PLEADING EC LAW IN IRISH LITIGATION: A CASE STUDY

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I. INTRODUCTION

To the best of the author's knowledge, the use of case studies is not as widespread in the area of legal studies, as it is in other disciplines.[1] While case notes have featured in legal studies for many years, it is suggested that a case study, certainly as understood in the context of other disciplines, is a somewhat different concept. For example, the author has seen a case study described as "a form of qualitative, descriptive research about a single or small number of events or cases."[2] Moreover, a case study normally sets the case or cases in question in a theoretical context, where relevant.[3] I have endeavoured to approach the subject matter of this paper in this manner.

While it may seem somewhat pedantic, it is nonetheless important to explain why this paper is concerned with "EC law" or "Community law," and not the more widely-referenced "EU law." As Collins and O'Reilly succinctly explain: "[b]y virtue of both its nature and subject matter, [EU] law is of less or practical importance in this jurisdiction than the more familiar subset of Community law."[4] This is because the Treaty on European Union deals with a range of matters, including foreign and security policy and police and judicial co-operation of criminal matters, some of which are expressly exempted from judicial review, and others of which are not as amenable to judicial review, as matters governed by EC law.[5]

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[1] For an example of another case study in the area of Irish and EC law, see Costello and Drake, "Enforcing EC Motor Insurance Directives: Navigating the Maze" (2003) 9 E.P.L. 371 *et seq* ("Costello and Drake").

[2] Guidelines on writing a case study for the Australian Health Review are available at http://www.aushealthreview.com.au/publications/articles/authors.asp.

[3] *Ibid.*

[4] Collins and O'Reilly, *Civil Proceedings and the State* (2002), p. 289. ("Collins and O'Reilly"),

[5] *Ibid.*, pp. 289-290.

Moreover, EU law does not share some of the important characteristics of EC law which are discussed in the next section of this paper. Consequently, while issues of EU law may arise in Irish litigation from time to time, it is more likely that a legal practitioner will plead EC, rather than EU, law in the Irish courts. This paper, therefore, concentrates on the pleading of EC law in Irish litigation.

It is important to first recall that persons seeking redress in respect of rights arising from EC law may have recourse to non-judicial procedures, as well as to litigation. Maslow observes "if the only tool you have is a hammer, you tend to see every problem as a nail." As lawyers, there can be a tendency to think only of litigation as a means of redress for the infringement of a client's rights. The website of the European Commission in Ireland, which contains a very helpful section on the enforcement of EC Law rights,[6] in discussing redress at national level, lists eleven separate means of non-judicial redress at a national level, including complaints to the Office of the Information Commissioner, the Competition Authority and the Data Protection Commission. Interestingly, obtaining redress through the Irish courts is addressed as a "further alternative" for enforcement of EC law rights. Accordingly, while this case study focuses on pleading EC law in Irish litigation, it is important to bear in mind that there may be other means of redress for breach of EC law rights before resorting to litigation.

Turning now to the subject matter of this case study, a good starting point might be to ask why EC law should be pleaded in Irish litigation. This point has been considered previously by other practitioners specialising in the areas of Community law.[7] For instance, at an Irish conference on EC law eight years ago, one commentator outlined the reasons why practitioners should be concerned with EC law. He provided a number of answers to this question, which remain pertinent today:

- The first and most basic reason why all practitioners need to be concerned about EC law relates to professional negligence.
- Secondly and more importantly, one can help people by

[6] http://www.euireland.ie/LegalRights/enforcement.htm.
[7] See e.g., Robinson, "How EEC Law Affects Practitioners" (1985) Law Society Gazette, Parts I – VI; Power, "European Law and Irish Solicitors" in Heusel (ed.), *Community Law in Practice Including Facets of Consumer Protection Law* (1996), p. 63

invoking EC law.

- Thirdly, clients demand and deserve assistance in the areas of EC law.
- Fourthly, an understanding of EC law generally and the practice of European courts particularly is imperative even to understand some areas of Irish national or municipal law.
- Fifthly, the jurisprudence and practice of the European courts sometimes present an opportunity to circumvent the rules of national law.
- Finally, there is a small matter of fees.[8]

The same commentator described the area of EC law at that stage as "still a largely untilled field for Irish lawyers." It is the author's hope that this paper will generally help to further raise awareness of the usefulness of pleading Community Law, where appropriate, in the pursuit or defence of civil or criminal proceedings in any court in the Irish judicial system.

II. SUBSTANTIVE ISSUES

A. General

This section endeavours to briefly explain the legal basis upon which EC law may be pleaded in Irish litigation, the measures of EC law that may be so pleaded and, finally, the matters in respect of which EC law may be pleaded.

B. Relevant Law

Article 29(4)(10) of the Constitution of Ireland provides:

> No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies

[8] Power, in Heusel (ed.), *op. cit.*, pp. 64-66.

> competent under the Treaties establishing the Communities, from having the force of law in the State.

This constitutional provision is complemented by Section 2 of the European Communities Act 1972, as amended by the European Communities Act 1992. It provides that, from 1 January 1973, the Treaties governing the European Communities and the existing and future acts, adopted by its institutions and the bodies competent thereunder, are binding on the State and are part of its domestic law under the conditions laid down in those Treaties.

As a consequence, measures of EC law form part of the domestic law of the Republic of Ireland. Moreover, they are immune from constitutional challenge. So too are laws enacted, acts done or measures adopted by the State but only to the extent that they are "necessitated by the obligations of membership of the European Union or of the Communities."[9] It has been observed that while Community law is part of domestic law in this State, it is neither statute law nor constitutional law, rather it remains Community law, governed by Community law, but with domestic effect.[10]

Two fundamental doctrines of Community law are, in particular, central to understanding the manner in which EC law has been incorporated into Irish domestic law and the ways in which it may be pleaded in Irish litigation. These are the doctrines of the "primacy" and "direct effect" of EC law.

The doctrine of the primacy of EC law holds that EC Treaty provisions and directly applicable EC secondary legislation render any conflicting provisions of domestic law automatically inapplicable (including, in the case of Ireland, the Constitution). Furthermore, insofar as they are an integral part of, and take precedence over, the legal orders of the Member States, they preclude the adoption of domestic rules to the extent that those rules may be

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[9] Article 29(4)(10) of the Constitution. Once a measure is not entitled to the benefit of such immunity, the Superior Courts are entitled to examine its compatibility with the Constitution: see Collins and O'Reilly, pp. 297-298. For example, it has been held that if the details of implementation of a measure of Community law are reasonable, they must be regarded as necessitated by the obligations of membership of the Communities and cannot therefore be unconstitutional. If, however, the details of the implementation are unreasonable or unfair, they cannot be regarded as being necessitated by the obligations of membership of the Communities: Condon v. The Minister for Agriculture and Food, High Court, unreported, Lynch J., 12 October 1990

[10] Tate - v- Minister for Social Welfare [1995] I.R. 418 ("Tate") (Meagher –v- The Minister for Agriculture [1994] 1 I.R. 329 applied)

incompatible with Community law.[11] All State organs, including the Irish courts, are obliged to apply EC law and to refrain from applying provisions of Irish law that conflict with EC law. As Collins and O'Reilly explain: "The duty imposed upon national Courts to comply with the principle of primacy, coupled with the requirement to secure the full effectiveness (effect utile) of Community law, lay the basis for the mechanisms available to individuals seeking to enforce and vindicate Community law rights before the Irish Courts."[12]

Under the doctrine of the direct effect of EC law, an individual may assert rights to be protected by the national courts.[13] However, not all provisions of EC law have direct effect. A provision of EC law has direct effect "*only if it is clear and unconditional and not contingent on any discretionary implementing measure.*"[14]

If a provision of EC law is directly effective, not only must Irish courts apply it, but it must also take priority over any conflicting provisions of Irish law, including the Constitution. Thus, as has been observed by the High Court, the right to rely on measures of EC law to preclude the application of any national provision inconsistent therewith is a right conferred by Community law.[15]

Under Community law, there are presently two types of direct effect, that is to say, "vertical direct effect" and "horizontal direct effect." Under the doctrine of vertical direct effect, a person may rely on a provision of EC law to assert rights based on such law against the State or an organ or "emanation" of the State in the Irish courts.

Under the doctrine of horizontal direct effect, a person may rely on the relevant provision of EC law to assert rights based on EC law against another person. As noted *infra*, the distinction between the two concepts of vertical and horizontal direct effect plays a

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[11] Case 106/77, Amministrazione delle Finanze dello Stato-v- Simmenthal SpA [1978] E.C.R 629

[12] Collins and O'Reilly, p. 291. See also Finlay and Hyland, "The Duties of Co-Operation of National Authorities and Courts and the Community Institutions under Article 10 E.C." (2000) 9 I.J.E.L 267 ("Finlay and Hyland")

[13] Case 26/62 *Van Gend en Loos –v- Nederlandse Administratie der Belastingen* [1963] E.C.R. 1.

[14] Case 44/84 *Hurd –v- Jones* [1986] E.C.R. 29.

[15] *Tate;* It was furthermore observed in the same case that rights conferred on individuals by Community law are not personal rights or property rights within Article 40(3) of the Constitution.

central role in determining the extent to which EC law may be pleaded in Irish litigation. The principle of direct effect is discussed again in the next section, which briefly reviews the types of EC law that may be pleaded.

C. EC Measures Giving Rise To Justiciable Rights

This section of the paper reviews those provisions of EC law, which may be relied upon to assert rights in the Irish courts.

1. Treaty Provisions

Many EC Treaty provisions have been held by the European Court of Justice to have direct effect, thereby giving rise to justiciable rights before national courts. Any such measure must be clear and unconditional and not contingent on any discretionary implementing measure. A Treaty provision satisfying these conditions may have vertical direct effect, i.e., it may be invoked against the State, or have horizontal direct effect, i.e., it may be invoked by a natural or legal person against another natural or legal person.[16]

Good examples of Treaty provisions which give rise to vertical and horizontal direct effect are the provisions of Articles 81 and 82 of the EC Treaty. These provisions prohibit anticompetitive agreements and arrangements between undertakings and associations of undertakings which have an effect on trade between Member States, and the abuse by an undertaking of a dominant position in the Common Market, or substantial part thereof. These provisions of EC law have been and continue to be relied upon, in addition to corresponding provisions of Irish competition law, by natural and legal persons seeking remedies in the Irish courts.[17]

2. Secondary Legislation

Article 249 of the EC Treaty confers a power to make secondary legislation, in the form of regulations, directives, decisions, recommendations and opinions, upon the European Parliament acting jointly with the Council of Ministers and the European Commission.

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[16] Case 43/75, *Defrenne –v- Sabena* (2) [1976] E.C.R. 455.

