



**AN BILL UM CHEARTAS COIRIÚIL (CÚNAMH
FRITHPHÁIRTEACH) (LEASÚ), 2014**
**CRIMINAL JUSTICE (MUTUAL ASSISTANCE)
(AMENDMENT) BILL 2014**

EXPLANATORY AND FINANCIAL MEMORANDUM

Introduction

The purpose of the Bill is twofold:

(1) to amend the Criminal Justice (Mutual Assistance) Act 2008 to give effect to the following international instruments which have been ratified by the Oireachtas and which provide for mutual legal assistance with other EU member states:

- **Council Framework Decision 2005/214/JHA on mutual recognition of financial penalties.**

This instrument establishes the rules under which a Member State recognises and executes in its territory a financial penalty order issued by a court competent in criminal matters of another Member State.

- **Council Framework Decision 2006/783/JHA on mutual recognition of confiscation orders.**

This instrument establishes the rules under which a Member State recognises and executes in its territory a confiscation order issued by a court competent in criminal matters of another Member State.

- **Council Decision 2008/617/11 on enhancing the operation of special intervention units in crisis situations.**

This instrument aims to improve cooperation between Member States' special intervention units in man-made crisis situations that present a serious and direct physical threat, such as terrorist incidents etc.

- **Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust.**

Eurojust is an EU agency, based in The Hague, dealing with judicial co-operation in criminal matters. This Council Decision amends the earlier Council Decision 2002/187/JHA setting up Eurojust, and provides for increased co-operation of Eurojust with other agencies such as OLAF or EUROPOL, and strengthens its operational capabilities.

- **Council Framework Decision 2009/299/JHA of 26 February 2009** amending Framework Decisions 2002/584/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

This instrument seeks to ensure that principles of natural justice are adhered to in cases where judgements in absentia arise in regard to requests for mutual legal assistance.

- **Council Decision 2010/616/EU on the conclusion of an agreement between the European Union and Japan on mutual legal assistance in criminal matters.**

This agreement provides for mutual legal assistance between EU member states and Japan, based on the laws of the requested state. Implementation by Ireland will be based on existing provisions of the 2008 Act.

(2) to provide for certain related amendments to the following Acts:

Criminal Justice Act, 1994,
International War Crimes Tribunal Act 1998,
Criminal Justice (Joint Investigation Teams) Act 2004,
Garda Síochána Act 2005,
Criminal Justice (Mutual Assistance) Act, 2008.

Section 1: Interpretation

This section provides for the definition of the terms “Minister” and “Principal Act”, as used in the Bill.

Section 2: Amendment of section 2 of Principal Act

This section amends section 2 of the Criminal Justice (Mutual Assistance) Act 2008 (2008 Act) to provide in that section for definition of additional EU Instruments and related terms required in this Bill.

Section 3: Amendment of section 31(1) of Principal Act

This section amends section 31(1) of the 2008 Act, in order to provide in that section for definition of additional EU Instruments and related terms required in this Bill.

Section 4: Amendment of section 32(6)(a) of Principal Act

This section corrects a text error in the section.

Section 5: Amendment of section 34(1) of Principal Act

This section amends the reference to the 2003 Framework Decision in section 34(1) of the 2008 Act, for clarification purposes.

Section 6: Amendment of section 35(6) of Principal Act

This section amends the reference to the 2003 Framework Decision in section 35(6) of the 2008 Act, for clarification purposes.

Section 7: Amendment of section 38 of Principal Act

This section amends section 38 of the 2008 Act to provide that the powers of recovery of property by the High Court or by a receiver will apply to confiscation orders transmitted by member states, as well as to confiscation co-operation orders issued by the court in respect of requests from non-member states. The distinction here is required because under the provisions of the Framework Decision 2006/783/JHA a request for confiscation from an EU state can be recognised directly without being translated by the court into a domestic confiscation co-operation order.

Section 8: Amendment of section 44 of Principal Act

This section amends section 44 of the 2008 Act to provide that where a freezing co-operation order is in force in respect of property

which is also subject to an external confiscation order, the freezing co-operation order remains in place until such time as the property confiscation process has been concluded or terminated.

Section 9: Amendment of section 45(1) of Principal Act

This section amends section 45(1) of the 2008 Act to provide that the Central Authority may apply to the High Court to have a freezing co-operation order varied or discharged.

