

# Memorandum on Mutual Co-operation in the Investigation of Criminal Cases and in the Presentation of Evidence

- 1. Does your country have any legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year – mutual cooperation in the investigation of criminal cases and in the presentation of evidence in a criminal proceeding at court? Please explain.**

As Ireland has an adversarial criminal justice model and a common law legal system, the judiciary do not play a role in gathering evidence. The police in Ireland, An Garda Síochána are tasked with gathering evidence and investigating crimes once they receive a criminal complaint. Following this investigation, they send a file to the Office of the Director of Public Prosecutions (“the DPP”). The DPP will then review the file and decide whether there is sufficient evidence to prosecute. An Garda Síochána may decide to prosecute in less serious crimes but prosecution is still taken in the name of the DPP. Once the prosecution begins, the DPP is responsible for the prosecution of the case and does not play any role in investigating crimes. The judiciary do not have any investigative function in Ireland either. The role of the judiciary in a criminal trial is as an arbiter between the claims of the prosecution and the defence, whilst ensuring that the trial is fair.

The role of the judiciary during the investigation of criminal proceedings is therefore limited to applications for warrants for the production of information or evidence. The [Criminal Justice \(Mutual](#)

[Assistance\) Act 2008 \(as amended\)](#) (“the 2008 Act”) governs applications for mutual assistance in respect of these applications and applications relating to the presentation of evidence in criminal proceedings.

Certain applications are not covered by the mutual assistance process namely:-

- Civil and criminal proceedings in a foreign jurisdiction for an offence which would be considered a civil matter in Irish law;
- Co-operation which is purely police-to-police or law enforcement co-operation;
- If providing the requested assistance would prejudice a criminal investigation or criminal proceedings in Ireland;
- If the request was made for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinion, or sexual orientation;
- If providing the requested assistance may result in the person being subjected to torture or to any other contravention of the European Convention on Human Rights;
- If providing the requested assistance would be likely to prejudice the sovereignty, security or other essential interests of Ireland, or would be contrary to public policy.

The implementing legislation for European Arrest Warrants (“EAWs”) in Ireland is the [European Arrest Warrant Act 2003 \(as amended\)](#) (“2003 Act”). Extradition to other countries from Ireland is governed by the [Extradition Act 1965 \(as amended\)](#). In terms of EAWs, the Central Authority in Ireland is the Minister for Justice. An

EAW can only be transmitted to the Central Authority (see [section 12](#)) or issued via the Central Authority (see [section 33](#)). The High Court is the executing judicial authority in Ireland (see [section 9](#)).

**2. In your country, when a crime is being investigated does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state? If your answer to either 2 (a) or 2 (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?**

Under the [Criminal Justice \(Mutual Assistance\) Act 2008 \(as amended\)](#) (“the 2008 Act”) the Central Authority (the Minister for the purpose of the Act) has the function of receiving, transmitting and otherwise dealing with requests from corresponding bodies in the designated states.

In this regard the 2008 Act makes provision for application to the judiciary for requests for information from a foreign state and/or to a foreign state in the course of a criminal investigation and/or for the purpose of criminal proceedings. By way of example:-

**(i) Part 2 of the Act deals with applications for information about financial transactions for Criminal Investigation Purposes**

Application can be made *ex parte* by a member of the Gardaí (not below the rank of Inspector) under [section 13](#) of the Act to the High Court for account monitoring and information orders in respect of

information held by a financial institution in the State and/or in a designated state which is required for the purpose of a criminal investigation in the State.

[Section 17](#) provides for *ex parte* application to the High Court by the Gardaí on receipt of a request from a designated state for an account monitoring and information order in respect of financial institutions in the State relating to criminal investigations in the designated state and for use in the designated state.

In each case the Judge may make the order subject to being satisfied that the conditions of the section are met. An application may subsequently be brought by the Gardaí or any financial institution affected by an account monitoring and information order to vary or discharge the order under [section 20](#) of the Act.

(ii) **Search for/seizure of material at a place in a designated state**

[Section 73](#) of the Act provides that a Judge sitting in any court may, where it appears that criminal proceedings have been initiated or a criminal investigation is taking place and that evidence relating to the proceedings/investigation may be obtained at a place in a designated state, issue a letter of request for such evidence on application by the DPP, or by a person charged in the said proceedings. Evidence obtained by virtue of this request shall only be used for the purpose specified in the letter of request and where no longer required shall be returned to the appropriate authority unless otherwise agreed.

