THE INFLUENCE OF THE GENERAL PRINCIPLES OF COMMUNITY LAW ON RULES OF PROCEDURE AND RULES OF SUBSTANCE IN IRELAND

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I. THE RECEPTION OF EUROPEAN COMMUNITY LAW INTO THE IRISH LEGAL ORDER

Ireland has received European Community law into its national legal order by means of the Third Amendment to the Constitution, as supplemented by additional amendments to cater for further Treaty amendments on the European side.[1] These Amendments expressly and formally authorise accession to the relevant Treaties. Article 29.4 of the Constitution of Ireland provides, in relevant part, as follows:

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Noel Travers' report on Community Directives in Ireland, submitted on behalf of the Irish Society of European Law, to the XVIII F.I.D.E. Congress, Stockholm, June, 1998, which latterly became a masterful article in (1998) I.J.E.L. 165, was used to provide a framework for portions of sections IV (in particular, section IV.C) and VII (in particular, section VII.B for the purposes of the *Pesca Valentia* case), *infra*. Further specific references are made to Travers' article, *passim*.

[1] The Tenth Amendment cleared the way for accession to the Single European Act, the Eleventh for accession to the Treaty on European Union and the Eighteenth for accession to the Treaty of Amsterdam.

> 3° The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). The State may ratify the Single European Act (signed on behalf of the Member States of the Communities at Luxembourg on the 17th day of February, 1986, and at the Hague on the 28th day of February, 1986).
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> 4° The State may ratify the Treaty on European Union signed at Maastricht on the 7th day of February, 1992, and may become a member of that Union.
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> 5° The State may ratify the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts signed at Amsterdam on the 2nd day of October, 1997.

Article 29.4.7° then goes on to confer a broad immunity from Constitutional challenge upon all such "laws enacted, acts done or measures adopted" by the State as are "necessitated by" the obligations of membership of the Communities.

These provisions have the effect of opening a constitutional window through which the light of Community rules may shine, unrefracted by the smudges of national legal interventions. That window is of finite dimensions, however, so that it is generally felt necessary to effect further constitutional amendments in Ireland co-extensive with

further accretions to Union competence, as reflected in the Treaties.

It should be emphasised that "accretions to Union competence", as used above, might suggest that when a new Union treaty emerges from the intergovernmental conference framework one merely has to examine it with a view to ascertaining whether additional fields, formerly matters of residual Member State competence, have been transferred to the Union. In reality, this is an oversimplification. The doctrine of attributed competences, or "*compétences attribuées*",[2] not only explains the transfer to the Union *zweckverband* of competences in specific fields, but also the conditions under which those competences are so transferred. The shift from unanimity to qualified majority voting, for example, alters the conditions under which competence is transferred from the regions to the centre and arguably amounts to an "accretion to Union competence". On this view, one is urged to concur with the government's choice to call for a referendum on the Nice Treaty, signed on 26 February 2001. While on the face it appears to do no more than fulfill a promise made at Helsinki (to states wishing to accede) that the Union would make the necessary institutional reforms by the end of 2000 in order to welcome new members by the end of 2002, it arguably does a great deal more than this. Ireland's vote in Council has been emasculated to a greater degree than the large Member States,[3] for example, thereby weakening the State's grip on areas of competence which were transferred under different conditions - triggering, according to this view, the "accretion of Union competence" effect.

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[2] Which now finds Treaty expression in Article 5 EC.

[3] Under Article 203 EC, from the 1 January 2003, Ireland's vote in Council will increase from three votes to seven votes. Were the votes of the "Big Four" (Germany, France, Italy and the United Kingdom) to increase commensurately, one would expect these Member States to have 23 votes from that date. In fact, they will have 29 votes.

On the other hand, this is not to say that each amendment to the Treaties of the European Union postulates a commensurate Irish constitutional amendment. So long as the competencies of the Union remain unchanged by the EU Treaty amendment, it will "fit through" the Irish constitutional window without the need to call in the constitutional carpenters. On this analysis, it is arguable that the Irish government erred on the side of caution in promulgating the 18th Amendment to the Constitution, sanctioning accession to the Amsterdam Treaty. That caution is nevertheless understandable in light of the Irish Supreme Court's ruling in *Crotty v. An Taoiseach*,[4] which had had the effect of delaying the entry into force of the Single European Act, since it was held there that the changes introduced by that Treaty were such as to go beyond the constitutional receptacle described by Article 29.4.3° (as it then was) and to require a referendum to accommodate it. Finlay C.J. rationalised Article 29.4.3° as follows:

> To hold that the first sentence of Article 29.4.3° does not authorise any form of amendment to the treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the treaties would be too broad.[5]

The ratification of a new European Treaty is never considered to be amongst the "laws enacted, acts done and measures adopted by the State necessitated by the obligations of membership of the Communities", for the purposes of the immunity conferred by Article 29.4.7° of the Irish Constitution (the former Article 29.4.5°). It was for this reason that the Irish Supreme Court was at liberty to inspect

[4] [1987] I.R. 713.

[5] [1987] I.R. 713 at 767.

the constitutionality of the proposed ratification of the Single European Act: it enjoyed no immunity from challenge.

The transposition of Directives, on the other hand, *is* necessitated by the obligations of membership of the Communities and so Irish implementing measures are immune from constitutional scrutiny as a matter of Irish law.

The foregoing Constitutional provisions are complimented by the European Communities Act, 1972, s. 2 (1) of which provides that the "constitutional" Treaties of the Communities and the existing and future acts of the Community institutions are to be part of the law of the State under the conditions laid down in those Treaties. This formulation has been judicially described as "the conduit pipe through which community law became part of domestic law"[6] and has conveniently allowed for the organic growth of European Community law without the necessity for further national legislative imprimatur.

Before proceeding to consider the tensions which can arise at the intersection of national constitutional law and European Community law, we should pause to make a point which has been made before but which merits rehearsal here since it should be considered by any acceding State. As a matter of 'pure' European Community law, the mere existence of national constitutional provisions such as Article 29 of the Irish Constitution challenges the constitutional claims of European Community law itself. Hogan and Whelan have couched the paradox thus:

> The European Court of Justice has long indicated that the Treaties are not to be treated simply as international agreements instituting a very advanced form of co-operation between sovereign States. The Treaties are the constitutional charter of a new legal order, characterised by the supremacy and direct

[6] *Tate v. Minister for Social Welfare* [1995] 1 I.R. 418 at 437, *per* Carroll J.

> applicability in the law of the Member States of many of the provisions of the Community Treaties and of derived Community legislation. The Member States have irrevocably transferred a number of sovereign powers to the Communities. As with any constitution, the Treaties are both a necessary and a sufficient basis of the obligations of Community law to be effective throughout the territory governed by its legal order, and require no further national act after that of ratification of the Treaties for them to have this constitutional effect.[7]

In the recent case of *Maher v. Minister for Agriculture*,[8] to which we will return later, Fennelly J., ventured, in the context of the constitutional protection given to national measures adopted in implementation of Community norms, that:

> ...it is probable that the authority to ratify the respective Treaties, in particular, the EC Treaty provide [*sic.*] a sufficient basis, in Community law terms, for the full effect in Irish law of directly applicable Community measures, even without the additional protection provided by Article 29.4.7°.

Now the European Court of Justice's account of the theoretical underpinnings of the 'new legal order' of

[7] Hogan and Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, pp. 7-8. Of course, the ECJ was not referring, in these instances, to the TEU, *strictu sensu*, which engrafts what are sometimes (oversimplistically) described as the "second and third pillars" onto the TEEC (now TEU). Titles V, VI and VII of the TEU *do* in fact institute "a very advanced form of cooperation between sovereign states". To this extent, Hogan and Whelan's use of the word "Treaties" may be misleading.

[8] Supreme Court, unreported, Keane C.J., Denham, Murray, Murphy and Fennelly JJ., 30 March 2001.

Community law has itself been the subject of strenuous academic criticism. The Court has been accused in the past of engaging in substantive constitutionalism, using the language of formal constitutionalism to do so.[9]

According to this argument, the Court of Justice simply cannot alter the basic normative hierarchy of the Member States (in the Kelsenian sense). This amounts to substantive constitutionalism which cannot bind those Member States. While extreme, this interpretation is one which indubitably follows logically from the attempt to shoehorn the claims of European Community law into the structure of traditional constitutional thought as elaborated by the likes of H. L. A. Hart and Hans Kelsen. We will return later to the points of tension between the tectonic plates of national constitutional law and European Community law in the context of supremacy and fundamental rights.

II. The Implementation of European Community Law in Ireland

It will be recalled that the Irish test, now contained in Article 29.4.7° of the Constitution, for determining whether national "laws enacted, acts done or measures adopted" benefit from immunity from constitutional challenge is that of "necessity": were the "laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities"? The boundaries of the province of immunity are staked out by the constitutional concept of necessity, then, and a broad interpretation was applied to that concept by the Irish Supreme Court in *Meagher v. The Minister for Agriculture and Food*[10] in 1994. Here, the Irish Court came to consider s. 3 of the European Communities Act, 1972, referred to already, which empowers Ministers of State to make domestic regulations with a view to introducing Community acts into national law. To the

[9] See, for example, Pavlos Eleftheriadis's "Aspects of European Constitutionalism" (1996) 21 E. L. Rev. 32.

[10] [1994] 1 I.R. 329.

extent that those ministerial regulations might derogate from national laws already in place, this section appears to drive a coach and four through the Irish constitutional rule which vests sole and exclusive law-making power in the Irish legislature.[11] As a matter of Irish constitutional law, ministerial regulations are merely permitted to give effect to the principles and policies contained in the parent Act of Parliament under which they are adopted,[12] but they may not go beyond the four walls of that Act. They may neither make new law nor amend existing laws. The section also appears to encroach upon the constitutionally-enshrined principle of the separation of powers between the Executive, the Legislature and the Judiciary.[13] So could s. 3 of the 1972 Act permit ministerial regulations to come into existence which went beyond the boundaries of existing Irish law and remain constitutional? Clearly, the answer to this question depended on the preliminary question of whether s. 3 was "necessitated by the obligations of membership of the Communities", within the meaning of Article 29.4.5°, now Article 29.4.7°, of the Irish Constitution.

Certainly, on at least one view, the answer to the preliminary question had to be in the negative. Directives are only binding on Member States as to the result to be achieved thereby. Article 249 EC expressly leaves to the national authorities of the Member States the choice of form and the method of transposing Directives into the national legal orders. Could it be said, then, that the use of ministerial regulation to transpose a Directive was "necessitated" by the obligations of membership of the Communities?

A possible counter-argument, of course, is that there is such a volume of European Directives to transpose each year that the obligation to give effect to the Directives even

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[11] Article 15.2 of the Irish Constitution.

[12] This was the test delineated by O'Higgins C.J. in *Cityview Press Ltd. v. An C.O.* [1980] I.R. 381 at 399.

[13] Article 6 of the Irish Constitution.

as to the result to be achieved thereby would be seriously jeopardised by the demand for national implementing legislation for each Directive. Parliamentary business would quickly grind to a halt under the weight of legislation to be passed, while no time at all could be devoted to the passing of legislation pertaining to areas of residual national competence.[14]

In dealing with the constitutionality of the 1972 legislation, Finlay C.J. said that the ministerial power contained in s. 3 "is prima facie a power which is part of the necessary machinery which became a duty of the State upon its joining the Community and therefore necessitated by that membership."[15] Section 3 of the 1972 Act was "necessitated" by the obligations of membership of the Communities, since the passing of legislation reflective of each Community Directive would be unworkable:

> ...having regard to the number of Community laws, acts done and measures adopted which either have to be facilitated in their direct application to the law of the State or have to be implemented by appropriate action into the law of the State, the obligation of membership would necessitate facilitating of these activities, in some instances at least, and possibly in a great majority of instances, by the making of ministerial regulation rather than legislation of the Oireachtas.[16]

This was the case even though the ministerial regulation could very well have the effect of amending a

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[14] Though we will see that, latterly, this counterargument has not found favour with the Supreme Court.

