

Protocol 21 – 15 Years On

by Dylan Casey Marshall



Introduction

In the landscape of the complex legal architecture of the European Union (EU), Ireland possesses some unique qualities in regard to its membership. This is largely in part due to the several Protocols to the European Treaties it negotiated over subsequent treaty changes since the country's accession in 1973. In addition to its potentially more well-known Protocol relating to Article 40.3.3. of Bunreacht na hÉireann,¹ which sought to protect Ireland's then effective ban on abortion,² Ireland has three Protocols which relate to the EU's Area of Freedom, Security and Justice (AFSJ).

Protocol 21 attached to the Treaty on the Functioning of the EU (TFEU),³ which came into effect in its current form with the Lisbon Treaty on 1 December 2009, is the focus of this paper.⁴ Protocol 21, in the most basic terms, provides Ireland with the right to opt-out of and the choice to opt-in to legislation adopted to govern the AFSJ under Title V of Part 3 TFEU on a case-by-case basis. Protocol 21 is complemented by Protocol 19, which deals with Ireland's (and others') relationship with the Schengen acquis, and Protocol 20, which focuses on border controls in the Common Travel Area (CTA) between Ireland and the United Kingdom.⁵

The Area of Freedom, Security, and Justice (AFSJ)

The AFSJ covers a broad area of policy areas, including criminal matters, judicial cooperation, external border management, and (irregular) migration. The provision of such an area is outlined in Article 3 of the Treaty on European Union (TEU) as one of the EU's primary objectives alongside the promotion of peace and solidarity, and the establishment of an internal market and economic union, amongst others.⁶

The AFSJ, in the EU treaties, has its origins in the Maastricht Treaty as the integration of the Single Market led to an increased movement of persons across the borders of EU Member States. Consequently, this gave rise to a perceived need for cooperation to manage the transnational impact which this movement could have, including with respect to asylum, migration, and transnational organised crime. It has been posited that, as the 'permissive consensus' of European integration has been eroded over recent years, the Union has utilised an increasingly restrictive and securitised approach to AFSJ to gain output legitimacy, particularly in its external border and migration policies.⁷ Importantly, when framing the AFSJ at the Intergovernmental Conference while during the drafting of the Amsterdam Treaty in 1997, the Justice and Home Affairs (JHA) Reflection Group noted the legitimacy link between 'serving the citizens' interest [and the] demand on the part of the public for great security'.⁸

The Maastricht Treaty introduced the policy areas of JHA, under Title VI of the Treaty establishing the European Community (TEC).⁹ This Title of the TEC formed the EU's Third Pillar, where policymaking was taken in a largely intergovernmental manner, rather than via the supranational community method.¹⁰ This had the effect of limiting the power of the European Commission, European Parliament, and the Court of Justice of the EU (CJEU) in this policy area. This was due to the political sensitivities surrounding matters relating to JHA in some Member States, such as migration. Several JHA provisions in the Maastricht Treaty built upon existing informal cooperation between Member States, such as the Trevi Group,¹¹ which then became institutionalised at the EU level.

1 Protocol (No 35) on Article 40.3.3 of the Constitution of Ireland [2016] OJ C202/320.

2 Federico Fabbrini, 'How EU Membership Transformed Ireland's Socio-Legal Norms: The Case of Abortion' (Verfassungsblog, 29 March 2023) <<https://verfassungsblog.de/the-case-of-abortion/>> accessed 18 December 2024.

3 Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice [2016] OJ C202/295 (Protocol 21).

4 Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU); Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

5 Protocol (No 19) on the Schengen acquis Integrated into the Framework of the European Union [2016] OJ C202/290; Protocol (No 20) on the Application of Certain Aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland [2016] OJ C202/293.

6 TEU (n 4), Art 3.

7 Adina Maricut, 'The Institutional Development of the EU's Area of Freedom, Security and Justice: Roles, Behaviors, and the Logic of Justification' (PhD thesis, Central European University 2016), pp 71-75; Cathryn Costello, 'Administrative Governance and the Europeanisation of Asylum and Immigration Policy' in Herwig C.H. Hofmann and Alexander H. Türk (eds), *EU Administrative Governance* (Edward Elgar 2006), pp 289-292; Paul Craig and Gráinne de Búrca, *EU Law – Texts, Cases and Materials* (6th ed, OUP 2015) (Craig and de Búrca), pp 969-972.

8 Quote cited in: Monica Den Boer and Willaim Wallace 'Justice and Home Affairs: Integration through Incrementalism', in Helen Wallace and Willaim Wallace (eds), *Policymaking in the European Union* (4th ed, OUP 2000), p 513.

