whilst the prisoner is in the care/captivity of the issuing state. It is possible to envisage a scenario whereby the failure to specify such conditions on the part of the executing state could lead to litigation after the prisoner's return.

Provision is made in Articles 24 & 25 for evidence to be delivered from an executing state to an issuing state by means of video or telephone communication. The conditions for these procedures are set out in the directive in Article 24. Whilst most of these are technical, one provision of interest in relation to the right to a fair trial is Article 24(7); this provides for punishment against perjury. An executing state is required to accept and understand that "where the person is being heard within its territory in accordance with this Article and refuses to testify when under an obligation to testify or does not testify the truth, its national law applies in the same way as if the hearing took place in a national procedure". The article is silent as to just which state or authority would initiate such potential proceedings.

The monitoring of banking and financial transactions is provided for under Articles 26 & 27. An issuing state may require the executing state to ascertain details about a bank account which may be held or legally controlled by a person or corporation which is subject to investigation. Furthermore, the issuing state can require that details of transactions from accounts which are subject to investigation be provided to the state. The responsibility to investigate all of these matters lies with an executing state. A similar provision under Article 28 exists so as to monitor in real time any transactions which may take place in specified bank account(s). This provision also allows for the monitoring of "controlled deliveries". All of these provisions do allow a degree of sovereign protection to executing states in right of refusal to an issuing state, if the action would be ultra vires in a similar domestic scenario.

The interception of telecommunications is the topic of Chapter Five of the directive. There are two articles (30 & 31). The first article deals with the interception of communications with technical assistance from an executing state. The second article allows member states to intercept communications in another jurisdiction. The framing of Article 31, regarding

‘tapping’ of telecommunications, could leave room for state abuse of the telecommunications surveillance.

Grounds for Non-Recognition

Numerous commentators have written about the potential grounds for refusal/non-recognition. Heard and Mansell suggest that the refusal grounds are “a recipe for confusion”¹⁷⁷. They claim that this is because there are differing grounds for refusal based on different circumstances. The grounds for refusal are contained in Article 11(1) of the EIO Directive. These can be listed as:

- If immunity or privilege in the case exists under the law of the executing state.
- where the executing state considers that executing the European Investigation Order would affect its national security.
- ne bis in idem. (The rule against double jeopardy).
- If dual criminality is required¹⁷⁸ but not present in cases where the accused could possibly serve 3 years in prison. (This is of particular concern to Ireland as we shall see).
- If certain issues of territoriality apply, for example if the act was committed within the executing state or outside the territory of the issuing state and the executing state does not recognise jurisdiction in such circumstances.
- The use of the investigative measure indicated in the EIO was restricted under the law of the executing state to certain offences other than those for which it was being sought.
- “substantial grounds to believe the execution of the investigative measure indicated in the EIO would be incompatible with the executing State’s obligations in accordance with Article 6 TEU and the Charter”¹⁷⁹

The inclusion of breach of fundamental rights as explicit grounds for non-recognition of an EIO is a novel development. The European Arrest Warrant & European Evidence Warrant had, for example, made general references for the need to respect fundamental rights. The

¹⁷⁷ *ibid* 359.

¹⁷⁸ The lists of 32 common offences included in the EAW Framework Decision are also included in this directive.

¹⁷⁹ EIO Directive, art 11(1)(f).

EIO Directive included an express reference to breach of fundamental rights as being a basis for non-recognition. We will return to considering this point later on.

Initial drafts of the EIO directive the grounds for refusal were more limited than what was ultimately enacted in the directive. Peer claimed that the original EIO proposal “provided for a ‘bonfire’ of the main grounds that have traditionally been available to refuse a request for mutual assistance (or the execution of a European evidence warrant – see Article 13 of the Framework Decision), going far beyond other EU measures (like the European Arrest Warrant Framework Decision) on this point”.¹⁸⁰ In earlier drafts of the EIO directive, the ground for refusal on the basis of dual criminality was excluded entirely. The final directive agrees that 32 common offences should be recognised (as with the EAW and EEW) and does include grounds for refusal on the basis of a lack of dual criminality *but significantly* only if the offence carries a maximum prison term of 3 years. We shall consider this in a moment.

The fact that the EIO directive as enacted includes the express provision for the protection of fundamental rights goes some way towards alleviating the fears of abuse of fundamental rights; but as we have seen in the previous chapter, the failure of the ECJ to implement a literal reading of Article 53 of the CFR has led to a diminishing of domestic rights due to the argued need to uphold the primacy of EU law.

Safeguards and Restrictions

The European Investigation Order will be a very powerful instrument. Once again it is necessary to stress that mutual recognition depends heavily on trust between states. That trust can be boosted by the enacting of safeguards and restrictions in the Directive; this section looks at some of these.

Chapter 2 of the EIO Directive deals with the procedures and safeguards for the issuing state. The corresponding procedures and safeguards for the executing state are dealt with in chapter 3

Article 6 of the EIO directive deals with the conditions for transmitting an EIO; article 6(1) deals with the issue of proportionality and whether or not a similar provision would be used

¹⁸⁰ Steve Peers, ‘Statewatch Analysis: The Proposed European Investigation Order’ (2010) accessed at: www.statewatch.org/analyses/no-96-european-investigation-order.pdf on 17 June 2016.

in similar domestic circumstances. Mangiaracina refers to the “principle of proportionality as a ‘hidden’ ground for refusal¹⁸¹. She claims that “the context of judicial cooperation, it is still a matter of controversy whether the executing State could apply the test of proportionality to refuse to execute the request of the issuing State”¹⁸². Article 6(1) clearly states:

The issuing authority may only issue an EIO where the following conditions have been met:

- (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and
- (b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

It would appear that not meeting these standards *should* lead to the failure of the EIO *ab initio*. However, there is clearly a sovereignty issue given that neither circumstance constitutes a ground for refusal. The directive merely gives grounds for the executing authority to raise concerns about the necessity for an EIO. The executing authority “may consult the issuing authority on the importance of executing the EIO. After that consultation the issuing authority may decide to withdraw the EIO”; however it does not require the issuing state to withdraw the EIO. Yet again this would seem to indicate that the implementation of the EIO will require high levels of mutual trust between states.

When carrying out investigative measures under an EIO, an executing state is required to follow any procedures and formalities mandated by the issuing state in the EIO, “provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing state”.¹⁸³ (Although the directive is silent as to which court, a question over such principles could be raised).

Article 10 provides that in certain circumstances the executing state may have recourse to other methods of investigation, than those requested by the issuing authority. An example of such a circumstance is if the method of investigation requested by the issuing state does not exist in the executing state.

¹⁸¹ Annalisa Mangiaracina, ‘A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order’ (2014) 10 Utrecht L Rev 113.

¹⁸² *ibid*.

¹⁸³ EIO Directive, art 9(1).

It may be important in countries such as Ireland, (where quite strict rules to exclude improperly obtained evidence have traditionally operated as we shall see in the next chapter), that specific methods of investigation outlined in an issued EIO are followed precisely in order to ensure that domestic rights are protected; otherwise this may lead to an exclusion of evidence. (The next chapter will consider the treatment of improperly obtained evidence in Europe).

Legal remedies available in relation to an EIO are dealt with in Article 14. Whilst legal remedies available should be equivalent to a domestic case, the validity of an EIO may only be challenged in the issuing state. The article says that this should be without prejudice to “the guarantees of fundamental rights in the executing state”.¹⁸⁴ This presents issues of sovereignty and mutual trust which will be considered in the next section.

The liability of issuing state officials who are operating in the executing state on foot of an EIO is dealt with under Articles 17¹⁸⁵ and 18¹⁸⁶. An issuing state officer shall be regarded under the executing state’s criminal law in the same manner as an officer of that state both in terms of their own criminal liability and the liability of those who may commit a crime against them. So for instance, had Ireland signed up to the EIO, a visiting PSNI officer killed in the line of duty would be expected to be regarded as the same as a Garda killed in the line of duty and the same penalties should be applied. Given the special protection given to Gardaí killed whilst serving in the line of duty this would be an interesting (albeit very obviously tragic) development. The issuing state will bear responsibility in civil law matters for the actions of their officials in an executing state; however the executing state will bear civil liability for their officials acting under an EIO.

There is a burden of confidentiality placed upon both parties to ensure the confidentiality of an investigation is maintained throughout any EIO process. Personal Data is protected by Article 20:

“When implementing this Directive, Member States shall ensure that personal data are protected and may only be processed in accordance with Council Framework Decision 2008/977/JHA (17) and the principles of the Council of Europe Convention for the protection of Individuals with regard to the Automatic Processing of

¹⁸⁴ EIO Directive, art 14(2).

¹⁸⁵ Criminal Liability.

¹⁸⁶ Civil Liability.

Personal Data of 28 January 1981 and its Additional Protocol. Access to such data shall be restricted, without prejudice to the rights of the data subject. Only authorised persons may have access to such data.”

This article is again an improvement on the original draft which was silent on the topic.

Issues Outstanding

Which standard of rights?

As we saw in the previous chapter, in the *Melloni* case the ECJ ruled that when considering which standard of fundamental rights to apply in a conflict between domestic constitutional rights and CFR rights, national courts must rule in favour of the CFR standard in order to maintain the primacy of EU law.

Mangiaracina argues for the inclusion of a specific provision for refusal on the basis of a breach of the executing state’s constitutional rights; favouring a general ground for the refusal to execute the EIO, if the request interferes with the constitutional rights of the executing State “otherwise it would be impossible to reject the request on this account”.¹⁸⁷ This would obviously conflict with the ECJ’s position in *Melloni*.

However, De Capitiani and Peers suggest that the European Parliament, concerned for national protection of fundamental rights, has nudged the ECJ in that direction in the EIO directive.

“(The European Parliament) was also concerned for the respect of the protection of the fundamental principles of the national criminal law systems. These principles can be protected by the Member States during the negotiation of an EU measure by using the so called “emergency brake” foreseen by Articles 82 and 83 TFEU.”¹⁸⁸

Parliament seems to have acted to return to the position expressed in Article 53 through the insertion of recital 39 of the directive:

“This Directive respects the fundamental rights and observes the principles recognised by Article 6 of the TEU and in the Charter, notably Title VI thereof, by international law and international agreements to which the

¹⁸⁷ Annalisa Mangiaracina, ‘A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order’ (2014) 10 Utrecht L Rev 113.

¹⁸⁸ Emilio De Capitiani and Steve Peers, ‘The European Investigation Order: A new approach to mutual recognition in criminal matters’ (2014) EU Law Analysis Blog Accessed at: <http://eulawanalysis.blogspot.ie/2014/05/the-european-investigation-order-new.html> on 17 June 2016.

Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in **Member States' constitutions in their respective fields of application.**" (emphasis added).

This is a pretty clear expression of a desire to ensure national standards of protection are not eroded by EU instruments on the part of the Parliament. It returns us to De Boer's assertion quoted in the previous chapter that it is "highly important that when change with an effect on such national standards is adopted, it is as the result of inclusive democratic deliberation"¹⁸⁹.

De Capitiani and Peers ask the question of recital 39 "Will this text be sufficiently clear to push the CJEU to recognise a wider 'margin of appreciation interpretation' of national authorities as regards (Justice and Home Affairs)?"¹⁹⁰ If it is not, then it is understandable that Ireland should not chose to participate in the EIO (or indeed more generally criminal justice provisions from the EU) for fear of undermining protections in Bunreacht na hEireann.

Dual Criminality

As with the EAW and EEW there is included in the EIO a list of 32 standard or common offences agreed by member states to be recognised as grounds for the issuing of an EIO.¹⁹¹ However, in the case of the EAW and EEW if an alleged crime fell outside of the scope of these 32 offences, then the traditional requirement for dual criminality kicked in. Under the EIO directive this requirement for dual criminality is watered down to only being necessary in circumstances whereby the alleged crime is punishable by 3 or more years in prison; for offences not punishable by 3 or more years in prison, lack of dual criminality is *not* grounds for refusal of an EIO.¹⁹²

Earlier drafts of the EIO directive did not include *any* right of refusal under dual criminality. Peers was scathing in his attack on this removal of dual criminality which he claimed represented "both a fundamental threat to the rule of law" as well as an attack on the

¹⁸⁹ Nik de Boer, 'Addressing rights divergences under the Charter: Melloni' (2013) 50 CMLR 1104.