Section 10: Amendment of section 48 of Principal Act

This section amends section 48 of the 2008 Act to make a minor text correction and to amend the reference to the 2003 Framework Decision, for clarification purposes.

Section 11: Amendment of section 49 of Principal Act

This section amends section 49 of the 2008 Act to provide that the Director of Public Prosecutions will liaise with the relevant state, via the Central Authority, to ensure that the amount of money realised in executing a confiscation order on behalf of another state does not exceed the amount specified in the order. This provision is required to give effect to Article 14 of the Council Framework Decision 2006/783/JHA. This section also provides for transmission of documents by any means capable of producing a written record.

Section 12: External Confiscation Orders (designated states other than member states)

This section amends section 51 of the 2008 Act, to provide that the section 51 provisions will apply only to requests received from non-EU states. Section 51 provides that if a confiscation order is received from a non-EU state an application must be made to the High Court for a confiscation co-operation order.

Section 13: External confiscation orders (member states)

This section creates a new section 51A in the 2008 Act, which provides for the treatment of confiscation requests from EU member states. Subsection (1) provides that in the case of a confiscation request from an EU member state, it can be executed by the Director of Public Prosecutions without the requirement that an application must be made to the High Court for a confiscation co-operation order. Subsection (2) provides that if a request received from a member state is not in order, then the Central Authority may apply to the High Court for an order refusing, postponing, varying or terminating the request.

Section 14: Refusal to confiscate

This section creates a new section 51B in the 2008 Act. This new section provides for enhanced provisions for refusal of confiscation orders. The grounds for refusal reflect the provisions of Article 8 of Council Framework Decision 2006/783/JHA. Subsection (1) (a) provides for refusal where the offence is not an offence to which the international instrument relates. Subsection (1) (b) provides for refusal if there is an immunity or legal privilege which would prevent confiscation of the relevant property. Subsection (1) (c) provides for refusal if compliance would infringe the *ne bis in idem* principle — this is the principle that a person cannot be tried a second time for an act which has already been adjudicated on by a court. Subsection (1) (d) provides for refusal if the judgement was made in absentia and the defendant did not have an opportunity to defend the case. Subsection (1) (e) provides for refusal if the criminal conduct was not committed in the territory of the state making the application for confiscation, or was committed in this State. Subsection (1) (f)

provides for refusal if the enforcement or the execution of the confiscation order is statute barred. Subsection (2) allows for refusal if the documentation is incomplete. Subsection (3) provides that the High Court may refuse execution of confiscation if the rights of any third party make it impossible to execute the confiscation. Subsection (4) provides that confiscation resulting from any of the offences scheduled in Article 6 (1) of the Council Framework Decision shall not be refused solely on the grounds that the offence is not an offence in this State.

Section 15: Postponement of Confiscation

This section creates a new section 51C in the 2008 Act, to provide for postponement of confiscation. Subsection (1) of 51C provides for postponement by the High Court where execution of a confiscation order might prejudice an ongoing criminal investigation in the State. Subsection (2) provides for postponement where confiscation proceedings in respect of the property are already in train. Subsection (3) provides that an order of the High Court postponing proceedings shall include an order to take whatever measures are necessary to ensure that the property concerned remains available for confiscation. Subsection (4) provides for the confiscation without delay once the grounds for postponement cease to exist. Subsection (5) provides a clarification that postponement can be applied in the case of requests from EU member states or requests from other designated states.

Section 16: Variation or discharge of confiscation co-operation orders

This section creates a new section 51D in the 2008 Act. This new section provides for variation or discharge of confiscation co-operation orders, issued by a court in respect of confiscation requests received from non-EU states. Subsection (1) of 51D provides that on application by a person affected by a confiscation co-operation order, or on application by the Central Authority, the High Court may vary or discharge the order, following consideration of evidence that the order has been complied with and following consultation with the issuing state. Subsection (2) provides that notice of an application to vary or discharge an order will be transmitted to the designated state concerned. Subsection (3) provides that the making of an application for variation or discharge of a confiscation co-operation order will not suspend confiscation of the property.

Section 17: Variation or discharge of external confiscation orders from member states

This section creates a new section 51E in the 2008 Act. This new section provides for variation or discharge of confiscation orders in respect of confiscation requests from EU member states. This differs from the provisions for non-EU states in section 51D in that subsection (2) of 51E provides that the only grounds for variation or discharge are where the issuing state informs the court that the external confiscation order is no longer enforceable.