[15] *Meagher v. The Minister for Agriculture and Food* [1994] 1 I.R. 329, 352.

[16] *Meagher v. The Minister for Agriculture and Food* [1994] 1 I.R. 329 at 352.

pre-existing statute. The Court made it clear, however, that to the extent that ministerial regulations are not necessitated by the obligations of membership of the Communities, they will be subject to the usual tests of constitutional validity and may be struck down as *ultra vires* in circumstances where they trespass beyond the parameters of the parent Directive.[17] Accordingly, the question of whether a particular ministerial regulation was or was not necessitated by, for example, the terms of a Community Directive requiring transposition into national law, is a justiciable issue in Ireland. A conclusion that the Directive did not necessitate the particular ministerial regulation then clears the way for a constitutional challenge to the regulation where it is in breach of Articles 6 or 15.2 of the Irish Constitution. In the *Meagher* case itself, both of the impugned ministerial regulations were ultimately upheld as having been necessitated by the terms of the relevant Community Directives.

It was otherwise in the more recent case of *Maher v. Minister for Agriculture*,[18] where the Supreme Court found that none of the measures contained in the European Communities (Milk Quota) Regulations, 2000[19] had been "necessitated by the obligations of membership".[20] It is not proposed to rehearse the rather involved facts of this case, since its primary importance lies in its clarification of

[17] See, in particular, the judgment of Denham J.

[18] Supreme Court, unreported, Keane C.J., Denham, Murray, and Fennelly and Murphy JJ., 30 March 2001.

[19] S.I. No. 94 of 2000.

[20] In the event, however, the impugned statutory provision survived the constitutional scrutiny to which it was exposed. The reasons for this conclusion were that the principles and policies to which effect were given in the impugned statutory instrument were to be found in the relevant Community Regulation and in Community law governing the regulation of agriculture. This meant that the use of a statutory instrument as a means of transposition could not be seen to amount to "legislating" on the part of the Minister. No property right in milk quotas, either at national or Community law, was found to exist which was capable of being violated by the Ministerial regulation.

Meagher and, more particularly, of the precise reason for which the making of Ministerial regulations may be considered to be "necessitated by the obligations of membership of the Communities" (and therefore constitutionally invulnerable) in circumstances where such regulations would, but for the existence of Community rules, amount to an impermissible encroachment upon the legislative monopoly of Parliament, in violation of Article 15.2.1°.

As a matter of Community law, it is immaterial which form of transposition Member States employ in seeking to implement rules of Community law, whether those rules be contained in a Directive[21] or, for that matter, in a Regulation,[22] provided that the form of implementation actually employed respects the general principles of Community law,[23] in particular the principle of equal treatment and the protection of fundamental rights, that the

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[21] In the case of Directives, of course, Article 249, third para., EC expressly states that they are binding as to the result to be achieved thereby, "but shall leave to the national authorities the choice of form and methods."

[22] Although the general rule is that it is not only unnecessary but impermissible to purport to implement a Regulation into national law (Case 94/77, *Fratelli Zerbone S.n.c. v. Amministrazione delle Finanze dello Stato* [1978] E.C.R. 99), Regulations do, on occasion, require national acts of implementation or transposition. Where this is the case, the detailed rules for the exercise of the national power of implementation or transposition are governed by the public law of the Member State in question (Case 230/78, *S.p.A. Eridania-Zuccherifici nazionali v. Minister of Agriculture and Forestry* [1979] E.C.R. 2749, para. 33).

[23] Since the Member States are implementing Community law and are therefore, in a sense, acting as agents on the Community's behalf. It is clear that, in such circumstances, the Member States are bound by all of the principles and rights which bind the Community in its actions. In the context of the Common Agricultural Policy, see Cases 201 &202/85, *Klensch v. Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1986] E.C.R 3477, [1988] 1 C.M.L.R. 151. Also, Case 249/86, *Commission v. Germany* [1989] E.C.R 1263, [1990] 3 C.M.L.R. 540; Case 5/88, *Wachauf v. Germany* [1989] E.C.R 2609, [1991] 1 C.M.L.R. 328.

effectiveness of Community law is not diminished[24] and that the principle of equivalence[25] is respected. Consequently, it can be said that the use either of a ministerial regulation or of an Act of the Oireachtas is not, as a general rule, "necessitated" by the obligations of membership of the Communities", within the meaning of Article 29.4.7° of the Constitution. All that is ever "necessitated" is that rules of Community law be implemented or transposed according to the demands of Community law and the demands of Community law, as we have seen, do not extend to the use of a particular form of implementation. They are concerned only to ensure that effect be given, in accordance with the principles described above, to the relevant provisions of Community law. Fennelly J. put it thus in *Maher*: "The issue of 'necessity' is appropriately considered by reference to the content, not the form, of the instrument."

Accordingly, Irish national law can legitimately apply with full vigour to the question of whether there has been an infringement of Irish constitutional law in preferring the use of a Ministerial regulation to an Act of the Oireachtas, even where that Ministerial regulation purportedly transposes provisions of Community law into Irish law.

This reasoning (and there is nothing in the judgments of Keane C.J., Denham, Murphy, Murray or Fennelly JJ. to suggest an alternative basis of reasoning) is perhaps rather surprising, since it opens the way for all S.I.s made by Ministers in purported implementation of Community rules to be challenged on the ground of an infringement of Article 15.2.1° of the Constitution. "Necessity" is an argument which goes to the issue of whether the provisions of a validly adopted Act or S.I. are capable of being tested against the provisions of the Constitution. It is not an argument which

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[24] See, in particular, Case C-285/93, *Dominikanerinnen-Kloster Altenhohenau v. Hauptzollamt Rosenheim* [1995] E.C.R I-4069, para. 26.

[25] That is, that rights under Community law are treated no less favourably than those under national law.

can be prayed in aid to defend the use of an S.I. as a means of implementing Community rules.

However, there is another step in the analysis and it is this: even though the use of a Ministerial regulation rather than an Act of the Oireachtas is not, as a general rule, *per se* "necessitated by the obligations of membership" of the Community, this does not mean that a Minister may not in implementing Community rules, consistently with Article 15.2.1° of the Constitution, make a regulation which affects Irish law in a manner which would normally require the enactment of legislation. This is so because where, for example, a Directive contains clear rules which admit of no discretion on the part of the Member States, in the sense that the Member States are not free to flesh out the principles and policies contained in the Directive, there is no reason why Ireland should not choose to implement by means of a Ministerial regulation.[26] The Ministerial regulation, in such a case, truly acts as no more than a "conduit pipe" through which the terms of the Directive become part of Irish national law.[27] If an existing Act is affected by the principles and policies of the Directive then it will be equally affected by the Ministerial regulation, but this is unassailable. It is a consequence of the objectives to be attained by the Directive itself and Directives are, as expressly provided in Article 249 EC, binding on the Member States "as to the result to be achieved."

This is to be contrasted with a situation where a Directive leaves to the Member States the power to flesh out its principles and policies. In such a situation, the Member States are expressly permitted by Community law not to implement every part of the Directive in a precise manner: some Member States will choose to implement in one way, others in different ways. The use of a Ministerial regulation

[26] See, in particular, the judgment of Denham J., in *Meagher*.

[27] The reference to a "conduit pipe" is made out of context and is taken from Carroll J.'s judgment in *Tate v. Minister for Social Welfare* [1995] 1 I.L.R.M. 507, 521, referred to above.

as a device with which both to implement such a Directive and to elaborate those principles and policies could result in a successful challenge if it affected existing Irish law, since it could be argued that a particular policy choice taken in the Ministerial regulation was not necessitated by the terms of the Directive and that the S.I. usurps the legislative function of the Oireachtas. The very essence of such a Directive is that no *particular* policy choice must be made. This is not to say, of course, that all such challenges will meet with success. A Directive may authorise Member States to choose between and to prioritise principles and policies but may simultaneously necessitate the amendment of existing national law and it is submitted that the use of a Ministerial regulation by way of transposition measure, at least so far as concerned the amendment provisions, would not be inconsistent with the Supreme Court's pronouncements in *Meagher* and *Maher*.

It might be noted in passing that the effect of the *Meagher* and *Maher* cases has been to introduce a species of 'no harm' rule to Irish constitutional law. It is clear that, in principle, there is a problem with the use of a Ministerial regulation as a mechanism with which to amend national legislation in circumstances where European Community law is unconcerned with the precise form of implementation used. Yet, recourse to statutory instruments is countenanced, it would appear, not on the basis that it is "necessitated" by considerations of time and convenience[28] but, rather, because whether a statutory instrument or an Act of the Oireachtas is used the result will be the same; the amendment of the national law.

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[28] This point was emphasised by Keane C.J. in his judgment in *Maher*. While expedition and convenience could legitimately be weighed in the balance in choosing whether to implement by way of S.I. or Act where the Directive/Regulation leaves no policy choices to the Member State, "it would be a serious overstatement to say that it justifies the making of regulations rather than the enactment of an Act in the case of every Directive or EU Regulation..."

More generally, the judgment is rather unclear in deciding upon the true importance of the "necessity" test. It provides authority for the proposition that neither Directives nor statutory instruments are ever "necessitated" by Community law. Indeed, the question of necessity is irrelevant to the form of Irish implementing measure chosen. Prima facie, then, all such measures are therefore open to constitutional scrutiny as against Article 15.2.1°. However, provided the Community measure leaves no room for the definition at national level of principle or policy, there is no danger that an S.I. would violate Article 15, since the Minister would not be 'legislating' in such a situation. It may be that the Supreme Court has now drawn a distinction in this regard between breaches of Article 15.2.1° of the Constitution and breaches of other of its provisions. The issue of necessity, since it is relevant only to the contents of the national provision, comes into focus only in challenges under provisions of the Constitution other than Article 15.2.1°. The latter Article is relevant to the question of usurpation of legislative function by the executive and necessity cannot be used as a defence here since the choice of S.I. over enactment is never one which is forced upon the State by the obligations of membership of the Union.

Some confusion may arise from the fact that, although the Supreme Court clearly found that the relevant provisions of Community law prescribed the principles and policies, leaving no room for further definition by the Member States, the S.I. was tested not only against Article 15.2.1° of the Constitution but also against its property provisions. This was so, however, because within those (Community) principles and policies, discretion was given to the Member States to decide upon alternative courses of action. As the discretion existed within the province of principles and policies described by Community law, it was legitimate for the implementing measure chosen by the State to take the "form" of a statutory instrument. However, because there was a discretion within the "contents" of the Community provisions, it could not be shown that any particular course of

action was "necessitated by the obligations of membership" of the Union. It must be remembered that the absence of a Member State power to delineate principle and policy does not mean that whatever is done by way of transposition is "necessitated", it simply means that the State may choose whether to implement by way of Act or by way of statutory instrument. Such was the case in *Maher*. The "necessity" shield will only appear when it can be shown that the State was obliged by reason of its membership of the Union (and hence by reason of its subscription to the principles of Community law) to enact (whether by Act or by S.I.) the particular provisions at issue. The existence of a Member State discretion as to the particular course to be steered meant that this could not be shown in *Maher* – hence the exposure to full constitutional scrutiny.

In order to clarify matters, it is submitted that the following propositions of law emerge from the *Maher* judgments:

1. "Necessity" is a constitutional prophylactic which shields the content, but not the form, of national implementing measures, whether they be Acts or S.I.s, from constitutional scrutiny.