9 Treaty on European Union [1992] OJ C191/1 (Maastricht Treaty).

10 For further reading on the Pillar system, see: Robert Lane, 'New community competences under the Maastricht Treaty' (1993) 30 *Common Market Law Review* 939; Pieter Jan Kuijper, 'The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects' (2004) 41 *Common Market Law Review* 609.

11 For further reading on the Trevi Group, see: Stef Wittendorp, 'Unpacking 'International Terrorism': Discourse, the European Community and Counter-Terror-

This area was somewhat amended in the subsequent Amsterdam Treaty, with matters such as visas, asylum, immigration, and other policies relating to free movement of persons, and judicial cooperation in civil matters, being incorporated into the EU's First Pillar under Title IV TEC. Meanwhile, police and judicial cooperation in criminal matters remained in the Third Pillar.¹² Perhaps the most significant change to the administration of the ASFJ came with the adoption of the Lisbon Treaty in 2009, which saw the abolition of the EU's pillar system, the introduction of the community method of decision-making across all policy areas, and the transition of policies associated with the AFSJ to the status of a shared EU competence.¹³ These far-reaching changes were accompanied by transitional provisions which ceased on 1 December 2014, five years after the Lisbon Treaty entered into force.¹⁴

Protocol 21

Protocol 21 has its origins in the EU's Amsterdam Treaty which was signed in the Dutch capital in 1997.¹⁵ In its original form, Protocol 21 only applied to the aforementioned Title IV TEC. As noted by Craig and de Búrca, the Lisbon Treaty preserved this Protocol and expanded its remit to cover all areas of the ASFJ.¹⁶ There were largely two reasons for Ireland, together with the United Kingdom, to seek such a Protocol. Firstly, there was a stated desire to protect the CTA between Ireland and the United Kingdom, which had been in existence since 1923, shortly after Irish independence. Secondly, there was some caution in both common law jurisdictions regarding the potential future development of criminal law in the EU.

Notably, since the departure of the United Kingdom from the EU in January 2020, Ireland is now unique in the EU in its relationship to the AFSJ policy sphere. Denmark, under Protocol 22, maintains a total opt-out from all legislation and policies adopted under Title V of Part 3 TFEU.¹⁷ As such, Denmark does not have the option to opt-in or to participate in any European legislation adopted in this field, even if this was desired. This Danish opt-out pre-dates the Irish AFSJ Protocols, dating to 1993, following the failure of the referendum to ratify the Maastricht Treaty in that country. Consequently, this is somewhat different to the situation that Ireland finds itself in under Protocol 21. Nonetheless, Denmark has, since 2001, been adopting the Schengen acquis on a domestic level and implementing it on an intergovernmental basis.¹⁸ Ireland, at times, adopts a similar approach for measures adopted pursuant to Title V Part 3 TFEU and seeks to align with EU norms as far as possible in line with national law.

The default position of the current Protocol 21 regime is that Ireland is exercising its right to opt-out of legislation covered within its auspices.¹⁹ In measures under Title V Part 3 TFEU, which Ireland opts-out of, the Government can participate in Council negotiations (and, where relevant, negotiations at the level of the European Council), Ireland does not get to vote at the Council level, with rules relating to the adoption of legislation by qualified majority voting and unanimity adjusted accordingly where relevant.²⁰

Article 3.2 of Protocol 21 provides Ireland with the option to opt-in to legislation adopted pursuant to Title V Part 3 TFEU.²¹ Here, the Protocol outlines that this opt-in must take place three months after a piece of legislation has been presented to the Council and is subject to the approval of the European Commission. Apart from a political decision taken by the Irish Government of the day, there are procedural matters that must be followed before an 'opt-in' can take place. When such a decision is made under Protocol 21, the Government must obtain the approval of both Houses of the Oireachtas prior to notifying the President of the Council.²²

ism, 1975–86' (2016) 54(5) *Journal of Common Market Studies* 1233; Adrian Hänni, 'Prequel to the present-multilateral clubs and the secret history of international counterterrorism cooperation in Western Europe, 1969-1989' (2018) 19(1-2) *National Security and the Future* 65.

12 Craig and de Búrca (n 7), p 966.

13 TFEU (n 4), Art 2.2.

14 Protocol (No 36) on Transitional Provisions [2016] OJ C202/321, Art 10(1).

15 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1 (Amsterdam Treaty).