¹⁹⁰(n 187)

¹⁹¹ EIO Directive, annex D.

¹⁹² EIO Directive Article 11(1)g

sovereignty of Member States as they would in effect “lose their power to define what acts are in fact criminal if committed on the territory of their State”.¹⁹³

This failure to include full dual-criminality appears to be ultimately what was fatal to Irish participation in the European Investigation Order. The Minister for Justice has commented in Dáil Éireann that:

“Ireland raised a number of concerns regarding the grounds for non-recognition and non-execution of an EIO and in particular, the absence from those grounds for a dual criminality provision with regard to certain coercive measures”.¹⁹⁴

The Minister specifically mentioned “coercive measures” as being of concern. Perhaps this displays a lack of trust in other Member States? Regardless it would appear that until the dual-criminality issue is resolved, Ireland *will* not participate in the EIO.

Proportionality

The principle of proportionality is enshrined in the Treaty on European Union.¹⁹⁵ As mentioned above, proportionality may be a hidden ground for refusal to execute an EIO. Craig and De Búrca outline the four step test for proportionality in EU law.

- there must be a legitimate aim for a measure
- the measure must be suitable to achieve the aim (potentially with a requirement of evidence to show it will have that effect)
- the measure must be necessary to achieve the aim, that there cannot be any less onerous way of doing it
- the measure must be reasonable, considering the competing interests of different groups at hand¹⁹⁶

The Directive states proportionality should be a requirement for the issuing of an EIO but ultimately the issuing State is the arbiter of proportionality. The executing state’s only recourse if it disagrees with the proportionality of an EIO is to ask the issuing state to

¹⁹³ Steve Peers, ‘Statewatch Analysis: The Proposed European Investigation Order’ (2010) accessed at: www.statewatch.org/analyses/no-96-european-investigation-order.pdf on 17 June 2016.

¹⁹⁴ Minister Frances Fitzgerald in response to a parliamentary question from Deputy Niall Collins TD, 4 June 2014, Accessed at: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014060400068?opendocument#WRT00450> on 18 June 2016.

¹⁹⁵ Consolidated Treaty on European Union, Article 5

¹⁹⁶ Craig and G de Burca, EU Law (5th edn OUP 2011) 526

reconsider use of the EIO. This appears to be a somewhat pointless exercise as surely the issuing state will have already considered the EIO a proportional tool, otherwise it would be unlikely to have issued it in the first instance.

State Sovereignty

Debates about the impact of EU legislation upon state sovereignty are as old as the European project itself. The EIO Directive does raise certain specific concerns. Initially much was made of the fewer grounds for refusal than in other mutual recognition documents. Some of these concerns have been addressed in the final enacted directive but as we have seen concerns remain.

Two concerns that still stand out as regards State Sovereignty have been flagged already in this chapter. The first one relates to the interception of telecommunications extraterritorially and the second one, which is perhaps more serious, relates to the lack of ability to challenge an EIO in the executing state's courts.

In the first case, Article 31(1)(b) allows room for an Issuing State to carry out surveillance in an Executing State and to then issue an EIO retrospectively. According to that section a Member State may be notified:

during the interception or after the interception has been carried out, immediately after it becomes aware that the subject of the interception is or has been during the interception, on the territory of the notified Member State.

This amounts to a telecommunications equivalent of the 'hot pursuit' scenario. The 'hot pursuit' scenario was legislated for under the Schengen agreement. Article 41 of the Schengen agreement provides that a pursuit can be continued on the territory of another Schengen state without prior authorization, if the authorities cannot be warned in advance. However, certain states have limited this. Den Boer explains:

Each Schengen partner has laid down its own conditions for the penetration of its territory by foreign police officers. For example, Germany imposes no time or distance limitations whatsoever, while the Netherlands only allows German police officers to pursue and stop suspects within the 10-km zone of the internal border (the

Belgian authorities enjoy a wider allowance: penetration of Dutch territory is unrestricted, but suspects may only be stopped within the 10-km zone).¹⁹⁷

As has been stated before, Ireland has not signed up to the agreement and therefore these procedures would be relatively novel to the Irish State.

Allowing a clause for the EIO to be issued after the fact requires all states who sign up to the EIO procedure to place a great amount of trust and faith in each other. Underlining the view (much discussed in the first chapter) that “the essential basis of the mutual recognition system (is the) mutual trust in respective legal orders and legal actors.”¹⁹⁸

The second issue revolves around the lack of a right of appeal to the courts of the executing state against an EIO. Whilst the mutual recognition principle requires minimal formality, surely any breaches of the law of the executing state which would result because of an EIO should be challengeable in the executing state’s courts. The question must be posed that where can one vindicate any rights that should be protected in an executing state if the central authority of that state grants an EIO that it ought not to have? The EIO directive is silent on this. Blackstock is very critical of this restriction and recommends change to allow a challenge before the courts in the executing state:

(The EIO) must provide for a hearing before a judicial authority in the executing state, where a decision on whether the request will be granted will be made and at which interested parties can make representations. Whilst the judicial authority may be able to decide whether there are grounds for refusal in most circumstances without the assistance of such representations, there will be many circumstances where fundamental rights are engaged without the executing authority being aware. These cannot be protected unless the affected person can raise such concerns.¹⁹⁹

Of course in a domestic matter the individual in question would not be able to challenge the matter prior to execution of any investigative measures. This issue is not specific to the EIO. In the EAW case of *Radu*²⁰⁰ in 2013 the ECJ rejected R’s appeal that he should have the right

¹⁹⁷ Monica Den Boer, ‘Not Merely a Matter of Moving House: Police Co-operation from Schengen to the TEU’ (2000) 7 Maastricht J Eur & Comp L 336.

¹⁹⁸ Lorena Bachmaier Winter, ‘European Investigation Order for obtaining evidence in the criminal proceedings: study of the Proposal for a European Directive’ (2010) 9 Zeitschrift für Internationale Strafrechtsdogmatik 580, 582.

¹⁹⁹ Jodie Blackstock, ‘The European Investigation Order’ (2010) 1 New J Eur Crim L 481, 495.

²⁰⁰ Case C-396/11 Ciprian Vasile Radu (29 January 2013, Grand Chamber)

to be heard in the executing state on the issue of the standard of protection of fundamental rights in the issuing state prior to his being surrendered to the issuing state.

Part 2 Ireland and the EIO

Ireland, the UK and Denmark have a different relationship to the other Member States as regards Justice and Home Affairs provisions. Denmark does not participate in Justice and Home Affairs matters. Whilst they have not abstained from JHA procedures entirely, Ireland and the UK have an automatic opt-out and therefore are required to 'opt in' to Justice and Home affairs legislation. The UK has chosen to take part in the EIO and Ireland has not.

As we have seen in Part 1 of this chapter, the Minister for Justice has expressed concern at the lack of dual-criminality provisions in the EIO Directive in particular as being grounds for Ireland not signing up to the EIO. However, the Minister has not ruled out the possibility of Ireland participating in the EIO into the future and has said that her department was in "consultations with the Office of the Attorney General, the Office of the Director of Public Prosecutions and the Garda Authorities to establish whether Ireland might now be in a position to opt in to the instruments. Once these consultations have concluded, the question of opting in to the EIO will be further considered".²⁰¹ This second part of the chapter will consider how the EIO might interact with fair trial rights in Ireland and also consider the example of the European Arrest Warrant as being a similar piece of legislation already enacted.

As Ireland has not opted to take part in the EIO its relationship with the participating member states will have to be treated as Mutual Assistance not Mutual Recognition. Requests for evidence between Ireland and other states will continue to be done in accordance with the provisions of the Criminal Justice (Mutual Assistance) Act 2008.

Elements of the 'Fair Trial' in Ireland considered in terms of the EIO

The first chapter outlined what elements have been identified as being crucial to the 'right to a fair trial' in Ireland. This section briefly considers some of these elements central to a fair trial and looks at them in light of their interaction with the EIO; but first to recap on those elements:

²⁰¹ Minister Frances Fitzgerald, Dáil Éireann, June 4, 2014.
<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014060400068?opendocument> accessed 17 June 2016

- The presumption of innocence
- The right to privacy;
- The right to dignity;
- The right to bodily integrity;
- The right to silence;
- The right to legal advice;
- The right to trial within a reasonable time;
- The right to bail; and,
- The right to proportionality in sentencing.²⁰²

The first element to be considered is the ‘presumption of innocence’. The presumption of innocence has long been a fundamental principle of the right to a fair trial. The oft quoted phrase from *Woolmington V DPP*²⁰³ describes it as “the golden thread” of justice. The presumption of innocence is guaranteed by international human rights documents²⁰⁴ including specifically the CFR (Article 48). As referenced in the previous chapter, there is a proposed Directive on the presumption of innocence as part of the roadmap on procedural rights; should this be enacted this should serve to strengthen mutual trust in this regard. For the moment the presumption of innocence under the CFR would be protected by Article 11 of the EIO directive in any event.

Some of the elements of a fair trial in Ireland are rights which can be considered to ‘overlap’, particularly in the breach rather than the observance; an example of this is the relationship between the right to privacy and the right to dignity. The right to privacy is protected as an unenumerated right under the Irish Constitution. In an international human rights context it is guaranteed under Article 12 of the Universal Declaration and Article 17 of the ICCPR. In a European context the right to privacy is protected under Articles 8 of the ECHR and 7 of the CFR. The EU Charter has a subsequent article, ‘Article 8’ which also guarantees the protection of personal data as separate right in and of itself. Within the directive Article 20 includes specific protections for personal data. We shall see in the next chapter privacy is

²⁰² Conway, Daly & Schweppe, *Irish Criminal Justice Theory, Process and Procedure*, Clarus Press, Dublin (2010) 4.

²⁰³ *Woolmington v DPP* [1935] AC 462.

²⁰⁴ UN Universal Declaration of Human Rights Article 11; ECHR Article 6(2); Charter of Fundamental Rights of the European Union Article 48; ICCPR Article 14(2).

considered to be a particularly important element of German law and the exclusionary rule of evidence may apply if an individual's privacy is breached. So how might the EIO affect the right to privacy?

According to Hogan & Whyte²⁰⁵ the right to privacy was first successfully invoked in *Kennedy v Ireland (1987)*²⁰⁶. That case involved the tapping of a journalist's phones by the State. In his judgment Hamilton P commented on the relationship between personal privacy and dignity:

"The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society"²⁰⁷

The very nature of any pan-European legislation is that it changes sovereignty but it is with consent. The specific issue of privacy however can be raised as a concern in the manner in which telecommunications and financial matters can be monitored. According to Hamilton P in the same judgment:

"The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon."²⁰⁸

Key elements of the EIO are Articles 26-28 on the gathering of information in relation to financial and banking matters and also Chapter V (Articles 30 & 31) on the interception of telecommunications. We'll first look at the effect of Articles 30 & 31 on the right to privacy and dignity. The first article (30) deals with the interception of communications with technical assistance from an executing state. The second article (31) allows member states to intercept communications in another jurisdiction.

The framing of Article 31, regarding 'tapping' of telecommunications, leaves room for state abuse of the telecommunications surveillance. Article 31(1)(b) allows room for an Issuing State to carry out surveillance in an Executing State and to then issue an EIO retrospectively. According to that section a Member State may be notified:

during the interception or after the interception has been carried out, immediately after it becomes aware that

²⁰⁵Hogan & Whyte, *JM Kelly: The Irish Constitution* (4th edn, Tottel Publishing 2003) 1440.

²⁰⁶ *Kennedy v Ireland* [1987] IR 587

²⁰⁷ *ibid* 592.

²⁰⁸ *ibid*

the subject of the interception is or has been during the interception, on the territory of the notified Member State.