A. Arguments as to Form

2. In the specific context of a claim that the use of a S.I. instead of an enactment of the Oireachtas amounts to an infringement of Article 15.2.1° of the Constitution, it is not enough for the State to claim that such recourse was "necessitated" by the obligations of membership of the Union, since Community law is indifferent to the form of implementing measure used, provided that the general principles of Community law are observed;

3. Where a provision or provisions of Community law prescribe the principles and policies to which effect is to be given in national implementing measures, a plea that the use of an S.I. instead of an enactment of the Oireachtas amounts to an unconstitutional executive usurpation of the legislation

function will not lie, since the Minister, in such a case, does not "legislate";

4. On the other hand, where Community law leaves it to the Member States to define principles and policies, even within defined ranges, such a plea will lie. In such a case, the use of a S.I. by way of implementing measure in circumstances which amount to an infringement of Article 15.2.1° of the Constitution will not be shielded from a finding of invalidity by Article 29.4.7° thereof.

B. Arguments as to Content

5. It is necessary in each case of challenge to national implementing measures to examine the provisions of the Act or S.I. with a view to determining whether those provisions, individually or as a whole, were necessitated by the prescriptions of Community law;

6. If the implementing provisions are found to have been necessitated by the obligations of membership of the Union, no argument that they violate provisions of the Constitution will lie;

7. If, on the other hand, the implementing provisions are found not to have been necessitated (because, for example, the State is found to have enjoyed a discretion as to the contents of the implementing measure or because the contents of the implementing measure go beyond the demands of the Community provisions to be implemented) the case will proceed along the lines of a traditional challenge to the constitutional validity of an Act or Ministerial regulation.

It should be apparent from the foregoing that Ireland generally discharges its obligation under European Community law to implement Directives into its legal order by means either of primary legislation or of ministerial regulations (secondary legislation). Though not 'laws' within the meaning of Article 34.4.5° of the Constitution,[29]

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[29] See Finlay C.J. in *Meagher v. Minister for Agriculture* [1994] 1 I.R.

ministerial regulations are binding in the same way as Acts of the Oireachtas, or Parliament, and are by far the more usual and preferred vehicles of transposition for the Irish State. No governmental guidelines have been posited to delineate the circumstances in which implementation by primary legislation might be more appropriate than implementation by regulation and in practice it would appear that decisions on this question are taken on an *ad hoc* basis. New criminal offences are usually created by primary legislation, though, as one would expect.[30]

To this we might add that the view is occasionally taken in Ireland, as in other Member States, that specific transposition measures are unnecessary since the Directive in question is already adequately reflected in the laws of the land. We might briefly mention here that Directive 84/5/EEC, the Second Council Directive on the Approximation of the Laws of the Member States relating to Insurance against Civil Liability in regards of the use of Motor Vehicles,[31] was at least partly implemented into Irish law by means of a 1988 agreement between the Motor Insurance Bureau of Ireland (essentially an association of motor vehicle insurers and known as the 'MIBI'), of the one part, and the government, of the other part. The remaining part of the Directive, which required the establishment of a body with the task of providing compensation for damage to property or personal injuries caused by an unidentified vehicle or by an uninsured vehicle did not require transposition, since such a body had already been established in Ireland in 1955, that is the MIBI itself. We will return to some of the issues which have arisen under the MIBI scheme later in this paper.

Article 249 EC has always accorded a measure of discretion to the Member States as to the preferred method of

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329 at 353.

[30] Travers, *Community Directives: Effects, Efficiency, Justiciability,* (1998) I.J.E.L. 165, 167-8.

[31] 30 December 1983 [1984] O.J. L008.

implementation of Directives. This discretion allows the Member States at least some degree of latitude to satisfy national administrative and constitutional demands. However, the European Court of Justice has long made it clear that the discretion conferred by Article 249 EC is not unlimited. Thus, any general principles of national, constitutional or administrative law must guarantee that the national authorities will in fact apply the Directive fully and, where the Directive is intended to create rights for individuals, that the legal position arising from those principles is sufficiently precise and clear and that the persons concerned are made fully aware of their rights. Where appropriate, those persons must be afforded the possibility of relying upon those rights before their national courts.[32] It has been suggested that this is tantamount to saying that Member States must transpose Directives either by way of legislation or by way of other legally-binding domestic legal instruments.[33] Whether that be so or not, it must call into question the use of ministerial circulars and other administrative schemes as transposition vehicles. The Irish High Court ruled in *Browne v. An Bord Pleanála*[34] that recourse to such methods of implementation had been abandoned, though a later ruling by the Supreme Court would seem to provide authority for the proposition that it may be permissible where the Directive itself envisages it.[35] Further consideration will be given in Section IV below to the implementation of Community Directives into Irish law.

III. The Primacy of European Community Law in Ireland

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[32] Case 29/84, *Commission v. Germany* [1985] E.C.R. 1661, at 1673.

[33] See Travers, "Community Directives: Effects, Efficiency, Justiciability", [1998] I.J.E.L. 163, 169.

[34] [1991] 2 I.R. 209.

[35] *Mallon v. The Minister for Agriculture, Food and Forestry* [1996] 1 I.R. 517 at 535.

Professor Joseph Weiler has suggested that the evolutionary nature of supremacy is necessarily a bi-dimensional concept[36] embracing as it does, first, the elaboration of the parameters of the doctrine by the European Court of Justice and, second, its incorporation into the constitutional orders of the Member States and its affirmation by their Supreme Courts.

The first of these limbs is a matter of pure European Community law with which the reader will be familiar. The facts and the outcome of *Van Gend en Loos*,[37] in which the European Court of Justice declared the Community to constitute a

> ...new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals...

do not require ventilation here. The reasoning in this case, it will be recalled, was to become the *fons et origo* of the twin concepts of direct effect and of the primacy or supremacy of European Community law. *Costa v. ENEL*,[38] *Internationale Handelsgesellschaft*,[39] *ERTA* (or *AETR*)[40] and

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[36] "The Community Legal System: The Dual Character of Supranationalism" (1981) 1 Y.B.E.L. 267, 275-6.

[37] Case 26/62, *NV. Algemene Transport en Expetitie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] E.C.R. 1, [1963] C.M.L.R. 105.

[38] Case 6/64, *Flaminio Costa v. ENEL* [1964] E.C.R. 585, [1964] C.M.L.R. 425 at 593.

[39] Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125, [1972] C.M.L.R. 255.

[40] Case 22/70, *Commission v. Council (ERTA)* [1971] E.C.R. 263, [1971] C.M.L.R. 335.

Simmenthal[41] quickly followed, elaborating upon these twin notions and further clarifying the precise parameters of the obligations which they imposed upon Member States. The following propositions, which stem from the foregoing cases, have now become firmly entrenched in the foundations of the Community legal order:

- By their entry into force, the treaties have become an integral part of the legal systems of the Member States.

- The courts of those Member States are bound to apply the law which flows from those treaties within their own legal orders.

- By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

- Member States cannot accord precedence to any national law over Community law, irrespective of the domestic status of that national law.

- The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

- The executive force of Community law cannot vary from one State to another.

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[41] Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263.

The strength or otherwise of the teleological arguments marshalled by the Court in declaring the existence of direct effect and supremacy of Community law has been the subject of copious academic contributions which need not concern us here. We are chiefly concerned to examine the manner in which these cases and the many others which have followed upon them have affected the national laws of Ireland.

One consequence, in particular, of such cases as *Simmenthal*, which is of some considerable importance to the courts of States intending to accede is this: the principle that a domestic court must directly and immediately enforce a clear and unconditional provision of Community law even in the face of a directly conflicting national law applies *even where the national court in question is not equipped with jurisdiction to do so as a matter of purely national law*. That is to say that European Community law can and does have the effect of expanding the jurisdiction of national courts to such an extent as is necessary to enable them to give full effect to European rules. We have already seen in the context of the Irish Supreme Court's decision in *Meagher* that Community law can have the effect of extending the power of the executive in a similar manner. This is so even where the national jurisdictional limitations are of a constitutional order. Thus, in *Factortame Ltd.*,[42] the ECJ demanded that a national rule which prevented a court from granting interim relief in a case governed by Community law must be set aside by the court seised of the case.

A similar example of this phenomenon can be seen in the Irish case of *Dublin Bus v. MIBI*.[43] There, a Circuit Court judge, faced with a national rule which purported to transpose a Community Directive into Irish law but which did so

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[42] Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and Ors.* [1990] E.C.R. I-2433, [1990] 3 C.M.L.R. 1.

[43] *Dublin Bus v. MIBI*, (Circuit Court, unreported, McMahon J., 29 October 1999).

incorrectly, declined to follow it and instead permitted the plaintiff to sue the defendant in damages for its failure properly to transpose the Directive. Moreover, the defendant was not the State (as one would expect in a *Francovich*-type scenario). Rather, it was the Motor Insurance Bureau of Ireland, to which we have made reference earlier. The Circuit Court judge rationalised that Bureau as a body largely under government control which was charged with the responsibility to transpose.[44] Now normally, the Circuit Court does not enjoy any power to strike down laws - this is the province of the Superior Courts. Yet here, we see how European Community law can weave new and exquisite jurisdictional garments to be worn by *all* national courts, however lowly they may be as a matter of purely domestic law. The need to educate members of the Bench as to the reality and as to the detail of European Community law cannot then be overstated.

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[44] This decision may, in fact, have gone too far in seeking to give effect to the terms of the Directive. It might be doubted whether it was prudent to equate the MIBI with the State when that body was never really authorised to transpose. Rather, the Bureau fortuitously fulfilled the role of the body to be set up under the terms of the Directive to provide compensation for accidents involving untraceable or uninsured motor vehicles. To say that because the MIBI, which predated the Directive and satisfied the criteria of the body called for by the terms of that Directive, had *transposed* the Directive is arguably to go too far. If the MIBI had not existed by the deadline for implementation of Directive 84/5/EEC, the Irish government would have had to create it. Moreover, even if the MIBI had "transposed" the Directive in question by entering into a 1988 agreement with the Irish government, the ultimate responsibility for any deficiencies in that regard would still rest with the government itself, which should be joined as a party in any *Francovich*-type litigation. Despite these reservations, however, the case must be seen as novel in so far as it applies the reasoning of cases such as *Foster v. British Gas plc* (Case C-188/89, [1990] E.C.R. I-3313, [1990] 2 C.M.L.R. 833), which extend the definition of the State in order to escape the strictures of the vertical/horizontal direct effect dichotomy, to cases like *Francovich v. Italy* (Cases C-6 and 9/90, [1991] E.C.R. I-5357, [1993] 2 C.M.L.R. 66), where it is sought to sue the State in damages for injury resulting from the State's failure properly and timeously to transpose a Directive into its national law.

The issues thrown into focus by the *Meagher* and *Maher* litigation, which we considered earlier, are, of course, indissociable from the notion of the primacy of European Community law. After all, only if one accepts that European Community law occupies a position in the hierarchy of national norms loftier than that of national constitutional law can one accept the proposition that a national constitutional rule, which normally pounces upon ministerial orders made *ultra vires*, can be kept tethered to its kennel by the leash of Community law while those ministerial orders raid the fowl-run of national law. On the other hand, one might say that it was a *national* constitutional rule - Article 29 - which kept Articles 15.2 and 6 at bay in *Meagher*, and herein lies perhaps the greatest tension between national law and European Community law. While European Community law demands recognition of the judicially-constructed notion of supremacy on its own terms, as an adjunct to the detection of a 'new legal order', many Member States, including Ireland, give effect to the notion of supremacy only because it has been interposed into their own constitutional orders. While in most cases this results only in theoretical incongruity, it will be seen that, in certain circumstances, it can result in intractable constitutional deadlock. Nowhere are those circumstances more favourable to deadlock than in areas such as fundamental human rights, where rules of the deepest national constitutional significance clash with Community rules which may well have been promulgated without any consideration of possible human rights implications yet which demand recognition of their primacy.

This brings us conveniently to the second limb of Weiler's bi-dimensional rationalisation of the primacy of EC law; the incorporation of Community law into the national legal order and its affirmation at the level of the national Supreme Court.