16 Craig and de Búrca (n 7), p 978.

17 Protocol (No 22) on the Position of Denmark [2016] OJ C202/298.

18 Udo Bux, Pablo Abril Marti and Mariusz Maciejewski, 'An Area of Freedom, Security and Justice: General Aspects' (European Parliament, May 2024) <https://www.europarl.europa.eu/ftu/pdf/en/FTU_4.2.1.pdf> accessed 17 December 2024.

19 Protocol 21 (n 3), Art 1.

20 Ibid, Art 1.

21 Ibid, Art 3.2.

22 Bunreacht na hÉireann, Art 29.4.7°.

Notably, as highlighted by Craig and de Búrca, Protocol 21 allows for Ireland to choose whether or not to opt-in to legislation amending previous measures adopted pursuant to Title V Part 3 TFEU that Ireland has previously opted-in to.²³ Thus, if Ireland were to fail to opt-in to such amendments, such measures would potentially become inoperable between Ireland and other Member States.²⁴ Furthermore, the inverse can also be true. Even where the political will exists in Ireland to opt-in to legislation, there can be obstacles to doing so if the proposed legislation builds off existing legislation which the Irish government did not previously opt-in to.

Further, not opting-in to measures under Protocol 21 may have wider unintended consequences for Ireland. One such example is the recent decision taken regarding the seat of the Anti-Money Laundering Agency (AMLA), which Ireland unsuccessfully bid to host.²⁵ A contributing factor to the decision of Dublin being overlooked may potentially lie in the fact that, despite intending to do so, Ireland did not opt-in to several EU measures related to the Agency's future function, such as Directive 2018/1673 on combating money laundering by criminal law and Directive 2017/541 on combating terrorism.²⁶

There can be a number of other potential challenges which governments may face when opting-in to legislation covered by Protocol 21. This three-month time limit can, in a practical sense, prove challenging for the government to satisfy, given the general administrative constraints of the civil service and potential issues gaining the approval of the Oireachtas. On the other hand, due to the requirement to gain the assent of the Oireachtas to undertake to opt-in to legislation covered by Protocol 21, Ireland is the only EU Member State in which such measures are debated and voted upon at the level of a national parliament prior to adoption. This is particularly significant in relation to AFSJ legislation that gains public attention, such as the recent Asylum and Migration Pact.

Notwithstanding, Ireland's frequent use of the opt-out in areas covered by Protocol 21, the State is not necessarily entirely unaffected by European law in policy areas covered by the AFSJ in any event. This is particularly clear when it comes to criminal matters, due to the binding nature of decisions of the CJEU and the primacy of EU law. A CJEU case relating to an AFSJ matter, originating from another Member State, could produce norms and principles that the Irish courts would be bound to uphold. Furthermore, cases on matters that do not specifically pertain to AFSJ legislation can nonetheless have important consequences for criminal matters. This is evidenced by the request for a preliminary ruling referred by the Supreme Court of Ireland to Luxembourg in the case *G.D. v The Commissioner of the Garda Síochána and Others*, which, while fundamentally a data privacy case, had clear consequences for criminal law.²⁷ In this case, the CJEU ruled that the general and indiscriminate retention of all location and traffic data by An Garda Síochána, which was being used as evidence in the applicant's criminal trial in this instance, is a breach of EU fundamental rights law and cannot be justified on account of combatting crime.²⁸ In light of EU privacy legislation, the Court in this case further dealt with procedural rules that an An Garda Síochána must follow in their acquisition of such data.²⁹

In addition to legislation and policy, Protocol 21 also has an effect on Ireland's membership of, and relationship with, several EU agencies that are linked with the AFSJ. Of those agencies, Ireland has opted-in to the regulations establishing Eurojust, Europol, the European Union Agency for Law Enforcement Training (CEPOL), the EU Agency for the Operational Management of Large-Scale IT Systems in the AFSJ (EU-LISA), and the EU Agency for Asylum (EUAA).³⁰ Notably, the Irish Government chose not to opt-in to the regulation establishing the European Border and Coast Guard Agency (Frontex), but nonetheless participates in and provides financial support to its operations on an ad-hoc basis.³¹

23 Craig and de Búrca (n 7), p 978.

24 Ibid.

25 Naomi O'Leary, 'Ireland misses out on bid to host new EU anti-money laundering agency' (The Irish Times, 22 February 2024) <<https://www.irishtimes.com/business/2024/02/22/ireland-misses-out-on-bid-to-host-new-eu-anti-money-laundering-agency/>> accessed 18 December 2024.