[17] See e.g., *Chanelle Veterinary Limited –v- Pfizer (Ireland) Limited, trading as Pfizer Animal Health* [1999] 1 I.R. 365; [1998] 1 I.L.R.M. 161. Articles 81 and 82 EC may also be raised by Irish courts of their own motion: see *Humphrey –v- The Minister for the Environment and Local Government* [2001] 1 I.L.R.M. 241. This case is discussed in detail in Section 4 of this paper.

2.1. Regulations

Regulations are provisions of general application, binding in their entirety and directly applicable in Ireland. Once they enter into force, they are automatically part of Irish law.[18] Regulations may have both vertical and horizontal direct effect provided the relevant provisions are unconditional, sufficiently precise and do not require further implementation.[19]

Regulations have been used extensively to implement into law the Community's Common Agriculture and Fisheries Policies.

2.2. Directives

Directives are measures of the EC law that bind Member States, to which they are addressed, as to the result to be achieved, but leave the choice of form and method of implementation to the Member States.[20] Directives are normally used for the purpose of harmonising the laws of the Member States so as to comply with general Community policies in specific areas, such as electronic commerce, the environment, intellectual property and public procurement. The Directive is the instrument most used by the institutions of the Communities.

In Ireland, many directives are implemented by means of secondary legislation pursuant to Section 3(2) of the European Communities Act 1972. This provides for the implementation of EC law without recourse to the Oireachtas. Since the mid-1990s, approximately 60% of all Statutory Instruments adopted by Ministers are concerned with the implementation of directives.[21]

A directive may have vertical direct effect where the State fails to adopt measures to implement the directive *or* takes measures that do not fully comply with its provisions. In such a situation the persons affected thereby may rely upon the provisions of that directive against the State.[22] A directive which is not implemented, or which is not properly implemented, cannot become directly effective before the period for the implementation of the Directive has

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[18] *Maher –v- Minister for Agriculture* [2001] 2 I.R. 139

[19] Case 93/71, *Leonesio –v- Ministero del'Agricolura delle Foreste* [1972] E.C.R. 287

[20] For example, in the case of *Dublin Bus –v- The Motor Insurance Bureau of Ireland*, Circuit Court, unreported, Judge McMahon, 29 October 1999, the relevant directive was implemented by way of an Agreement dated 21 December 1988, between the Minister for the Environment and the Motor Insurers Bureau of Ireland. This particular means of implementing EC law has been the subject of criticism in the English Courts: see *White –v- White* [1999] 1 C.M.L.R. 1251.

[21] Kennedy, Cahill and Power, *European Law* (2002) ("Kennedy").

[22] Case 41/74, *Van Duyn –v- Home Office* [1974] E.C.R. 1337.

expired.[23] After the expiry of such period, the Directive may have vertical direct effect *provided* that the provisions sought to be relied upon are clear and unambiguous, unconditional, and not dependent on further action for their implementation.

A non-implemented or mal-implemented directive may not give rise to horizontal direct effect, i.e., it may not be relied upon by a person to assert rights in the Irish courts against another legal person.[24] A directive may not of itself impose obligations on an individual and, accordingly, a provision of a directive may not be relied upon against such a person. This limits the scope for pleading provisions of non-implemented or mal-implemented provisions of directives in the Irish courts in private law, as opposed to public law, actions. As such, it has been widely criticised.[25]

The European Court of Justice has compensated for this limitation in three ways. First, it has adopted a broad definition of the "State" and organs or emanations of the State. This issue is discussed in more detail *infra*.

Second, it has imposed an obligation on the domestic courts to interpret national law, [implementing a directive] insofar as possible, in light of the wording and purpose of the directive so as to achieve the results which it prescribes.[26] This interpretative obligation precludes Irish courts from applying domestic rules of law insofar as they are inconsistent with the provisions of unimplemented directives, but does not go so far as to give Irish courts jurisdiction to enforce rights conferred by non-implemented directives against private individuals (somewhat akin to the position after Irish courts declare an Act of the Oireachtas unconstitutional before any legislation has been enacted to replace it).[27]

Third, it has provided a remedy in damages against the State where an individual has suffered loss as a result of non-implementation, or mal-implementation, of a directive. As the issue

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[23] Case 148/78, *Pubblico Ministero –v- Ratti* [1979] E.C.R. 1629

[24] Case 152/84, *Marshall –v- Southampton and South West Hampshire Area Health Authority (Teaching) (No. 1)* [1986] E.C.R. 723.

[25] See e.g., Craig, "Indirect Effective Directives in the Application of National Legislation" in Andenas and Jacobs (eds.), *European Community Law in the English Courts* (1998), pp. 37-55

[26] Case C-106/89 *Marleasing SA* [1990] E.C.R. I-4135.

[27] Finlay Geoghegan, "The Status of Non Implemented Directives before Irish Courts Post-Marleasing" in Curtin & O'Keeffe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T.F. O'Higgins* (1992), pp. 247-255.

of remedies under EC law is outside the scope of this paper, it will not be considered further.[28]

2.3. Decisions

Decisions are binding in their entirety upon those to whom they are addressed, whether Member States, or natural or legal persons. Precise and unequivocal provisions of the decision addressed to a Member State may be relied upon by individuals against the Member State concerned.[29]

2.4. Recommendations and Opinions

Recommendations and opinions have no binding force and do not create rights upon which natural or legal persons may rely. Courts are bound, however, to take recommendations into consideration, particularly where they assist in the interpretation of national measures implementing them or where they are designed to supplement binding provisions of Community law.[30]

3. Reviewable acts, omissions, measures and decisions

The acts, omissions, measures and decisions in respect of which EC law may be pleaded in Irish litigation will depend upon the nature and scope of the provisions of EC law sought to be relied upon.

In the case of measures of EC law which have only vertical direct effect, such as directives, it is suggested that only national laws, including constitutional laws and primary and secondary legislation, and acts, omissions, decisions and other measures of the State and "emanations of the State," may be challenged by reference to such measures of EC law.

It is not clear whether private law agreements entered into by the State, or an emanation of the State, may be subject to review in light of measures of Community law having vertical direct effect. For example, the English Court of Appeal refused to strike out an agreement between the Motor Insurance Bureau and the Secretary of State for Transport, which it found to have infringed EC law, on the

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[28] The issue of EC law remedies is considered in a paper by John Handoll, presented at the Law Society of Ireland/Irish Centre for European Law Seminar in September 2004 "*European Law Remedies from the District Court to the European Court of Justice - A Step by Step Guide.*" (Paper on file with author).

[29] See Case C-156/91, *Hansa Fleisch Ernst Muntd GmbH & Co.-v- KGV Landrat Des Kreises Schleswig – Flensburg* [1992] E.C.R. I-5567.

[30] Case C-322/88, *Grimaldi –v- Fonds Des Maladies Professionnelles* [1989] E.C.R. 4407. See also *Dublin City Council –v- Wright,* High Court, unreported, Quirke J., 21 January 2004.

basis that it was "a private law agreement," as only Article 81 of the EC Treaty provided for the nullity of private law contracts.[31] Until the matter comes before the Irish Superior Courts, it is not entirely clear whether private law agreements entered into by the State or emanations of the State are subject to review by the courts for compatibility with the measures of EC law which they are intended to implement. It is hoped that the approach of the Court of Appeal will not be adopted by the Irish courts, as it clearly would frustrate the implementation of Community law in this jurisdiction. It is suggested the better view is that while more conventional means of implementation, such as primary or secondary legislation, are to be preferred,[32] agreements entered into by the State or emanations of the State should be reviewable in the light of directly effective measures of EC law.

In other cases, where the measures of EC law have horizontal directive effect, there seems to be no reason why any agreement, arrangement, act or omission by a natural legal person that infringes the right or rights conferred by such measure of EC law should not be open to attack in Irish litigation. For example, agreements and arrangements between undertakings that infringe the provisions of Articles 81 and/or 82 of the EC Treaty, which prohibit anticompetitive agreements and behaviour respectively, may be challenged by affected persons.

Court procedures may also be challenged on the basis that they infringe the relevant provisions of EC law. For example, under Order 29 of the Rules of the Superior Courts 1986, the Irish courts have a discretion in requiring a plaintiff who is ordinarily resident outside the jurisdiction to provide security for costs. The European Court of Justice found that a plaintiff who is a national of, and is ordinarily resident in, one of the Member States cannot be required to provide security for costs.[33] The basis for this decision was that it infringed Article 7 of the EEC Treaty, which prohibited

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[31] *White –v- White* [2001] 2 C.M.L.R. 1. The case was subsequently appealed to the House of Lords, (*White –v- White* [2001] 2 All E.R. 43.) which avoided issues of EC law raised by employing conventional principles to interpretation of documents. However, Lord Cooke, in a separate judgment, disagreed with the characterisation of the contract as a purely private law and noted that the agreement belonged to that category of "contracts widely used by public authorities as instruments both of policy and administration." Thus, he saw no reason why the agreement in question should not be reviewed in light of the "principle of compatibility with European Community law." See also Costello and Drake, *op. cit.*,

[32] See Costello and Drake, at 398.

[33] Case C-398/92, *Mund and Fester –v- Hatrex International Transport* [1994] E.C.R. I-467.

discrimination based on nationality (read in conjunction with Article 220 of the EEC Treaty and the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1968). In a series of subsequent High Court judgments, the decision of the Court of Justice was applied to Order 29, such that it was decided an order requiring security for costs could not be made having regard to Article 7.[34]

For the sake of completeness, it should be mentioned that certain measures of EC Law may themselves be challenged as invalid before the Irish courts. This may occur, for example, where a national act or measure is challenged on the basis that the Community measure which gave rise to the national measure is inconsistent with Community law. Considering that only the European Court of Justice has the competence to declare a Community measure invalid,[35] any such challenge in the Irish courts will be indirect.[36] However, one should not underestimate the importance of such challenges. Due to restrictive *locus standi* rules, often the only way a person can challenge a measure of Community law is by way of reference from the national courts. Consequently, the national courts play a very important role in this area.

Finally, as Collins and O'Reilly note:

> [t]he only ground upon which an Irish Court may be invited to review laws enacted, acts done or measures adopted by the European Union, the Communities, its institutions, or bodies competent under the Treaties establishing the Communities is on the basis that they go beyond the terms of the licence granted under Art.29.4.3 et seq. of the Constitution. Where such measures go beyond the terms of that licence, any conflict between them and the provisions of the Constitution is to be resolved in favour of the latter [...] There is no reported instance of a challenge to legislation having been made on this basis since

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[34] See e.g. *Pitt –v- Bolger* [1996] 1 I.R. 108; [1996] 2 I.L.R.M. 68
[35] Case 314/85, *Foto-Frost –v- Hauptzollamt Lübeck-Ost* [1987] E.C.R. 4199.
[36] Direct challenges to Community measures are outside the scope of this paper.