Allowing a clause for the EIO to be issued after the fact requires all states who sign up to the EIO procedure to place a great amount of trust and faith in each other. Underlining the view that “the essential basis of the mutual recognition system (is the) mutual trust in respective legal orders and legal actors.”²⁰⁹

This ability to retrospectively issue an EIO could lead to a breach of privacy rights and entitlements for a private citizen, of the type referenced in *Kennedy*.

Obviously, the details of a person or business’ finances are extremely confidential. The provisions which allow for the monitoring of these could constitute a serious intrusion on an individual’s privacy.

In the case of both provisions, it would be necessary that the implementation of the process would conform to national standards. This is most likely achievable with the obvious note of caution to be applied to the Article 31(1)b provision for retrospective issuing of the EIO.

The right to bodily integrity has been examined in a number of constitutional cases, including several in relation to the treatment of people in custody. According to Hogan and Whyte the right to bodily integrity was established in the case of *Ryan V Attorney General*²¹⁰. In the case of *The State (C) v Frawley* the High Court established that the right to bodily integrity placed a duty on the state to protect the health of prisoners. In the same case the court considered the question of the right to be free from torture, or inhuman or degrading treatment. Finlay P was of the opinion in relation to unenumerated rights under Article 40 that “it is surely beyond argument that they include freedom from torture and from inhuman or degrading treatment and punishment.” The right to freedom from torture was guaranteed by Article 5 of the universal declaration. It was further protected in 1984 by the introduction of the UN Convention against Torture. Article 3 of the EU Charter guarantees the right integrity of the person, both physical and mental integrity. Article 4 of the same charter prohibits torture and inhuman or degrading treatment.

²⁰⁹ Lorena Bachmaier Winter, ‘European Investigation Order for obtaining evidence in the criminal proceedings: study of the Proposal for a European Directive’ (2010) (9) *Zeitschrift für Internationale Strafrechtsdogmatik* 580.

²¹⁰ *Ryan v Attorney General* [1965] IR 345.

The main interaction between the right to bodily integrity and the EIO would come in terms of the provisions in relation to the transfer of persons in custody. Protections for persons in custody would appear to be robust. The EIO provides that a person held in custody may be transferred either to the executing or issuing state for the purposes of carrying out an investigative measure. However, the person held in custody may refuse to consent to be transferred to a new jurisdiction²¹¹ or if the state believes it will prolong the detention of the person in custody²¹². The strongest guarantee of the maintenance of appropriate levels of protection for the citizen comes from the Article 22(5) of the EIO. This section requires both states to agree in advance the conditions under which the transfer of the prisoner should take place and also the conditions under which they must be held “ensuring the physical and mental condition of the person concerned”.

In the case of Ireland, should it sign up to the EIO, it might perhaps be possible to envisage potential for action against the state if the state failed to stipulate appropriate conditions under Article 5. However, in general it is fair to say there is little in the EIO which could lead to a breach of the right to bodily integrity.

The next element to be considered is the right to silence. Daly, Conway and Schweppe explain the right to silence:

“The right to silence often referred to as the “privilege against self-incrimination”, refers to the entitlement of a suspect within the criminal process to refuse to answer any questions put to him or to provide any information to the prosecution.”²¹³

Whilst the Supreme Court upheld the right to silence in Ireland in *Heaney*²¹⁴, it has qualified that the right is not an absolute one. If one is arrested under the Offences Against the State Act 1939, it is an offence not to account for one’s movements and actions during a time period if questioned by the Gardaí regarding same. (Although this has drawn ECtHR litigation as we shall see). It is also an offence under the same Act not to provide the Gardaí with all information one might possess in relation to commission of one of the crimes listed as a

²¹¹ EIO Directive, art 22(2)(a).

²¹² EIO Directive, art 22(2)(b).

²¹³ Conway, Daly & Schweppe, *Irish Criminal Justice Theory, Process and Procedure* (Clarus Press 2010) 43.

²¹⁴ *Heaney & McGuinness v Ireland* [1997] 1 ILRM 117.

scheduled offence. There are also certain circumstances under subsequent Acts²¹⁵ whereby ‘inferences’ may be drawn from silence.

The right to silence has been considered by the ECtHR on a number of occasions as part of Article 6 hearings. The court considered an appeal from Ireland in the previously mentioned Heaney case, as the case of *Heaney and McGuinness v Ireland*²¹⁶. The ECtHR found that Ireland was in breach of Article 6 by denying the accused their right to silence, however the law remains unchanged. The court considered the use of ‘inferences from silence’ in *John Murray v the UK*²¹⁷; in that case the court held that inferences being made from silence was not a breach of the right to silence as long as the accused is made aware of this being a possibility.

The European Investigation Order provides for the giving of testimony in a number of ways, through telephone/video conference or in person; however it does not compel a person to break their silence. An issue may arise if domestic law in the issuing state did not guarantee the right to silence. There would be little room for vindication of said right, unless potentially through the CFR.

The right to legal advice in the pre-trial stage has been “partly legislated for but has also been recognised by the courts as a right of constitutional status”²¹⁸. The right to consult a solicitor and corollary rights are contained within the Custody Regulations. This issue was considered in detail in the previous chapter and would be strengthened by Ireland signing up to the Directive on the right to legal advice.²¹⁹

The right to legal advice is not specifically mentioned at any point within the EIO. It could be considered that there is an indirect reference or provision for legal advice in relation to the hearing of evidence by video conference/by telephone. Under Article 24(5) in relation to video conferencing (with Article 25(2) in relation to telephone conference applying *mutatis mutandis*), the executing state can ensure that fundamental legal rights of the executing state are followed through e.g. in England there is a right to have a solicitor present during

²¹⁵ Criminal Justice Act 1984 (as amended by the Criminal Justice Act 2007).

²¹⁶ [2000] ECHR 684.

²¹⁷ *John Murray v The United Kingdom* [1996] 22 EHRR 29.

²¹⁸ Conway, Daly & Schweppe, *Irish Criminal Justice Theory, Process and Procedure* (Clarus Press 2010) 51.

²¹⁹ See Chapter 2 Procedural Rights protection.

interview. Even though Ireland has not opted in to the Directive on the right to legal counsel, the other Member States (UK excepted) have signed up to it and would be bound by its provisions; this should serve to alleviate any anxieties in this regard.

The right to trial within a reasonable time is an important principle of Irish law. According to Hogan and Whyte delays of up to 12 months are not considered excessive²²⁰. What would appear to be important is whether the delay prejudices the rights of the accused. It is hard to envisage grounds under which the execution of an EIO would delay the right to a trial within a reasonable time. The exception to this perhaps being if an accused was transferred whilst in custody to an issuing state, however, as previously mentioned, the provisions in relation to custody give grounds for refusal if the custody would extend the subjects' period of detention.

An accused person has a right to bail, although since the 16th amendment to the constitution the courts may decide to refuse to grant bail if they believe it is necessary to prevent the commission of a serious offence.

Within the EIO it is unclear whether "persons already in custody" refers to just those who have already been sentenced or if it includes those awaiting trial. The right of a person to refuse to be transferred out of the jurisdiction²²¹ would mean that theoretically they could refuse to be transferred if it affected their bail status. As to whether a state could refuse such an application it is unclear.

The right to proportionality in sentencing includes the right to certainty in sentencing. The EIO does not include any reference to sentencing other than the reference to not extending a person's period of detention.

Mutual Recognition in action in Ireland. Example: The European Arrest Warrant

This section will be used to consider the European Arrest Warrant as a very similar piece of legislation to the EIO, in that it is a cross border mutual recognition document which compels the authorities of one country to act in a criminal justice matter for another country under the principle of mutual recognition.

²²⁰ Hogan & Whyte (n 204) 1150.

²²¹ EIO Directive, art. 22(2)(a).

The European Arrest Warrant (EAW) has been described as “the first and most analysed, example of mutual recognition in criminal matters in the European Union.”²²² According to the Framework Decision on the European Arrest Warrant, the EAW is a “judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.”²²³

The EAW replaced the traditional ‘extradition’ approach to dealing with an individual who has fled a jurisdiction to evade the criminal justice system. Forde defines extradition as being: “a formal process based on international agreement whereby a person in one country who is wanted in another country to stand trial or be sentenced or to serve imprisonment or other punishment there, is handed over by the authorities in the former country to the officials of the latter.”²²⁴

Once again we can see the desire to minimise formality underpinning the EU ‘mutual recognition’ approach. According to Forde²²⁵ the process used by the EAW is one of ‘rendition’ rather than extradition. Forde can say this because the system of the EAW is based on mutual recognition. Rendition is where “two or more states enact virtually identical legislation which provides for handing over of those who are sought by the other state or states”.²²⁶ Certainly the trust element is very high in the EAW for a member state to allow for the detention and transfer of a citizen to another state.

The EAW has been described by Douglas Scott as “the jewel in the Crown of the EU's response to terrorism”²²⁷. Whilst the EAW had already been in the pipeline, it was rushed through as a response to the 9/11 attacks in the USA. However, according to Mitsilegas “a striking feature of the European Arrest Warrant is that its scope is not limited to terrorist offences”. Indeed the EAW has been used in cases as trivial as receiving a stolen mobile phone.²²⁸

²²² Valsamis Mitsilegas, *EU Criminal Law* (Hart Publishing 2009) 120.

²²³ Framework Decision 2002/584/JHA, art 1.

²²⁴ Michael Forde, *Extradition Law in Ireland* (3rd edn, Tottel Publishing 2005) 1.

²²⁵ *ibid* 5.

²²⁶ *ibid*.

²²⁷ Douglas Scott, ‘The rule of law in the European Union -- Putting the Security into the Area of Freedom, Security and Justice’ (2004) ELR 219.

²²⁸ *Zak v Regional Court in Bydgoszcz* [2008] EWHC 470.

Matters are expedited and simplified due to 3 changes brought about since the introduction of the EAW:

The first of these new characteristics is the de-politicisation of the extradition process. Previously, and in traditional extradition cases, the transfer of wanted individuals took place after the matter was handled through diplomatic/political channels. Since the enactment of the EAW there now exists, what Plachta calls a “judicialisation of surrender”²²⁹. This of course is very much at the core of the mutual recognition process. In the new EAW process, requests are passed straight through to judicial authorities in the member states to execute warrants. In Ireland the High Court handles such requests.

The second characteristic which has represented a radical change towards extradition has been the partial removal of the requirement for ‘dual criminality’. With the inception of the EAW there was created a list of 32 ‘standard offences’ which should be recognised throughout the EU as reasons for the execution of an EAW. These offences are listed in Article 2.2 of the Framework Decision. This same list was included in the Directive on the EIO. However, as mentioned several times in this chapter, the issue of dual criminality would appear to be a stumbling block under the EIO.

The third characteristic (and the one most expressly designed to speed up the criminal prosecution process) is the insertion in the framework decision of deadlines. According to Plachta:

"Another important feature are very short time limits imposed on both the execution of the EAW and the actual surrender after the request of person. In addition to a general statement to the effect that such a warrant must be dealt with and executed as a ‘matter of urgency’, the council demands that the final decision on the execution of the EAW be made either within 10 days (in cases where the person consents to surrender) or 60 days (in other cases)²³⁰."

Occasionally, there may be an allowance for an extra period after 30 days for judicial consideration of the matter. There is a final deadline though of 10 days after the final decision on the execution of the warrant. As mentioned in Part 1 of this chapter the

²²⁹ Michael Plachta, ‘European Arrest Warrant: Revolution in Extradition?’ (2003) 11 EJCCLCJ 178.

²³⁰ *ibid.*

implementation of deadlines is a crucial part of distinguishing the EIO from existing provisions such as EU freezing orders.

The European Arrest Warrant Act 2003 came into operation in Ireland on 1st of January 2004. Figures²³¹ from the Department of Justice indicate that the EAW has certainly become a feature of the Irish criminal justice system. Between the years 2004 & 2013 the Irish state executed 907 surrender orders on behalf of other states and had 276 cases of a person being surrendered to Ireland in the same time.

