IMPLEMENTING COMMUNITY LEGISLATION INTO NATIONAL LAW: THE DEMANDS OF A NEW LEGAL ORDER

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I. INTRODUCTION

It is well established that the European Community constitutes a "new legal order" in international law.[1] One of the primary characteristics of this new legal order is the development of a body of law that, within defined fields of community competence, takes precedence over member states' domestic law.[2] Membership of the European Community therefore entails the creation by member states of a new legal infrastructure in domestic law which can accommodate the influx of vast amounts of EC legislation. This article will examine the means by which Ireland implements EC legislation, with a view to assessing whether such means are consistent with EC and Irish Constitutional law.

The first section of this article will explore the nature and scope of Ireland's obligation to implement EC legislation under EC and Irish law. The legislative mechanism by which Ireland implements community legislation into national law will then be described in the second section of this article. The third section will assess whether, in light of recent Irish case law, the mechanism in place at the time of writing adequately complies with Ireland's obligations under domestic and community law. Finally, proposals will be submitted for a more democratic and constitutionally consistent means of implementing EC directives into Irish law.

II. IRELAND'S OBLIGATION TO IMPLEMENT EC LAW

The obligation of member states to comply with EC law is set out in Article 10 (formerly Article 5) and Article 249 (formerly Article 189) of the EC Treaty. Article 10 provides that "Member

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[1] Case 26/62, *Van Gend en Loos* [1963] E.C.R. 1.

[2] Case 6/64, *Costa v. ENEL* [1964] E.C.R. 585; [1964] C.M.L.R. 425.

States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the Institutions of the Community. They shall facilitate the achievement of the Community's tasks."

Article 249 defines the different forms of community legislation and describes the legal obligation they entail. In particular Article 249 defines Regulations as "binding in their entirety" and "directly applicable" on all member states. Directives, however, are defined as legislation that is binding "as the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Member states are thus given discretion to consider the most appropriate means of implementing directives into domestic law provided that the objectives of the directives are attained and provided that the directive is implemented into domestic law within the required timescale. In the words of Lord Hoffman "Community law is indifferent to the internal arrangements of power within a member state".[3] Nevertheless member states' discretion is not absolute. The Court of Justice of the European Communities (the "Court of Justice") has held that although community law does not require any particular form of implementation, it is crucial that the form adopted does not have the effect of impeding the effectiveness of community Law.[4] In the case of *Commission v. France*[5] the Court of Justice held that directives must be implemented with "unquestionable binding force and with the specificity, precision and clarity"[6] that is necessary to satisfy the requirement of legal certainty, so that where a directive confers rights on individuals, the persons concerned must be enabled to ascertain the full extent of the rights set out in the relevant directive.

In an article entitled "Direct Effect, Supremacy and the Nature of the Legal Order", Professor Bruno de Witte points out that when Ireland joined the EEC in 1973, the cases of *Van Gend en Loos* and *Costa v. Enel* had already been decided, and the doctrine of

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[3] Lord Hoffman in *R. v. Secretary of State for Health* [2001] 1 W.L.R. 127 at 138 (H.L.), cited by Fennelly J. in *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 at 250 (H.C. & S.C.).

[4] Case C-285/93, *Dominikanerinnen-Kloster Altenhohenau v. Hauptzollamt Rosenheim* [1995] E.C.R. I-4069.

[5] Case C-197/96, *Commission v. France* [1997] E.C.R. I -1489. See also Case C-361/88, *Commission v. Germany* [1991] E.C.R. I-2567.

[6] Case C-197/96, *Commission v. France* [1997] E.C.R. I -1489 at para. 15.

supremacy firmly established in community law.[7] Accordingly, prior to entering the EEC Ireland had the benefit (that the founding members of the EEC did not have) of knowing the nature of the legal system into which it was entering, and the obligations that membership of the EEC entailed. To enable Ireland to fulfil its obligations under EC law, the Constitution of Ireland was amended by the insertion of what is now Article 29.4.10.[8] This article provides that:

> No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.

Article 29.4.10° ensures that Ireland could fully comply with its obligations under EC law, without fear of breaching the Constitution. Yet it also defines the legal limits pursuant to which a provision could withstand constitutional challenge. Only laws, acts and measures that are "necessitated" by virtue of Ireland's membership of the EC are constitutionally immune. The question as to what is "necessitated" [9] for the purposes of Article 29.4.10° has been considered in a number of cases.[10] In the *Crotty*[11] case it was clear that the term "necessitated" was to be strictly defined. Only measures that constituted a legal obligation in EC law could be said to be necessitated under Irish law. Keane C.J. in *Maher v. Minister*

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[7] de Witte, B., "Direct Effect, Supremacy and the Nature of the Legal Order", 177-213 at 197 published in Craig, P. and de Búrca, G. (ed.), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999).

[8] The numbering of this Article alters when the Constitution is amended. At the time of writing the relevant Article reference number is 29.4.10°. This provision has previously been referred to as Article 29.4.3°, Article 29.4.5° and Article 29.4.7°.

[9] In preparatory drafts Article 29 provided constitutional immunity in respect of measures that were "consequent upon" Ireland's membership of the European Community. However this was subsequently replaced by the term "necessitated". In *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 (H.C. & S.C.) Keane C.J. expressly stated when interpreting the meaning of "necessitated" he did not take this change into account.