Ireland acceded to membership of the European Communities, and it is submitted that it is unlikely to arise frequently in practice.[37]

D. Procedural Issues

1. General

As noted in section 3, Ireland, as a Member State of the European Communities, is obliged as a matter of EC law to afford legal protection to natural and legal persons arising from the primacy and, where relevant, direct effect of provisions of EC law. In particular, Irish courts, as organs of the State, must protect such rights.[38]

In the absence of EC rules, it is for the domestic system of each Member State to designate the court's jurisdiction and to determine the procedural rules governing actions intended to protect these rights.[39] Domestic procedural rules are, however, constrained by the twin EC law requirements of "equality" and "efficacy."[40] These are also known as the principles of "equivalence" and "effectiveness."[41]

The principle of equivalence provides that domestic procedural rules must be no less favourable than those governing similar domestic actions.[42] The principle of effectiveness is that national procedural rules must not make the exercise of rights arising from the direct effect of EC law "impossible in practice"[43] or "virtually impossible" or "excessively difficult."[44] In determining whether a national procedural law renders the application of EC law impossible or excessively difficult, the European Court of Justice examines "its role in a relevant procedure, its progress and its special features, viewed as a whole, before the various national instances."[45]

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[37] Collins and O'Reilly, pp. 296-297

[38] See *Simmenthal*, para. 21. This obligation derives from Article 10 of the EC Treaty and the duty of sincere co-operation: Case C-213/89, *R –v- Secretary of State for Transport ex parte Factortame and Others* [1990] E.C.R. I-2433. See also Finlay and Hyland, pages 267-289.

[39] Case 33/76, *Rewe –v- Landwirtschaftskammer Saarland* [1976] E.C.R. 1989.

[40] See e.g., *Marshall.*

[41] Case C-261/95, *Palmisani –v- I.N.P.S.* [1997] E.C.R. I-4025

[42] *Saarland*, paras. 5-6.

[43] *Saarland,* para. 5.

[44] Case 199/82, *Amministrazione delle Stato –v- San Giorgio* [1983] E.C.R. 3595

[45] Collins and O'Reilly, p. 299. They furthermore observe: "*in carrying out that analysis, appropriate account is taken of the basic principles of the domestic legal order, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure. It has been observed that this examination is conducted on the underlying premise that states based on the rule of law organise their domestic legal orders so as to ensure the correct application of the law and adequate legal protection of a person subject thereto. It is therefore only exceptionally that the Court of Justice is required to intervene so as to ensure that effect is given to Community law*".

Not surprisingly, EC law has helped shape domestic procedural law to some extent.[46] It has been observed that: "in practice there has been a shift in the balance away from national procedural autonomy towards the development of Community procedural rules and the development of an increasing in Community competence in the area of judicial protection."[47]

2. Procedures

In the absence of EC rules, the domestic system of each Member State must determine the procedural rules governing actions intended to protect rights conferred as a result of the direct effect of EC law in the domestic legal order, subject to the Community law principles of equivalence and effectiveness. Natural or legal persons seeking to enforce and vindicate EC law rights in the Irish courts may rely upon the same procedures and remedies available to them when they seek to uphold rights deriving from Irish domestic law. Accordingly, it follows that no special procedures apply to cases where EC law is relied upon before an Irish court, save for where specific EC procedural rules apply.[48]

One area of Community law in Ireland governed by Community rules of procedure is that of public procurement.[49] Challenges by way of judicial review of the decisions of "contracting authorities" subject to EC public procurement law are normally based on the special procedures stipulated in the Irish implementing legislation and Rules of the Superior Courts (Order 84A), giving effect to the relevant rules of EC law. Thus, for example, it is not necessary to seek leave to apply for a judicial review in respect of such decisions. It would appear from a recent decision of the High Court, *SIAC Construction Limited –v- The National Roads Authority*,[50] that challenges to contract work procedures may also be subject to the general provisions of the Rules of the Superior Courts (Order 84) provided that such provisions of national law are interpreted in a way that complies with the State's obligations under

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[46] See e.g., Murphy, "Community Law in Irish Courts 1982-1985" (1986) 11 E.L.Rev. 99, at 112.
[47] Brent, *Directives: Rights and Remedies in English and Community Law* (2001) ("Brent"), p. 136.
[48] Collins and O'Reilly, p. 299.
[49] Council Directive 89/665/EEC, 21 December 1989, implemented in Ireland by Statutory Instrument No. 309 of 1994
[50] *SIAC Construction Limited –v- The National Roads Authority*, High Court, unreported, Kelly J., 16 July 2004

the relevant rules of EC law.[51]

The Equal Treatment Directive also contains certain Community procedural rules in the area of equal treatment for men and women in respect of working conditions and access to employment, vocational training and promotion. [52]

3. Courts

As observed earlier, it is for the domestic system of each Member State to designate the courts with jurisdiction in respect of actions intended to protect the rights conferred on natural legal persons by EC law.

To the author's knowledge, no provisions of Irish law preclude any Irish court from having jurisdiction in respect of EC law actions. It is questionable in any event whether the State could seek to curb the jurisdiction of any Irish court in this respect. Costello observes that "all national judges, however lowly in the national judicial hierarchy, are not merely entitled, but rather obliged, to set aside national law which conflicts with community law."[52] It is suggested, however, that the jurisdiction of such courts need not be any more extensive than that for similar domestic actions.

EC law may be, and has been, pleaded before the District Court,[53] the Circuit Court,[54] the High Court,[55] and Supreme Court.[56] Although reported decisions are difficult to come by, there seems no reason why EC law could not be pleaded in the Central Criminal Court.

EC law may be pleaded in the Irish courts in respect of civil and criminal matters.[57] That said, the majority of cases in which EC

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[51] *Ibid.*

[52] Council Directive 76/207/EEC 9 February 1976 on implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ 1976 L39/40.

[52] Costello, "European Community Judicial Review in the Irish Courts - Scope, Standards and Separation of Powers" in Lucey and Keville (eds.), *Irish Perspectives on EC Law* (2003), p 19

[53] See e.g., *Dublin City Council –v- Wright* [2004] I.E.H.C. 7

[54] See e.g., *Dublin Bus –v- The Motor Insurance Bureau of Ireland*, Circuit Court, unreported, McMahon J., 29 October 1999. This case is considered in more detail in Section 4 of this paper.

[55] See e.g., *Humphrey –v- The Minister for the Environment and Local Government* [2001] 1 I.L.R.M. 241. This case is considered in more detail in Section 4 of this paper.

[56] See e.g., *Maher –v- Minister for Agriculture* [2001] 2 I.R. 139; [2001] 2 I.L.R.M. 481; [2001] 2 C.M.L.R. 1195

[57] See e.g., *Browne –v- The Attorney General, The Minister for the Marine and Natural Resources, Ireland and District Judge James O'Connor* [2003] 3 I.R. 205. This case is considered in more detail in Section 4 of this paper.

law is pleaded are civil cases. EC law may be pleaded in respect of issues of private law or public law. This is considered further in the following sections of the paper dealing with pleadings and parties, respectively.

While it is clearly the responsibility of the parties to any given proceedings to plead relevant issues of EC law, it is open to the Irish courts to apply EC law of their own motion "in exceptional cases where the public interest requires" such intervention.[58] Such circumstances might include where an agreement is "manifestly illegal" under EC law.[59] Where a national court is obliged to raise points of law of its own motion based on binding domestic laws or rules which have not been raised by the parties, as a matter of EC law, it is also obliged to raise points of law based on binding Community rules.[60] Furthermore, where, as a matter of domestic law, such courts have a discretion, as opposed to an obligation, to raise binding domestic rules, as a matter of EC law, they are under an obligation to raise binding rules of EC law.[61]

If a domestic court raises an issue of EC law of its own motion it may have a significant impact on the outcome of the case. This is discussed in further detail in Section 4 of this paper.

4. Pleadings

Given the domestic procedural autonomy described *supra*, it is not surprising that special pleadings are not required when EC law is relied upon in Irish litigation. It is usually sufficient to set out the provision or provisions of EC law sought to be relied upon in the pleadings normally used for the relevant court.

The choice of pleadings will depend on the court in which the claim is to be pleaded and will be dictated accordingly by the relevant procedural rules: the Rules of the District Court, the Rules of the Circuit Court or the Rules of the Superior Courts, as applicable.[62] For example, in the case of the High Court, the relevant provisions of Community law sought to be relied upon would be set out in both the Plenary Summons and the Statement of Claim, or in the case of judicial review proceedings, in the Statement of Grounds.

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[58] See Cases C-430/93 and C-431/93, *Van Schijndel and Others –v- Stichting Pensionenfonds voor Fysiotherapeten* [1995] E.C.R. I-4705.
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*
[62] On the issue of pleadings generally in the Superior Courts, see Delany and McGrath, *Civil Procedure in the Superior Courts* (2001), ("Delany and McGrath"), Chapter 5.

Likewise, such provisions would, in the case of the Circuit Court, be set out in the Civil Bill.[63]

Moreover, the form of pleadings will depend on whether the proceedings involve issues of private and/or public law. Thus, a private law claim, based on a provision or provisions of EC law and within the jurisdiction of the High Court, will be pleaded as a High Court plenary action, in which case the pleadings will include a Plenary Summons and Statement of Claim on the part of the plaintiff.[64]

Where a claim based on EC law involves public law - for example, a claim to quash a decision of an administrative authority which wrongfully refuses the grant of a licence for authorisation, contrary to the provisions of EC law - it should be brought by way of judicial review, and not by means of a plenary action. In such proceedings, the pleadings will include a Statement of Grounds insofar as the applicant is concerned. It is suggested that where the decision sought to be impugned has resulted in loss or damage to the client, a claim for damages would be included in the application for judicial review.[65]

As with provisions of domestic law, it is suggested that provisions of EC law should be set out in the claim or, in the case of a party seeking to rely on provisions of EC law in its defence, in the defence. This should be done concisely[66] and "in language in terms easily understood by the reasonably intelligent layman."[67]

In summary, as one leading Irish Counsel who practices in the area of EC law remarked to me in conversation, there is no "special magic" about pleading EC law before the Irish courts.

5. Parties

5.1. Factors to be Considered

While special procedures or pleadings do not apply to cases where EC law is sought to be relied upon, I suggest that special considerations apply to the choice of potential

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[63] For a very useful set of precedent pleadings for use in the High Court and the Circuit Court in respect of claims which rely, *inter alia*, on provisions of EC law, see Collins and O'Reilly, p. 621 *et seq*.

[64] See Delany and McGrath, Chapters 2 and 5 respectively.

[65] See Brent, page 228.

[66] Order 19, Rule 1 of the Rules of the Superior Courts, for example, specifies that pleadings should be as brief as the nature of the case will admit.