Section 37 of the Act makes it clear that there is a prohibition of surrender (i.e. the state will not execute an EAW) where there is a potential breach of ECHR rights or rights under Bunreacht na hEireann. As discussed at length throughout this thesis, the ECJ has ruled that it will not allow the primacy of EU law to be undermined by provisions of domestic constitutions, even where those provisions offer a higher standard of protection of fundamental rights to the individual. Ireland may find itself in conflict with the ECJ yet as regards section 37 of the Act should Irish Constitutional provisions be used to block the execution of an EAW. The apparent efforts by the European Parliament in recital 39 of the Directive to push for more recognition of the role for domestic constitutions in the EIO directive in protecting fundamental rights, *might* meant that a section 37 equivalent could be enacted for the EIO in Ireland. However, it is submitted here, that given the manner in which the ECJ historically was extremely tough on ensuring the primacy of European law and given the fact that in the *Melloni* judgment we have seen the court reference the landmark community law cases in this regard, it would appear the ECJ intends to uphold the primacy of EU in the face of national constitutions. This is potentially a point of major conflict between EU law and Ireland.

Conclusions

This chapter should have left the reader with an understanding of the content and potential operation of the European Investigation Order. It also explained the operation of the most well-known mutual recognition instrument the European Arrest Warrant as this offers a tangible example as to how the EIO might operate.

²³¹ Report On the operation of the European Arrest Warrant Act 2003 (2013) made to the Houses of the Oireachtas by the Minister for Justice and Equality pursuant to section 6(6) of the European arrest Warrant Act 2003. Accessed at www.justice.ie on 17 June 2016.

It would appear that in terms of the right to a Fair Trial as constructed in Chapter 1, the EIO may not have a directly detrimental effect on the rights that comprise the Fair Trial in Ireland.

However, whilst the investigation into the potential treatment of Irish Fair Trial rights seems to give the EIO a relatively clean bill of health, there are numerous issues outstanding which have to be considered as serious and ultimately, at least one of these concerns has been fatal to the adoption of the EIO by Ireland.

The issue of which standard of human rights to be applied (national or domestic) may have been further confused by the EIO (although admittedly, if the commentators quoted above are correct, the EIO attempts to use the higher standard of rights protection in all cases).

The reduction in the level of protection offered on the basis of dual criminality under the EIO has been regarded as fatal to Ireland's participation in the EIO. The fact that Ireland is so insistent on the need for dual-criminality highlights a lack of trust in other member states' legal systems and perhaps it could be argued their protection of fundamental rights.

State sovereignty also suffers due to the fact that whilst the disproportionate use of an EIO should mean the EIO fails ab initio; executing states are not permitted to reject an EIO on the basis of disproportionality, only being allowed to ask the issuing state to reconsider. This is also reflected in the fact that there is no right of appeal in the executing state against an EIO.

In several places the EIO displays the potential to present challenges to the protection of fundamental rights. There are positives, for example the inclusion for the first time in an EU criminal justice instrument of a ground for refusal on the basis of a breach of the CFR; but this must be contrasted with issues outstanding, which were raised above and restated here in the conclusion.

Chapter 4: Comparative treatment of improperly obtained evidence

Given that the purpose of the EIO is to obtain and share criminal evidence between Member States of the European Union it is worth comparing the evidential systems of differing jurisdictions. In particular it is worth considering how evidence which has been improperly obtained through breach of fundamental rights has been dealt with by varying legal systems.

The exclusion of evidence, based on breaches of fundamental rights is interesting and necessary to study, due to the fact that the very operation of the EIO may not be possible if evidence obtained in breach of rights may not be used in court. Alternatively, perhaps if a lower standard of rights' protection is applied to the evidence obtained under an EIO then this could result in a failure to protect fundamental rights in the criminal process. Ireland, as we shall see, has traditionally operated a very strict exclusionary rule of evidence, the rigidity of which could have presented great difficulties to the operation of an EIO; however, as we shall see, recent changes to the Irish approach to the exclusionary rule, may bring it more in line with other countries.

This chapter will compare the approach of the Irish criminal justice system to the exclusionary rule of improperly obtained evidence with the application of similar exclusionary evidence rules in other major EU countries. In this case we will compare the system with that of another common-law jurisdiction, England and Wales, and a civil law system, that of Germany. The comparison with England and Wales is based on the self-evident closeness of two jurisdictions which both operate 'common law' systems and which have been separate for less than 100 years. The comparison with Germany is based on the view that it is one of the "two largest and most influential legal systems"²³² on the continent (the other being France). The systems will be compared as to the approach they take towards the admissibility of evidence; in other words 'the exclusionary rule of evidence'.

It is also worth considering the treatment of improperly obtained evidence in the EU due to the fact that recent Irish case law has dramatically changed the manner in which improperly obtained evidence is treated and perhaps could be said to bring Ireland more in line with other jurisdictions. If it is true that Ireland's treatment of improperly obtained evidence is now closer to fellow EU countries, this might make it easier for Ireland to participate in the EIO.

²³² Jackson and Summers, *The Internationalisation of Criminal Evidence* Cambridge University Press, Cambridge (2012) 57.

Part 1: European Evidential Traditions

Inquisitorial and Adversarial Modes of Trial

Traditionally, the criminal trial in European countries has taken place under what are called the adversarial and inquisitorial methods. Ireland operates an adversarial mode of trial, as do the courts in the England & Wales jurisdiction. Continental jurisdictions tend to operate an inquisitorial method of trial. The adversarial process is a contest between the cases presented by two parties: prosecution and defence will cross-examine witnesses. The role of the judge is to neutrally ensure that the law as to the admissibility of evidence is observed and to adjudicate on legal matters. The case is tried by the parties to the matter. Wan der Valt describes the role of the various parties in an

“Traditionally, the adversarial system is described as a contest between two equal parties, seeking to resolve the dispute before a passive and impartial judge, with the jury pronouncing one version of the facts to be the truth”.²³³

The judge in the inquisitorial model has a much more significant role in ascertaining the facts of the matter. Presented with a dossier of evidence from the pre-trial process the judge has the power to decide which witnesses to call and what questions to ask. The cross-examination process does not exist in the inquisitorial process; however counsel for the defence and prosecution may ask certain questions. There are far fewer rules of evidence.

“For inquisitorial systems, the dominant mode is state control of the case, usually through the judiciary, rather than party control. **The judge, whether as investigating magistrate or at trial, regards himself as more than an umpire.** He is expected to take the initiative in amassing evidence and in ensuring that the merits of guilt and penalty are correctly assessed. And the judiciary is accustomed to participating in directing investigative and administrative processes which in our system are left largely to the police and counsel”.²³⁴ (emphasis added)

The fundamental difference between both systems appears to be that in an adversarial system it is through conflict that the truth will out and it is for the best case to triumph, whereas in an inquisitorial system the court must establish, through investigation of the facts, the truth of the matter, wherein finding the facts of the matter from an objective standpoint is the object of the exercise.

²³³ Wan Der Walt, ‘Comparative Method: Comparing legal systems and/or legal cultures?’ (2006) (1) *Speculum Juris* 52.

²³⁴ Goldstein, ‘Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure’ (1974) 26 *Stan L Rev* 1009, 1019.

The Exclusionary Rule of Evidence and Freedom of Proof

“Within ‘adversarial’ systems, the law of evidence is viewed as a highly regulated system of rules for the admission of evidence at the contested trial. By contrast, civil law systems operating under a court-dominated inquiry are assumed not to have a law of evidence at all. These simple assumptions are a distortion of the way in which evidence has evolved in common law and civil law systems.”²³⁵

The preceding statement from Jackson and Summers outlines the stereotypical view of the ‘rules of evidence’ in criminal trials across the two methods of trial in Europe. (There are of course lots of exclusionary rules of evidence; but this work is examining the exclusionary rule of improperly obtained evidence as in the case of an EIO this is where difficulties may arise). In this section we look firstly at the theory behind excluding evidence in the adversarial system and then at the concept of free proof and the manner in which evidence which is obtained improperly can be removed from trial in the inquisitorial system. This will show that not all adversarial systems adopt similar rules in relation to the admissibility of evidence, and nor do all inquisitorial systems simply operate ‘free proof’. It is worth remembering that we are concerned with how ‘improperly obtained evidence’ is treated in different jurisdictions, as it is at this point in an evidence-sharing system that different approaches to the protection of fundamental rights in the evidential system could potentially undermine fundamental rights protections.

First, we consider the adversarial system. In the context of improperly obtained evidence, the reasons given to justify the adversarial system’s decision to exclude or not to use the improperly obtained evidence are of importance.

“The bias of the system is such that it is allegedly preferred nine guilty men go free, rather than one innocent be convicted. In the context of determining the issue of guilt, the court does not have regard to all evidence relevant to the issue before it. This is due most immediately the application of the rules of evidence; the concept of relevance and admissibility; and ultimately to the fact, that, for various policy reasons over the years, the courts have found it possible to admit, or to rely on, certain types of evidence less frequently than others. Various interests and value judgements come into play, in delineating the distinction between relevance and admissibility.”²³⁶

²³⁵ Jackson and Summers (n 231) 57.

²³⁶ Fennell, *The Law of Evidence in Ireland*, (2nd edn, Tottel Publishing 2003) 105.

There are a number of rationales applied as to why evidence may be excluded from trial. These variously include, protecting the rights of the citizen, disciplining the police and maintaining the integrity of the trial process. Ashworth & Redmayne and Jackson & Summers both reference these three rationale which will be used throughout this chapter. They are detailed and explained below.

- The '*discipline*' or '*deterrent*' approach for the exclusion of evidence operates to encourage the police to stay within the law when gathering evidence. The deterrent approach assumes that the police will do what is necessary to achieve a conviction up to and including breaches of the law when gathering evidence; the theory is that if the police are prohibited from using evidence achieved in this manner then they will not break the rules in obtaining it. In short the police will not benefit from their breach of the law. Using the example of denying legal advice Ashworth and Redmayne explain how the rule operates:

"The idea here is that evidence is excluded in order to deter future misconduct by the police. If the police gain a confession after improperly denying the suspect legal advice, then the court should exclude the confession in order to teach the police a lesson. The police will be less likely to deny legal advice in future cases if they are aware that any evidence they obtain from the suspect by questioning him cannot be used against him in court."²³⁷

According to Jackson and Summers the deterrent approach has become the dominant argument for the exclusion of improperly obtained evidence in the United States²³⁸. This is a view recently agreed with by Daly who says that the US exclusionary rule operates "only in the context of deterrence, i.e. where the exclusion of the impugned evidence would highlight the transgression of rights to police and prosecutors and result in such rights being properly observed in the future".²³⁹

- The *protection approach* is aimed at defending the rights of the citizen. Under the protection approach to the exclusionary rule, evidence will be disallowed if there is a breach of the accused's fundamental rights.

²³⁷ Ashworth and Redmayne, *The Criminal Process* (3rd edn, OUP 2005) 319.

²³⁸ Jackson and Summers (n 231) 54.

²³⁹ Yvonne Marie Daly, 'Overruling the protectionist exclusionary rule: DPP v JC' (2015) *International Journal of Evidence and Proof* (forthcoming).

“According to this thesis, known as the 'rights theory' or the 'protective principle', the state has, by enshrining formal fundamental rights in law, defined the boundaries for lawful access to evidence. Consequently, the court must ensure that the state and the citizen are placed in the position they would have been in, had the fundamental rights of the accused not been violated.”²⁴⁰

The protection approach was the approach that had been said to be in operation in Ireland from 1990 until 2015 as we shall see in a moment.

- The *integrity or legitimacy approach* to the exclusionary rule of evidence is based on the idea of protecting the moral outcome of the trial. This approach suggests that if evidence is gathered in an untoward or illegal manner it should be excluded as not being acceptable because it would call the very justice system itself into disrepute.
- The *external or reliability approach* to the exclusionary rule of evidence suggests that all evidence should be admitted regardless of the rights of the citizen or the laws of the state. Under the reliability approach evidence will only be excluded on the basis that it is unsound.