**(iii) Search for/seizure of property in this state for use outside the state (general) (section 74) and/or for specified evidential material (section 75)**

On receipt of the letter of request from a designated state, the Gardaí can apply under [section 74](#) to a Judge of the District Court for a search warrant to search a location/premises subject to the alleged conduct being punishable both under the laws of the State and the requesting State for a maximum period of 6 months. If the request is for specified evidential material, an application can be made to a Judge of the District Court under [section 75](#) of the Act for a production order of the said material. These applications are subject to the conditions and safeguards set out within the sections.

Evidence obtained by virtue of such requests shall not, without the consent of the appropriate authority be used for any purpose other than that for which it was requested and shall be returned to the appropriate authority when it is no longer required or destroyed upon request.

These provisions are arguably very far reaching permitting the Gardaí to seize on the execution of a warrant any material found at the time of a search which is believed to be evidence of or relating to the commission of any offence or other criminal activity in a designated state.

**(iv) Requests for identification evidence**

[Sections 77](#), [78](#), [79](#), [79B](#) and [79C](#) of the 2008 Act make provision for applications for evidential identification material (e.g. fingerprints,

footprints, dental impressions, samples of blood or hair etc.) for use in the State and for use in a designated state. All such applications which must be accompanied by:

- a. a statement that the evidence is required in connection with criminal proceedings, or a criminal investigation, in the requesting state;
- b. a description of the conduct constituting the offence;
- c. a statement outlining the purpose for which the evidence is sought;
- d. assurance that the evidence will only be used for the purpose stated; and
- e. that the evidence will be destroyed in accordance with the Act.

Provision is also made for a requests for a DNA profile pursuant to [Article 7 of the Prüm Decision](#) (2008/615/JHA). It must be accompanied by the name and reference code of the requesting authority and an investigation warrant, or a statement issued by a competent authority in the requesting state confirming that the requirements of the taking of the requested DNA sample in the requesting state would be complied with if the person from whom they were required were in the investigating state.

Finally, the Gardaí have investigative powers under the [European Arrest Warrant Act 2003 \(as amended\)](#) and can carry out searches to obtain evidence and seize proceeds relating to an offence referred to in the warrant (see [section 25](#)). Where a surrender is made, and evidence is obtained it will be passed to the issuing

authority after the person is surrendered, providing that they are not, or no longer, required in relation to any domestic proceedings.

**3. What is the legislation or court rules that relate to the taking of evidence from a witness in a foreign state, or the giving of evidence from a witness in your country to a court in a foreign country? Please explain these including the role played by a judge in both scenarios.**

**(i) Evidence from a witness in a foreign State**

[Section 62](#) of the 2008 Act makes provision for the taking of evidence from a person in a designated state where criminal proceedings have been instituted in the State or a criminal investigation is taking place here. Application can be made by the DPP to a Judge at a sitting of any court for a letter of request to the designated state seeking assistance in obtaining specified evidence from a person in that State in connection with the said proceedings/investigation. A statement of the evidence of the witness is admissible without formal proof. However, in considering whether such evidence should be excluded the court shall, where appropriate, have regard to whether the witness was permitted to be legally represented and cross examined and the extent to which the manner in which the evidence was secured differed from the taking of comparable evidence in the State.

Where criminal proceedings have been instituted against a person in the State and a witness to the proceedings is in a designated state, [section 67](#) (on application by the accused or the DPP) makes

provision for the evidence of the witness to be taken through live television link from a designated state. This is subject to the Judge being satisfied that it is not desirable for the witness to give evidence in person.

**(ii) Evidence from a witness in the State for use in a designated State**

[Section 63](#) makes provision for the taking of evidence in the State for use in a designated state. On receipt of a request, the Minister may request the President of the District Court to nominate a Judge of that court to receive evidence in the State from the witness in respect of the criminal proceedings/investigation in the designated state. The District Court will hear evidence in the same manner as they would receive evidence in any criminal proceedings, shall inform the witness of their rights and may refuse to compel a witness to testify if such compulsion was not permissible under Irish law. There is no provision to award costs.

[Sections 68](#), [69](#) and [70](#) make provision for a witness present in the State to give evidence in criminal proceedings in a designated state through live television link before a nominated Judge of the District Court where the Minister is of the opinion that it is not desirable for the witness to give evidence in the designated state. The evidence is given in accordance with the practices and procedures of the requesting state, the proceedings are conducted under the direction of the Judge of the requesting state and in accordance with the laws of that State to the extent that they do not contravene the fundamental principles of the laws of the State.



Evidence obtained pursuant to these sections shall not, without the appropriate consents be used for any purpose other than that for which it was requested.