Section 18: Termination of external confiscation orders from member states

This section creates a new section 51F in the 2008 Act. This new section provides for termination of an external confiscation order from an EU member state only if a request to terminate it is received from the issuing state.

Section 19: Central Authority to inform competent authority

This section creates a new section 51G in the 2008 Act, which

provides an obligation on the Central Authority to keep the issuing state informed of various matters relating to the execution, postponement, variation, discharge or termination of the confiscation order.

Section 20: Amendment of section 53 of Principal Act

This section amends section 53 of the 2008 Act to provide for disposal of property in accordance with the provisions of Council Framework Decision 2006/783/JHA. The insertion of subsection (7) in section 53 will enable a receiver to sell any property recovered on foot of a confiscation order received from another state. Subsection (8) will provide that sums received on foot of a confiscation are paid into the exchequer where the amount is less than €10,000. Amounts greater than €10,000 will be divided equally with the issuing state.

Section 21: Amendment of section 56 of Principal Act

This section amends section 56 of the 2008 Act to provide that if property is requested for evidence purposes under section 75 of the Act, that request will have priority over a request for confiscation.

Section 22: Amendment of section 57(b) of Principal Act

This section amends section 57(b) of the 2008 Act to provide that sections 40, 41, 42 and 43 of that Act will apply to external confiscation orders as they already apply to confiscation co-operation orders.

Section 23: Application of provisions on enforcement and realisation to execution of external confiscation order from member states

This section provides that sections 52, 54, 55, 56 and 57 of the 2008 Act will apply to external confiscation requests from EU member states as they apply to requests from non-member states.

Section 24: Financial Penalties

This section inserts a new Part into the 2008 Act to provide for mutual recognition of financial penalties imposed by courts in EU member states, in accordance with the provisions of the Council Framework Decision 2005/214/JHA on mutual recognition of financial penalties.

The new Part 4A of the 2008 Act provides for the following new sections to the 2008 Act:

New section 60A Interpretation

This section provides definitions of the terms used in Part 4A, which largely derive from the Council Framework Decision 2005/214/JHA. The terms defined include “appropriate court”, “certificate”, “competent authority”, “executing state”, “external financial penalty order”, “financial penalty”, “financial penalty order”, “issuing judicial authority” and “issuing state”.

New section 60B Request for execution of financial penalty in member state

This section sets out the procedure to be followed in this State to request execution in another member state of a fine imposed in an Irish Court, where a fine has not been paid in whole or in part. Subsection (1) provides for the Central Authority to be notified where a financial penalty order is imposed by a court on a person who is resident in another member state or who has property or income in that state. Subsection (2) provides for the Central Authority to transmit the relevant documents and a

request for execution of the financial penalty order to another member state. Subsection (3) provides for the Central Authority to inform the other member state of the amount remaining to be paid or if the financial penalty order ceases to be enforceable. Subsection (4) provides for the financial penalty order to be reduced or discharged where amounts are paid to the member state concerned. Subsection (5) states that a certificate from a competent authority in another state which states the amount of any payment made to that state on foot of a financial penalty order will be admissible without further proof. Subsection (6) provides for transmission of documents by electronic or other means capable of producing a written record.

New section 60C Transmission to State of external financial penalty order

This section sets out the procedure to be followed by a member state seeking to transmit an external financial penalty order for execution by the State. Subhead (1) provides for the member state to seek execution of the external financial penalty order in this State. Subhead (2) provides for the request to be accompanied by the relevant certificate and documents required in accordance with the Council Framework Decision. Subhead (3) provides for transmission of documents by electronic or other means capable of producing a written record. Subhead (4) allows for transmission of facsimile documents and any translations required, subject to any regulations the Minister may make in that regard under subhead (6). Subhead (5) provides for the Central Authority or court to request an original or copy document if a facsimile is found not to be satisfactory. Subhead (6) allows the Minister to make regulations prescribing procedures and specifications for transmission of documents.

New section 60D External financial penalty orders

This section provides for the execution of external financial penalty orders. Subsection (1) provides that an external financial penalty order will be dealt with as though it is an order of an appropriate court in this State. Subhead (2) provides that where there are grounds for refusal or termination of the external financial penalty order, the Central Authority may make an application to the appropriate court under section 60E, 60F or 60G. Subsection (3) provides that the provisions of the Fines (Payment and Recovery) Act 2014 will apply to the execution of external financial penalty orders. Subsection (4) provides that where necessary, the amount of an external financial penalty order will be converted into euros at the exchange rate prevailing on the date of the making of the order.