“According to this argument, the exclusion of the evidence is required as a consequence of the risk that the evidence is unreliable and that allowing the factfinder to evaluate the evidence would result in a significant risk of error.”²⁴¹

Fennell writes that the operation of an exclusionary rule of evidence leads to a system that is characterised by a due process model rather than a crime control one.²⁴² The “Due Process” and “Crime Control” models of a criminal justice system, were created by Herbert Packer²⁴³. The “Due Process” model is characterised by ensuring that the rights of the accused are paramount throughout. The “Crime Control” model is characterised by ensuring minimum formality with the emphasis on prosecution.

²⁴⁰ Jackson and Summers (n 231) 154.

²⁴¹ Jackson and Summers (n 231) 154.

²⁴² Fennell (n 213) 106.

²⁴³ Herbert L. Packer, ‘Two Models of the Criminal Process’, 113 U. Pa. L. Rev. 1 (1964)

Moving on to examine the concept of free proof we will see that the inquisitorial system has its own approach to dealing with improperly obtained evidence as we look at the examples of Germany and France. Jackson and Summers suggest:

“The principle of free proof continues to be one of the most important principles, albeit to differing degrees, in the majority of the continental European legal systems. This principle requires the judge to take all available evidence into consideration in determining guilt or innocence of the accused.”²⁴⁴

Jackson and Summers²⁴⁵ also continue to explain that in an inquisitorial system it would be wrong to describe the method in which improperly obtained evidence is dealt with as an ‘exclusionary rule’ as they believe ‘exclusion’ implies that the judge of facts (the jury) is unaware of the existence of the evidence. In the free proof system the judge is expected to ignore that evidence even though they know of its existence. According to Gless²⁴⁶ illegally obtained evidence is approached from two angles in Germany. In the first instance evidence must be viewed in the light of providing a fair trial. In the second instance such evidence must be viewed in the light of the right to privacy. (We shall look at this in the next section as we compare against the system in Ireland).

Having outlined the theory behind both systems we now turn to look at the system of exclusionary evidence rules that apply in Ireland and compare it against that in England and Wales and that of Germany.

Part 2: A comparison of the Exclusionary Rule of Improperly Obtained Evidence operated in selected EU Countries.

Ireland

The exclusionary rule of evidence in Irish law has recently been dramatically changed following a decision of the Supreme Court in *DPP v JC*.²⁴⁷ For many years, the exclusionary rule of evidence in Ireland was “expressly centred on a rationale of protectionism such that evidence obtained in breach of constitutional rights had to be automatically excluded in

²⁴⁴ Jackson and Summers (n 231) 69.

²⁴⁵ Jackson and Summers (n 231) 72.

²⁴⁶ Sabine Gless, ‘Germany: Balancing Truth Against Protected Constitutional Interests’ in Stephen C Thaman (ed) *Exclusionary Rules in Comparative Law* (Springer 2013).

²⁴⁷ [2015] IESC 31

almost all circumstances”.²⁴⁸ Following the judgment in *JC* it appears Ireland now operates a deterrent approach to the exclusionary rule of evidence. This would appear to bring it more in line with other EU countries such as England and Germany. However, we first consider the development of the protectionist rule before the change in *JC* to the deterrent rule.

The traditional protectionist approach in Irish evidence law:

Up until the recent decision in *JC* the rules regarding improperly obtained evidence in Irish Law varied depending on the manner of the breach. The courts regarded ‘illegally obtained evidence’ and ‘unconstitutionally obtained evidence’ in different lights. This two-tiered approach to the rules of evidence had the effect of meaning that evidence obtained in breach of legal rights of the accused may be included at trial despite the breach of law. For the most part evidence which had been obtained in breach of constitutional rights would not have been included. (There was a caveat in relation to the rule regarding constitutional rights such that evidence may have been admitted in ‘extraordinary exclusionary circumstances’ as we shall see below).

The old two-tiered system was first articulated in the case of *AG v O’Brien*²⁴⁹. The famous error in that case was made when the District Court issued a warrant for 118 Cashel Road, Crumlin when the warrant requested should have been for 118 Captains Road, Crumlin. The defendants argued that the evidence garnered from that search should be excluded due to the error on the warrant. The accused argued that the incorrect warrant was illegal due to trespass and unconstitutional due to the Article 40 guarantee of the inviolability of the dwelling. The Supreme Court then laid out the separate rules for evidence which was improperly obtained. One set of guidelines applied to illegally obtained evidence and one set applied to unconstitutionally obtained evidence.

Regarding illegally obtained evidence in Irish Law, the basic principle was that the trial judge should have discretion whether or not to include this evidence at trial. If a trial judge was faced with deciding whether or not to include illegally obtained evidence he/she was required to consider certain factors including the nature and extent of illegality, whether or not the breach was intentional, whether or not it was a trivial breach of the law, if the

²⁴⁸ Yvonne Marie Daly, ‘Overruling the protectionist exclusionary rule: DPP v JC’ (2015) International Journal of Evidence and Proof (forthcoming).

²⁴⁹ *People (AG) v O’Brien* [1965] IR 142.

breach of law was as a result of a set policy of the Gardaí or was an ad hoc event and whether it would be in the public interest to include the evidence²⁵⁰.

The chairman of the Balance in the Criminal Law Review Group Gerard Hogan (now Hogan J) stated in his dissent to the Group's report that illegally obtained evidence is nearly always accepted by the courts:

"In practice, the courts almost never exclude evidence on the ground there has been a mere illegality (as distinct from unconstitutionality) and there is nearly always a reason why such evidence should be held to be admissible in the overall public interest."²⁵¹

If under the traditional rule a breach of *legal* rights lead to few exclusions of evidence, it could be said that a breach of constitutional rights would lead to very few inclusions of evidence. Unconstitutionally obtained evidence would be excluded where there has been a deliberate breach of the rights of the suspect, even if the authorities were unaware that the act in question was unconstitutional. The exception to this was where there were 'extraordinary excusing circumstances'. Such extraordinary circumstances include the prevention of the destruction of vital evidence or the need to protect human life²⁵².

In *DPP v Kenny*²⁵³ a search warrant was issued to the Gardaí by a Peace Commissioner (PC). The Supreme Court later found that the PC had issued the search warrant without reasonable grounds to do so. The Gardaí had no reason to doubt the validity of the warrant. Initially the Court of Criminal Appeal held that as there had been no deliberate breach of rights as the Gardaí acted in a bona fide manner, they were inclined to include the evidence. The Supreme Court differed from the Court of Criminal Appeal. The court ruled that as the constitutional rights of the accused had been breached, the evidence should be excluded. The bona fides of the Gardaí did not matter to the court. As Conway, Daly and Schweppe put it:

"The majority of the Court expressly denounced the deterrence principle as a rationale for the exclusion of unconstitutionally obtained evidence in the Irish context, favouring the protection of rights as the basis for the operation of the rule"²⁵⁴.

²⁵⁰ *ibid.*

²⁵¹ Gerard Hogan, 'Note of Dissent on Exclusionary Rule by the Chairman' in Balance on Criminal Law Review Group Final Report accessed at <http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf> on 17 June 2016.

²⁵² *People (AG) v O'Brien* [1965] IR 142.

²⁵³ *People (DPP) v Kenny* [1990] 2 IR 110.

²⁵⁴ Conway Daly and Schweppe (n 231) 81.

The court weighed up the competing interests of the protection of the rights of the individual against the importance of investigating and prosecuting crime. Ultimately it held in favour of the protection of the rights of the citizen. Finlay CJ defined the rule thus:

“evidence obtained by the invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in [the court’s] discretion”²⁵⁵

Conway, Daly and Schweppe note that there have been some criticisms of the rule set out in Kenny by the courts and by the Balance in Criminal Law Review Group²⁵⁶. The Court of Criminal Appeal in *DPP V Balfe*²⁵⁷ viewed O’Brien and Kenny as conflicting. In *DPP (Walsh) v Cash* Charleton J criticised the rule in Kenny:

“a rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of a society which is the purpose of the criminal law”²⁵⁸

The rule may have appeared severe in its application, but it did ensure protection of citizen’s rights, whilst allowing flexibility for the extraordinary circumstances that can occur (such as those in Shaw). If considers the question asked in this thesis about the protection of fundamental rights, the former protectionist rationale operated in Ireland shows the link between criminal investigation/evidence and the protection of fundamental rights.

However, in 2015 the Supreme Court radically reformed the exclusionary rule of evidence.

A shift to a deterrent approach: DPP v JC

In *JC*, the accused had been arrested after the execution of a search warrant which had been issued in a proper fashion, in that it was issued in accordance with what the law was understood to be at the time. After his arrest he made a number of inculpatory statements; however, it was later decided in the *Damache*²⁵⁹ case that the type of warrant which the original statement was used for was unconstitutional. Thus the search of JC’s premises was under an unconstitutional warrant and so the comments made under arrest would be fruit of the poison tree. At trial the court ruled the comments inadmissible under the Kenny ruling, even though at the time of the issuing of the warrant, the Gardaí had no way of knowing that the warrant would be held unconstitutional. The Supreme Court heard an

²⁵⁵ *People (DPP) v Kenny* (1990) 2 IR 110.

²⁵⁶ Conway, Daly and Schweppe (n 217) 82.

²⁵⁷ *DPP v Balfe* [1998] 4 IR 50.

²⁵⁸ *DPP (Walsh) v Cash* [2007] IEHC 108.

²⁵⁹ [2012] IESC 11.

appeal from the DPP on the case and took the opportunity to revisit the *Kenny* ruling. The new rule is summed up by Daly as allowing “evidence obtained in inadvertent breach of constitutional rights to be admitted at trial while evidence obtained in knowing, reckless or grossly negligent breach must be excluded, except in exceptional circumstances”.²⁶⁰ The Supreme Court decided for other reasons not to order a retrial, but have now re-written the law of evidence as it stood for at least 25 years.

The JC case was decided 4-3 and six of the seven judges issued judgments which combined over 155,000 words. According to Daly the new rule has been defined in Clarke’s J judgment, and (given the length and depth of the six judgments). Daly for summarises the new exclusionary rule as set out by Clarke J:

- The onus is on the prosecution to establish the admissibility of all evidence.
- If a claim is raised that evidence was obtained in breach of constitutional rights, the onus is on the prosecution to establish either (i) that there was no unconstitutionality, or (ii) that despite any interference with constitutional rights the evidence should still be admitted.
- Where evidence is obtained in deliberate and conscious violation of constitutional rights (in the sense of knowing breach of rights) it should be excluded, except in exceptional circumstances.
- Whether or not a breach of constitutional rights was deliberate and conscious requires analysis of the conduct or state of mind of the individual who actually gathered the evidence, as well as any senior official or officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence-gathering of the type concerned.
- Where evidence was taken in breach of constitutional rights, but this was not deliberate and conscious, there is a presumption in favour of exclusion, which can be rebutted by evidence that the breach of rights was either (i) inadvertent or (ii) derived from subsequent legal developments.²⁶¹

²⁶⁰ Yvonne Marie Daly, ‘Overruling the protectionist exclusionary rule: DPP v JC’ (2015) *International Journal of Evidence and Proof* (forthcoming).

²⁶¹ *ibid.*

Clearly the '*mens rea*' (as we might say in criminal law terms) of the officer accused of breaching the rights of the accused has an important part to play in the new rule. This would suggest that the exclusionary rule now exists to ensure that an investigating officer who is aware that they may be in a position to obtain evidence in breach of rights is not tempted to follow through and obtain the evidence in breach of said rights. This leads us to consider the rationale of the Irish exclusionary rule.

Rationale

In *Trimbole v Governor of Mountjoy Prison*²⁶² (before Kenny but after O'Brien) Finlay CJ explained what he believed the rationale behind the exclusionary rule was:

- (a) to protect persons against the invasion of their constitutional rights;
- (b) if invasion has occurred, to restore as far as possible the person so damaged to the position in which he would have been if his rights had not been invaded; and
- (c) to ensure as far as possible that persons acting on behalf of the executive who consciously and deliberately violate the constitutional rights of citizens do not for themselves or their superiors obtain the planned results of that invasion.