[10] *Crotty v. An Taoiseach* [1987] I.L.R.M. 400 (H.C.), *Lawlor v. Minister for Agriculture* [1988] I.L.R.M. 400 (H.C.), *Greene v. Minister for Agriculture* [1990] I.L.R.M. 364 (H.C.), *Condon v. Minister for Agriculture* High Court, unreported, 12 October 1990, *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 (H.C. & S.C.), *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 (H.C. & S.C.).

[11] *Crotty v. An Taoiseach* [1987] I.L.R.M. 400 (H.C. & S.C.).

for Agriculture[12] similarly gave a strict definition of "necessitated" emphasising that the term could not simply be equated with what was "desirable" or "convenient".

It is submitted that there are two levels of obligation, an EC level and an Irish level, to which Ireland must have regard when implementing EC legislation. Such a view has been expressed by Hogan and Whelan, who argue that when determining how to implement EC legislation one should not forget "that one is engaging in two qualitatively different judicial inquiries with different aims".[13] The first inquiry relates to whether obligations under EC law are being fulfilled. The second relates to whether the means chosen to fulfil EC obligations, is the means that is most consistent with Irish constitutional requirements. In an article entitled "Article 29.4.3° and the Meaning of Necessity"[14], Whelan explains that in addition to observing EC law, Ireland must also have regard to domestic law when deciding how it will fulfil its obligations that are "necessitated" under EC law. He proposes that the double construction test as formulated by Walsh J. in *McDonald v. an Bord an gCon*[15] ought to be applied in determining the appropriate means by which an obligation under EC law should be fulfilled. This test provides that if there are several means of interpreting a particular provision, the interpretation that is most consistent with the Irish Constitution should be adopted. Similarly, Whelan argued that when deciding how to comply with an obligation under EC law, the relevant Minister ought to weigh up the different means of complying with the particular obligation, and choose the means which is most consistent with the Constitution of Ireland.

Moreover, it is arguable that the obligation under Irish constitutional law to choose the means of implementing EC directives that is most consistent with the Constitution is inherent in the wording of Article 29.4.10°. As we have just seen this provision prevents the invalidation of measures that are necessitated by EC law. It is clear in this context that the term "necessitated" refers to measures that would ordinarily be unconstitutional (but are nevertheless protected under Article 29 because they are the only

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[13] Hogan, G., and Whelan, A., *Ireland and the European Union, Constitutional and Statutory Texts and Commentary* (Sweet & Maxwell, London, 1995), p. 73.
[14] Whelan, A., "Article 29.4.3° and the Meaning of Necessity" (1992) 2 *Irish Student Law Review*, 60.
[15] [1965] I.R. 217 (S.C.).

means of complying with an EC law obligation). For it is self-evident that if a measure were constitutionally sound, there would be no need for it to be protected from constitutional invalidity in the first place. Accordingly, under Article 29.4.10° the State may adopt unconstitutional measures to comply with EC obligations provided they are necessitated. If, however, the State proposes to adopt unconstitutional measures to comply with EC obligations, when alternative constitutional means of complying with EC obligations are available, then the proposed breach of the Constitution cannot be said to be necessitated and therefore the breach will not be immune to Irish constitutional challenge.

This line of reasoning appears to have been adopted by Murray J. in the Supreme Court in the case of *Maher v. Minister for Agriculture*.[16] In the *Maher* case Murray J. explained that if there is a wide discretion on a state as to how it can fulfil an obligation necessitated by EC law, there is an obligation to adopt the method that is most consistent with the Constitution. He held:

> … where the State enacts a legislative measure in the exercise of a discretion conferred by Community law it is not *ipso facto* absolved from ensuring that such legislation is compatible with the Constitution. *This is self-evident from the terms of Article 29.4* … [if] the discretion conferred by Community law on the State when implementing legislative measures maybe sufficiently wide to permit the State to have full regard to the constitutional protection afforded to fundamental rights without impinging on the full effect and uniform application of Community law. In such circumstances the State, in the exercise of such discretion, would be bound to respect personal and fundamental rights as guaranteed by the Constitution.[17]

From the above analysis it becomes clear that when implementing EC law in Ireland that is likely to be contrary to the Constitution, one must be vigilant in ensuring that (a) the obligation

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[16] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 (H.C. & S.C.).
[17] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 at 227 (H.C. & S.C.) *per* Murray J., emphasis added.

for which the measure adopted is truly necessitated (i.e. it comes within an area of community competence and creates a legally binding obligation on Ireland) and (b) that there is no alternative means of implementing the relevant legislation in a manner more consistent with the Constitution.

III. OVERVIEW OF THE MECHANISM FOR IMPLEMENTING EC LAW IN IRELAND

A. Statutes and Statutory Instruments

Prior to Ireland's entry into the European Community, legal obligations in domestic law could only be expressed using statutes and statutory instruments. However, once Ireland joined the EEC in 1973, European Community regulations (and certain directly effective directives and Treaty articles) could also form part of domestic law without the requirement for further implementing measures being taken.

The legal basis for the creation of statutes and statutory instruments is found in Article 15 of the Constitution of Ireland. Article 15.2 provides:

> 1° The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas; no other legislative authority has power to make laws for the State.
> 2° Provision may however be made by law for the creation or recognition or subordinate legislatures and for the powers and functions of these legislatures.