In France, it will be recalled that the main obstacle to the recognition of supremacy in the Conseil d'Etat was a jurisdictional rule. In *Semoules* (1970), the Conseil held that

it had no jurisdiction to review the validity of French legislation and could not therefore find it incompatible with Community law. It could not, by the same declension, afford precedence to Community law over national French law. Although the French Constitution did provide for the primacy of certain international treaties, the constitutionality of legislation was thought to be a matter for the Conseil Constitutionnel; a matter, moreover, to be resolved before the legislation was formally promulgated. In the seminal *Raoul Georges Nicolo* case, in October 1989, although the Conseil overruled its *Semoules* decision and recognised the primacy of Community law, it did so primarily on the basis of its interpretation of a French constitutional provision: Article 55. Thus, the *Nicolo* case does not represent an unqualified acceptance by the Conseil d'Etat of the primacy of European Community law on its own terms. Indeed, Manin has pointed out[45] that Commissaire Frydman's emphatic plea (accepted by the Court) in favour of using Article 55 to ensure the primacy of treaties over French laws was accompanied by a categorical rejection of Community law as another possible basis.

In Ireland, as in Germany and Italy, the main obstacle to the recognition of the supremacy of European Community law was the apparent imbalance between national rules of a fundamental constitutional nature and Community rules which did not seem quite so important. It has already been suggested that the reason for this difficulty stems in the main from the fact that supremacy in Ireland is a concept which has been enshrined in the national Constitution.[46] While it might seem logical to give precedence to a *sui generis* system of law which operates independently of national

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[45] Manin, "The *Nicolo* Case of the Conseil d'Etat: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law over Subsequent National Statute Law" (1991) 28 C.M.L.Rev. 499.

[46] See, for example, de Witte, "Community Law and National Constitutional Values", (1991) 2 L.I.E.I. 1, 4.

constitutional values (the Community perspective), it is not quite so logical to allow a technical provision of a national constitution (recognising supremacy) to prevail over fundamental human rights provisions contained in the same text (the Member State perspective).

The tension between the Community's perception of supremacy and that of the Member States was thrown into sharp focus by the celebrated Irish case of the *Society for the Protection of the Unborn Child (Ireland) Ltd. v. Grogan*[47] (hereinafter, "*SPUC v. Grogan*"). This case, like the German triptych of *"Solange"* cases[48] and the Italian *Frontini* and *Granital* cases,[49] demonstrates to what an agonising pitch that tension can rise. It also demonstrates that supremacy, even after almost forty years, remains a chimerical concept which has never been fully embraced by the Member States.

In *Grogan*, it was argued that Ireland's restriction on the dissemination of information pertaining to the availability of abortion services in Member States in which those services were not unlawful, together with her restriction on the freedom to travel in order to avail of those services, amounted to an infringement of Article 59 (now Article 49) of the EC Treaty. In the course of his judgment, Walsh J., clearly suggested that the Irish constitutional provision recognising the supremacy of European Community law may well have been qualified by the later constitutional amendment recognising the right to life of the unborn child. To quote from his judgment:

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[47] [1989] I.R. 753 and Case C-159/90, *Society for the Protection of the Unborn Child (Ireland) Ltd. v. Grogan and Ors.* [1991] E.C.R. I-4685, [1991] 3 C.M.L.R. 849.

[48] *International Handelsgesellschaft mbH v. Einfuhr-und Vorratstelle fur Getreide und Futtermittel* [1972] C.M.L.R. 177; *Re Wunsche Handelsgesellschaft* [1987] 3 C.M.L.R. 225 and *Brunner v. The European Union Treaty* [1994] 1 C.M.L.R. 57.

[49] *Frontini v. Ministero delle Finanze* [1974] 2 C.M.L.R. 372 and *SpA Granital v. Amministrazione delle Finanze*, Italian Constitutional Court, 8 June 1984.

> It has been sought to be argued in the present case that the effect of the amendment of Article 29 of the Constitution, which was necessary to permit our adhesion to the treaties of the European Communities, is to qualify all rights including fundamental rights guaranteed by the Constitution. The 8th Amendment of the Constitution is subsequent in time, by several years, to the amendment of Article 29. That fact may give rise to the consideration of the question of whether or not the 8th Amendment itself qualifies the amendment to Article 29. Be that as it may any answer to the reference received from the Court of Justice of the European Communities will have to be considered in the light of our own constitutional provisions. In the last analysis only this Court can decide finally what are the effects of the interaction of the 8th Amendment of the Constitution and the 3rd Amendment of the Constitution.[50]

The conflict which arose in Ireland, then, was one between a constitutional rule of foundational importance - the right to life of the unborn - and a European Community rule allowing for freedom to receive services and information pertaining thereto. This conflict was left unresolved by the *Grogan* litigation itself since, as readers will no doubt know, the European Court of Justice avoided giving a substantive ruling on the issue raised.[51] Clearly, however, this case, like

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[50] [1989] I.R. 753 at 768-769.

[51] A Protocol (Protocol No. 17) was subsequently inserted into the TEU to defuse the conflict. This Protocol provides that

> Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3° of the Constitution of Ireland.

the German and Italian cases, presented the Community Court with a potential revolution which threatened to undermine supremacy completely: Community law is supreme, but only to the extent that it does not conflict with national fundamental norms. Fundamental rights are not protected by the Treaties but only by the Member States.

The tension of which we have been writing, between the Member State conceptualisation of primacy and that of the European Court of Justice has been attenuated somewhat by an ingenious line of European Court of Justice authority which has had the effect of expanding the role of the Court, guaranteeing the survival of supremacy and safeguarding human rights.[52] This solution might be called the "inspiration" approach: instead of applying the foundational precepts of national fundamental human rights jurisprudence (which could not be done without emasculating supremacy), the European Court of Justice has stated that jurisprudence to be declaratory of general principles of European Community law.[53] Thus, while *European Community law* is applied, *national law* inspires it. In a bold stroke, the Luxembourg Court has surmounted the problem of the absence from the Treaties of express provisions protective of human rights.[54] It

A Solemn Declaration was later made which appears to claw back the protection of the Protocol, though its precise status and effect remain unclear.

[52] This is a simplified statement and it should be noted that the authorities have been strongly criticised as being either unconstitutional in the broad sense or feeble in the sense of protecting human rights. Moreover, the Court's recent ruling in *Opinion 2/94* must now be seen as casting doubt on the ingenuity of the solution.

[53] Article 6(2), TEU (formerly Article F(2), TEU), first introduced by the Maastricht Treaty, now provides that "[t]he Union shall respect fundamental rights ... as general principles of Community law."

[54] Of course, the authorities do little to assuage the concerns of pure constitutionalists who opine that there has never been a transfer of sovereignty from the Member States to the Community in the field of human rights. Indeed, the Bundesverfassungsgericht, in *International Handelsgesellschaft,* had asserted that "[t]he part of the Grundgesetz dealing with fundamental rights is an inalienable essential feature of the

has brought within the Community framework the whole panoply of fundamental rights developed at national law for decades or at least such of those rights as the Court might chose to classify as 'general principles' of EC law. The net effect of this development is that, while conflicts may yet arise between national fundamental rights law and European Community law, conflict is rendered less likely, since EC law *itself* protects fundamental rights. This *volte-face* in Community policy was announced initially in *Stauder v. City of Ulm*,[55] where the Court found no breach "capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court." Next came *Internationale Handelsgesellschaft*,[56] in which the Court developed the theme of a general principle of fundamental human rights within the Community. It began by addressing the supremacy issue, stating that the validity of Community measures cannot be judged according to the rules or concepts of national law: only Community criteria may be applied. Consequently, even a violation of a fundamental human rights provision of a Member State constitution could not impair the validity of a Community provision. However, the Court then sweetened the pill by adding:

> However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions

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valid Constitution of Germany".

[55] Case 29/69, *Stauder v. City of Ulm* [1969] E.C.R. 419; [1970] C.M.L.R. 112.

[56] Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr - und Vorratsstelle fur Getreide und Futtermittel* [1970] E.C.R. 1125; [1972] C.M.L.R. 255.

> common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[57]

In *Nold*,[58] the Court further eased the supremacy conflict by suggesting that, because EC fundamental rights law is inspired by the constitutional traditions common to the Member States, it could not uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those states. This, of course, predates *Grogan* and does not solve the problem identified in that case, since the right in *Grogan* was *not* protected to the same extent in other Member States. Here we see one of the limits of the attenuating influence of the Court of Justice. Another is the fact that human rights at the Community level inhere in the individual by virtue of one's status as a Community national and not by virtue of one's humanity. Undoubtedly, the protection of human rights at the Community level has suffered by reason of its coming into existence as a device with which to avert a constitutional crisis relating to supremacy. More importantly, because the ECJ's jurisprudence is parasitic, depending upon the common constitutional principles of the Member States, it is necessarily limited and, in more than one respect, represents the lowest common denominator of human rights protection in Europe. While there is a great deal more to fundamental rights law within the Union structure, it is largely outside the scope of this paper. The point has, we hope, been made that supremacy remains a thorny polemic in Ireland, as in other Member States, and it is in the field of human rights law that that polemic has presented itself most starkly.

IV. Community Directives in Ireland: Aspects of Implementation in Practice

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[57] [1970] E.C.R. 1125 at 1134.

[58] Case 4/73, *Nold KG v. Commission* [1974] E.C.R. 491; [1974] 2 C.M.L.R. 338.

A. Retrospective Transposition

As a general rule of Irish law, criminal legislation cannot constitutionally be passed with retroactive effect. Article 15.5 of the Irish Constitution provides as follows:

> The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.

The Irish Supreme Court has interpreted this provision as "an expressed and unambiguous prohibition against the enactment of retrospective laws declaring acts to be an infringement of the law, *whether of the civil or the criminal law*."[59]

Irish policy in the field of transposition of Directives, then, is generally inimical to the adoption of *ex tunc* measures which purport to have retroactive effect.[60] The adoption of any such measures would in any case fall foul of the European Court of Justice's rulings in the *Francovich v. Italy* line of authority, since those measures could set at nought the effect of the principle that compensation should be paid by the State to those who suffer as a result of late implementation of Directives. On the other hand, an argument might be available at Community law to the effect that where, for example, a Directive aims to protect consumers, it is preferable to adopt retroactive measures *ex tunc* than to force the consumer to invoke the direct effect of

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[59] *Magee v. Culligan* [1992] 1 I.L.R.M. 223 at 272, *per* Finlay C.J., emphasis added.

[60] The European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, which purport to transpose the Council Directive on unfair terms in consumer contracts (93/13/EEC 5 April 1993 [1993] O.J. L095), are an exception to this general rule. The ministerial regulations were adopted on 1st February, 1995, and have retroactive effect to 1st January of the same year. It has been argued that this is contrary to the terms of Article 15.5 of the Irish Constitution: see, in particular, Murphy, *The Unfair Contract Terms Regulations 1995: A Red Card for the State* (1995) 14 I.L.T. 156, 159.

the Directive or, failing this, to rely on an action against the State. Such a course arguably gives greater effect to the principles and policies of the Directive than the adoption of *ex tunc* measures without retrospective effect.

B. The concept of the State, for the purposes of the rule in Marshall v. Southampton and South West Area Health Authority

There have been a number of Irish cases which have addressed the scope of the State for the purposes of vertical direct effect. The recent case of *Dublin Bus v. M.I.B.I*[61] has already been considered and has been noted as a significant extension of the relevance of this inquiry, insofar as the case has purported to extend the definition of the State for the purposes of the rule in *Francovich and Bonifaci v. Italy.*

In *Coppinger v. Waterford County Council*,[62] the issue arose as to whether the plaintiff, who had been seriously injured in a motor accident, could rely upon the vertical direct effect of a directive in circumstances where he sought to argue that the Directive had been implemented both tardily and incorrectly. The plaintiff, for reasons which never became clear, had collided with the rear of a tipper truck, the property of the defendant County Council, which was lawfully stopped on the plaintiff's side of the road but close to the centre. The plaintiff mounted his claim on an allegation of negligence and argued, in the alternative, that the defendant County Council was in breach of EC Directives and was liable, as an emanation of the State, for any damage or injury resulting from that breach. The Directives in question were Council Directive 70/156/EEC on type approval of motor vehicles, Council Directive 70/221/EEC on rear protective devices for motor vehicles and their trailers and Commission Directive 79/490/EEC, which refined and expanded the requirements of the earlier Directives. These

[61] *Dublin Bus v. MIBI*, (Circuit Court, unreported, McMahon J., 29 October 1999).