In *People (DPP) v Kenny*²⁶³ the Supreme Court held that the reference in *O'Brien* to 'deliberate and conscious' breach of constitutional rights by the Gardaí meant that it was their actions which had to be deliberate and conscious, not that they had knowingly broken the law. This suggested that the approach was one of providing a high level of protection for the citizen and so a rationale of protectionism in relation to unconstitutionally obtained evidence in Ireland was the primary motivator behind the Irish exclusionary rule.

Following *JC* it appears the courts have turned to a deterrent approach; evidence will not be excluded if it was obtained as a result of an inadvertent or mistaken breach of constitutional rights. Clarke in Chapter 4 of his judgment seems to wrestle in several places with the need to protect constitutional rights and yet vindicate victims.

In terms of the need to ensure full availability of evidence to the court, the judge says that:

"...society, and indeed the victims of crime, are entitled to have an assessment carried out at a criminal trial of the culpability of an accused based on the proper consideration by the decider of fact (be it judge or jury) of all

²⁶² [1985] 1 IR 550, 557.

²⁶³ [1990] ILRM 569.

evidence, where that evidence is material to the question of guilt or innocence, is potentially probative of guilt, and is not potentially more prejudicial than probative..."²⁶⁴

Yet later on the judge acknowledges the need to ensure that investigative authorities, specifically the Gardaí follow the law in order to maintain the rights of citizens and states that consequences should follow from the breach of such rights

"Why do we have elaborate laws concerning arrest, the power to enter premises, questioning and other means of what might be described as non-voluntary evidence gathering? We do so because there is a significant constitutional value in ensuring that there are clear rules which mark the limits of the powers of investigation and enforcement agencies in evidence gathering. Those limits are there to protect us all. There is a high constitutional value in ensuring that those limits are maintained. It follows that there should be consequences, and indeed significant consequences, where those rules are broken."²⁶⁵

Ultimately the judge decides that achieving a balance between the two competing interests is what is correct and thus strives to define a rule "to require trial courts to exercise vigilance to ensure that investigating agencies (such as An Garda Síochána) act in an appropriate fashion and to enable trial judges, having carried out such vigilant scrutiny, to apply a properly defined constitutional balance to the situation which then emerges".²⁶⁶

This widening of discretion and yet placing of responsibility on the court to ensure that the authorities act appropriately suggests that the rationale is now one of deterrence and this stated rather plainly by McMenamin

"There can be no doubt that the deterrence principle is now a fundamental part of our law".²⁶⁷

The old protectionist approach to excluding evidence was very strong. The new deterrence principle may make Ireland more similar to other European jurisdictions. We now turn to consider Germany and England.

Germany

²⁶⁴ *ibid.*

²⁶⁵ *ibid.*

²⁶⁶ *ibid.*

²⁶⁷ *ibid.*, 62.

Germany can said to operate a two tiered approach to excluding evidence in a manner reminiscent of the Irish approach. In the first instance evidence must be viewed in the light of providing a fair trial. In the second instance such evidence must be viewed in the light of the right to privacy as a result of a constitutional provision.

General Approach

Further down, we will look at the some of the grounds for excluding evidence in the German legal system; it is first necessary to remember that the German system *is* an inquisitorial one and thus is motivated to find the facts of the case before it.

As Gless puts it:

“German Courts are obligated to ascertain the truth. Thus a justification for the exclusion of evidence is necessary because the court must consult all relevant evidence in searching for the truth.”²⁶⁸

This of course reflects the traditional approach to the criminal trial in an inquisitorial system as mentioned above, Fahl goes further saying that:

“There is no rule in German Law that evidence that has been obtained unlawfully cannot be used in court.”²⁶⁹.

The German Criminal Code provides a provision 244(2) which affirms this point:

“In order to establish the truth, the court shall, of its own accord, extend the taking of evidence to all facts and means of proof relevant to the decision.”²⁷⁰

Gless describes this as pointing to the duty placed upon the judiciary to “find the truth” which has been “an essential feature for centuries” of the German criminal system²⁷¹.

Crucially, however, she also quotes a famous maxim of the German Criminal Supreme Court and says that this points to a limit of the search for truth.²⁷²

²⁶⁸ Sabine Gless, ‘Germany: Balancing Truth Against Protected Constitutional Interests’ in Stephen C Thaman (ed) *Exclusionary Rules in Comparative Law* (Springer 2013) 117.

²⁶⁹ Dr Christian Fahl, ‘The Guarantee of Defence Counsel and the Exclusionary Rules on Evidence in Criminal Proceedings in Germany’ (2007) German LJ accessed at:

http://www.germanlawjournal.com/pdfs/Vol08No11/PDF_Vol_08_No_11_1053-1067_Articles_Fahl.pdf 20 June 2016

²⁷⁰ Gless (n 267) 117.

²⁷¹ *ibid.*

²⁷² *ibid.*

“It is not a principle of criminal procedure to arrive at the truth at any cost”²⁷³

So if the end does not justify the means we must now examine how the two principles of the right to a fair trial and the right privacy restrict the admission of evidence.

Fair Trial

There are numerous provisions within the German Code for Criminal Procedure, the Strafprozessordnung (StPO), which provide for a fair trial. Section 136 is of particular note, it relates to the rights of a defendant when being questioned. If these rights are breached evidence may be excluded:

(1) The accused’s freedom to make decisions and to manifest his will must not be affected by ill-treatment, induced fatigue, physical interference, the administration of drugs, torment, deception or hypnosis. Coercion may be applied only in so far as the criminal law permits. Threats of impermissible measures or the promise to grant an advantage not permitted by law are prohibited.

(2) Measures affecting the memory or the ability to understand the accused are not permitted.

(3) The prohibition referred to in paragraphs 1 and 2 shall apply without regard to the consent of the accused. Statements that are in breach of this prohibition shall also not be used if the accused has agreed.²⁷⁴

Gless points out that beyond the express statutory prohibition of evidence there may be an exclusion due to a grave breach of the rights of the accused.

“In such situations, statements obtained through interrogation were excluded where the *Miranda*²⁷⁵-like admonitions have been neglected. However, in certain situations German courts will weigh the interests of the defendant against broader law-enforcement interests and often reject the remedy of exclusion. This “balancing theory” has been consistently criticised in academia”²⁷⁶

This “balancing theory” will be considered when we look at a comparison with Ireland further on.

The Right to Privacy

²⁷³ *ibid.*

²⁷⁴ German Code for Criminal Procedure s.136.

²⁷⁵ ‘Miranda’ referenced here is *Miranda v. Arizona* [1966] 384 U.S. 436, the United States case which required police to read arrested persons their rights.

²⁷⁶ Gless (n 267) 139.

German courts will exclude evidence which was obtained in breach of a suspect's basic right to privacy. This is based on constitutional rights. The German Constitution, the Grundgesetz, provides the right to free development of personality, sanctity of the home, secrecy of correspondence and freedom of movement. These are regarded as contributing to a right to privacy under the constitution.

Gless explains it thus:

"... courts exclude evidence which was obtained or used in a manner which violated the defendant's basic right to privacy, derived from the constitutionally protected "universal personality rights". The underlying theory is that, in the view of the Constitution, there is an absolute sphere of privacy which bans the use of evidence obviously stemming from the person's private life, such as diaries, tape recordings of conversations in intimate surroundings, etc. which if not protected would impair free development of the personality"²⁷⁷

The courts have established a fairly strong protection of privacy. The German Criminal Supreme Court (the Bundesgerichtshof für Strafsache, abbreviated as BGH) has ruled in numerous cases to exclude evidence taken from private sources of information. In the *Tape Recording Case*²⁷⁸ in 1960 an attorney was accused of having asked a client to perjure herself. A conversation between the defendant and a friend of his client was secretly recorded and was offered as evidence. The BGHSt excluded this evidence on the basis that recording the defendant without their consent violated the defendant's sphere of personality.

The *First Diary Case*²⁷⁹ was also a matter dealing with perjury. In that case a woman had denied being party to adultery during a divorce hearing. Later evidence of her personal diary emerged which showed that she had been engaged in the affair. She was put on trial for perjury. The trial court admitted the evidence of the diary. However, when the matter was appealed to the BGH it overturned the decision and excluded the evidence. The BGH reasoned that including such evidence violated the defendant's right of self-determination of personality.

These were both decisions of the Supreme Criminal Court the (Bundesgerichtshof or BGH) decisions. The Constitutional Court (the *Bundesverfassungsgericht* or BVerfG) has further

²⁷⁷ *ibid.*

²⁷⁸ *Tape Recording Case* [6.14.1960] BGHSt 14, 358.

²⁷⁹ *First Diary Case* [2.21.1964] BGHSt 19, 325.

dealt with the issue of privacy in *The Census Case*²⁸⁰ and the *GPS case*²⁸¹. The court has held that every citizen has a right to “informational self-determination” and every citizen has a right to know what it is that the state is collecting about them.

The right to privacy also extends to the privacy of the home, according to Article 12 of the Grundgesetz (constitution):

“1.The home is inviolable.

2. Searches may only be authorised by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed”.

This provision is very similar to the provisions in Irish law such as Art 40.5 of Bunreacht na hEireann which protects the inviolability of the dwelling.

Fahl gives a detailed explanation of what differing degrees of privacy the courts consider:

“Considering the cases, one has to distinguish between different spheres of privacy. Under the first sphere, the most intimate feelings of the suspect may not be enquired into by the police or judge. They are taboo. In the second sphere, which is called the private sphere we have to take into consideration the weight of the crime on the one side and the weight of the penetration of privacy on the other and balance the two against one another. And there is a third sphere of privacy, called the social sphere, where it is not a problem to enquire into if there is a suspicion that a person has committed a criminal offence by consulting simple listings, timetables, itineraries and so forth.”²⁸²

In comparing the German approach to the Irish it seems that the Irish system offered stronger protection prior to *JC* due to the mandatory exclusion of breaches of constitutional rights. However, after *JC* it would appear as if the Irish system may now be more in line with the German one.

Rationale

In any commentary on rationale for excluding evidence in the German legal system it would be impossible for one to ignore the significance of the weight of 20th century history upon the legal system. Section 136 of the StPO protects against coerced or ‘tricked’ confessions and the constitution provides for a rigid defence of the right to a private life. This writer suggests that the effect of the oppressive Nazi Gestapo and then later East-German Stasi

²⁸⁰ *Volkszählungsurteil* [12.15.1983] BVerfGE 65, 1.

²⁸¹ [4.12.2005] BVerfGE 112, 304.

²⁸² Fahl (n 268) 1066.

must be brought to mind. However, from a theoretical legal position what is the purpose of the exclusionary rules of evidence?

It is submitted by this writer that the 'deterrent approach' is the one operated by the German system. This is because as we have seen, the courts go to great lengths to protect the rights of the citizen but as explained by Fahl, the prosecution may still be able to rely on evidence obtained illegally by the police:

"Although it does not make much sense that there are rules governing the collection of evidence that may be disobeyed without consequences, this is the predominant opinion in Germany among the courts and in books on criminal law the courts fear that otherwise too much evidence will be lost."²⁸³

It would seem thus, that the aim of the German Courts is to deter the police from behaving in an illegal manner.

England

"The law of England and Wales on the use of illegally gathered evidence in a criminal trial may be said to be characterised by the general absence of fixed rules of automatic inadmissibility and other bright line rules. Rather, a case by case approach is favoured."²⁸⁴

General Approach

The traditional view espoused by Jeremy Bentham was that all evidence relevant to trying a matter should be considered in court. The famous quote in this manner was from *R v Leatham* "It matters not how you get it; if you steal it even, it would be admissible in evidence"²⁸⁵. The past 30 years has seen legislation introduced which has changed the exclusionary rules of evidence in the UK and gives the courts some further scope for thought regarding the admissibility of evidence. Whilst Irish academics will write about unconstitutionally and illegally obtained evidence; UK academics write about 'unfairly and illegally obtained evidence'. The unwritten nature of the UK constitution means that the courts do not have to consider the breach of constitutional rights as a reason for the exclusion of evidence but there are a number of pieces of legislation which have been introduced which require the courts to consider the manner in which the evidence was obtained.