[67] *P.W. –v- CIE* [1967] I.R. 137, at 140 (Walsh J).

defendants/respondents when acting on behalf of a claimant who seeks to rely upon EC law in Irish litigation.

A number of factors need to be taken into consideration in determining the appropriate parties to an EC law action, as follows:

5.1.1. The Community Act or Acts to Be Relied Upon By the Claimant

It is necessary to consider whether the provision or provisions of EC law sought to be relied upon have direct effect and, in particular, whether they have vertical direct effect and/or horizontal direct effect. In the case of provisions of EC law having only vertical direct effect, the relevant parties will include the claimant, who alleges an infringement of his rights based on those provisions, and the State and its emanations, provided that such parties may be reasonably regarded as having infringed such rights leading to loss or damage being incurred by the claimant. This requirement may be satisfied, for example, where the State or one or more of its emanations is responsible for the adoption of the domestic law, or the adoption of the measure or decision, which is alleged to have infringed the provisions of EC law sought to be relied upon by the claimant.

Where the relevant provisions of EC law have horizontal direct effect, the appropriate parties will be the claimant, who alleges an infringement of his rights arising from such provisions, and any natural or legal person, including the State and its emanations, whom it is alleged has breached such rights as a result of acts, omissions, decisions or measures adopted by them.

As aforementioned, persons may avail of EC law even where it does not have direct effect, such as to argue for the interpretation of Irish legislation in a manner consistent with the relevant measure of EC law, or in claiming damages against the State. In such actions, the likely defendants/respondents would be the State and the relevant emanation of the State.

5.1.2. The Type of Act, Omission, Measure or Decision Sought To Be Challenged

Clearly, the choice of defendants/respondents must take into

consideration the person or persons, including the State and its emanations, who have entered the relevant agreement, adopted the relevant measure or made the decision, which is sought to be challenged on the basis of rights conferred by EC law. For example, in the case of an agreement alleged to breach the claimant's rights arising under Article 81 EC, which prohibits anti-competitive agreements affecting trade between Member States, each of the parties to the agreement should, at a minimum, be joined to any proceedings challenging such an agreement. Likewise, the administrative body that made the decision and, therefore, the alleged breach of the claimant's rights under Community law should be joined in the proceedings. As noted later, serious consideration should also be given in such circumstances to joining the State, in which case, the relevant defendants will be the Minister (if any), Ireland and the Attorney General.

5.1.3. The Nexus Between the Relevant Domestic Measure and the Alleged Infringement of EC Law

As may be seen in one of the cases discussed *infra*, care should be taken before issuing proceedings to precisely identify the *nexus* between the alleged infringement of the relevant provision or provisions of Community law and the relevant domestic law, measure or administrative decision. Moreover, where a provision of EC law identifies a "competent authority" for the purpose of its administrative implementation, care should be taken that it is joined as a party to any action involving that provision of EC law.[68]

5.1.4. The Type of Relief Sought

While it is outside the scope of this paper to discuss remedies available under EC law, clearly the nature of the remedy sought is an important consideration to bear in mind when considering the appropriate parties to be joined in any EC law action. This should be borne in mind, particularly in the case of an alleged non- and/or mal-implementation of provisions of a directive, where the State's failure may give rise to an action for damages (even when those

[68] See M*ary Pat Cosgrave –v- An Bord Pleanala, and Ors.*, High Court, unreported, Kelly J., 21 April and 27 May 2004. These judgments are considered in more detail in Section 4 of this paper.

provisions do not have direct effect).[69]

5.2. Meaning of the "State" and "Emanations of the State"

Where a provision of EC law has vertical direct effect, as noted earlier, it may be relied upon against the State and its emanations. This is because the capacity in which the State acts is irrelevant.[70] While it is ultimately a matter for domestic courts to determine what constitutes the State and its emanations for the purpose of the doctrine direct effect,[71] the Court of Justice includes in its definition, all organs of the administration, including decentralised authorities like municipalities,[72] and such emanation or organ "whatever its relation may be with other organs of the State."[73] It also extends to any body: "whatever its legal form which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State, and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals."[74]

Entities in Ireland which have been regarded as constituting emanations of the State include the Motor Insurance Bureau of Ireland (MIBI),[75] Waterford County Council[76] and Dundalk District Council.[77] It is important to note, however, that in a number of recent cases the Superior Courts have taken what has been described as an "illiberal view of the doctrine of the 'emanation of the State.'"[78] For example, in *McBride –v- Galway Corporation*,[79] the Supreme

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[68] See M*ary Pat Cosgrave –v- An Bord Pleanala, and Ors*., High Court, unreported, Kelly J., 21 April and 27 May 2004. These judgments are considered in more detail in Section 4 of this paper.
[69] Joined Cases C-6/90 & C-9/90, *Francovich –v- Italian Republic* [1991] E.C.R. I-5357.
[70] *Marshall*, para. 49.
[71] *Ibid*., para. 50.
[72] Case 103/88, *Fratelli Costanzo SpA –v- Commune di Milano* [1989] E.C.R. 1839
[73] Case 222/84, *Johnston –v- Chief Constable of the RUC* [1986] E.C.R. 1651
[74] Case C-188/89, *Foster and Others –v- British Gas plc* [1990] E.C.R. 1-3313. That case refers to "organs" rather than "emanations" of the State. For the origins of the latter term, see Brent, page 199, at note 101.
[75] *Dublin Bus –v- The Motor Insurance Bureau of Ireland*, Circuit Court, unreported, Judge McMahon, 29 October 1999; and *Withers –v- Delaney & MIBI*, Circuit Court, unreported, Judge McMahon, 7 February 2003
[76] *Coppinger –v- Waterford County Council* [1996] 2 I.L.R.M. 427. See Travers "The Liability of Local Authorities for Breaches of Community Directives by Member States" (1997) 22 E.L.R. 173.
[77] Case 45/87, *Commission –v- Ireland* [1988] E.C.R. 4929
[78] Fahey, "Preliminary Reference from the Circuit Court: The 'Emanation of the State' Doctrine in the Irish Court" (2004) I.L.T. 6.
[79] [1998] 1 I.R. 485.

Court held, per Keane J., that the defendant Corporation, although undoubtedly an organ of the national administration, was not in breach of the requirements of the relevant directive (the "Environment Directive"), as the burden was on the *State* to ensure that the Environmental Impact Assessments were prepared. Likewise, in *De Burca –v- Wicklow County Council*,[80] O'Caoimh J., in the High Court, held that as the defendant Council was not responsible for making regulations under the relevant legislation, no order could be made in relation to the alleged failure of the Minister or the State generally as to the implementation, transposition or application of the provisions of the directive.

In light of decisions such as these, it is recommended that the State should be joined to any proceedings in which relief is sought against an organ or emanation of the State, such as a local authority.[81] If the State is joined as a party to any such action, as is the case with domestic law actions, it is usual that the relevant Minister, if any, Ireland and the Attorney General, as law agent of the State, should also be joined to the proceedings.

5.3. Locus Standi

Any discussion of the appropriate parties to an action involving EC law should have regard to the issue of *locus standi*. It is submitted that no special considerations apply in the case of EC law actions and, accordingly, the issue of *locus standi* should be determined by the rules of Irish law applicable to analogous domestic actions, whether private or public.

Accordingly, it is suggested that, as with a domestic law action,[82] the question of whether a person has sufficient interest to maintain an EC law action is a mixed question of fact and law. Moreover, where a person is an aggrieved person he has, by definition, *locus standi*.[83]

It is not as clear whether a potential claimant has *locus standi* in proceedings to enforce provisions of Community law simply where he has a *bona fide* concern and interest in an actual or threatened infringement of Community law, akin to the position of

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[80] [2002] 2 I.R. 196.

[81] See Fahey, *op. cit.*, page 10. In this respect, she remarks "it is an unfortunate state of affairs and legal certainty (which is not itself a hallmark of the "organs of the State" doctrine) is further being thwarted."

[82] *The State (Lynch) –v- Cooney* [1982] I.R. 337

[83] Chambers –v- An Bord Pleanala & Sandoz (1992) I.R. 134; (1992) I.L.R.M. 296

a party seeking to enforce provisions of the Constitution.[84] The *locus standi* of a claimant in an EC law action may be called into question where his action is not "a genuine case," such that there is no genuine infringement of rights or genuine interest in the contested measure or act.[85] The converse of this could imply that a person enjoys *locus standi* where she has a genuine (or *bona fide*) interest in an actual or threatened agreement in Community law.

Where Irish litigation involves a challenge to the validity of a Community measure it is usual that such a question will be referred to the Court of Justice for a decision pursuant to the preliminary reference procedure under Article 234. In essence, this constitutes an "indirect challenge" to Community measures, as opposed to a direct challenge thereof before the Court of Justice pursuant to Article 230 of the EC Treaty. It is generally accepted that the requirements for *locus standi* in respect of such indirect challenges are far less restrictive than those pertaining to direct challenges before the Court of Justice.[86]

6. Standard of Review

It is a settled principle that effective judicial protection includes the right of access to courts.[87] In the context of judicial review proceedings in which EC law is pleaded, the scope of review provided by such access to the courts is, as one commentator has noted, "a matter of debate."[88]

In principle, the European Court of Justice has held that EC law does not warrant a distinctive approach to the standard review by national courts. In the leading case of *Upjohn*,[89] the Court of Justice noted:

> [I]t is for the domestic legal system within each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding

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[84] See e.g., SPUC –v- Coogan & Others [1989] I.R. 734

[85] See e.g., Condon v. The Minister for Agriculture and Food, High Court, unreported, Lynch J., 12 October 1990 and O'Neill –v- Ryanair, Aer Lingus and Ors. [1990] 2 I.R. 200

[86] See e.g., Costello, in Lucey and Keville (eds.), *op. cit.*, pp. 44-45

[87] See e.g., Case 222/84, *Johnston –v- Chief Constable RUC* [1986] E.C.R. 1651; and Case C-185/97, *Coote –v- Granada Hospitality Ltd.* [1998] E.C.R. I-5199.