Statutes are the laws enacted by the Houses of Oireachtas, pursuant to Article 15.2.1° of the Constitution of Ireland. Statutory instruments are a subordinate form of law, and are made pursuant to Article 15.2.2°. While statutes are passed by the legislature, statutory instruments may be brought into force by members of the executive.

Statutory instruments have sometimes misleadingly been

referred to as "delegated legislation", because they are perceived to constitute a delegation of the Houses of Oireachtas of their legislative powers to members of the executive. Mr. Justice Walsh of the Supreme Court, writing extra judicially emphasised the inaccuracy of this term, on the grounds that Article 15 of the Constitution of Ireland as set out above, does not permit the Oireachtas to delegate its legislative power to members of the executive.[18] For a legislature to delegate its legislative powers to a member of the executive would be a clear breach of the separation of powers as enshrined in the Irish Constitution. Accordingly, Mr. Justice Walsh highlights that statutory instruments are a subordinate form of law rather than a delegated form of legislation. Such a view is consistent with the definition of a statutory instrument in the Statutory Instruments Act, 1947 which provides that "the expression 'statutory instrument' means an order, regulation, rule scheme or bye-law made in exercise of a power conferred by statute".[19]

The distinction between the nature and scope of statutes and statutory instruments was considered in detail by the Supreme Court in the case of *Cityview Press*[20] and again subsequently in the cases of *Meagher v. Minister for Agriculture*[21] and *Maher v Minister for Agriculture*.[22] In the *Cityview Press* case, the Supreme Court relied on U.S. authorities in order to clarify the defining characteristics of statutes and statutory instruments. The Court held that a statute contains "clear declarations of policies and aims and it establishes machinery for the carrying out of these policies and the achievement of these aims".[23] The statutory instrument, however, ought simply to be a part of the machinery used to achieve policies and aims set out in the enabling statute. The Court further held that where a statutory instrument purports to achieve more than to give effect to statutes, it may risk constitutional challenge. O'Higgins C.J. in a frequently quoted passage explained that:

> … the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more

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[18] This view was expressed in an Introduction written to Richard Humphrey's *Index to Irish Statutory Instruments* (Butterworths, Dublin, 1988).
[19] Section 1 of the Statutory Instruments Act, 1947.
[20] *Cityview Press v. An Comhairle Oiliúna* [1980] I.R. 381 (H.C. & S.C.).
[21] *Meagher v. Minister for Agriculture* [1994] 2 I.R. 329 (H.C. & S.C.).
[22] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 (H.C. & S.C.).
[23] *Cityview Press v. An Comhairle Oiliúna* [1980] I.R. 381 at 399 (H.C. & S.C.).

> than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so by the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power.[24]

B. The use of statutes and statutory instruments to implement EC directives

Ireland's membership of the EEC in 1973 resulted in the "historic transfer of legislative, executive and judicial sovereignty to the European Communities".[25] On a practical level, this meant Ireland had to implement large amounts of legislation originating from outside the State. Accordingly, the question arose as to what mechanisms would be employed to accommodate this influx of new law?

In order to facilitate the implementation of directives the European Communities Act, 1972 was enacted. Section 2 of the 1972 Act provides that existing and future acts adopted by the institutions of the European Communities are binding in domestic law. Section 3 of the Act gives ministers the authority to pass whatever statutory instruments are necessary in order to ensure that section 2 of the 1972 Act would have full effect. Section 3(2) provides that if necessary, a statutory instrument made under section 2, could amend, apply and repeal any law (other that the 1972 Act). It is clear that section 3 confers a substantial amount of legislative authority on a Minister. It entitles the Minister to amend or repeal a statutory instrument, statute or even the Constitution, without reference to the legislature, should it be necessary in order to give effect to section 2 of the 1972 Act.

The significance of the powers bestowed on Ministers was recognised at the time the legislation was being drafted, and

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[24] *Cityview Press v. An Comhairle Oiliúna* [1980] I.R. 381 at 399 (H.C. & S.C.). This passage was cited in *Meagher v. Minister for Agriculture* [1994] 2 I.R. 329 at 366 (H.C. & S.C.) *per* Denham J. See also *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539 (S.C.); *Laurentiu v. Minister for Justice* [1999] 4 1 I.R. 26 (H.C. & S.C.); *McDaid v. Sheedy* [1991] 1 I.R. 1 (H.C. & S.C.); *Lovett v. Minister for Education* [1997] 1 I.L.R.M. 89 (H.C.)

[25] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 at 175 (H.C. & S.C.).

accordingly section 4(1) of the 1972 Act, introduced a safeguard. The section required that statutory instruments made pursuant to section 2 (and which did not merely revoke statutory instruments previously made under the Act) were to be positively affirmed by the Houses of the Oireachtas within six months of the date that the relevant statutory instruments were brought into force. However, section 4 of the 1972 Act was subsequently amended by Section 1 of the European Communities (Amendment) Act, 1973 which removed the requirement for confirmation by the Houses of the Oireachtas. As amended, section 4 provided that if the Joint Committee on the Secondary Legislation of the European Communities recommends to the Houses of the Oireachtas that any statutory instrument under the Act be annulled, and if the Houses of Oireachtas pass such a resolution within a year after the relevant statutory instrument was made, then the statutory instrument may be annulled. In other words, prior to the amendment the continued existence of a statutory instrument made under section 3 of the 1972 Act was dependent upon a positive act of confirmation by the Houses of the Oireachtas. Subsequent to the amendment, it was sufficient for the Houses of Oireachtas to refrain from acting, in order for the relevant statutory instruments to be maintained in force. The Joint Committee on Secondary Legislation has since been replaced by the Joint Committee on European Affairs.[26] To date, no statutory instrument made under this Act has ever been annulled by the Houses of the Oireachtas.[27]

It is clear from the 1972 Act that members of the executive may implement directives using statutory instruments that have statutory effect. However, the Act does not specify the circumstances in which it is appropriate to use such statutory instruments. The question therefore arises as to whether Ministers have discretion in deciding how directives are to be implemented. Can they opt for the quickest or most convenient means of complying with Ireland's obligations under community law? Or does the test set out in the *Cityview Press* case and as outlined above still apply when implementing EC directives into Irish law?