²⁸³ *ibid* 1061.

²⁸⁴ ALT Choo, 'England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical Evidence' in Stephen C Tharman (ed) *Exclusionary Rules in Comparative Law* (Springer, 2013) 352.

²⁸⁵ *R v Leatham* [1861] 8 Cox CC 498.

PACE and the requirement for 'fairness'

The adoption of the Police and Criminal Evidence Act (PACE) in 1984 followed the report of the Phillips Royal Commission on Criminal Behaviour. The commission sought a way to balance between police powers and civil liberties.

PACE changed the rules governing the actions of the police. In particular s.78 of PACE provides:

'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

According to s. 78 the central test revolves around the issue of fairness. However, fairness is a vague concept and would appear to give the judiciary a wide amount of discretion. In the German system as we have seen various parts of the StPO indicate that which can be considered be fair. In England however, the judiciary were left with this vague description; thus by 1990 an article in the Law Gazette was describing the large build-up of case law due to the unclear nature of PACE.

"A large area of case law is already building up around s.78, and will continue to do so because of the inherent difficulties in dealing with what amounts to a subjective concept -- a statutory discretion based on the need to protect the fairness of proceedings."²⁸⁶

Ashworth and Redmayne have also said that "this vaguely worded provision has led to a substantial change to the way in which the courts have approached illegally and unfairly obtained evidence."²⁸⁷ So how have the courts approached this concept of fairness?

Not unlike the German approach of considering elements of the StPO when deciding upon fairness, the judiciary will look to the PACE codes. PACE introduced a number of provisions to govern the treatment of suspects and the way in which the police garner evidence.

The judiciary may exclude evidence based upon breaches of these codes; but according to Ashworth and Redmayne "exclusion is by no means automatic"²⁸⁸. A preliminary question to

²⁸⁶ *PACE s78: the Maze*, The Law Society Gazette, Wednesday 25 July 1990, Accessed at <http://www.lawgazette.co.uk/news/pace-s78-maze> on 18 June 2016.

²⁸⁷ Ashworth and Redmayne, *The Criminal Process* (3rd Edn, OUP 2005) 320.

²⁸⁸ Ashworth and Redmayne (n 236) 320.

be asked is whether the breach of the PACE code may be regarded as either significant or technical; if it is then there is no need for an exclusionary rule to be applied.

In *R v Blackwell*²⁸⁹, there were a number of breaches of the PACE code, these included a failure for the suspect to be reminded of his legal rights and to be served light meals instead of dinner. The court held that minor breaches of the PACE codes were only technical and not significant.

The courts will consider whether or not the defendant was disadvantaged by the breach of rights. In *R v Samuel*²⁹⁰ the courts heard that the defendant had made a confession without being given access to legal advice; his solicitor said such advice would have included staying silent during interview. The court ruled this evidence as inadmissible. This is to be contrasted with the decision in *R v Alladice*²⁹¹ the defendant was similarly denied legal advice. The court heard that Alladice admitted he already knew his rights without having being informed of them. In *Alladice* the court admitted the evidence. This case demonstrates the flexibility of the rule in England and Wales.

Ashworth and Redmayne have said that a breach of rights in good faith may not lead to the exclusion of evidence, while a bad faith breach of rights may be more likely to lead to an exclusion²⁹².

The issue of improperly obtained evidence is somewhat easily determined when members of the police have acted in breach of a defined law such as PACE. However, it may not be so clear when rules of fair play have been breached. The leading case in this regard is *R v Mason*²⁹³; the Court of Appeal said that whilst the court's role was not to discipline the police, the 'hood-winking' of both client and solicitor in this case (by informing them falsely that the police had forensic evidence implicating the accused) necessitated exclusion of the evidence thereby obtained."²⁹⁴

Section 78 has reformed the rules of evidence in the UK greatly. Professor Stone sums up the 3 factors which have been determined by the courts as to excluding evidence:

²⁸⁹ *R v Blackwell* [1995] 2 Cr App R 625.

²⁹⁰ *R v Samuel* [1988] 1 QB 615.

²⁹¹ *R v Alladice* [1998] 87 Cr App R 380.

²⁹² Ashworth & Redmayne p 321.

²⁹³ *R v Mason* [1988] 1 WLR 139.

²⁹⁴ Caroline Fennell, *The Law of Evidence in Ireland* (3rd Edn, Bloomsbury Professional 2009) 164.

- “1. 'bad faith' on the part of the police;
2. impropriety, often in the form of breaches of PACE or its Codes of Practice;
3. the effect of such impropriety on the outcome of the case.

The first two of these have had explicit and widespread recognition from commentators on s 78 as forming an important part of the decision to exclude. It is submitted, however, that the third has tended to be overlooked.”²⁹⁵

The courts do not exercise a ‘fruit of the poison tree’ approach to evidence in England and Wales. This can be seen in the *Attorney General’s Reference (No 3 of 1999)*²⁹⁶. In that case the police came to the realisation that a suspect could be convicted due to their possession of a DNA sample from a previous case. The accused was charged with committing an offence of rape on the basis of a DNA match against a sample that had been taken from him in connection with a burglary at another time. He had been acquitted of the burglary in August 1998 and on this basis under the law as it then stood the DNA sample *should* then have been destroyed. It was not destroyed however, and a match was made in October 1998 in connection with a rape. At his trial for rape the Judge ruled that the DNA evidence was therefore inadmissible. Without the DNA match the prosecution offered no evidence and he was acquitted.

Given that they were not entitled to the original sample, the police simply re-arrested him and took a new sample. The courts allowed the new sample to be adduced as evidence. Under the ‘fruit of the poison tree theory’ this evidence may not have been allowed as the police would not have had suspicion to obtain it in the first place.

There is further indication that the traditional preference towards allowing evidence to be admitted regardless of how it is obtained still pervades English criminal law. Thus it is worth taking note of Ashworth and Redmayne’s comments on the development of PACE case law:

“When one looks at the PACE cases, one finds that the courts are fond of saying that ‘fairness’ in s.78 includes fairness to the prosecution as well as the defence. It is hard to tell

²⁹⁵ Richard Stone ‘Exclusion of Evidence under Section 78 of the Police and Criminal Evidence Act: Practice and Principles’ (1995) 3 Web JCLI.

²⁹⁶ [2001] 2 AC 91.

just what is meant by this, but it may simply imply that reliable prosecution evidence should not be excluded without good reason.”²⁹⁷

The Human Rights Act 1998

As we have seen PACE has challenged the traditional approach of the courts to excluding evidence (even if this is still limited when compared to other jurisdictions). The Human Rights Act 1998 changed the landscape further. “Since the HRA became fully operative in October 2000, it has no longer been possible to treat such issues merely as involving interpretation of s78(1) of PACE 1984 itself. Additionally Art 6²⁹⁸ of the ECHR must be taken into account by any court in appropriate circumstances.”²⁹⁹

Although there is some potential for the Human Rights Act 1998 to bring about changes in the law and to strengthen the exclusionary rule in England and Wales; there has been little case law to date and such as there has been has provided a mixed response.

Article 6 of the ECHR guarantees the right to a fair trial. The first case whereby the exclusionary rule was tested in this manner was the *Khan* case. In *R v Khan (1996)*³⁰⁰ the House of Lords ruled that evidence obtained from a secret listening device planted could be admitted despite the fact that there were no laws to regulate the use of such devices. The case was appealed to the European Court of Human Rights in *Khan v United Kingdom (2000)* the accused argued that the lack of regulation of the listening devices was a breach of Article 8³⁰¹ of the ECHR and in turn was a denial of his right to a fair trial under Article 6 of the ECHR. The European Court of Human Rights agreed that it was in fact a breach of Art 8 however, this did not automatically lead to a breach of Article 6, even though the evidence obtained was crucial to the conviction.

If a protectionist rationale was to be followed, the evidence obtained in breach of Art 8 would be excluded in order to protect the rights of the accused. Slapper and Kelly raise the issue thus:

²⁹⁷ Ashworth and Redmayne (n 236) 325.

²⁹⁸ Article 6(e) – to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

²⁹⁹ Slapper and Kelly, *The English Legal System*, 7th edn, Cavendish Publishing, London (2004) 456.

³⁰⁰ *R v Khan* [1996] 3 WLR 162.

³⁰¹ Article 8 – Right to respect for private and family life.

“the interesting issue may well be whether the illegal or improper obtaining of the evidence means that its use in the trial renders the trial itself unfair. If not, then Art 6 clearly has no effect.”³⁰²

So initially it would appear that the Human Rights Act 1998, did not have such a significant impact; but the *Khan* decision has since been followed by a contrasting case *Allan v The United Kingdom (2002)*. In *Allan* evidence was again recorded through the use of secret recording devices on three occasions (with an accomplice, with a friend and with a police informant). The court held that the evidence recorded during Allan’s discussions with the police informant were unfair and in breach of Art 6 due to the agent provocateur. The court differentiated between casual conversation in *Khan* and the persisting badgering and attempts made to elicit information made by the informant in *Allan*. According to Choo the difference between the two was the reliability of the evidence.

“It is no surprise, in the light of the stance taken earlier by the ECHR in *Khan* that the admission of evidence of undisputed reliability was considered not to violate Art 6 ECHR, while Art 6 was held to have been violated by the admission of evidence of questionable reliability.”³⁰³

Reviewing the case law, one can see that whilst courts in England and Wales will be required to consider the Human Rights Act when considering to admit evidence or not, there has been little effect on the exclusionary rule of evidence. Indeed Choo writes that whilst many may wish for the Human Rights Act to become a Bill of Rights it “has not brought about radical change to evidence in England and Wales”³⁰⁴.

The underlying message in the law in England and Wales is that evidence will be excluded in cases where it is deemed to be unfair, but the concept of fairness is not easily defined and is at the discretion of the judiciary.

Rationale

There could be some suggestion that the introduction of PACE was to deter the police from acting illegally or improperly in their investigative duties. If one considers the numerous ‘miscarriage of justice’ cases that emerged in England in the late 1980’s and early 1990’s one

³⁰² Slapper and Kelly (n 275) 456.

³⁰³ Choo (n 283) 335.

³⁰⁴ *ibid* 352.

could understand the need for such an approach (see the Guilford Four Case³⁰⁵). However Ashworth & Redmayne state that courts do not see it as their role to discipline the Police. This clearly would seem to suggest that the deterrence approach is not in operation in England.³⁰⁶

According to the same authors the integrity principle has been put forward by numerous academics as the rationale for the operation of the exclusionary rule in England; they themselves dispute this offering instead a suggestion that the protectionist approach is in place.³⁰⁷ However, there is evidence to dispute their belief in the protectionist approach. As we have seen in the *Khan* and *Allan* cases, if the evidence can be shown to be reliable the courts will admit it regardless of the breach of rights. Furthermore, we have also seen that technical breaches of PACE will not lead to an exclusion of evidence, even if it is a right of the accused which has been breached.

Rather it is submitted in this work that the rationale is a reliability approach. If one looks at the long standing prohibition on torture as a method of garnering evidence and the approach in *Allan* this argument is supported. Indeed Choo writes:

“...torture aside, evidential reliability is at the forefront of the appellate courts thinking, the primary concern apparently being with the determination of the truth rather than with upholding due process. ”

Comparison

Despite coming from differing trial traditions (i.e. inquisitorial and adversarial) Ireland and Germany seem to take more similar approaches to the exclusionary rule of evidence than Ireland and the UK. The fact that both countries have written constitutions may have something to do with this; both countries have written sets of parameters to define rights by in order to ensure a fair trial and the upholding of fundamental rights. Despite the fact that Ireland appears to have made the exclusion of evidence more difficult, the fact is that the deterrence rationale still aims to prevent infringement of citizens' fundamental rights; this is something which the German courts also attempt to do.

Whereas in not having a written constitution to concern themselves with, it is easier for the UK courts to adopt a more free proof mentality. Twomey argues that this leads to a less fair method of trial:

³⁰⁵ *R v Richardson; R v Conlon; R v Armstrong; R v Hill; The Times*, (20 October 1989).