[88] Brent, page 139. See also Costello, in Lucey and Keville (eds.), *op. cit.*, pp. 39-43

[89] Case C-120/97, *Upjohn Limited –v- The Licensing Authority established by the Medicines Act 1968 and Others* [1999] E.C.R. I-223

> rights which individuals derive from Community law, provided, however that such rules are no less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness).[90]

The court then stated that it did not appear necessary that the national courts be empowered: "to substitute their assessment of the facts and, in particular, of the scientific evidence relied on in support of the revocation decision for the assessment made by the national authorities competent to revoke authorisations."[91]

Drawing an analogy with similar reviews of Community authorities, the Court of Justice noted that the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by the authority was not vitiated by a manifest error or misuse of powers and that it did not clearly exercise the bounds of its discretion.[92]

Thus, according to *Upjohn*, EC law does not demand more from national courts.[93] This should not be construed, however, as granting a *carte blanche* to domestic procedural rules, as the court has stipulated that it still must be possible "to apply the relevant principles and rules of Community law when reviewing its legality."[94] As Costello notes: "This is a loaded caveat for in the grounds of judicial review, Community general principles allow for more searching substantive review than that traditionally available under common law principles."[95]

The same commentator reviews this issue in the context of Irish planning and development law, where the domestic standard of review has traditionally been deferential, with reference to the Environmental Impact Assessment (EIA) Directives. She is critical of decisions of Irish courts in this area, such as *Browne*.[96] She believes the courts have refused to acknowledge that the nature of

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[90] *Ibid*., para. 32.
[91] Para. 33.
[92] Para. 34.
[93] Para. 35.
[94] Para. 36.
[95] Costello, in Lucey and Keville (eds.), *op. cit*., p. 40.
[96] *Browne –v- An Bord Pleanala* [1991] 2 I.R. 209; [1989] I.L.R.M. 865.

administrative discretion under national law has been altered by the requirements of the relevant directives, thus thwarting the principle of effective enforcement of EC law. Accordingly, where the provisions of a directive are mandatory, as is the case with the EIA Directive, then its application must be judicially controlled: "[t]he decision to apply the Directive is patently a legal determination, quintessentially amenable to judicial review."[97]

The standard review in the area of public procurement law has been considered by the High Court and the Supreme Court (as well as an Advocate General) in the case of *SIAC Construction Limited –v- Mayo County Council.*[98] In that case, Laffoy J. took the view that the standard of review in public procurement cases was the traditional unreasonableness test in judicial review, i.e., a decision must "plainly and unambiguously fly in the face of fundamental reason and common sense." Following a preliminary reference, the Advocate General assigned to the case thought that the standard of review should be "rather less extreme." In the view of the Supreme Court (*per* Fennelly J.), the formulation adopted by Laffoy J. "would run the risk of not offering what the Remedies Directive clearly mandates, namely a judicial remedy which will be effective in the protection of the interests of disappointed tenderers." Accordingly, the Supreme Court, while recognising that awarding authorities have a wide margin of discretion, found that Irish courts must recognise that this cannot be unlimited. The courts must exercise their function of judicial review so as to make the principles of the public procurement directives effective. Accordingly, in the case of a clearly established error, i.e., a "manifest" error, the courts must exercise their powers.

In summary, therefore, although EC law is, in principle, indulgent of deferential domestic standards of review in the area of judicial review, it is subject to the important qualification that national standards of review must not be permitted to infringe or undermine the principle of the effectiveness of EC law in the Irish legal order.

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[97] Costello, in Lucey and Keville (eds.), p. 42.

[98] [2002] 2 I.L.R.M 401. For a more detailed note, see Gaffney, "Public Procurement in Ireland: Recent Developments" (December 2002) Law Society Gazette 49.

7. Burden of Proof

No special rules apply to the burden of proof in cases in which EC law is pleaded, subject to the caveat that where such rules make effective implementation impossible in practice, they are to be dissapplied or adjusted.

Thus, it has been held that with regard to claims pursuant to the Equal Pay Directive, as implemented in domestic law, while it is a general principle that in such cases the burden of proof ordinarily falls on the worker, it "may be shifted where it is necessary to avoid depriving workers who appear to be the victim of discrimination of an effective means of enforcing the principle of equal pay."[99]

Other cases in which national rules on the burden of proof have been deemed contrary to EC law include the following:

- A certificate issued by a national authority stating that the conditions permitting a derogation from the principle of equal treatment have been satisfied as conclusive evidence that they indeed have been satisfied.[100]
- The exclusion of evidence, other than documentary evidence, for the purpose of establishing that charges had been paid contrary to EC law had not been passed on and so were recoverable.[101]

In summary, therefore, while there may be no special rules applying to the burden of proof in cases where EC law is pleaded, national rules on the burden of proof, and indeed any other area, may be challenged and overturned where they made the enforcement of rights conferred under EC law virtually impossible or excessively difficult.

8. Time Limits

Under EC law, the State is authorised to lay down reasonable limitation periods for bringing proceedings in the interest of legal certainty.[102]

Thus, the limitation periods which apply under the Statute of Limitations 1957 in respect of domestic law actions will apply by

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[99] See Case C-400/93, *Specialarbejderforbundet i Denmark –v- Dansk Industrie* [1995] E.C.R. I-1275, at par. 24.
[100] Case 222/84, *Johnston –v- Chief Constable RUC* [1986] E.C.R. 1651.
[101] Case 199/82, *Amministrazione delle Finanze dello Stato –v- San Giorgio* [1983] E.C.R. 3595 (the court found that it made it "virtually impossible" or "excessively difficult" to claim recovery of the sums in question and therefore, such requirement was contrary to EC law).
[102] Brent, page 142.

analogy to EC law actions. Where an EC law action involves the breach of Community law by the State, the applicable limitation period will be the same as for a domestic law action involving an alleged tort, that is to say, six years from the date on which the cause of action accrued.[103] An EC law action by way of judicial review must be made promptly and, in any event, within three months of the date when the grounds of the application first arose (or six months where the relief sought is certiorari).[104] Advocate General Mischo has suggested that, in principle, the three month period provided by the Rules of the Superior Courts in Ireland for judicial review is reasonable.[105]

In each case, however, the effect of the limitation period must be assessed in context. Limitation periods that are acceptable in one context will not necessarily be acceptable in another, with the result that a general guide cannot be laid down as to the reasonableness of such period.[106] While it is not possible to lay down a general guide, limitation periods may not be less favourable than those governing similar domestic claims. Such limitation periods also must not make "virtually impossible," or "excessively difficult," the exercise of rights conferred by EC law.[107]

The issue of time limits is most likely to arise where national legislation seeks to limit retrospective claims arising from a directly effective provision of EC law. Such rules are generally permissible provided they do not prevent an individual claimant from relying on the EC measure in question or make it impossible to bring a claim, but they only serve to limit the retroactive effect of such a claim.[108]

In exceptional circumstances, national time limits will not apply until such time as a directive has been properly implemented into domestic law. This principle will only apply where the State is both in default in implementing the Directive and has obstructed the exercise of a judicial remedy in reliance upon it, such that the individual's delay is due in some way to the conduct of the national authority.[109]

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[103] Statute of Limitations 1957, s. 11(2), as amended.
[104] Order 84, Rule 21(1) of the Rules of the Superior Courts.
[105] Case C-208/90, *Emmott –v- Minister for Social Welfare* [1991] E.C.R. I-4269
[106] *Brent*, pp 142-143.
[107] Kennedy, p. 28.
[108] Case C-338/91, *Steenhorst-Neerings –v- Bestuur van ee Bedrijfsvereniging voor Detainhantdel* [1993] E.C.R. I-5475
[109] Case C-2/94, *Denkavit International and Others –v- Kamer van Koophandel en Fabrikien voorr Midden-Gelderland and Others* [1996] E.C.R. I-2827 (This qualified the earlier finding in the Irish case of *Emmott –v- Minister for Social Welfare* [1991] E.C.R. 1-4269).

Otherwise, national time limits will ordinarily run from when the claim arises and not from the date of transposition of the directive.[110]

9. Preliminary References

Irish courts may seek the assistance of the European Court of Justice or, where applicable, the Court of First Instance, on questions concerning the interpretation and validity of provisions of EC law pleaded before them. Article 234 of the EC Treaty provides that where a question on the interpretation or validity of a Community act is raised before any court or tribunal of a Member State, that body may, if it considers that a decision on the question is necessary to enable to give judgment, request the Court of Justice to rule on it.[111] There have been just over 40 preliminary references made by the Irish courts to the Court of Justice under the Article 234 procedure since Ireland was admitted to membership of the EEC in 1973.[112] In the Irish judicial system, a preliminary reference can only be made by a court of last resort. In such a case the court is obliged to refer the matter to the Court of Justice if it considers that a decision of that court is necessary to enable it to give judgment. Moreover, it has been observed that:

> ...where a national court cannot be completely confident as to the validity of Community measure at issue, the better view is that the national court, irrespective of whether it is a court of last resort, ought ordinarily to refer the matter to the Court of Justice since only that Court has the competence to declare a Community measure invalid.[113]

The purpose of the reference procedure has been described as follows:

> [T]o prevent the emergence of a body of national case law that it is at variance with the rules of Community

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[110] Case C-188/95, *Fantask A/S –v- Industriminiesteriet* [1997] E.C.R. I-6783.
[111] See generally Collins and O'Reilly, pp. 306-329; and Brent, Chapter 22.
[112] Fahey, *op. cit.*, p. 6
[113] Brent, p. 297 (footnote omitted).

> law coming into existence in other Member States. In other words, it is a way of ensuring the uniform application of Community law. It achieves this, not by being a remedy for parties in disputes in National Courts, but by being an instrument of co-operation between the Court of Justice and national courts.[114]

The important consequence of the foregoing observations is that a reference to the Court of Justice is thus a reference by an Irish court and not by the parties to the action. As a result, the participation of the parties in the action in the reference is very much limited. For example, the Court of Justice cannot reply at the request of the parties to questions which have not been put to it by the national court.[115] The parties' role is limited to submitting observations to the Court of Justice within the framework set out by the Irish court which referred the matter.[116]

Although the reference is made by the national court, not by the parties, the national court should give some weight to the wishes of the parties. In particular, an Irish court should hesitate against making a reference where neither party wishes to have one. At the same time, it has been observed that the parties' "wishes should not be given undue weight."[117] Accordingly, a practitioner representing an applicant/plaintiff or respondent/defendant, who wishes to avoid the delays inherent in a reference to the Court of Justice, must argue forcefully with regard to the exercise of the court's discretion to refer the matter (where such a discretion exists) and/or with regard to the necessity of the reference in enabling the court to give judgment in relation to that particular case.

It should be borne in mind that a request for a reference cannot be made once judgment is given. It seems implicit that the authority conferred under Article 234 on a national court to refer a question to the Court of Justice is contingent upon the court being of the opinion that a decision on the question by the Court of Justice is necessary to enable it to give judgment and that precondition cannot apply where judgment has already been given.[118]

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[114] *Ibid.*
[115] Case 44/65, *Hessische Knappschaft –v- Maison Singer et Fils* [1965] E.C.R. 965
[116] Case 40/70, *Sirena Srl –v- Eda Srl* [1979] E.C.R. 3169
[117] Brent, p. 313.
[118] *Murphy –v- Wicklow County Council* [1999] I.E.H.C 61

A detailed account of the procedure before the Court of Justice or the Court of First Instance in respect of a preliminary reference is outside the scope of this paper. Instead, a brief summary is provided, as follows:

- Within two months of being notified of the referral, the parties are permitted to submit statements of case of written observations to the court. There is no right of reply and observations are lodged simultaneously rather than serially.
- There is no obligation to submit written observations, nor does the failure to do so preclude making oral observations at the hearing before the court, unless the court decides that no such hearing is necessary and provided that none of the parties entitled to participate in an oral hearing has served an application setting out the reasons why he wishes to be heard.[119]
- The oral hearing, if any, is followed by the delivery by the Advocate General of his Opinion and subsequently judgment is delivered.
- The costs of participating in the preliminary reference before the court are a matter for the Irish court that has made the referral to determine.