[62] High Court, unreported, Geoghegan J., 22 March 1996.

Directives were purported to have been implemented in Ireland by the Road Traffic (Construction, Equipment and Use of Vehicles) (Amendment) Regulations, 1985.[63] These regulations required the fitting of rear under-run protective devices to certain categories of vehicles. Tipper trucks were excluded from those categories, however.

The plaintiff's common law negligence action failed on the ground that the defendant County Council was entitled to believe that the State had correctly implemented the Directives in question and were not, therefore, negligent in not having a rear under-run safety device on the truck in question at the time of the accident.

However, the plaintiff then sought to argue that the Irish regulations had wrongly implemented the relevant Community rules, since they had exempted tipper trucks from the obligation to fit rear protection, and that he was therefore entitled to compensation from the defendant. To make that argument, the plaintiff had to prove, first, that the regulations incorrectly transposed the Directive and second, that the extent of the plaintiff's injuries would have been diminished had the defendant Council abided by the true requirements of the Directive. Of course, these arguments could only themselves be made if the plaintiff could show that the Directive could be relied upon directly as against the defendant. In other words, the plaintiff had to show that the defendant County Council was an emanation of the State, responsible with the State for the failure properly to implement the Directive.

Geoghegan J., now a judge of the Irish Supreme Court, had little difficulty in finding that the defendant County Council was an emanation of the State. He accepted without question, in the course of his judgment, the settled jurisprudence of the European Court of Justice relating to the circumstances in which an incorrectly transposed Directive may be relied upon by an individual against the State or an

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[63] S.I. No. 158 of 1985.

emanation thereof: *Pubblico Ministero v. Ratti*,[64] *Becker v. Finanzamt Munster-Innenstadt*,[65] *Marshall v. Southampton and South-West Area Health Authority*,[66] *Johnston v. Chief Constable of the RUC*,[67] *Marleasing SA v. La Comercial Internacional de Alimentacion SA*,[68] *Foster v. British Gas plc*[69] and *Fratelli Costanzo SpA v. Comune di Milano*.[70]

Ultimately, it was held that the Irish regulations had indeed failed properly to give effect to the parent Directives and, accordingly, that the plaintiff could pursue the defendant local authority in damages for its failure to affix a rear protective device to the tipper truck with which he had collided. Had it been found that the local authority was not an emanation of State, one imagines that a fresh action against the State would have had to have been mounted, this time claiming damages under the rule in *Francovich v. Italy*.[71]

In *McBride v. Galway Corporation*,[72] Quirke J. accepted that the plaintiff could invoke the provisions of Article 4 (2) of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment[73] (the 'Environmental Impact Assessment' Directive) against the defendant Corporation. In so holding, the learned High Court judge referred also to the *Fratelli*, *Becker*, *Marshall* and *Foster* cases. However, the judge went on to find that the provisions of the Directive

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[64] Case 148/78, [1979] E.C.R. 1629.

[65] Case 8/81, [1982] E.C.R. 53.

[66] Case 152/84, [1986], E.C.R. 723.

[67] Case 222/84, [1986], E.C.R. 1651.

[68] Case C-106/89 [1990], E.C.R. I-4135.

[69] Case C-188/89 [1990], E.C.R. I-3313.

[70] Case 103/88 [1989], E.C.R. 1839.

[71] Cases C-6 and 9/90, [1991] E.C.R. I-5357 [1993]; 2 C.M.L.R. 66.

[72] [1998] 1 I.R. 485.

[73] 85/337/EEC, [1985] O.J. L 175/40.

which were in issue were not sufficiently unconditional and precise to be relied upon by an individual against the State where the State fails to implement the Directive into its national law by the end of the prescribed period and he derived assistance in reaching this conclusion from an earlier decision of the Scottish Court of Session (Outer House) to the same effect.[74]

To date, then, it is clear that the Irish Courts have proven themselves disposed to applying the principle of vertical direct effect in such manner as to give Directives their full currency. This is of some significance in Ireland, where semi-State bodies are common.

C. Direct Effect of Directives in Ireland

The *Coppinger*[75] and *McBride*[76] cases, described above, aptly demonstrate the enthusiasm with which the Irish Courts have recognised and endorsed the principle of the direct effect of unimplemented or incorrectly implemented Directives. This is so even where the Directive in question is in conflict with domestic provisions of national law. The case of *Tate v. Minister for Social Welfare*[77] evinces the extent to which Irish regard for the principle of direct effect has

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[74] This was the case of *Kincardine and Deeside District Council v. Forestry Commissioners* [1994] 2 C.M.L.R. 869. An argument that this case was no longer an accurate statement of the law following upon the European Court of Justice's ruling in Case C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV v. Gedeputeerde Staten Van Zuid-Holland* [1996] E.C.R. I-5403 was rejected. The Court of Justice's decision was distinguished on the ground that that case had not addressed the question of whether or not Article 4 (2) of the 1985 Environment Impact Assessment Directive was sufficiently unconditional and precise to be relied upon directly against the State where the State fails to implement the Directive within the prescribed period, as opposed to where the State fails correctly to implement the Directive.

[75] High Court, unreported, Geoghegan J., 22 March, 1996.

[76] [1998] 1 I.R. 485.

[77] *Tate v. The Minister for Social Welfare* and *Robinson v. The Minister for Social Welfare* [1995] 1 I.R. 418 .

revolutionised national social welfare law. The domestic provisions at the heart of the litigation only arrived at the doorstep of the Irish High Court, battered and exhausted, after three long and arduous journeys to Luxembourg, following references in other cases.[78]

Council Directive 79/7/EEC[79] establishes the principle of equal treatment as between men and women as regards social security. Article 4 (1) of that Directive essentially prohibits discrimination on grounds of sex, either directly or indirectly, by reference to marital or family status, in the context of social security schemes and the conditions of access to such schemes. Ireland was obliged to implement that Directive by 23 December 1984, but failed to do so. The result of that failure was that married men and married women were not treated equally for the purposes of various social welfare matters which fell within the scope of the Directive. In 1985, the Irish Parliament introduced the Social Welfare (No. 2) Act, which came into effect at the end of 1986 and which ameliorated the situation prospectively. To make matters even more Gordian, the Irish Minister for Social Welfare promulgated regulations in 1992 which purported to make up for any shortfalls in payments to married women between 1984 and 1986.[80] However, those regulations did not account for all of the differences in treatment which had arisen. The plaintiffs, all of whom were married women, instituted proceedings in which they sought declarations that they were entitled to receive the same benefits and have the same rules applied to them as were paid and applied to married men in the same situation from 23

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[78] Case 286/85, *McDermott and Cotter v. Minister for Social Welfare* [1987] E.C.R. 1453; Case C-377/89, *Cotter v. Minister for Social Welfare* [1991] E.C.R. I-1155 and Case 208/90, *Emmott v. Minister for Social Welfare* [1991] E.C.R. I-4269.

[79] 19 December 1978 [1979] O.J. L006.

[80] The European Communities (Social Welfare) Regulations (S.I. No. 152 of 1992).

December 1984, that the State had failed to implement the Directive and that the 1992 regulations were *ultra vires* the powers of the Minister or repugnant to Articles 15.2 and 40.3 of the Irish Constitution and were therefore void.

Carroll J. found that Ireland was indeed in breach of her Community obligations in failing properly to implement the Directive and that the plaintiffs were entitled to an award of damages. So far as the direct effect of the Directive was concerned, the High Court judge was in no doubt whatsoever:

> It is established that Directive 79/7/EEC could be relied on from 23 December 1984 in the absence of implementation and that women were entitled to have the same rules applied to married men in the same situation. (See *Cotter and McDermott v. Minister for Social Welfare (No. 1)* (24 March 1987) [1987] ECR 1453).

An argument that the rights enjoyed by the plaintiff were rights under national constitutional or statute law was emphatically rejected. Their rights stemmed from the Directive itself, which became directly effective on 23rd December, 1984, upon the State's failure to implement. That reliance upon the terms of the Directive could prescind any competing claims at national law was made equally clear:

> ...as from 23 December 1984 the plaintiffs were entitled to rely on the provisions of the directive to preclude the application of any national provision inconsistent with Article 4(1) of the directive (see *Cotter and McDermott (No. 2)*, a right which was conferred by European law.

Accordingly, the defendant Minister was precluded from relying upon the terms of the 1992 regulations to the extent that those terms trammelled the plaintiffs' rights arising from the direct effect of the Directive. Interestingly,

the judge found that this finding made it unnecessary to strike down the regulations as having been made *ultra vires*.

D. The interpretative obligation in Ireland

Just as the principle of direct effect has been accommodated into Irish law without difficulties of any real consequence, so too has the Irish judiciary shown itself to be predisposed to arguments anchored in the interpretative obligation as enunciated in such cases as *Von Colson*[81] and *Marleasing*.[82]

That interpretative requirement was accepted unquestioningly by the Irish High Court, and, indeed, by Counsel for both the plaintiffs and the defendants, in the case of *Bloomer & Others v. Incorporated Law Society of Ireland, Ireland and the Attorney General*.[83] The Incorporated Law Society of Ireland, or the 'Law Society' as it is commonly styled, is the body entrusted by the Oireachtas with responsibility for administering and regulating the apprenticeship, vocational training and examination of persons seeking to qualify as solicitors in Ireland. The Society is empowered by a framework of Irish statutes, known collectively as the Solicitors' Acts, to make regulations relating to matters within the remit of its responsibilities under the Acts. In particular, the Society may make regulations governing access to vocational training for aspirant solicitors. The Acts themselves stipulate the basic requirements of entry to the Law Society for those aspiring to become solicitors in Ireland. Amongst these stated requirements is the requirement that applicants should satisfy the Society, by examination, of their knowledge of certain core subjects of substantive national law before being

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[81] Case 14/83, *Von Colson v. Land Nordrhein-Westfalen* [1984] E.C.R. 1891.

[82] Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] E.C.R. I-1415.

[83] [1995] 3 I.R. 14.

admitted to its vocational courses,[84] since the Society does not concern itself with the teaching of substantive national law. This is the province of the Universities. The Acts confer power upon the Society to regulate for exemptions from these examinations, however, and it was with the manner in which the Society had used that power that this case was concerned. The Society had stipulated, by regulation, that applicants who had received a law degree from any one of a number of named Irish universities were exempt from the examination requirement for the core subjects. Degree-holders from the Queen's University of Belfast, which is in Northern Ireland, did not benefit from that exemption.