Provision is made in [sections 65](#) and [66](#) for the transfer of prisoners to the State or to a designated state to give evidence or assist in a criminal investigation. Such requests are subject to the consent of the prisoner

***(iii)* European Arrest Warrants (“EAWs”)**

A EAW must be issued by a judicial authority, which is defined in the Act as meaning a judge, magistrate or other person who is authorised under the law of the Member State to issue a warrant for the arrest of a person.

Upon receipt of a EAW, and following administrative verification, the Central Authority will forward it to the Office of the Chief State Solicitor, who will make an application to the High Court to have the warrant endorsed for execution. Once endorsed, the warrant is sent to An Garda Síochána for the purposes of arresting the person being sought. The High Court may request further information or documentation from the issuing judicial authority or the issuing state, in order to enable it to properly perform its functions under the 2003 Act. The DPP may also apply to the High Court for the issue of a EAW where a person in another Member State is facing charges or is required to serve a sentence in Ireland.

There have been some recent developments in the law of EAWs in Ireland. For example, in March 2021, Ireland joined the SIS II

Schengen Information System, leading to a very significant increase in arrests, and the new concept of a “SIS arrest” i.e., where the arrested person is given only bare details of what might be in the underlying EAW. In such circumstances, the warrant must be transmitted within 14 days, leading to a “section 14 hearing”, where the original warrant is produced to the court and is examined briefly. The matter then generally proceeds like a normal case.

In October 2022, the [European Arrest Warrant \(Amendment\) Bill 2022](#) completed the second stage of Seanad debates and was referred to the Oireachtas. The Bill aims to address issues raised by the European Commission in infringement proceedings against Ireland and other Member States in 2020. Enactment of the Bill will ensure that Ireland will not be referred to the European Court of Justice and it will allow the closure of the European Union infringement case. It also makes several amendments to the [European Arrest Warrant Act 2003 \(as amended\)](#) in order to ensure the continued efficient operation of the EAW system in Ireland.

**4. As a judge, if you receive a request for assistance from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), is it relevant to your determination of whether and how to assist that the basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected? Please explain.**

Yes, and this is reflected both in the governing statutory provisions and relevant caselaw. The 2008 Act itself makes specific provision for the exclusion of certain applications where:-

- the requested assistance would prejudice a criminal investigation or criminal proceedings in Ireland;
- the request was made for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinion, or sexual orientation; and
- providing the requested assistance may result in the person being subjected to torture or to any other contravention of the European Convention on Human Rights.

In addition, [section 70](#) of the 2008 Act provides that even where proceedings are conducted in accordance with the practices and procedures of the requesting state and at the direction of the Judge of the requesting state, the resident Judge must always ensure that the fundamental principles and tenants of the laws of this State are observed and complied with.

Such considerations are also relevant in extradition proceedings. See by way of example:-

- [Minister for Justice v. Motyl \[2022\] IEHC 93](#) – the High Court refused to order the surrender of the respondent to Poland, as the surrender would amount to an abuse of process due to the fact that (1) the offence did not involve violence; (2) the issuing authorities failed to explain the reason for the delay; (3) there was no explanation why this offence was not included in the previous EAW; and (4) there was evidence that repeat applications for

surrender are likely to result in a deterioration in the respondent's mental health.

- [\*Minister for Justice v. Brunins\* \[2022\] IEHC 419](#) – the High Court ordered the surrender of the respondent on the grounds that their personal circumstances are not so “truly exceptional” as to justify a refusal of surrender. The court were not satisfied that there were substantial grounds for believing that there was a real risk of the respondent being treated in an inhuman and degrading manner.
  
- [\*Minister for Justice & Equality v. Celmer\* \[2019\] IESC 80](#) – the legal issue in this case was whether the Irish courts could refuse to surrender a person in response to EAWs issued in Poland, if the legislative changes in Poland have the effect of depriving the person of the right to a fair trial to such an extent as to oblige the Irish courts. The Supreme Court held that the trial judge was correct in her determination, and the appeal was dismissed.

**5. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request**

**for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.**

I sit as a Judge of the District Court in Dublin and have been nominated by the President of the District Court to conduct hearings under [section 70](#) of the 2008 Act where evidence has been taken from both witnesses in a case and from the alleged injured party.

In my experience the main challenges faced by the witnesses relate more to the format and conduct of the proceedings, and in particular the sense of detachment from the proceedings in the other State. This is always a challenge where proceedings are conducted via video link affording the witness limited overview of the court room or the parties involved. Rarely do the parties introduce themselves and the questioning can pass from the prosecution to the defence with limited explanation or introduction. It can therefore be difficult for a witness to know who they are responding too. This is proved even more pronounced with the presence of interpreters or where on occasion the presiding Judge was not wearing robes.