New section 60E Refusal to execute an external financial penalty order

This section sets out the grounds for refusal of an external financial penalty order, in accordance with the provisions of Article 7 of the Council Framework Decision 2005/214/JHA. Subhead (1)(a) provides for refusal if the conduct which resulted in the financial penalty order has already been the subject of a financial penalty order in this State. Subhead (1)(b) provides for refusal if the conduct which resulted in the financial penalty order has already been the subject of a financial penalty order in another state. Subhead (1)(c) provides for refusal if the conduct in question is not an offence in this State. Subhead (1)(d) provides for refusal if the execution of the order is statute barred. Subhead (1)(e) provides for refusal where the conduct

concerned was not committed in the territory of the issuing state or this State. Subhead (1)(f) provides for refusal if there is an immunity or privilege in this State which prevents execution of the financial penalty order. Subhead (1)(g) provides for refusal if the defendant could not have been convicted of the offence due to their age. Subhead (1)(h) provides for refusal if the judgement was made in absentia and the defendant did not have an opportunity to defend the case — this provision is required by Council Framework Decision 2009/299/JHA. Subhead (1)(i) provides for refusal where the financial penalty is less than €70. Subhead (2) provides for refusal where the documentation is incomplete or incorrect.

New section 60F Variation of amount payable under external financial penalty order

This section provides that the court may reduce the amount of the financial penalty order if it exceeds the maximum penalty which may be imposed for the offence in this State or where there has been partial payment of the penalty or the court otherwise determines that the amount should be reduced.

New section 60G Termination of execution of external financial penalty order

This section provides that the execution of the financial penalty order shall be terminated once the issuing state informs the competent authority that it is no longer enforceable or has been withdrawn.

New section 60H Central Authority to inform competent authority

This new section provides an obligation on the Central Authority to keep the issuing state informed of various matters relating to the execution, variation, or termination of the financial penalty order, or if imprisonment or alternative sanctions are imposed on a defendant on foot of non-payment of a financial penalty order.

New section 60I Amounts to accrue to Exchequer

This section provides that amounts collected on foot of executing a financial penalty order accrue to the Exchequer unless otherwise agreed with the issuing state.

Section 25 Amendment of section 67 of Principal Act

This section amends section 67 of the 2008 Act, replacing the words “possible” with “practicable”. Section 67 provides for giving of evidence through a video link. The Act as currently worded only allows this procedure where it is not possible for a person to attend in person. However, there are many circumstances where it is possible for a person to attend but is not practicable to do so. For example in a trial for an offence it may be “possible” to request attendance of a witness. However due to the fact that the person is unwilling to travel, it may not be “practicable” to do so, given that there is no power to compel persons from one state to attend as witnesses in another state.

Section 26: Amendment of section 68(2)(d) of Principal Act

This section amends section 68(2)(d) of the 2008 Act, replacing the words “possible” with “practicable” and is consequential on the amendment of section 67 (above).

Section 27: Amendment of section 69(a) of Principal Act

This section amends section 69(a) of the 2008 Act, replacing the words “possible” with “practicable” and is consequential on the amendment of section 67 (above).

Section 28: Amendment of section 74 of Principal Act

This amendment to section 74 of the 2008 Act makes an explicit provision that where general evidence sought by another state is already in the possession of the Garda Síochána or the evidence is obtained on foot of a warrant, the Gardaí may transmit the evidence to the requesting state.

Section 29: Amendment of section 75 of Principal Act

This amendment to section 75 makes explicit provision that where a particular piece of evidence sought by another state is already in the possession of the Garda Síochána or the evidence is obtained on foot of a warrant, the Gardaí may transmit the evidence to the requesting state.

Section 30: Powers of officers of Revenue Commissioners

This section provides that where requests for searches for evidence under section 74 or 75 are conducted by the Revenue Commissioners in relation to revenue offences, the officers of the Revenue Commissioners have the same powers of search and seizure of evidence as have the Garda Síochána.