³⁰⁶ Ashworth and Redmayne (n 236) 331.

³⁰⁷ Ashworth and Redmayne (n 236) 333.

“It is clear that the UK adheres less so to the overall importance of the fairness of a trial. This is understandable given the lack of a written constitution and no personal rights evaluation in such a document to provide guidance to the Courts when these questions arise”.³⁰⁸

Whether or not trials end up being less fair as a result of the more free proof system envisaged by the UK, it certainly shows that the courts are less concerned with how evidence is obtained than say Ireland or Germany. Could this lead to a more cavalier approach to the collection of evidence than the German or Irish police would normally use? And if so; how would the courts in those jurisdictions react to evidence obtained under an EIO executed in the UK that breached constitutional rights in the issuing country? The next section will consider some of the hypothetical situations which could arise.

The Irish Courts, the Exclusionary Rule and the EIO

How would the Irish Courts deal with improperly obtained evidence in an EIO arrangement? The first issue to consider is how a criminal trial in Ireland might treat evidence which might be obtained in breach of fundamental rights. In order to examine this problem, we will consider two hypothetical scenarios:

First, consider a scenario where Ireland issues an EIO to Germany to seek the diary of an accused German citizen for use in the proceedings against them in Ireland; this as we have already seen would be in breach of German law, but not of Irish law. The German police execute the EIO and present the diary to the Gardaí. This is a breach of the accused’s rights as a German citizen. Should the Irish courts act to protect the accused’s rights as a German citizen?

Secondly consider a scenario whereby the German police are asked to execute an EIO which requires search of an accused’s home in Germany. The German police knowingly do not bother to get a warrant and search a premises and seize evidence which they transfer to the Gardaí for use in proceedings. This is not only a breach of German law but would also have been a breach of Irish law. How would the Irish courts deal with this issue?

³⁰⁸ Aisling Twomey ‘Poisonous Fruit from a Poisonous Tree: Reforming the Exclusionary Rule for Ireland- Part II’ (2012) 30(19) ILT 288.

These hypothetical scenarios are interesting in the light of the newly permissive rule in Ireland. If the rationale in Irish law of evidence had remained to maintain a protectionist approach to excluding improperly obtained evidence, then it is likely that the evidence may have been excluded in the first scenario and in the second scenario almost certainly would have been excluded. If the new approach to the exclusionary rule in Ireland is to deter the authorities against breaching fundamental rights, then the question must be posed: How effective would excluding evidence in an Irish trial in deterring the German police? The answer, this writer can only surmise, is that exclusion would hardly be a deterrent to the German police. Would this mean the Irish courts would allow such evidence? Again, one can only surmise, but it is submitted here that perhaps they would, where the breach was no fault of the Irish authorities.

This, raises another question to consider; how important is Section I of the EIO form contained in Annex A of the EIO Directive? This 'Section I' of the EIO form requires the issuing state to inform the executing state if there are certain formalities or procedures that the executing state carries out in executing the EIO. Again in our hypothetical scenario, the Irish law requires that a search of premises not take place without a search warrant. In issuing the EIO, the Irish authorities fail to make the executing state aware of this in Section I and the executing authorities carry out a search of the premises in question without a warrant and transmit evidence found to the Irish authorities. When the prosecution tenders this evidence to the court, could the accused argue that when issuing the EIO the State should've included this requirement? If it is agreed that they should, would the court exclude the evidence? It is hard to know what approach the courts would take in this scenario given the recent nature of the re-stating of the exclusionary rule, but it does present a scenario whereby the courts could seek to deter the Irish authorities from failing to thoroughly complete such a form in future engagements.

Finally, returning to an issue which was raised in the previous two chapters, the decision in *Melloni*. In a scenario where the Irish police are required to execute an EIO search on behalf of the German authorities and in so doing, knowingly breach a standard of behaviour that would be required of them under the Irish constitution but under German law their behaviour is considered perfectly acceptable. The person who was subject to the search seeks to apply to the Irish courts under Article 14(1) & 14(2)³⁰⁹ to prevent the evidence being

³⁰⁹ EIO Directive, art 14:

transmitted because of the behaviour of the Gardaí. In this scenario, the ECJ would say that the Irish courts have no right to apply the higher standard of rights to the consideration of an EIO than those under the CFR, but would the Irish courts seek to deter the Gardaí from doing so? This question cannot for the moment be answered, but should the courts decide to allow the evidence be transmitted abroad in a scenario where they would not have allowed it be used in an Irish trial, then the courts would be undermining the Constitution. If they did not allow it to be transmitted then the Irish courts would be defying the supremacy of EU law. This is a potential conflict point.

Conclusions

The law of evidence can be affected by the mode of trial in operation in a country. EU countries have operated both the inquisitorial and adversarial method of trial. Inquisitorial systems and adversarial systems have differing approaches to the law regarding improperly obtained evidence. The traditional view is that whilst the adversarial tradition operates and exclusionary rule of improperly obtained evidence, the inquisitorial system takes a more ‘free proof’ approach. This traditional view can however be challenged; and the similarities between the Irish and German systems show that.

The exclusionary rule of improperly obtained evidence is of importance to the protection of fundamental rights in the law of evidence. Ireland has traditionally operated a much higher bar for the inclusion of evidence at trial. Breach of fundamental rights as defined by the constitution nearly always led to the exclusion of evidence. The new exclusionary rule of evidence has to be fully developed in time but would appear to only serve to deter the authorities from the deliberate breach of fundamental rights. This lowering of standards brings Ireland closer to the UK, Germany and (it is submitted) other EU countries which perhaps would make the EIO a more plausible offering.

There is no way of reasonably foreseeing the practical difficulties which may come about due to the EIO and one may only create hypothetical scenarios to gauge how the courts may

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1. Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.
 2. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.

respond. If the issuing of and EIO leads to breaches of domestic rights in the executing country, how would they be vindicated in the issuing country?

The fact is that the newly permissive nature of evidence law in Ireland may see that evidence which previously was excluded will now be included and may generally impact upon the lowering of protections of fundamental rights, but as to whether the EIO would exacerbate the situation, for the moment one may only surmise.

Chapter 5: Conclusions

Could Ireland opting-in to the European Investigation Order have a detrimental effect on Fair Trials and Fundamental Rights protections in Ireland?

The brief answer to the question posed, is a qualified ‘yes’; it would appear from this investigation that Ireland could implement the European investigation order without having a detrimental effect on fair trials or fundamental rights protections in Ireland. There are of course possible problems and the matter should be approached with care, but as we shall see as we recap the evidence of this investigation, whilst there are concerns, these are not new or insurmountable.

The argument that Ireland could ‘opt-in’ to the EIO without detrimental effects the evidence can be re-evaluated from 3 angles. The first item to consider is the general issue of European criminal justice matters, the second item will be to consider issues raised by the EIO instrument specifically and the third item will be considering how domestic Irish evidence law might be considered.

The adoption of the mutual recognition principle in criminal matters at the Tampere European Council has led to the EU institutions exercising more influence over justice and home affairs matters. This had been inspired by how the same approach had led to the unblocking of the common market in the 1980s.

For mutual recognition to be successful, there is a need for mutual trust between Member States. It is suggested that in the case of criminal justice matters, trust can be based on Member State’s common subscription to guarantees of fundamental rights. This thesis examined three such documents: European Convention on Human Rights, Charter of Fundamental Rights of the European Union and the European Union roadmap on procedural rights.

It has been shown here, in Chapter 2, that there are shortcomings in the standard of protections that these documents provide. The ECHR has not been adopted by the EU itself, this means that the ECJ will not apply it to their decisions, furthermore as we have seen in countries such as Ireland the ECHR is only of limited effect in how domestic courts will apply it. The CFR does not inspire confidence given the decision in *Melloni*³¹⁰ that national

³¹⁰ Case C-399/11 (Criminal proceedings against Stefano Melloni), OJ EU 2013 No. C 114/16 [2013]

constitutional rights must not affect the primacy of EU law. It could be argued after the *Melloni*³¹¹ case that the CFR has been used to reduce the effectiveness of national constitutions in protecting rights. None of this inspires confidence that EU criminal justice legislation will not undermine fair trials and fundamental rights.

The procedural rights roadmap represents a stronger form of protection for protection of fundamental rights in criminal investigations. If fully implemented the recommendations in the roadmap should guarantee that a minimum standard of protection of fundamental rights exist across the EU in criminal justice matters. A criticism that one could level at the EU is that Member States should've agreed these standards before pushing on with the introduction of criminal justice instruments. Member States, it seems are slow about fully implementing the roadmap recommendations, with only two measures adopted by all states. It would be the suggestion of this writer that this roadmap should be fully implemented before further steps are taken in criminal justice matters. This would serve to provide guarantees necessary to ensure that fair trials and fundamental rights are not undermined

The *Melloni*³¹² judgment presents concerns as to the ECJ's respect for domestic fundamental rights as the ECJ appears to be willing to choose a lower standard of rights protection in order to uphold the principle of supremacy of EU law.

Despite the shortcomings in all three of the documents (and legislation stemming therefrom) mentioned above, these represent a good baseline for fundamental rights across the Union.

The *Melloni* judgment does represent a worrying challenge to domestic rights provisions; however, the judgment will apply to existing provisions such as the EAW in any case.

In summary, the potential challenges to fundamental rights presented by EU criminal justice will apply to all existing provisions such as the EAW. As long as Ireland continues to participate in other EU criminal justice matters the EIO presents nothing new in terms of general principles.

³¹¹ *ibid*

³¹² *ibid*

The second area we are considering is the specific instrument of the European Investigation Order. It would appear that there is little within the EIO itself that should negatively impact on fair trial rights in Ireland. (That being said, a very technical concern is raised in relation to a potential for retroactive application of an EIO to the tapping of telecommunications).

The EIO itself represents an improvement on the EAW in terms of the fact that breaches of fundamental rights should serve as grounds for refusal of the EIO. The problem with this is that the standard which will be applied to deciding upon the potential rights is the standard of the CFR, which as we have seen can undermine domestic provisions. It would appear that the Parliament intended that domestic provisions shouldn't be undermined by the CFR and have indicated in the EIO directive recitals as such. If this can be shown to operate as such then the EIO could be seen to uphold rights in a manner that is reassuring.

The Irish government have cited the lack of dual-criminality provisions as the main reason for not participating in the EIO. It seems odd that Member States couldn't have agreed that the same provisions which apply to the EAW and the EEW could've applied in the case of the EIO. There are only minor difference between the 3 year maximum sentence rule in the EIO and the dual criminality rule in the EIO.

The application of the CFR standard of protection of fundamental rights to the issuing and execution of the EIO should serve to underpin fair trial rights. The stumbling block as far as the Irish government have been concerned is the issue of the circumstances of the abolition of dual-criminality; however the very technical nature of this provision and the narrow scope to which it may be applied suggests that the EIO could be implemented with a minimum disruption to the dual criminality condition.

The third and final area to be considered is the relationship between domestic evidence law and the EIO. The changes in Irish evidence law in DPP V JC have led to a more permissive approach to the inclusion of 'improperly obtained evidence'. It would appear that this means that Irish courts see the role of the exclusionary rule to deter breach of fundamental rights rather than to protect against the breach of rights itself. This lowering of the bar would appear to mean that the Irish courts see the inclusion of improperly obtained evidence as less problematic than was traditionally the case. The EIO could perhaps be implemented more easily as a result of the fact that it now appears that Irish evidence law is more in tune with fellow EU Member States.

Whether Ireland *should* 'opt-in' to the EIO, is a policy decision, but it would appear to be a sensible choice in fighting crime on a cross border basis. The opinion of this writer on the basis of this investigation is that the EIO would provide no greater problem to the protection of fundamental rights or fair trials than any other EU criminal justice instrument. It would appear that more than ten years after the implementation of the EAW that the Arrest Warrant system is functioning (albeit after some teething problems), in order to be ensure that the EIO can be a useful tool for law enforcement, opting in should occur earlier rather than later.

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