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[26] Pursuant to section 1 of the European Communities (Amendment) Act, 1995.
[27] This has been confirmed by the library of the Houses of the Oireachtas to be the case at the time of writing.

Guidance on these issues, came in the case of *Meagher v. Minister for Agriculture*, where the applicant challenged the constitutionality of section 3 of the 1972 Act, together with the validity of a statutory instrument brought into force under the 1972 Act, which prohibited the possession and use of certain substances having a hormonal action, sometimes administered by farmers to fatten their animals. The statutory instrument at issue had the effect of amending primary legislation, namely the Petty Sessions (Ireland) Act, 1851.

Council for the applicant argued that the relevant statutory instrument was invalid because the 1972 Act pursuant to which the statutory instrument was made was unconstitutional. It was asserted *inter alia* that the power given to a Minister to make statutory instruments repealing or amending statutes represented an unconstitutional delegation of legislative powers contrary to Article 15 of the Constitution of Ireland. The applicant emphasised that Article 29.4.5° (as the present Article 29.4.10° was referred to then) did not cure the invalidity of section 3 of the 1972 Act, because the EC Treaty did not oblige the State to implement laws, acts or measures by any particular method. Therefore the section allowing statutory instruments to have statutory effect was not strictly necessitated by EU membership. The sole obligation upon the State was to implement community directives into national law, but the method of implementation was a matter of choice left to the State and not one of necessity.

The respondents conceded that ordinarily, any statute authorising a Minister to amend primary legislation by way of statutory instrument would breach Article 15 of the Constitution of Ireland. Nevertheless, they argued that given the number of directives that were being issued the use of statutory instruments having statutory effect was the only practical means by which Ireland could comply with its obligations under community law. Accordingly, their use and the consequent breach of Article 15 of the Constitution could be justified on the basis that it was necessitated by virtue of Ireland's Membership of the European Union.

It is therefore clear that there was overall agreement between the parties that measures "necessitated" by virtue of Ireland's

membership of the European Union could not be declared constitutionally invalid. The net point at issue was whether the implementation of directives using statutory instruments (having statutory effect) could be considered to be so "necessitated". This in turn depended upon how broadly one defined the term "necessitated". The applicants advocated a restricted definition of the term, claiming that the use of statutory instruments was not expressly necessitated as a matter of EC law as there were other more constitutionally consistent means of implementing EC law into domestic law. In contrast, the respondents argued for the adoption of a more pragmatic approach, whereby the use of statutory instruments having statutory effect could be considered to be necessitated, because it is the only practical means by which Ireland can comply with its obligations under EC law.

In the High Court Johnson J. agreed with the applicant that section 3 of the 1972 Act was unconstitutional, claiming that a statutory instrument ought not to be held as capable of amending an Act of the Oireachtas. Johnson J. explained that both statutes and statutory instruments could be used to implement EC legislation into Irish law and that the use of a statutory instrument to implement community law, in circumstances where the enactment of an Act of the Oireachtas would have been appropriate, could not be held to be necessitated within the meaning of Article 29.4.5°. Johnson J. held that when deciding how to implement a directive, a Minister should have regard to what is the most appropriate means of implementing the particular directive, having regard to the provisions of the Constitution as a whole.

The High Court decision was, however, reversed in the Supreme Court. In his judgment, Finlay C.J. explained that it was a fundamental obligation of the State to implement EC directives into domestic law and that:

> … having regard to the number of laws, acts and measures of the European Community which required to be incorporated into the law of the State, the obligations of membership of the European Community dictated that in some instances, and possibly in a great majority of

> instances, this be done by way of ministerial regulation rather than legislation.[28]

In the above mentioned extract, Finlay C.J. appears to endorse the view that the use of statutory instruments to implement community measures is "necessitated" (and thereby constitutionally immune) because having regard to the sheer number of measures requiring implementation, it is evident that there is no real or practical alternative to their use. As it is worded, Finlay C.J.'s statement implies that a criterion which determines whether or not a statutory instrument ought to be used to implement directives is the quantity of directives that must be implemented rather than the nature of each individual directive. So, for example, one might conclude that the more directives there are to be implemented, the more a Minister is justified in using statutory instruments to implement them. It is submitted, this implication arises from the reference by the Chief Justice to the quantity of community laws requiring implementation and as a result of the progression from "some instances" to "a great majority of instances".

The Supreme Court and the Chief Justice then went on to hold, however, that it is the nature and content of the directive, rather than the number of directives requiring implementation, that ultimately determines how a particular directive should be implemented into Irish law. Denham J. in her judgment held that the criteria laid down in the *Cityview Press* case (as described above) could be applied to determine the legislative mechanism by which a particular directive or other community measure should be implemented into domestic Law. The learned judge explained that where a directive left matters of principle or policy to be determined by a national authority, such matters would require implementation by means of an Act of the Oireachtas.[29] However, where a directive left little or no discretion to a national authority in developing principle or policy, then it could be implemented by way of statutory instrument.