Section 31: Special Intervention Units

This section gives effect to the Council Decision 2008/617/11 on enhancing the operation of special intervention units in crisis situations. The section inserts a new Chapter 8A in the 2008 Act setting out the procedures which will apply in regard to requests and operation of special intervention units. The following are the provisions of that new Chapter 8A:

New section 94A Interpretation

This section defines terms such as “competent authority”, “Council Decision”, “crisis situation” or “special intervention unit”.

New section 94B Special Intervention Unit

This section provides that the Garda Commissioner may establish a special intervention unit for the purpose of providing assistance in the control of a crisis situation under section 94E.

New section 94C Request to other member state for assistance of a special intervention unit in dealing with crisis situation

This section provides for the issuing of a request to another member state for the assistance of a crisis intervention unit. Subsection (1) provides that the competent authority may issue such a request, with the agreement of Government, if as a result of the commission of a criminal offence a crisis situation exists and it is in the public interest to seek the assistance of a special intervention unit from another state. Subsection (2) sets out the requirement for any request to include information regarding the nature of the crisis and the type of assistance required. Subsection (3) provides that such other information as would reasonably be required by another state in deciding a request will also be provided. Subsection (4) provides that the Competent Authority may agree the type of equipment, expertise and assistance to be provided by the special intervention unit.

New section 94D Request to State for assistance of a special intervention unit in dealing with crisis situation

This section provides for other member states to issue a request for the assistance of a crisis intervention unit from this State. Subsection (1) provides that the competent authority shall consider such a request from another member state. Subsection (2) sets out the requirement for any request to include information regarding the nature of the crisis and the type of assistance required. Subsection (3) provides that such other information as would reasonably be required in deciding a request may be sought. Subsection (4) provides that the competent authority may, subject to Government agreement, agree the form of assistance, including the equipment and expertise to be provided by a special intervention unit to that member state.

New section 94E Operation of special intervention unit

This section provides for the operation of a special intervention unit. Subsection (1) provides that it will be established for a specific purpose and limited time period as agreed by the competent authorities. Subsection (2) provides the special intervention unit may operate in this State or in the other member state for so long as is necessary, subject to subsection (1). Subsection (3) provides for the competent authority to terminate assistance once the intended purpose of the crisis intervention unit has been served. Subsection (4) provides that a crisis intervention unit operating in this State shall do so under the direction and control of the Garda Commissioner, in accordance with the laws of the State and within the limits of powers conferred by its own state.

Section 32: Eurojust National Member

This amendment provides that the Minister may designate a Eurojust national member who may transmit and receive information in accordance with Council Decision 2009/426/JHA.

Section 33: Insertion of Schedules 5A, 5B, 7A, 7B and 7C to Principal Act

This section adds the texts of the international instruments, which this Bill is giving effect to, to the Schedules of the 2008 Act.

Section 34: Amendment of Criminal Justice Act 1994

Section 65 of the Criminal Justice Act 1994 provides for compensation to be payable to persons affected by any serious default on behalf of the State arising from a domestic confiscation of property. This amendment extends the compensation provisions of section 65 of the 1994 Act to include compensation for serious default by the State in executing an external confiscation order, external freezing order or external forfeiture order.

Section 35: Amendment of Garda Síochána Act 2005

This section amends the Garda Síochána Act 2005 to give effect to the Council Decision 2008/617/11 on enhancing the operation of special intervention units in crisis situations and to provide that an Garda Síochána may participate in special intervention units.

Section 36: Repeals

This section provides for the repeal of section 88(2) of the Criminal Justice (Mutual Assistance) Act, 2008 and section 2(2) of the Criminal Justice (Joint Investigation Teams) Act 2004.

Section 37: Short title, collective citation and commencement

This is a standard section providing the short title and commencement provisions of the Act.

Financial Implications

As the mutual legal assistance provisions laid out in the Bill are intended to make mutual legal assistance arrangements more efficient (many of which are already in place), it is not envisaged that there will be significant costs arising. Some additional costs may arise in relation to the new forms of mutual assistance which come under the terms of the Bill. The costs will be met from the Office of the Minister for Justice Vote, the Courts Vote or the Garda Síochána Vote as appropriate. There will also be some extra revenues accruing to the State arising primarily from the provisions of section 23 which will allow moneys collected on foot of external financial penalty orders to be disposed of by the Exchequer. It is not possible, however, to quantify the extent of such expenditure or revenues until the Act becomes operational for some time.

*An Roinn Dlí agus Cirt agus Comhionannais
Lúnasa, 2014.*