Where an action before an Irish court involves a challenge to the validity of a provision of EC law, a preliminary reference pursuant to Article 234 provides an important means of indirectly challenging such measure before the Court of Justice or the Court of First Instance. As noted earlier, one important consequence of this is that a party who might otherwise be precluded from instituting a direct challenge in respect of a Community act, for reasons of lack of *local standi*, may be in a position to have the validity of the measure in question reviewed by the court, albeit in an indirect manner.[120]

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[119] Brent, p. 317.

[120] The issue of direct challenges to the validity of Community measures before the European Court of Justice is a matter considered by Mr. Noel Travers in a paper presented at the Law Society of Ireland/Irish Centre for European Law Seminar in September 2004 on "European Law Remedies from the District Court to the European Court of Justice - A Step by Step Guide." (paper in the author's possession).

10. Impact of Commission Proceedings against Ireland

Under Article 226 of the EC Treaty, the Commission is empowered to bring enforcement proceedings before the European Court of Justice against a Member State which it considers has failed to fulfil an obligation under the Treaty.[121] Article 226 provides:-

> If the Commission considers that a Member of State has failed to fulfil an obligation under this Treaty it shall deliver a reasonable opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court.

It would appear that proceedings by the Commission against Ireland are being increasingly invoked in Irish litigation. There have been a number of Irish cases where parties have exhibited a Reasoned Opinion by the Commission in order to justify their assertion that a particular act by the State contravenes Community law. The status of Reasoned Opinions is not clear, but they may have an important effect on the mind of the court. Thus, where relevant, it this may be a useful tactic when pleading an infringement of EC Law by the State on behalf of a claimant.

E. Individual Case Studies

In this Section of the paper, a number of recent Irish cases in which EC law was pleaded are briefly considered. The purpose of each of these individual case studies is to provide "real life" examples of the substantive and procedural issues involved in pleading Community law in Irish litigation, which have been discussed above in Sections 2 and 3 of this paper. These case studies represent only a small and highly selective sample of cases in which

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[121] See Craig and De Burca, *EU Law* (3rd ed., 2002), pp. 398 – 428.

EC law has been pleaded before the Irish courts.

1. Humphrey –v- The Minister for the Environment and Local Government[122]

This case involved a Statutory Instrument adopted by the Minister for the Environment and Local Government in 2000 to increase the supply of taxis in Dublin and Dundalk. In an attempt to address the increasing demand for taxis in Dublin and Dundalk, the Minister for State at the Department of Environment and Local Government decided in 1999 that new taxi licences would be offered to all current holders of such licences in Dublin. This decision was prompted by the dual concern of the Minister to ensure the rapid mobilisation of the licences and to operate in a manner which was fair and reasonable, having regard to the interests of the then existing taxi licence holders.

The applicants were holders of hackney licences and had applied for new taxi licences under the scheme introduced by the Minister, but had been refused. They sought a number of reliefs, including declarations that the relevant Statutory Instrument was *ultra vires* the Minister's power, and an Order of Certiorari quashing the Minister's decision to offer new taxi licences to all the existing holders of such licences in Dublin. Injunctions were also sought restraining Dundalk Urban District Council and Dublin City Council from allocating taxi licences.

It would appear that in the written and oral pleadings, neither Counsel addressed the High Court on the extent to which EC law affected the scheme. Notwithstanding this, Murphy J. considered of his own motion that EC law was relevant to the proceedings such that it might be fatal to the Minister's scheme.

He noted that non-discrimination is a general principle of Community law and, as such, it is a binding principle upon the State, including the High Court, as well as the Executive and Legislature. In particular, he noted that Article 12 of the EC Treaty prohibited direct and indirect discrimination on the grounds of nationality. He noted that a case of indirect discrimination would arise, where, as in

[122] [2001] 1 I.L.R.M. 241.

the case before him, a national rule which appears non-discriminatory on grounds of nationality, in practice affects nationals of other EU Member States to a greater degree than nationals of Ireland. In essence, all that need be proved is that the measure is "inextricably liable" to affect nationals of other Member States more than Irish nationals.[123]

Moreover, Murphy J. observed that Article 12 is directly effective and can be relied upon before the High Court without the necessity of relying on any other Treaty article.[124]

Murphy J. thus concluded that the Minister's scheme, purportedly put in place by the relevant Statutory Instrument

> may very well indirectly discriminate against Member States of the European Union other than Ireland in a manner which is prohibited by Article 12 of the EC Treaty. I venture that all, and if not, the great majority of current taxi licence holders are Irish nationals. By restricting the grant of new licences to this category of persons, the Minister is effectively precluding nationals of other EU Member States from becoming the owners of new taxi licences in Ireland.

Murphy J. found that even if this interpretation of Article 12 were misguided (because of the equal exclusion of Irish nationals who were not taxi licence holders), Article 86 of the EC Treaty had to be considered. This provision prohibits Member States from enacting or maintaining in force, in the case of undertakings to which Member States have granted special or exclusive rights, any measure contrary to the rules contained in the Treaty, particularly those provided for in Article 12 and Articles 81 to 89.

Additionally, he believed the scheme might be further impugned under the same provision on the ground that it might lead taxi drivers to abuse Article 82 of the EC Treaty which prohibits the abuse of a dominant position. This finding was based on

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[123] Reference was made in this respect to Case C-237/94, *O'Flynn –v- Adjudication Officer* [1996] E.C.R. I-2617.

[124] Case C-92/92, *Phil Collins –v- Imtrat Handelsgesellschaft mbH* [1993] E.C.R. I-5145; [1993] 3 CML R773.

jurisprudence of the Court of Justice to the effect that the grant of exclusivity, such as in the present case, may infringe Articles 86 and 82 either when the exercise of the exclusive rights cannot avoid being are unavoidably abusive or where such rights are liable to create a situation in which the undertaking is induced to commit an abuse.

The decision of Murphy J. in *Humphreys* is significant in a number of respects. First, it underlines, as is demonstrated in the other cases reviewed in this Section, that Community law may be a potent weapon in the pursuit or defence of civil or criminal proceedings in any court in the Irish judicial system. In this case, it constituted the sole ground upon which Murphy J. was prepared to impugn the scheme, all other arguments based on provisions of domestic law having failed.

Secondly, it demonstrates that issues of EC law may not be readily apparent in the circumstances of each particular case. Just as Community law is often masked as Irish law,[125] the breach of Community law may not be readily apparent, particularly where the case involves only Irish nationals challenging domestic legislation or schemes. Accordingly, provisions of Community law giving rise to justiciable rights may arise in the most unlikely circumstances. As such, the question of whether the offending agreement, legislation or measure breaches EC law should be on the check list of each litigation practitioner at the outset of every case in which he or she is involved.

Finally, the approach of Murphy J in *Humphrey* should not necessarily be construed as advocating the pleading of as many alternative grounds based in Community law as possible (so as to increase the chances of the claimant or defendant prevailing on the basis of the Community law pleaded). While one does not wish to be too selective at the pleading stage (as opposed to the presentation stage before the court), a "scatter gun" approach can sometimes undermine one good point based on EC law.[126]

2. Mary Pat Cosgrave –v- An Bord Pleanala and Ors.[127]

The two judgments of Mr. Justice Kelly in this case centred

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[125] Power, in Huesel (ed.), *op. cit.*, p. 67.
[126] See e.g., *NWR FM Limited T/A North West Radio –v- Broadcasting Commission of Ireland,* High Court, unreported, Peart J., 23 June 2004, in which such an approach was adopted and, as may be seen from that judgment, does not appear to have advanced the applicant's cause.
[127] High Court, unreported, Kelly J., 21 April and 27 May 2004

on an application for leave to commence judicial review proceedings against the respondents, who included An Bord Pleanala, Wicklow County Council, Ireland and the Attorney General. The applicant was objecting to a decision made by An Bord Pleanala whereby a Notice Party to the proceedings, Greenstar Recycling Holdings Limited, was granted Planning Permission for a waste disposal development in County Wicklow.

The applicant sought a number of reliefs against the State and the Attorney General provided she was granted leave to commence substantive proceedings against the respondents. These included: a declaration that the State failed to properly implement into Irish law provisions of the relevant directives relating to the carrying out of an Environmental Impact Assessment (EIA); a declaration that the provisions of Section 26 of the Local Government Planning & Development Acts, as amended by Article 6 of Statutory Instrument 84 of 1994, was inconsistent with and contrary to the requirements of the relevant directives; and a declaration that Section 53(3) of the Waste Management Act 1996 was inconsistent with and contrary to the requirements of the relevant directives and constituted an improper transposition of the requirements of those directives into Irish law. She also sought a declaration that Section 54 of the Waste Management Act 1996, and Section 98 of the Environmental Protection Agency Act 1992 were inconsistent with the Constitution in that the Constitution afforded primacy to Community law and that domestic implementation of Community law must be construed in the context of the constitutional obligation in that regard.

Mr. Justice Kelly, applying an earlier decision of Mr. Justice Morris in *Lansfort*,[128] decided to refuse the applicant leave to commence the judicial review proceedings against Ireland and the Attorney General for the reliefs sought. Kelly J. upheld the objections made on behalf of the respondents and the Notice Party that the applicant was not entitled to seek to challenge the adequacy of the implementation by the State of the relevant directives by means of judicial review proceedings. The respondents and the

[128] *Lancefort Limited –v- An Bord Pleanala* [1997] 2 I.L.R.M. 508.

Notice Party had contended that the remedies available to the applicant by way of judicial review were limited to the decision making process and the applicant was not permitted to use those proceedings to challenge the implementation by the State of the directives. Kelly J. accepted that the complaint made by the applicant was not, and indeed, could not be directed at the decision-making process of An Bord Pleanala. Rather, the complaint constituted a criticism of the manner in which the State implemented the relevant directives. In essence, the learned judge found that the "pivotal complaint" made with regard to the transposition of the relevant directives was that Section 54 of the Waste Management Act 1996 precluded An Bord Pleanala from considering the risk of environmental pollution and, therefore, it was not possible for an EIA to be carried out.