For clarity, it should be emphasised that in her judgment, Denham J did not state that any directive (or other community

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[28] *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 at 352 (H.C. & S.C.).
[29] *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 at 365 (H.C. & S.C.).

measure) containing matters of principle or policy should automatically be implemented by way of an Act of the Oireachtas. Rather, the learned judge held that a directive (or community measure) which conferred on national authorities a meaningful role in developing matters of principle and policy should be implemented by an Act of the Oireachtas. Accordingly, a directive which contains clear and detailed statements of principle and policy, but which does not leave such matters to be determined by national authorities, could lawfully be implemented by statutory instrument in accordance with the 1972 Act.

Therefore it becomes apparent that in the *Meagher* case, the Supreme Court sought to reconcile competing arguments advanced by both the applicants and the respondents. On the one hand, the Court held that the significant volume of EC directives requiring implementation justified certain types of community legislation being implemented by way of statutory instrument having statutory effect. On the other hand, the Court held that it was the nature of the community measure (and in particular, whether or not a particular law conferred on national authorities a meaningful role in developing matters of principle and policy) which ultimately determined if a particular community measure ought to be implemented by statute or statutory instrument. This interpretation of the *Meagher* case has been confirmed in the *Maher case*[30] where Keane C.J. stated that:

> I am satisfied [… that the judgment of the Court in the Meagher case does not…] lend any support to the proposition that, in cases where it is convenient or desirable for the community measure to be implemented in the form of regulations rather than an Act, the making of the regulations can for that reason alone be regarded as "necessitated" by the obligations of membership. Thus while it appears from the judgment of the court that an argument was advanced on behalf of the respondents in that case that the necessity for "expedition" in the implementation of a directive would justify its

[30] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 (H.C. & S.C.).

> implementation in the form or regulation rather than an Act, such a submission, as a general proposition, would, in my view, be unsustainable and derives no support from the judgments in *Meagher v. Minister for Agriculture*.[31]

Accordingly, the *Maher* case can be cited as evidence for the proposition that the requirement for expedition alone cannot justify the making of statutory instruments rather than the enactment of an Act of the Oireachtas when implementing community legislation into Irish law.

It is interesting to note that in the *Meagher* case, Finlay C.J. stated that it would be possible to challenge a Minister if she or he unconstitutionally exercised her or his power of issuing statutory instruments, when "having regard to the nature of the content"[32] of such statutory instrument there was no necessity for it to be carried out by statutory instrument instead of legislation. This was also expressly confirmed by Keane C.J. in the *Maher* case.[33] It is therefore clear, that far from being immune, a statutory instrument made under section 3 of the 1972 Act may still be constitutionally challenged, if the directive it relates to has been transposed into domestic law using an inappropriate means.

IV. CRITIQUE OF CURRENT METHOD OF IMPLEMENTATION

From the decisions in the *Meagher* and *Maher* cases as outlined above it is evident that any directive requiring a national authority to formulate declarations of principle and policy ought to be incorporated into Irish law by way of statute. However, directives that do not give national authorities the scope or discretion to develop principles or policy, or which simply supply the necessary detail in order to give practical effect to existing principles and policy, may be implemented by way of statutory instrument. Despite this distinction, practice shows that the vast majority of directives are nevertheless incorporated into Irish law by statutory instrument.

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[31] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 at 182 (H.C. & S.C.).
[32] *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 at 353 (H.C. & S.C.).
[33] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 at 179 (H.C. & S.C.).

One possible explanation for this is that most directives simply do not contemplate national authorities determining matters of principle and policy. An alternative, and in this writer's view a more plausible explanation may be, however, that the requirement to maintain a distinction between Acts of the Oireachtas and statutory instruments so clearly defined by the Courts, is not always adhered to in practice because of the urgency with which large volumes of EC legislation is required to be implemented. If the latter explanation applies, then it means that legislation is being implemented into Irish law without debate and as a result, important measures slip ever more quickly and imperceptibly into law.

In his article on necessity, Whelan argues convincingly that the absence of debate in the implementation of laws by statutory instrument, may add to the common perception of a "democratic deficit" in EC institutions and in EC law.[34] From the context in which he writes, it is evident that the specific type of "democratic deficit" to which he refers is a legislative democratic deficit rather than an executive democratic deficit, as it is not in the proposition of the laws, but in the process of debating and implementing such laws that the deficit arises. Keane C.J. in *Maher* similarly acknowledges that the use of statutory instruments to implement directives may give rise to "natural misgivings [...that other than the limited function referred to in section 4 of the 1972 Act] there is no role for the democratically elected institutions of the State".[35]

It has been argued that one approach to countering the perception of a legislative democratic deficit in relation to the implementation of directives into national law by statutory instrument would be to increase the supervisory powers of the legislature in relation to statutory instruments made under section 3 of the European Communities Act, 1972. As we have seen in the second section of this article, the already limited supervisory functions of the Houses of the Oireachtas over the implementation of directives by statutory instrument contained in section 4 of the 1973 Act, were further eroded by the European Communities (Amendment) Act, 1973. The 1973 Act removed the obligation of

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[34] Whelan, A., "Article 29.4.3° and the Meaning of Necessity" (1992) 2 *Irish Student Law Review*, 60.
[35] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 at 185 (H.C. & S.C.).

the Houses of Oireachtas to confirm positively statutory instruments made by members of the executive under section 3 of the 1972 Act. Instead it was envisaged that confirmation by the legislation would be inferred from the absence of any motion of annulment.