The plaintiffs were all students of the law faculty of Queen's University and claimed, *inter alia*, that their exclusion from the benefit of the Society's regulatory exemption amounted to indirect discrimination on grounds of nationality. Clearly, the main issue was the validity of the Society's regulation exempting certain degree holders, though an important consideration in that regard was the validity or otherwise of the Acts which empowered that exemption to be made in the first place. Significantly, although the Society urged that the regulation at Bar was valid as a matter of European Community law, it conceded that the empowering legislation had to be interpreted in conformity with the provisions of European Community law. Now, while the Irish judge could simply have examined the regulation to determine whether it was in conformity with the precepts of European Community law, this would have had the disadvantage, in the case of a negative conclusion, of dragging down the parent Act with it, since the implication would be that the parent Act had authorised that digression from European Community law. Instead, then, Laffoy J. read the parent Act in accordance with Community law and sought

[84] Very broadly, these courses comprise three steps. First, a four and a half month institutional course (the Professional course). Second, an eighteen month period of in-service training as an apprentice in a solicitor's office and, third, a two month institutional course (the Advanced course).

to discover whether the regulation had gone beyond the parent Act, in just the same way as an Irish judge would examine the validity of a ministerial regulation contended to be *ultra vires* its parent Act in a wholly domestic case:

> Section 40 of the Solicitors' Act 1954 must be construed on the basis that the power thereby conferred on the Society to make regulations governing access to vocational training for aspirant solicitors is subject to the prohibition on discrimination on the grounds of nationality contained in Article 6 and that the question which falls to be considered is whether Regulation 15 contravenes that prohibition.

We can see here a uniquely Irish aspect of European Community legal interpretation which arises with some frequency. This is the extension of Community legal rules beyond the fact scenarios with which the European Court of Justice was originally presented in enunciating them. The *Von Colson and Kamann* interpretative requirement was designed to ensure that, where Member States fail to implement a Community Directive, either properly or at all, any provision of national law which is inconsistent with the Community rule must be interpreted, so far as possible, in a manner which gives effect to the rule.[85] Yet here, it was applied to a situation where a rule of domestic law appeared to infringe the more general principles of Community law; principles such as the free movement of workers, the prohibition of discrimination on grounds of nationality and the freedom to provide services. This is not to say that the Irish courts misinterpret Community law. Rather, they incorporate that law into the Irish Common Law tradition with facility and bring the same reasoning to bear upon it as

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[85] Case 14/83, *Von Colson v. Land Nordrhein-Westfalen* [1984] E.C.R. 1891, para. 26. See also Case 106/89, *Marleasing SA v. La Comercial Internacional de Alimentación SA* [1990] E.C.R I-4135 at para. 8-9.

they would upon a rule of national constitutional law. That reasoning involves the incremental development of the rule on a case by case basis. The same incremental development approach has already been seen in the Irish Circuit Court in the case of *Dublin Bus v. M.I.B.I.*,[86] discussed earlier.[87]

Ultimately, Laffoy J. concluded that the regulation in question did indeed amount to indirect discrimination on grounds of nationality for which there was no justification. An interesting further element of the judge's reasoning was her reliance upon the principle of proportionality[88] in reaching her conclusion. It was broadly accepted that degree holders from the Queen's University of Belfast have a knowledge of Irish substantive law which is inferior to that of their Southern semblables. This is especially so in the context of Irish constitutional law. Nevertheless, it was found that a total denial of the exemption provided for was a disproportionate response to that deficiency. Northern candidates could, for example, have been exempted from all but the constitutional law examination. The Society could not argue that deficiencies in other subjects of substantive Irish law justified differential treatment, since that knowledge was never examined in according qualified Northern lawyers their establishment rights under Council Directive 89/48/EEC.

Interestingly, the response of the Law Society to the *Bloomer* litigation was that the exemptions from examination in core subjects of Irish substantive law were stripped away from *all* degree holders, whether from Irish or from Northern Irish universities.

In *In re The Organisation of Working Time Act, 1997*,[89] O'Sullivan J. came to consider the application of

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[86] *Dublin Bus v. MIBI*, (Circuit Court, unreported, McMahon J., 29 October 1999).

[87] See above, Section III.

[88] Proportionality as a General Principle of European Community law will be considered in greater detail in Section VI (a) below.

[89] *In re The Organisation of the Working Time Act, 1997; Coastal Line*

Council Directive 93/104/EC[90] on the organisation of working time, to terminal operatives who drove cranes and other similar equipment for the purposes of loading and unloading vessels at a facility at Dublin Port. Essentially then, the employees in question were stevedores, though that description appears nowhere in the report of the judgment. The Irish Labour Court had found that, as such, they could be deemed to be 'dock workers'. The Council Directive, which had been implemented into Irish law by means of the Organisation of Working Time Act, 1997, excludes from its provisions "... air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training". However, "dock or airport workers" do come within the general purview of the Directive, albeit in the context of derogations which may be adopted in their cases, but only subject to the proviso that they are afforded equivalent periods of compensatory rest. The 1997 Act empowered the relevant Minister to make regulations fleshing out the categories of activities which were excluded from the terms of the Directive and the categories which were subject to the partial derogation. The Union representing the employees relied upon one set of Irish regulations[91] made under that Act (which, for the sake of simplicity, we will call the 'Union's regulation'), while the Company employing them relied upon another[92] (which we will refer to as the 'Company's regulation'). The regulations relied upon by the Company exclude certain activities from the terms of the Irish statute completely, so that persons engaged in those activities do not benefit from the envisaged reorganisation of

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Container Terminal Ltd. v. Services Industrial Professional Technical Union and the Minister for Enterprise, Trade and Employment (Notice Party) [2000]1 I.R. 549.

[90] 23 November 1993 [1993] O.J. L307.

[91] Organisation of Working Time (General Exemptions) Regulations (S.I. No. 21 of 1998).

[92] Organisation of Working Time (Exemption of Transport Activities) Regulations (S.I. No. 20 of 1998).

working time at all. The regulations relied upon by the Union exempt certain activities from the requirements of the Working Time Directive, provided that workers engaged in these activities are afforded rest periods and breaks which can reasonably be regarded as equivalent. As we have seen, both forms of exclusion are permissible under the Directive. The problem was that the wording of the regulations did not coincide exactly with the wording of the Directive and strong arguments could be made to the effect that the workers at issue in this case were covered by either of these regulations. The Company's regulation made reference to "[a]n activity consisting of or connected with, the operation of any ... vessel...", while the Union's regulation referred to an activity "the nature of which is such that employees are directly involved in ensuring the continuity of production or the provision of service, as the case may be, and in particular, the provision of services at a harbour or airport."

In seeking to determine the primary issue of which of these regulations governed the particular activities of the stevedores, O'Sullivan J. appeared to accept the proposition put forward by Counsel on behalf of the defendant and Notice Party and accepted by counsel for the plaintiff that:

> ...both the European Court and the Irish domestic courts have acknowledged that in construing domestic legislation which implements European law, the Court should adopt a teleological approach to interpreting the former so as to achieve and implement the true scheme and purpose of the latter.

Clearly, the Directive envisaged a scheme whereby the sector of activity comprising sea transport would be excluded, subject to a derogatory clawback in respect of dock workers. O'Sullivan J. therefore inferred that the intention of the legislature in passing the implementing Act of 1997 was to follow the same structural approach. The Irish legislature must have intended to exclude sea transport activities from

the terms of the Directive altogether, but must have intended that dock workers come within its general purview. He went on to find that the reference in the Union's regulation to "the provision of services at a harbour" must include a reference to the activities of dock workers, since the Directive itself makes reference to dock activities in the Article with specific reference to which the Irish provision was promulgated. The Company's regulation, on the other hand, was couched in the language of the Directive referring to complete exclusions and O'Sullivan J. accordingly found that it was "proper to interpret the intention lying behind this language by reference to those provisions". However, the complete exclusion provisions of the Directive clearly did not cover dock work and so it was inferred that dock workers were not completely excluded under the Company's regulation.

The Irish Supreme Court, reversing the High Court on this point, has ruled that the provisions of the Irish Employment Equality Act, 1977, should be interpreted by reference to Council Directive 76/207/EEC, which it transposed into Irish law. This was the case of *Nathan v. Bailey Gibson Ltd.*[93] The Irish legislation required, on its face, that there be some causal connection between the sex or marital status of the claimant and the discrimination of which he or she is alleged to have been the victim. The Directive, on the other hand, appears unconcerned with any such connection, so that where, as here, a (clearly less qualified) man received a position in preference to the claimant because of his membership of a Union comprised overwhelmingly of men, the Directive would fasten upon the situation as a form of indirect discrimination. The Supreme Court insisted upon a purposive approach to the interpretation of the 1977 Act. The purpose of the 1976 Directive was to enjoin *any* form of discrimination on grounds of sex, whether that discrimination be direct or indirect. Accordingly, the 1977 Act was construed as prohibiting indirect as well as direct

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[93] [1998] 3 I.R. 162.

discrimination on grounds of sex. In the course of his judgment, Hamilton C.J. had the following to say:

> As stated by Mr. Justice Blayney in the course of his judgment in *Meagher v. Minister for Agriculture* [1994] 1 I.L.R.M. 1, it is well established that Community Law takes precedence over our Domestic Law and that where they are in conflict it is the Community Law which prevails.
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> It is also well established that national or domestic courts in interpreting a provision of National Law designed to implement the provisions of a Directive, should interpret their National Law in the light of the wording and the purpose of the Directive in order to achieve the results envisaged by the Directive.[94]

In *Conlan v. University of Limerick*,[95] this approach was adopted with alacrity by the Irish High Court. There, a female applicant for the position of Professor of Law at an Irish university argued that by requiring "several years of experience at a senior academic level", the university was indirectly discriminating against women, since very few females had reached senior academic level. The Labour Court had taken the view that there was no discrimination, since this was an essential requirement for the post of Professor of Law. This is a perfectly valid defence both under European Community law[96] and under national law. It was not enough

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[94] At 173. Quoted with approval and applied by O'Sullivan J. in *Watson v. The Environmental Protection Agency* [2000] 2 I.R. 454. See also in this regard, the judgment of Kelly J. in *Byrne v. Conroy* [1998] 3 I.R. 1.

[95] *In re the Employment Equality Act, 1977; Conlan v. University of Limerick and Minister for Enterprise, Trade and Employment (Notice Party)*, High Court, unreported, McCracken J., 4 February 1999.

[96] See, for example, *Bilka-Kauthaus GmbH v. Karin Weber Von Hartz*

to say that lecturers performed tasks which were broadly similar to those of a full Professor and were therefore capable of undertaking the job. The Professor must also be seen to be a person of senior stature, with considerable experience, so that students of high calibre would be attracted to the courses and that the standing of those courses with employers and with the legal professional institutions would be high. The High Court declined to set those findings aside. Although the plaintiff was ultimately unsuccessful in her claim, the point being made here is that the High Court adopted the same purposive approach to the interpretation of the 1976 Act as had commended itself to the Supreme Court in *Nathan*.

E. Liability in damages for breaches of Community law

The cases of *Tate v. Minister for Social Welfare,*[97] *Coppinger v. Waterford County Council*[98] and *Dublin Bus v. M.I.B.I*[99] have already been considered. In each of these cases, damages were awarded, arising out of the State's failure properly to incorporate rules of European Community provenance into domestic Irish law. These cases illustrate the eagerness with which the Community principle of reparation for breaches of Community law has been received in Ireland. The cases are of interest too in that they demonstrate the 'global' approach to damages favoured in Ireland. The judges rarely apply the guidelines posited by the European Court of Justice in the *Francovich* and *Dillenkofer*[100] in a mechanical fashion. Rather, they examine the nature of the breach and the

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[1986] 2 C.M.L.R. 701, 721.

[97] *Tate v. The Minister for Social Welfare* and *Robinson v. The Minister for Social Welfare* [1995] 1 I.R. 418.

[98] High Court, unreported, Geoghegan J., 22 March, 1996.

[99] *Dublin Bus v. MIBI*, (Circuit Court, unreported, McMahon J., 29 October 1999).

[100] Cases C-178, 179, 188-190/94, *Dillenkofer v. Germany* [1996] E.C.R. I-4845, [1996] 3 C.M.L.R. 469.

causal connection between that breach and the damage suffered and simply award damages on that account.