26 John Mulligan, 'EU Commission raps Irish knuckles over failure to take on board all anti-money-laundering laws' (Irish Independent, 25 April 2024) <<https://www.independent.ie/business/irish/eu-commission-raps-irish-knuckles-over-failure-to-take-on-board-all-anti-money-laundering-laws/a833985947.html>> accessed 18 December 2024; Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [2018] OJ L284/22; Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6.

27 C-140/20 *G.D. v The Commissioner of the Garda Síochána and Others* ECLI:EU:C:2022:258.

28 Ibid, para 101.

29 Ibid, paras 106-112.

30 'EU Justice and Home Affairs Measures Subject to Protocol 21 in which Ireland did Opt-in' (Department of Justice, 21 December 2021) <<https://assets.gov.ie/205006/f8be62b6-3506-41eb-957f-d15d528a3bc8.pdf>> accessed 16 December 2024.

31 For example: 'Management Board Decision 46/2024 on adopting the procedure relating to Ireland's request(s) for the participation in Frontex activities and its financial contribution for this participation' (Frontex, 9 December 2024) <[mb-decision-46_2024_ies-requests-to-participate-in-fx-activities.pdf](https://assets.gov.ie/205006/f8be62b6-3506-41eb-957f-d15d528a3bc8.pdf)> accessed 18 December 2024.

It is notable also that a number of central features of the AFSJ have been initiated through systems of intergovernmental agreements that lie outside the EU's legal framework or forms of enhanced cooperation, where a subset of Member States have moved forward with specific measures when they felt it was required. This is largely due to the frequent political sensitivity mentioned previously with respect to policy relating to the AFSJ and the occasional inability to gain the necessary qualified-majority or unanimity to act. While enhanced cooperation is now governed by Article 20 TEU and Articles 326-334 TFEU, many examples of such cooperation pre-date the introduction of the provisions for institutionalised enhanced cooperation under the EU Treaties.³² These include the Schengen Agreement (relating to the removal of internal EU border checks), the Dublin Convention (relating to asylum), and the Prüm Convention (relating to cross-border cooperation in combatting terrorism and organised crime), many of which were later fully incorporated into or adapted and superseded by the EU's legal framework. A more recent example of this type of enhanced cooperation in the field of AFSJ is the European Public Prosecutor's Office (EPPO).³³ While Ireland is not a member of EPPO, this is not on account of Protocol 21, but rather a political choice not to join the twenty-four other EU Member States in the Office's establishment in 2017, potentially on account of the significantly different roles played by prosecutors within Ireland's common law system as compared to in civil law jurisdictions.³⁴ However, as this choice was not taken under Protocol 21, the Protocol's three-month time limit to opt-in does not apply and a future Irish Government could choose to join EPPO without having to account for such constraints.

Conclusion

Protocol 21 has been an important part of Ireland's membership of the EU since the Amsterdam Treaty came into force in 1999. This has become increasingly the case in the post-Lisbon context. The Protocol, together with Protocol 19 and Protocol 20, provide Ireland with flexibility in its approach to European integration in potentially politically sensitive areas and allows for a pragmatic approach to its engagement with the AFSJ. On the other hand, the Protocol has made Ireland's relationship with the EU *acquis* more complex and fragmented.

Politically speaking, in an ever more contested geopolitical environment, Ireland may wish to guard against its opt-outs from the AFSJ under Protocol 21 from being viewed by other Member States as representing a lack of commitment to the European project, which has been central to Irish domestic and foreign policy for more than half a century. Fifteen years on from its enactment, researchers and policymakers alike should ensure that all initiatives covered by Protocol 21 are carefully considered and scrutinised to identify how Ireland's interests are best served before deciding upon how best to proceed. An assessment of the capability of relevant Government departments and agencies to deliver any opt-in within the timescale allowed for under Protocol 21 should also be undertaken in order to ensure that administrative capacity does not prevent legislation from being adopted that is deemed to be in Ireland's interests.

³² TEU (n 4), Art 20; TFEU (n 4), Arts 326-334.

³³ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office OJ L283/1.

³⁴ For further reading the different roles of prosecutors, see: Mar Jimeno-Bulnes, 'American criminal procedure in a European context' (2012) 21 *Cardozo Journal of International and Comparative Law* 409; Máximo Langer, 'Strength, weakness, or both? On the endurance of the adversarial-inquisitorial systems in comparative criminal procedure' in Jacqueline E Ross and Stephen C Thaman (eds), *Comparative Criminal Procedure* (Edward Elgar 2016).

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The IIEA acknowledges the support of the Citizens, Equality, Rights and Values (CERV) Programme of the European Union



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