Kelly J. noted *obiter* that his decision to refuse leave to apply for judicial review against Ireland and the Attorney General did not deprive the applicant of a remedy in the circumstances. He expressed the view that plenary proceedings were not ruled out in circumstances such as this, with a view to testing, if the applicant wished to do so, the manner in which the relevant directives were implemented by the State.

In his judgment of 27 May 2004, Kelly J. considered whether to grant leave to apply for judicial review against An Bord Pleanala (it having been accepted by the applicant that no relief was in reality being sought against Wicklow County Council).

The applicant had sought a number of reliefs against An Bord Pleanala.[129] She alleged, *inter alia*, that An Bord Pleanála, in granting the relevant permission which departed from the terms of the Wicklow County Council Waste Management Plan, did so unlawfully because it was constrained by virtue of the relevant directive (the so called "Land Fill Directive").

Kelly J. noted that if the applicant were to have a case in this respect, she would have to demonstrate to the court that the directive had direct effect. Having reviewed the conditions for direct effect laid down under EC law, Kelly J. doubted whether the relevant

[129] For the purpose of this case study, I propose to consider only the relief involving a plea based on EC law.

provisions of the Directive were of "direct application." However, he assumed the contrary and proceeded on the basis that the Land Fill Directive was "directly applicable," in order to establish whether An Bord Pleanala was in breach thereof. Having reviewed the relevant provisions, he concluded that the Directive essentially dealt with landfill permits, the granting of which is a function of the Environmental Protection Agency ("EPA"). Accordingly, the EPA was, in his view, the competent authority for the purpose of the directive and therefore any complaint in this regard should be addressed to it. Kelly J. noted that the EPA was not before the court nor was its decision to grant a waste licence. He concluded his analysis by stating that even if the Land Fill Directive were directly applicable, which he doubted, the applicant's case had not established a breach by An Bord Pleanala of the provisions of the relevant Directive.

Kelly J.'s judgments underline the importance of pleading matters of EC law by way of appropriate procedures and pleadings. It is also important to ensure that all relevant parties are joined to such proceedings.

These judgments also demonstrate however, the limited extent, under existing Irish jurisprudence, to which Community law may be pleaded by a claimant. In the present case, the applicant's issue concerned the decision of An Bord Pleanala to grant the relevant permission for the development of the waste disposal facility. However, it would seem clear that, from either the manner in which Community law was pleaded before the High Court, or the view taken by the High Court of such pleadings, the decision of An Bord Pleanala to grant permission did not of itself breach the provisions of Community law upon which the claimant sought to rely. Rather, such provisions could only be relied upon in the High Court's perception as constituting a basis for challenging the State's purported implementation of the relevant directives.

It is not clear whether, had the claimant sought relief on foot of plenary summons, An Bord Pleanala would have been regarded by the High Court as an "emanation" of the State and, therefore, share liability, if any, for the alleged mal-implementation of the relevant directives. It is submitted that under existing Irish jurisprudence this

is unlikely, and even if it were so regarded, the claimant would not in any event have obtained the desired relief, (i.e., the quashing of the decision of An Bord Pleanala to grant the permission in question).

It is worth mentioning that one of the difficulties faced by the applicant in the present case in relation to the decision to proceed by way of judicial review rather than plenary summons, as noted earlier, was that the applicant was challenging a decision of An Bord Pleanala and under Section 50 of the Planning and Development Act 2000 was required to do so by way of judicial review. This statutory limitation was not addressed in the case, but clearly is of relevance.

It is also questionable whether the decision in *Lancefort* is in breach of Community law. If a statutory body acts in excess of its jurisdiction, i.e., outside of the parameters of the Act by which it is established, it acts *ultra vires* and the appropriate method of challenging the wrongful act is by way of judicial review. It is arguable that where An Bord Pleanala is acting pursuant to a provision of Irish law that has incorrectly implemented an EC directive, this provision does *not* provide An Bord Pleanala with the proper legal footing upon which to act. Accordingly, the Board could be accused of acting in a way which is the equivalent of an *ultra vires* action. In those circumstances, it would seem proper for an applicant to judicially review the actions of the Board rather than to institute proceedings by way of Plenary Summons. To force an applicant to proceed by way of Plenary Summons when launching a challenge on the basis of Community Law might be considered a breach of the principle of equivalence. This theory has yet to be tested under current law as stated in *Lancefort* and *Cosgrave*. It remains to be seen whether these decisions will be upheld in due course.[130]

3. The "MIBI" cases.[131]

The first of these cases, *Dublin Bus –v- MIBI*, involved the appeal from two decrees made in the District Court which awarded damages to Dublin Bus plus costs for property damage caused to its property in two separate but similar incidents in 1997. Vehicles

[130] This passage is a summary of letter to the author from Niamh Hyland BL, who has suggested and should therefore be credited for this theory.
[131] Circuit Court, unreported, Judge McMahon, 29 October 1999

stolen or taken without the owners' consent were driven into the rear of buses owned by Dublin Bus. Dublin Bus sued the Motor Insurance Bureau of Ireland ("MIBI") for property damage and the District Court made an award of damages to Dublin Bus in both cases.

On appeal, the dispute focused on the exact meaning of Clause 7(2) of an agreement dated 21 December 1988 between the Minister for the Environment and the MIBI. This Clause provided that the liability of MIBI for damage to property should not extend to damage caused by a vehicle the owner or user of which remained unidentified or untraced. MIBI had claimed that it was not obliged to pay compensation pursuant to this provision unless both owner and user were identified. Dublin Bus opposed this interpretation and argued that in cases like the present MIBI should be liable where the owner was identified and traced (even though the user could not be located).

The case involved a point of EC law given that the disputed clause was intended to give effect to a provision of a directive concerning motor vehicle insurance, commonly known as the Second Directive. As Judge McMahon noted, while legislation or statutory instruments might be the normal national measure by which the State implements Directives into Irish law, they are not the only means. The means of implementation are left up to the State pursuant to Article 249 of the EC Treaty.

The learned judge found that an examination of the relevant portion of the Directive clearly showed that the exception created in Clause 7(2) of the 1988 Agreement was neither justified nor authorised by the terms of the Second Directive. He then found that as a full contracting party and a full partner with the State in implementing the Second Directive by means of the 1988 Agreement, the MIBI must be associated with the State in answering the question as to who is responsible for the improper implementation of the relevant Directive. Judge McMahon found that the "State's yoke of responsibility for transforming community responsibility in this regard lies equally on the shoulders of the [MIBI] as well as on the shoulders of the Minister."[132] Judge McMahon also found that the

[132] *Ibid.*

MIBI was aware of the mal-implementation of the relevant Directive for several years and failed to remedy the same. In these circumstances, he found that the failure to implement the Directive into Irish law and the continued failure by the State and the MIBI to rectify the situation, once the improper implementation was recognised, led to the plaintiff's loss.

On the basis that this conduct breached Article 10 of the EC Treaty it was proper for the court to grant Dublin Bus the appropriate remedy by dismissing the appeal by the MIBI and confirming the District Court Orders. Dublin Bus was also awarded interest from the date of the District Court Orders and the costs of the proceedings, including the costs of the appeal. In essence, the learned judge awarded damages against the MIBI for losses sustained by Dublin Bus as a result of the improper implementation of the second Directive.

The issue of the MIBI's liability to pay compensation pursuant to the 1988 Agreement came before Judge McMahon again in the more recent Circuit Court case of *Withers –v- Delaney & The Motor Insurers Bureau of Ireland*.[133] *Withers* involved a fatal road traffic accident where the victim was killed as a passenger in the back of a two-seater van in a covered-in area with no seating. The mother of the victim brought a claim under Part IV of the Civil Liability Act 1961 and the MIBI was sued as a second defendant. While the 1961 Act provides for compulsory insurance in respect of civil liability for motor vehicles, Section 65 does not permit the Minister to extend compulsory insurance to passengers in any mechanically propelled vehicle unless the vehicle is designed and constructed with appropriate seating. Thus, insurance was not compulsory in the present case. Judge McMahon considered if it was possible to have recourse against MIBI.

The MIBI argued that it was not liable under the 1988 Agreement as no insurance cover was required for persons, such as the deceased, on the date of the accident, which was prior to the date of entering into force of the Third Directive (31 December 1995). The Third Directive had extended compulsory insurance cover in

[133] Circuit Court, unreported, Judge McMahon, 7 February 2003; see also Case C-158/01, *Withers –v- Delaney & Motor Insurers Bureau of Ireland* [2002] E.C.R. I-8301.

this respect.

The plaintiff contended that the Irish legislation did not correctly implement the First and Second Directives.

Judge McMahon again held that the MIBI was "an emanation of the State." However, he decided to make a preliminary reference pursuant to Article 234 of the EC Treaty in respect of its liability as such in the present case. Three questions were referred to the Court of Justice:

1. Whether on the true interpretation the First and Second Directives, the State was entitled to maintain legislation which excluded vehicles not designed for passenger use with appropriate seating?
2. If so, whether the State was liable for damages?
3. Whether the court could award damages against the State without applying the Directive against the defaulting emanation of the State or whether this could only be done after deciding that the Directive could not be invoked?

The Court of Justice held that Member States remain competent to determine the extent of passenger cover on condition that passengers who are members of the family of the insured, the driver or any other person liable should be afforded protection equivalent to that of other third party passengers. Accordingly, if the State's domestic law did not impose compulsory cover for personal injuries to passengers who are not family members, the State was not required to impose compulsory cover for personal injuries to passengers who were members of the family of the insured person or of the driver. While the Third Directive had extended compulsory insurance cover in this respect, the date of the accident had occurred before the date for implementation of that directive in Ireland and, therefore, could not be relied upon.

Following the decision of the Court of Justice, Judge McMahon held that as a result of that decision, the MIBI was entitled to have the plaintiff's action dismissed. Considering the public interest element to the proceedings, however, Judge McMahon ordered that the MIBI bear its own costs. Judgment was

entered against the first named defendant for the agreed damages between the parties.

The decisions of the Circuit Court in *Dublin Bus* and *Withers* serve to demonstrate a number of matters pertinent to pleading EC law in the Irish courts. First, they demonstrate clearly the scope for pleading EC law in the District and Circuit Courts. While there may be some scepticism among practitioners about the merits of pleading EC law in the lower courts, particularly in the District Court, it may be the winning or losing of a case, as the decision in *Dublin Bus* demonstrates. As the High Court decision in *Wright*[134] demonstrates, it is always open to the District Court to refer more complex matters raised through the pleading of EC law before it to the High Court for determination pursuant to the case stated procedure. That being said, the Superior Courts may not necessarily adopt a correct interpretation of Community law. It is suggested that this is clearly demonstrated in a series of High Court and Supreme Court judgments, which adopted a more restrictive view of the doctrine of the "emanation of the State" and which is arguably inconsistent with the pronouncements of the Court of Justice on this doctrine.[135]

Secondly, the *Withers* case provides an example of the preliminary reference procedure in operation. Indeed, in that case, the decision of the Court of Justice effectively decided the case in favour of the MIBI insofar as the points of EC law pleaded were concerned. Judge McMahon was free, however, to determine the other aspects of the case, including the issue of costs incurred by the MIBI, as he saw fit.