The Irish Supreme Court added its endorsement to the reparation principle in *Emerald Meats Ltd. v. The Minister for Agriculture*,[101] in which the Court stated, having quoted from paragraphs 31-37 of the *Francovich* case, that

> [t]hese principles must be applied by the courts of every Member State and it is clear from them that Emerald is entitled to claim compensation from the State for the Department of Agriculture's failure to carry out the obligation imposed on it by Regulation No. 4024/89.[102]

V. Application of Community Law on own motion by Irish Courts

The reader will be aware that Ireland is a Common Law country in which the adversarial system of litigation predominates. Within that framework, judges are generally reluctant to raise legal matters on their own motion, that is, without having heard submissions from both sides on those matters. The policy underpinning that reticence is the desire to ensure that neither side is placed in the position of having his case decided on a ground in respect of which he has been denied the opportunity to make submissions.

This is not to say that Irish judges cannot and do not raise legal issues on their own motion and, to be sure, any Irish judge would be perfectly within his powers to do so. It is arguable that this is more apposite a course than usual in the specific context of Community law, since it must be regarded as enjoying, at the very least, the status of Constitutional law within the State. We might mention here

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[101] [1997] 1 I.R. 1, 17.

[102] *Per* Blayney J., at pp. 15-17. Hamilton C.J. and Denham J. concurred with Blayney J.'s judgment.

that in the case of *Dublin Bus v. M.I.B.I.*,[103] which we have addressed earlier, the European aspect of the case was raised by the Circuit judge before whom the matter came on and that aspect was ultimately dispositive of the case.

In *Humphrey v. Minister for the Environment*,[104] European Community law again played an important role, albeit a strictly *obiter* one, in the resolution of the facts in issue. The case arose out of the Irish Government's belated attempt to address the chronic shortage of taxis, particularly in the metropolis of Dublin. Knowing that the complete liberalisation of access to Government-issued taxi licences would probably result in strikes, since a lucrative market in taxi licences had pullulated from the conditions of scarcity which had theretofore characterised the market, the Government decided to liberalise access only for those who already held such a licence - by offering a new licence to each existing holder of a licence. In this way, it was hoped to double the number of licences while keeping existing licence-holders content. Many taxi licence-holders did not even drive their own vehicles, instead "letting-out" the licence to "cosies" for large sums of money. The proposed Government scheme, then, would increase the number of cosies while maintaining the protected class of licence-holders who could expect to receive large sums of money from cosies for the use of the licence and ultimately to sell the licence for a lump sum upon retirement.

Not unsurprisingly, the new Government scheme discontented many who had hoped to secure a taxi licence but who could not afford to buy one from an existing licence-holder. In particular, however, hackney drivers objected to being frozen out of the scheme. Hackney licences, though substantially cheaper than taxi licences, do not entitle their holders to display a "Taxi" sign on their vehicles, to

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[103] *Dublin Bus v. MIBI*, (Circuit Court, unreported, McMahon J., 29 October 1999).

[104] High Court, unreported, Murphy J., 13 October 2000.

stand at designated ranks, to stop on public highways to pick up passengers who hail them or to use designated bus lanes in the city. Many such licence-holders, then, were anxious to secure a taxi licence in order, essentially, to improve their lot.

A number of hackney licence-holders challenged the Ministerial regulations[105] by which the new scheme was to be introduced on the ground that the Road Traffic Act, 1961, under which the Minister for Environment and Local Government had made the regulations, permitted regulations which were qualitative, but not quantitative, in nature.[106]

Murphy J. ultimately held that the Act of 1961 did permit the making of Ministerial regulations which represented the exercise of numerical control over the taxi licences: this was apparent simply from the fact that the Minister is empowered to grant licences. After all, by granting or, indeed, by refusing an application for a taxi licence, the Minister is *ipso facto* exercising quantitative control over the licensing of such vehicles. However, by restricting the grant of licences under the regulations to a specific class of persons (*viz.* existing taxi licence-holders), the Minister had fettered the discretion conferred upon him by the 1961 Act. Murphy J. considered that:

> The scheme ostensibly put in place by S.I. 3 of 2000 represents an exercise of quantitative control and there can be little objection to that per se. However, it is also a blanket restriction which renders nugatory applications from parties other than current taxi licence holders. It represents a fettering of the Minister's discretion which affects the rights of citizens to work in an industry for which they may be qualified and, further, which affects public

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[105] The Road Traffic (Public Service Vehicles) (Amendment) Regulations, 2000 (S.I. No 3 of 2000).

[106] The case involved further issues which are not addressed here.

> access to taxis and restricts the development of the taxi industry.

This, the learned Judge continued, was sufficient to dispose of the matter before him: the Ministerial regulations would be struck down as having been made *ultra vires*.

In the course of oral argument before him, Murphy J. had solicited submissions on the possible application of European Community law to the facts raised. Counsel had given it as their opinion that the matter could be disposed of without recourse to Community law considerations. In the final section of his judgment, the judge nevertheless gave it as his view that the proposed scheme violated Article 12 EC on the ground that it necessarily involved indirect discrimination on grounds of nationality, which is proscribed by that Article. Most, if not all, of the existing taxi licence-holders were Irish nationals, so that, by restricting the grant of new licences to this category of persons, the Minister was effectively precluding nationals of other EU Member States from becoming the holders of new taxi licences in Ireland. Beyond that consideration, he was satisfied that the proposed scheme violated Article 86 EC, in so far as it relieved the taxi industry wholly or partially from the discipline of competition and promoted breaches of Article 82 EC.

It was clear that the European element in the *Humphrey* case was *obiter*, the issues having already been disposed of by means of the application of Irish public law. Nevertheless, the case provides a clear example of the courageous raising of Community law by a judge in the absence of detailed submissions on the matter.

VI. Proportionality, legitimate expectation and transparency

The protection of fundamental rights as a general principle of European Community law has already been touched upon. It is now proposed briefly to address the extent to which some other general principles (properly so-called) of

Community Law have been incorporated into Irish national law.

A. Proportionality

The principle of proportionality, a concept with which German and French lawyers are perhaps most familiar, has now become snugly nestled into the general principles of Community Law. It can be used both to challenge Community action[107] and to challenge the legality of Member State action[108] to the extent that it falls within the scope of European Community law.

The Irish High Court has applied the principle of proportionality as a principle of Community law without difficulty. This is significant, given that proportionality is not a well-developed constitutional concept in Ireland, as it is in other Member States. Thus, in *H.M.I.L v. Minister for Agriculture*,[109] Barr J. applied that principle to strike down a ministerial scheme of financial corrections as it applied to the meat industry on the basis that the corrections were altogether too severe and were not tailored to the gravity of the breaches in question. Moreover, he ruled that even if the Minister's scheme for financial corrections was specifically authorised by Community Regulations, they too would have been struck down in the circumstances of that case as offending the proportionality rule.[110]

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[107] As in Case C-331/88, *R. v. Minister for Agriculture, Fisheries and Food, ex parte Fedesa* [1990] E.C.R. I-4023, [1991] 1 C.M.L.R. 507, which concerned an unsuccessful challenge to a Common Agricultural Policy Directive.

[108] It is enough simply to draw attention to the European Court's voluminous caselaw on free movement of persons, services and goods, in this regard. Reference has already been made to the *Bloomer* litigation in Ireland.

[109] *H.M.I.L. Ltd. (formerly Hibernia Meats International Limited) v. The Minister for Agriculture and Food*, High Court, unreported, Barr J., 8 February 1996.

[110] At page 70.

B. Legitimate expectation

Legitimate expectation, which has been recognised as a general principle of Community Law,[111] is an inchoate but rapidly-developing territory of the Irish legal landscape. It is a field which has been fertilised as much by comparative law as by Community principles. A clear example of its application in Ireland, as a general principle of Community Law, can be seen in *Duff v. Minister for Agriculture.*[112] The very interesting aspect of that case, which arose under the milk super levy régime, was that although legitimate expectations were adverted to by the Court of Justice in answering the questions put to it by the Irish Supreme Court on 14 January 1993, the Court found that those expectations could not generate a Community remedy for the plaintiffs. When the matter was returned to the Supreme Court, however, a remedy in national law was found for the plaintiffs.[113] In the course of his judgment, Barrington J. (then of the Irish Supreme Court) commented as follows:

> It appears to me that ... the Advocate General has gone out of his way not to exclude the possibility that the Plaintiffs may have a remedy in national law. Neither has he excluded the possibility that principles of Community law, such as legitimate expectation, may be invoked by the Plaintiffs so long as there is no discrimination against Community funds (as compared to national

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[111] See, for example, Case 120/86, *Mulder v. Minister van Landbouw en Visserij* [1988] E.C.R. 2321, [1989] 2 C.M.L.R. 1, especially at p. 24.

[112] *Duff v. The Minister for Agriculture and Food (No. 2)* [1997] 2 I.R. 22. The judgment of the Court of Justice on the Article 177 reference made to it by the Supreme Court is reported at [1996] E.C.R. I-569.

[113] This was an award of damages for loss suffered as a result of a mistake of law by the Minister as found by the Supreme Court.

> funds) and so long as the interests of the Community are kept in sight.[114]

C. Transparency

Transparency, as a general principle of Community law, if, indeed, it is a general principle of Community law, has yet to find a place within the jurisprudence of the Irish courts. While it is to be imagined that transparency will begin to resonate with greater plangency in the years to come, not least because of the great debate on the issue which now rages across the territory of the Union,[115] it is as unclear how the call for greater transparency at Union level will translate into an expansion of rights as it is unclear how greater transparency at the Union level will translate into greater transparency on the national level. It may well be that we will see cases in the future in which challenges will be brought to Community measures on the basis that those affected thereby were excluded from the possibility of making submissions and representations at the formative stages of those measures.

VII. Procedural Law

A. Limitation periods

In *Tate v. Minister for Social Welfare*,[116] which we have discussed above, the State claimed that it was entitled to rely on the Irish Statute of Limitations, 1957, to bar the right of the plaintiffs to recover any sum of money due in respect of the delay in the implementation of Directive 79/7/EEC from 1984 to 1986 and also to bar any sum claimed in respect of the transitional compensatory payments paid to men which had fallen due more than six years before the issue of

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[114] *Duff v. The Minister for Agriculture and Food (No. 2)* [1997] 2 I.R. 22, 81.

[115] Most recently, this debate has been fuelled by allegations of nepotism and corruption within the Commission (culminating, of course, in the resignation of the college of Commissioners on the 15th March, 1999).

[116] [1995] 1 I.R. 418.

proceedings. The 1957 Act posits a six year limitation period from the date on which the cause of action accrued for actions to recover money under any enactment (that is, under a statute) and for actions founded on tort.[117] It was accepted that a breach of statutory duty amounts to a tort, that is to a civil wrong.

Carroll J. rejected the argument that the breach of obligation by the State to implement the directive was a breach of statutory duty. It was a wrong arising from Community Law which had domestic effect in Ireland and which "approximate[d] to a breach of constitutional duty."[118] The judge found no incongruity in describing such a breach as a tort, just as a breach of statutory duty amounted to a tort though not expressly stated to be so in the Act. Consequently, the breach at issue triggered the six year limitation period for torts contained in the Act.

It will be recalled that the State had belatedly adopted regulations in 1992 to implement the Directive and that those regulations were themselves defective in so far as they failed fully to do so. The argument was put forward by Counsel for the plaintiffs that the adoption of those defective measures in 1992 amounted to a fresh breach of Community law so that, for the purposes of the claims made in respect of the regulations, the six year limitation would have begun to run afresh in 1992. The learned High Court judge accepted that the regulations deprived married women of rights under the Directive and agreed that a fresh cause of action had accrued. Interestingly, the judge went on to hold that the failure to provide for the payment of transitional payments in the regulations did *not* give rise to a fresh cause of action, however, since this was a mere omission and not a positive act by the State. Whether this is a distinction on which so much should turn is perhaps open to question.

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[117] Sections 11(1)(e) and 11(2)(a) of the Act, respectively.

[118] *Tate v. The Minister for Social Welfare* [1995] 1 I.R. 418 at 438.