Johnson J. in the High Court in the *Meagher* case held that the act of refraining to annul a statutory instrument could not adequately substitute a positive act of confirmation or adoption. However, this particular point was not addressed in the subsequent Supreme Court decision. Travers has argued that it was regrettable that the Supreme Court did not use the opportunity provided to express a view on this point. [36] In addition, he doubts whether the Houses of the Oireachtas can effectively supervise the proper implementation of directives when its powers are limited to recommending the annulment of statutory instruments. It is submitted that the effect of the current Irish approach to the implementation of EC directives, is the elimination of debate and ultimately the undermining of Ireland's sovereignty and democracy. There is a loss of democracy, because the role of elected representatives in implementing EC legislation (or, at least, in determining the form EC legislation should take) is diminished. There is a loss of sovereignty because, as a result, the State becomes a passive actor in the legislative process pursuant to which EC directives are implemented.

The recently enacted European Union (Scrutiny) Act, 2002 goes some way towards increasing the potential input of the Houses of the Oireachtas in the legislative process of the European Union. Section 2(1) of the 2002 Act provides that once the European Commission or a member state makes a proposal for the adoption of a measure (which is defined to include a regulation or directive), the Minister, whose portfolio is most relevant to the subject matter of the proposal, shall issue a copy of the relevant proposal to the Houses of the Oireachtas, together with a statement outlining the "content purpose and likely implications for Ireland of the proposed measure and including such other information as he or she considers appropriate".[37] The Minister must then have regard to any

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[36] Travers, N., "The Implementation of Directives into Irish Law" (February 1995) 20(1) *European Law Review*, 103.

[37] Section 2(1) of the European Union (Scrutiny) Act, 2002 (Act no.25 of 2002).

recommendations made from time to time by the members of the Oireachtas pursuant to Section 2(2).

Sections 2(1) and (2) of the 2002 Act do not apply in circumstances where the Minister considers the proposed measure to be confidential[38], or where "there is insufficient time for the carrying out of the procedures aforesaid and the performance of the functions of the Houses of the Oireachtas" in relation to the relevant proposal.[39]

If Sections 2(1) and (2) do not apply because the Minister considers a certain proposal to be confidential, then the Minister may prepare a report to either or both Houses of the Oireachtas or to a committee of either or both Houses in relation to the proposed measure. If Sections 2(1) and (2) do not apply because the Minister deems there is insufficient time to carry out the relevant procedures and if the proposed measure is subsequently adopted by an institution of the European Communities then the Minister must provide the Oireachtas with a copy of the proposal as adopted as well as a statement outlining the implications of the proposal for Ireland and details of the circumstances of its adoption (as well as any other additional information that the Minister would consider appropriate).

The 2002 Act also introduces a new obligation on the Irish Government to prepare an annual report, as of 2003, to the Houses of the Oireachtas on developments regarding the European Union.[40] The Joint Committee on European Affairs is similarly obliged to report annually to the Houses of the Oireachtas outlining its activities in the preceding year.

The 2002 Act is to be welcomed in that it requires the executive to keep the legislature more fully informed of legislative developments in the European Union and in that it invites the legislature to participate more fully in the initial stages of the EC legislative process.

However, it is submitted that the Act does not go far enough in addressing the concerns expressed above, namely the lack of participation by the Houses of the Oireachtas in determining, or

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[38] Section 3(1) of the European Union (Scrutiny) Act, 2002 (Act no.25 of 2002).
[39] Section 2(3) of the European Union (Scrutiny) Act, 2002 (Act no.25 of 2002).
[40] Section 4 of the European Union (Scrutiny) Act, 2002, which amends Section 5 of the European Communities Act, 1972.

supervising the procedure by which the executive determines, whether or not to implement EC legislation pursuant to section 3 of the 1972 Act. For example, the 2002 Act does not provide a statutory mechanism for assessing and determining whether or not a particular community measure should be implemented by statute or statutory instrument. It is submitted that it would have been useful had the legislature inserted an express provision in the 2002 Act requiring the Minister's report (as provided for under section 2(1), 2(4) or 3(2) of the 2002 Act) to contain a preliminary recommendation by the Minister as to how she or he envisages the community measure that is the subject of the report will be implemented. A procedure could then have been established whereby the members of the Houses of the Oireachtas would be given an opportunity to participate in determining the method of implementation of the proposed measure. As the 2002 Act has only recently come into force it is too early to determine whether the level of scrutiny introduced is substantive or cosmetic.

From a review of the implementation procedures used in other EU member states, it is apparent that Ireland is not alone in its reliance on the executive for the implementation of EC directives into national law.[41] The mechanism for implementing directives in the UK is very similar to that used in Ireland. Statutory instruments rather than acts of parliament are predominantly used to implement directives and commentators in the UK have expressed concerns about the quality of domestic scrutiny of EC legislation by the British Houses of Parliament.[42] Belgium similarly relies heavily on the executive to implement directives into national law, with the large number of directives requiring implementation, and the workload of parliamentary chambers, being cited as an explanation for such reliance.[43] France and Italy also rely to varying extents on the executive for the implementation of EC directives.