The plaintiffs then argued that the European Court of Justice's ruling in *Emmott*[119] on 25 July 1991, to the effect that Ireland could not rely on national procedural rules relating to time limits so long as it had not fulfilled its obligations under the Directive, prescinded reliance by the State upon the Statute of Limitations against them now. Carroll J. preferred to distinguish *Emmott* from the case before her, however. In the earlier case, Ms. Emmott had been induced by the State to believe that proceedings need not be brought while the earlier *Cotter and McDermott* cases where pending, while here, the State merely sought to rely upon general legal provisions limiting the retroactive effect of claims. The Statute of Limitations could be relied upon by the State, therefore. The State had made no unambiguous promises that it would not so rely in relation to persons who made claims prior to the passing of the 1992 regulations.[120]

B. Interim Measures

Even before the European Court of Justice's landmark ruling in *Factortame,*[121] the Irish courts had ruled that interim measures could be made in order to defend against potential violations of European Community rules, even in the teeth of conflicting national law. In *Pesca Valentia*,[122] the Irish Supreme Court granted an injunction restraining Ireland from enforcing a condition attached to Irish licences for sea fishing within the State's exclusive fishing limits unless seventy five per cent or more of the members of the crew were Irish

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[119] [1991] E.C.R. I-4269.

[120] Noel Travers agrees with Carroll J.'s conclusion here; see Travers, *Community Directives: Effects, Efficiency, Justiciability,* (1998) I.J.E.L. 165. He says that *Emmott* may have gone too far against national authorities and that the more recent Case C-188/95, *Fantask A.S. V. Industriministeriet* [1997] E.C.R. I-6783, paras. 49-52 suggests a more moderate approach by the European Court of Justice.

[121] Case 213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd.* [1990] E.C.R. I-2433.

[122] *Pesca Valentia Ltd. v. Minister for Fisheries* [1985] I.R. 193.

citizens or nationals of another Member State, pending a determination of its compatibility with Community law.

The case is not really of massive significance, however, in that the Irish law did not discriminate on the basis of nationality *as between Member States* (which would have brought European Community law sharply into view), but only as between Member States, on the one hand, and non-Member States, on the other. Although the plaintiffs were Spanish, Spain had not yet acceded to the European Economic Community (as it then was) at the material time. It would appear, then, that the case was decided on domestic constitutional grounds rather than by reference to Community precepts. The Supreme Court was facilitated in reaching its conclusion by a domestic jurisdiction which permits the temporary suspension of legislation which is challenged as being unconstitutional and not by the European Court of Justice's supremacy jurisprudence, which formed the bedrock of the later *Factortame* decision in Luxembourg. In *Factortame*, it will be recalled that the U.K.'s Merchant Shipping Act, 1988, and Merchant Shipping (Registration of Fishing Vessels) Regulations of the same year *did* discriminate against Member State nationals, since they were designed to abolish quota hopping under the Common Fisheries Policy by Spanish vessels, Spain having then acceded to the Community. Nevertheless, the Irish case does illustrate that the Court of Justice's ruling in *Factortame* presents no real constitutional headache in Ireland while, in the United Kingdom, the clear constitutional bar of parliamentary sovereignty made *Factortame* a singularly untoothsome pill to swallow.

There are myriad further examples of the manner in which European Community law can mould national procedural law. That Community Law can do so to just the same extent as it can sculpt national substantive law need hardly be observed. Two further examples should suffice here, then.

C. Security for costs

The cost of proceedings in Ireland "follow the event". That is to say that, as a general rule, the loser pays the costs. Security for costs[123] refers to the pre-trial lodgement into Court of a security or bond by one party (usually the plaintiff) to protect the other party (usually the defendant) in the event that costs are awarded against the party lodging the security. Orders for security for costs have traditionally been available only as against plaintiffs resident outside the jurisdiction[124] on the basis that, if they were not available, spurious claims could be made with impunity and orders for costs could be evaded with facility.

The test which is applied in Ireland to determine whether the plaintiff should be required to provide security for costs is conveniently set out in the judgment of Finlay, P. (as he then was), in *Collins v. Doyle*[125] as follows:

> prima facie a defendant establishing a prima facie defence to a claim made by a plaintiff residing outside the jurisdiction has got a right to an order for security for costs.

The right to an order in these circumstances is not absolute, however, and the court will exercise its discretion based upon the facts of the particular case. The court will consider, for example, whether a *prima facie* case has been made by the plaintiff that his inability to provide security

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[123] Such securities are governed by Order 29 of the Rules of the Superior Courts and by certain provisions of the companies code in Ireland.

[124] An order for security for costs will, however, be made against a limited liability company resident within the jurisdiction where it appears to the presiding judge that there is credible testimony giving reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence: Companies Act, 1963, s. 390.

[125] [1982] I.L.R.M. 495, at p. 496. See also *Heaney v. Malocca* [1958] I.R. 111 at 114, *per* Maguire C.J.

flows from the wrong allegedly committed by the defendant.[126]

However, after the European Court of Justice's ruling in *Mund & Fester v. Hatrex International Transport*,[127] it became apparent that to apply a similar test to those resident outside Ireland but within the European Union would amount to covert discrimination on the ground of nationality, proscribed by Article 7 EC (which became Article 6 after Maastricht and is now Article 12 EC). Nor was that discrimination capable of being justified in objective terms, since the incorporation of the Brussels Convention into Irish law[128] had had the effect of sweeping away any argument that might have been made to the effect that it was more difficult to execute an order for costs against a resident in a signatory state and all of the Member States of the Union are signatory states.

These propositions have been fully incorporated into the modern law of security for costs in Ireland[129] and have not proved troublesome in practice.

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[126] *Jack O'Toole Ltd. v. MacEoin Kelly Associates* [1986] I.R. 277; *Irish Commercial Society Ltd. v. Plunkett* [1987] I.L.R.M. 504, *inter alios.*

[127] Case C-398/92, [1994] E.C.R I-467.

[128] By the Jurisdiction of Court and Enforcement of Judgments (European Communities) Act, 1988.

[129] See, for example, *Maher v. Phelan* [1996] 1 I.R. 95, *per* Carroll J., and *Carmen Proetta v. Neil* [1996] 1 I.R. 100, *per* Murphy J. The Rules of the Superior Courts now reflect these changes: RSC Ord 29 r 8. Indeed, the Rules have gone further than necessary, in that they will not tolerate any distinction between Irish residents and those resident in other signatory states of the Brussels Convention. The Member States of the European Union are, however, a mere sub-set of signatory states, and Article 12 EC merely prohibits discrimination as between EU Member States. It should be noted that it is still possible to obtain an order for security for costs against a person resident within the Union but not in Ireland. If there is cogent evidence to suggest that any judgment obtained will be unenforceable notwithstanding the Convention, there will be an objective justification for differential treatment and so Article 12 EC will

D. Service of summonses outside the jurisdiction

Formerly, a plaintiff wishing to pursue a natural or legal defendant residing outside the jurisdiction had to apply to the court under Order 11 of the Rules of the Superior Courts, 1986, seeking an order for leave to issue and to serve a summons out of the jurisdiction.

The incorporation of the Brussels Convention, 1968, and the San Sebastian and Lugano Conventions, 1993, into Irish law has again rendered insistence upon a different procedure for service within a signatory state unnecessary. As a result O.11A RSC now permits civil actions to proceed without any cumbersome special rules relating to issue and service provided that:

(i) the claim is one which the court has power to hear under the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Acts 1988 and 1993. These incorporated the above Conventions into Irish law and outline the various types of claims which the court has power to hear.

(ii) there are no other proceedings regarding the same cause of action between the same parties in another contracting state.

(iii) the defendant is domiciled in one of the contracting states.[130]

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not be breached - *Pitt v. Bolger* [1996] 1 I.R. 108.

[130] The Acts of 1988 and 1993 acknowledge and uphold exclusive jurisdiction clauses on condition that the clause is written and in accordance with usual practices of international trade and commerce. All matters relating to land, probate, succession, bankruptcy and insolvency for example, are handled by national courts only.
The modern Irish rules do require that two endorsements be added to the summons under O. 11 A. Such endorsements must:

> (i) state that the court has power to hear and determine the claim under the relevant provision of the Act.
> (ii) that no proceedings between the parties concerning the same cause of action are pending in another contracting state.

VIII. Some Facts and Figures: Where does Ireland Stand?

A. Actions for failure to fulfil obligations

In 1999, the European Court of Justice heard 162 actions under the former Articles 169, 170, 171 and 225 of the EC Treaty (now Articles 226, 227, 228 and 298 of the EC Treaty), Articles 141, 142, 143 of the Euratom Treaty and Article 88 of the Coal and Steel Community Treaty. Of these, 13 involved Ireland as the defendant. Belgium and Portugal were defendants in the same number of actions over the same period.

The greatest number of actions in 1999 was taken against France (35 - including one Article 170 EC action brought by Ireland) and, with France, only Italy (29) and Luxembourg (14) were involved in more actions before the Court as defendants. This suggests that Ireland still has some way to go before it can claim to be entirely scrupulous and fastidious about its European obligations. Only one action was taken against each of Denmark, the Netherlands and Sweden in 1999, while Finland did not defend a single case before the Court.

Ireland has defended 97 actions before the Court from the time of her accession in 1973 to the end of 1999 and while this compares favourably with such countries as France, Italy and Belgium,[131] it must be remembered that Ireland acceded to the Community some sixteen years after these Member States. The United Kingdom and Denmark, which acceded in the same year as Ireland, have defended only 47 and 22 cases, respectively. The Netherlands, which was one of the founding states of the Community, has

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Where there are multiple defendants, some of whom are foreign based but do not come within the scope of O. 11A, then it is customary to issue two summonses, one of which is marked "concurrent summons". The summons is issued and served upon the Irish defendants in the usual way and leave of court is obtained pursuant to O. 11 to issue and to serve the concurrent summons.

[131] With 220, 384 and 238 actions against them, respectively.

defended only 60 cases before the Court of Justice since 1953.

B. Renvoi préjudiciel

Of the 4,157 cases referred to the European Court of Justice since 1961, Ireland has referred only 39. Of these, eleven were referred by the Supreme Court, 15 from the High Court and 13 from other courts or tribunals. This is a remarkably small number by comparison with our European counterparts. Indeed, only Portugal (38), Finland (15) and Sweden (28) have referred fewer matters to the Court and these States acceded in 1985 and 1995. Denmark and the United Kingdom, with which Member States Ireland acceded, have referred 81 cases and 291 cases, respectively.

It has been suggested earlier in this report that Irish judges are effective and courageous in their application of Community rules, frequently showing a willingness to develop and interpret Community norms within the crucible of the domestic legal system, rather than waiting for rulings from above. This is very much a part of the Common Law tradition - blocks of rules which have become part of the existing edifice of the nation's law become part of the foundations upon which her future laws are built. Whether those blocks are quarried locally or imported from abroad is immaterial.

Nevertheless, this reality can only partially explain why Ireland lags so far behind other European Union Member States in seeking preliminary rulings.[132] Barristers in Ireland receive no compulsory continuing education. Many of those who are afforded the opportunity of appearing before the High and Supreme Courts were called to the Bar before Ireland's accession and are therefore not well versed in European Community Law. Further study may very well reveal that European Community law is not being pleaded in

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[132] The extent to which Ireland lags behind is quite breathtaking. Belgium has referred 410 cases to the Court of Justice; Germany, some 1,162. France has referred 611, Italy 624 and the Netherlands some 516.

Ireland in areas where it is relevant and that this, rather than any particular judicial recalcitrance, is the cause of the rarity of references. Irish judges, as we have said earlier, are unwilling in general to raise issues of Community Law on their own motion and try, as much as possible, to decide the cases which come before them by reference to such law as is pleaded by Counsel. If Counsel decline to identify the European issue, the case will often be decided on the application of purely domestic principles.