In Italy the power of the legislature to delegate legislative authority to the executive derives from Article 76 of the Italian Constitution. Every year the Italian legislature passes what is known

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[41] For a comparative study of different member states' methods of implementing EC directives, see FIDE, XIII Congès - Stockholm 3 - 6 Juin 1998 *Les Directives Communautaires: Effets, Efficacité, Justiciabilité*.

[42] Travers, N., "The Implementation of Directives into Irish Law" (February 1995) 20(1) *European Law Review*, 103 at 127.

[43] Travers, N., "The Implementation of Directives into Irish Law" (February 1995) 20(1) *European Law Review*, 103.

as the "Legge Comunitaria"[44] which authorises the executive to implement the directives specified in that Law, in the form of a "decreto legislative". It is noteworthy that unlike section 3 of the European Communities Act, 1972, where the legislature confers a general open ended power on the executive, the authority given by the Italian parliament is much more restricted. The executive may only implement such directives as have been expressly specified in the relevant Legge Comunitaria.

In France, it is Article 38 of the French Constitution, which entitles the French legislature to delegate, within certain defined parameters, legislative authority to the executive. The instrument used by the executive to legislate on behalf of the legislature is known as an "Ordonnance". In order to have continuing statutory effect and obtain the status of primary law, an Ordonnance must be confirmed by the parliament within a specified timeframe.

Even, if Ireland is not alone in employing an expedient means of implementing EC legislation, the method that it uses differs from the French and Italian systems in several crucial respects.

Firstly, and most fundamentally, the legislature in both France and Italy is constitutionally entitled to delegate legislative authority to the executive. In Ireland, however, it is clear, both from the Constitution and from the Supreme Court's interpretation of the Constitution in the *Meagher* and *Maher* cases, that no such entitlement exists. Although the executive has the power to make statutory instruments having statutory effect pursuant to section 3 of the 1972 Act, the distinction between the objects and scope of statute and statutory instruments has been retained by the Supreme Court in order to ensure the preservation of the separation of powers. Consequently, as the law stands in Ireland at present, the executive is not entitled to implement by statutory instrument a directive which involves the formulation of new principle and policy by national authorities and which consequently belongs to the legislative sphere. The same restriction does not apply in France or Italy.

The second difference follows from the first. It is that directives

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[44] The Legge Comunitaria was provided for by the "La Pergola" law, Legge nº 86 del 9 marzo 1989, in GU del 10 marzo 1989, n.58.

implemented by the executive in both France and Italy are capable of enjoying the status of primary legislation provided that the requisite procedures have been followed. In Ireland, by contrast, the powers conferred on the executive to implement directives by statutory instrument have statutory effect, but do not have the corresponding status of primary law.

The third difference is that the power of the French and Italian executive to implement directives using their legislative powers is far more restricted and much more clearly defined than the powers of the Irish executive to pass statutory instruments having statutory effect pursuant to section 3 of the European Communities, 1972 Act. The legislature in both France and Italy is required to play an active role in supervising the executive as it exercises the legislative authority which has been delegated to it. By contrast, the executive in Ireland is largely unsupervised when passing statutory instruments having statutory effect under the 1972 Act and moreover, the power to create statutory instruments under section 3 of the 1972 Act is open ended.

The lack of legislative supervision in Ireland may, however, be explained by the fact that, in theory at least, such supervision is not necessary because the Irish executive ought in any event only to be implementing directives which do not confer on national authorities a meaningful role in developing matters of principle and policy and therefore are not legislative in character. The corollary of this argument would be, however, that if the executive were in the future to be delegated legislative powers, then special provision should be made to ensure that the exercise of such powers are effectively supervised by members of the Houses of the Oireachtas.

V. CONCLUSION

The challenge of implementing large amounts of EC legislation into domestic law, within strict time limits, is one that concerns every member state of the European Union. As we have seen earlier, certain member states have attempted to meet this challenge by delegating legislative authority, within strictly defined limits, to the executive. In Ireland, however, the executive has not been given such legislative

authority. From our analysis of the decisions in *Cityview, Meagher* and *Maher* it is clear that the Supreme Court has consistently emphasised the importance of maintaining a clear distinction between the role of the executive and the legislature in order to ensure that the separation of powers is preserved.

The *Meagher* and *Maher* cases are authority for the proposition that, as a matter of law, EC legislation that involves national authorities determining matters of principle and policy are required to be implemented by statute. Yet it is difficult to ascertain, whether or not this requirement is followed in practice. As described in part III, the Houses of the Oireachtas presently have a very limited supervisory role over the way in which the members of the executive exercise their powers under section 3 of the 1972 Act. The ever-increasing number of directives requiring implementation within strict deadlines inevitably puts pressure on members of the Irish executive to implement directives by statutory instruments even in circumstances where enactment by statute might otherwise have been more appropriate.

It is submitted that there is a need for a fundamental rethink as to the means by which directives ought to be incorporated into domestic law in Ireland. If the implementation process in Ireland remains unaltered, there is danger of an increasing gap emerging between the law on one hand, and practice on the other. With the widening of this gap comes the perception of an increasing legislative democratic deficit.

One possible means of narrowing the gap between law and practice, and countering the perception of an increasing legislative democratic deficit in the implementation of EC directives, would be to take inspiration from the French or Italian models and introduce a constitutional amendment which would enable the Houses of the Oireachtas to delegate legislative authority to the executive so that it could enact directives of a legislative nature, which currently may only be implemented by statute. Such increased powers would, of course, have to be accompanied by increased supervision by the Houses of the Oireachtas. The result of such an approach would be that the executive could legitimately implement every kind of directive (whether or not it envisages the formulation of new

principles or policy by national authorities) but such implementation would be effectively supervised by the legislature. The resulting legislation would have the status of primary law.

Although this may be an option worth considering, this writer would not favour the adoption of this system in Ireland, as it is submitted that this would entail an excessive erosion of the doctrine of the separation of powers. A preferable approach might be to follow Whelan's approach and give thought to establishing a new legislative framework altogether, designed to permit the legislature to adopt EC Directives more swiftly, and which would relieve the legislature of the requirement to rely on the executive for the timely implementation of directives.[45]

It is submitted that there may be scope for reform, not just with respect to the procedure by which EC legislation is implemented, but also with respect to the *form* that such legislation takes in domestic law. In particular, it is recommended that statutory instruments having statutory effect should no longer be used as a means of implementing EC Directives into Irish law, as in the view of this writer this form of implementation is paradoxical and may in certain circumstances undermine the very status of EC Law.

If one considers the hierarchy of different forms of legislation in Ireland, it is evident that EC Law (in areas of community competence) would be at the top. At the other extreme are statutory instruments, which are the lowest and most subordinate form of law in the State. On a theoretical level, it is paradoxical for potentially the highest form of legislation in Ireland to be encased and published in the form of the most sub-ordinate form of legislation. This paradox is reflected in the possibility that a directive, implemented by statutory instrument, could theoretically amend the Irish Constitution. The nature of the laws that would typically be found in an ordinary statutory instrument is frequently different to that which would be contained in a directive that was implemented by a statutory instrument having "statutory effect" under section 3 of the 1972 Act. Consequently, it is submitted that it is inappropriate that two qualitatively different kinds of law be published in the same

[45] Whelan, A., "Article 29.4.3° and the Meaning of Necessity" (1992) 2 *Irish Student Law Review*, 60 at 76.

legislative form.

The use of statutory instruments to implement directives, and amend statutes also raises difficulties on a practical level, relating to the accessibility of EC legislation. At present, it may safely be asserted that statutory instruments are not well referenced. There is no official publication that gives up to date information as to whether or not a particular statutory instrument has been amended or revoked. In fact, the only certain way of establishing as to whether or not a particular statutory instrument is in force, is by going through every subsequent statutory instrument manually, and checking to see if another statutory instrument with a similar title exists on which a later date is printed. Even then, it is possible to miss an amendment if a subsequent statutory instrument under a different name, amends the earlier statutory instrument. Accordingly, it is only by conducting a thorough and lengthy search that one can be entirely sure of ascertaining what legislation is currently in force. The effect of permitting statutory instruments to amend statutes under section 3 of the 1972 Act was to extend the uncertainty that was previously limited to statutory instruments to Acts of the Oireachtas.

For all the reasons set out above, it is proposed that the types of directives that ordinarily would be implemented into Irish law under Section 3 of the 1972 Act as a statutory instrument having statutory effect (i.e. directives that contain declarations of principle and policy, but leave national authorities with little discretion to participate in the development of such principle and policy) should now be published in a new form of publication that is easily identifiable from ordinary statutory instruments and which would be referred to under a different title. The reason for publishing directives in a readily identifiable form would be to enhance access to implemented community law and highlight that statutory instruments having statutory effect, implementing EC law in areas of community competence, are different in character and scope to regular statutory instruments. Equally, it would be important to clarify the terminology involved in describing the different types of legislation and for example, to ensure that the term "regulation" is confined to denoting the form of community legislation that is defined in Article

249 of the EC Treaty. It should no longer be used as a synonym for statutory instrument.[46]

To ensure accessibility of implemented EC legislation, it would be important to create a proper referencing system for the new publication. Each volume should be indexed alphabetically, chronologically and by subject matter. A system should also be incorporated by which one could readily identify the directive pursuant to which the relevant implementing instrument is made. Moreover, there should be an official index which sets out whether or not a particular implementing instrument is in force or not and this index should be updated monthly. It is further proposed that a "chronological index" should be established in respect of the new publication which clearly traces how implementing instruments have been amended. All this information should also be maintained on the Internet on an official government web-site. In short, these measures should be aimed at ensuring that there is no obstacle in determining what the law is at any given moment in time, and the new publication should be at least as accessible, if not more accessible, than Acts of the Oireachtas are at present. Finally, it is proposed that the new publication should indicate whether or not they have been considered judicially either by the national courts, or by the Court of Justice.

Ireland has been overwhelmed by the quantities of legislation originating from the Community Institutions, which require to be implemented into Irish law. Consequently much important EC legislation has been incorporated into domestic law in haste using a means that is quick, inaccessible and opaque. This has had the effect of reducing debate and thereby ultimately undermining Ireland's sovereignty and democracy. It is arguable that unless Ireland develops an infrastructure which can properly take control of the influx of EC legislation, it risks submitting more of its sovereignty to the EU than is strictly necessitated under Article 29.4.10° of the Constitution of Ireland.

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[46] Bríd Moriarty, EC Law lectures (April 2002), Law Society of Ireland.