In *Dublin Bus*, Judge McMahon remarked *obiter* that if he held for the MIBI on the interpretation of Clause 7(2) of the 1988 Agreement, Dublin Bus "would no doubt pursue the State for the damages suffered, including no doubt the legal costs of all attendant proceedings." While Judge McMahon effectively took a very expansive interpretation of what constitutes an "emanation" of the State, it is suggested that if the matter had come before the Superior Courts, they may have adopted a more restrictive view and, accordingly, may have refused to hold the MIBI liable for the

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[134] *Op. cit.*

[135] See e.g., *Short –v- Ireland* [1996] 2 I.R. 188; *McBride –v- Galway Corporation* [1998] 1 I.R. 485; and *DeBurca –v- Wicklow County Council* [2002] 2 I.R. 196. See *supra* Section 3.5.2. of this paper; see also Fahey, *op. cit.*, at 8-10.

improper implementation of the Directive into Irish law.[136]

As such, these cases again highlight the advisability of joining the State to any action in which an "emanation" of the State is being sued for non-implementation or mal-implementation of a Directive, unless Irish or EC case law has unequivocally settled the issue of whether the purported emanation of the State is such. It is suggested that as the answer to this question may vary according to the circumstances of each particular case, it is a safer course of action to join the State if any doubt arises as to the classification of the purported organ or emanation of the State sought to be sued.

Finally, it is interesting to note that while Judge McMahon referred, in an earlier part of the decision, to the entitlement of persons to sue the State for damages for the non-implementation or mal-implementation of a Directive, he did not appear to consider whether the relevant provisions of the Directive in this case had direct effect. If the relevant provision was held to have direct effect, it would supercede the offending provision in the 1988 Act and entitle Dublin Bus to seek damages against the MIBI as an emanation of the State. In essence, the same result would have been achieved. Some commentators have suggested that Judge McMahon would not have declared the relevant provision of the Second Directive to be sufficiently precise and unconditional, such that the provision could have direct effect.[137]

4. Browne –v- The Attorney General, The Minister for The Marine and Natural Resources, Ireland and District Judge James O'Connor[138]

Browne involved an appeal to the Supreme Court from a decision of Mr. Justice Kearns delivered on 6 March 2002. The background to this case briefly is as follows. Mr. Browne was the Master of an Irish fishing vessel, the MVF "Antonia." His livelihood depended principally on fishing for tuna. While fishing in international waters in June 2000, a party from the Irish naval vessel

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[136] Judge McMahon's finding that the MIBI was an emanation of the State has not been without its critics: see e.g, Keville, "The Principle of Effectiveness and the Development of a System of Remedies at European Community Law" in Lucey & Keville (eds.), *op. cit.*, pp. 13-14. However, it would appear that his expansive interpretation of the status of the MIBI may have since been justified by decisions of the Courts of Justice in *Haim II* and *Konle*: Case C-424/97, *Haim II* [2000] E.C.R. I-5123; and Case C-302/97, *Konle –v- Austria* [1999] E.C.R. I-3099.

[137] Costello and Drake, *op. cit.*, at 378.

[138] [2003] I.R. 205

boarded Mr Browne's fishing vessel and inspected his fishing gear and fishing nets. Mr. Browne was advised that he and the vessel were being detained on suspicion of having in excess of the permitted quantity of drift nets on board and that they would be escorted from international waters back to Ireland. The fishing vessel and gear were subsequently detained by an Order of the fourth named respondent, District Judge James O'Connor. Mr. Browne faced two charges of being in breach of the relevant regulations. He was returned for trial by Judge O'Connor to Cork Circuit Court, but on 19 December 2000 was given leave by the High Court to apply for orders of prohibition and certiorari.

Mr. Browne had been returned for trial on indictment on two charges of keeping on board and using for fishing drift nets prohibited by the relevant EC Regulation and a Statutory Instrument which had purportedly been adopted pursuant to Irish fisheries legislation. Kearns J. found that the Statutory Instrument of which Mr. Browne was alleged to have been in breach was *ultra vires* the powers of the Minister having been made in exercise of the powers conferred on him by the relevant Irish legislation and not in exercise of the powers conferred by Section 3 of the European Communities Act 1972, as amended. He also found that the Statutory Instrument was *ultra vires* the powers conferred on the Minister by the Irish legislation by purporting to authorise the creation by the Minister of an indictable offence outside the exclusive fishery limits of the State. Section 3 of the 1972 Act provides that regulations made under that Section shall not create an indictable offence. The respondents appealed the decision of Kearns J.

Keane C.J. and Denham J. handed down judgments for the Supreme Court. In his judgment, Keane C.J. found that the EC Regulation in question was directly applicable in the State to the same extent as if it were an act of the Oireachtas. He noted that, as is normally the case with EC measures, it is left to the State to provide for the effective policing of the measure in question in whatever appropriate manner, having regard to the laws of the State. The Minister was empowered by Section 3 of the 1972 Act to make regulations for that purpose. Even though the principles and policies which were being given effect were not prescribed by the Oireachtas

in primary legislation, this did not affect the constitutional validity of any such regulations. Keane C.J. noted, however, that regulations adopted pursuant to Section 3 of the 1972 Act, as amended, were subject to one important limitation; such regulations could not create an indictable offence.

Keane C.J. was satisfied that the relevant Statutory Instrument was intended to give effect to Community policies on the conservation of fisheries resources and, moreover, there was no Act of the Oireachtas in existence setting out such principles or policies. Indeed, the Court of Justice had made it clear that the power to adopt such principles and policies were exclusively vested in the European Communities.[139] The Supreme Court, therefore, found that the relevant Statutory Instrument was not intended to give effect to principles and policies set out by the Oireachtas in the purported parent legislation. It was intended to give effect to the principles and policies adopted in the relevant EC Regulation and, indeed, this was acknowledged in the Statutory Instrument which stated that the Minister was adopting same "for the purpose of giving effect to Council Regulation (EC) Number 1239/98" notwithstanding that the Minister purportedly invoked the powers conferred on him by the relevant Irish legislation to create the indictable offence in question. As such, the Minister, in availing the powers conferred under Section 3 of the 1972 Act, as amended, was not entitled to provide for the creation of an indictable offence – that power was expressly reserved to the Oireachtas by Section 3(3).

The Supreme Court accordingly dismissed the appeal and affirmed the Order of the High Court granting an Order of prohibition directed to the Attorney General prohibiting him from prosecuting Mr. Browne in Cork Circuit Criminal Court on the charges noted earlier.

The judgments of the High Court and Supreme Court in *Browne* are significant in at least two respects. First, they demonstrate that EC law may be pleaded in criminal, as well as civil, matters to great effect. Accordingly, EC law should be pleaded in defence of criminal proceedings wherever relevant - it should be

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[139] Case 804/79, *Commission –v- United Kingdom* [1981] E.C.R 1045.

dismissed as irrelevant on the basis that it essentially comprises "economic law." It also underlines the need to consider issues of EC law when representing a defendant or respondent in proceedings.

Secondly, the judgments underline the need to critically examine the purported legal basis for the adoption of secondary legislation in Ireland by reference to EC law and the constitutional and legislative provisions providing for the incorporation of EC law into the Irish legal order. In this case, the proper legal basis for the adoption of the secondary legislation in question was critical in determining the power of the Minister to create indictable offences for the breach of the relevant EC Regulations which Mr. Browne was charged.

5. Conclusion

To conclude this case study, I propose to summarise what I believe to be the key points to pleading EC law in Irish litigation.

First, the potential application of EC law to what might appear at first sight to be a domestic law issue should always be considered prior to the institution of any proceedings before any court in the Irish judicial system. While in many cases no specific issue of Community law will arise, it is nonetheless a useful exercise given the demonstrated impact of pleading Community law in Irish litigation. This may be a positive impact, insofar as it confers rights on the claimant not available under domestic law, or a negative impact, insofar as the Community measure being relied upon may impugn a domestic law or administrative decision which infringes Community law.

Second, having identified an area or areas of Community law relevant to the subject matter of the dispute, one should consider whether non-judicial means of redress, rather than redress through litigation, would be more appropriate.

Third, where it is appropriate to seek redress through litigation one needs to consider carefully the appropriate court, parties and form of pleadings. Irish rules of procedure apply equally to EC law actions, as they do to domestic law actions, provided they comply with the Community law principles of equivalence and effectiveness. That being said, the form of pleadings and choice of

parties requires special consideration in the case of EC law actions. It is suggested that these issues depend on a number of factors, including the measure of Community law on which reliance is sought, the type of act, omission, measure or decision sought to be challenged, the *nexus* between the measures sought to be challenged and the measure of Community law on which such challenge is based, and the type of relief sought on behalf of the claimant. At the same time, it is acknowledged that in many cases an action will involve pleading matters of domestic, as well as EC law, and, therefore, the nature of the domestic law claims and reliefs sought must also be taken into account.

Fourth, consideration should be given to other procedural issues, such as time limits, limitation periods, locus standi, and burden of proof. The rules which apply to domestic law actions apply to EC law actions, subject to the observation of the Community law principles of effectiveness and equivalence. Any national procedure may be challenged on the basis that it fails to respect either or both of these principles.

Fifth, when representing a defendant or respondent, one should also consider issues of EC law. Where a plaintiff is seeking redress for an alleged wrong action, it may be helpful for a defendant to consider whether the provisions upon which the plaintiff relies are themselves contrary to Community law. This occurs most frequently in the area of competition law, but may arise in other areas also. Thus, Community law may be pleaded in the defence of civil and criminal matters, as well as on behalf of a claimant in ordinary civil proceedings. This should be the case whether one is defending a client in respect of summary proceedings or proceedings on indictment and regardless of whether the case is being tried before the District Court, the Circuit Court or the Central Criminal Court.

Sixth, one should advise one's client not only of the potential benefits of pleading Community law, but also of its inherent limitations, e.g., where the Community law in question does not confer rights enforceable by one person against another either because it has no direct effect or limited direct effect.

Seventh, one should bear in mind that pleading EC law in Irish litigation may prompt the court to refer an issue or issues of EC

law to the Court of Justice for determination. This procedure is effectively outside the party's control once it is initiated by the court and has the potential for significantly delaying conclusion of the action. One should point out this possibility to a client.

Eighth, it may be possible not only to challenge provisions of Irish law that allegedly infringe a client's rights under Community law, but also to challenge measures of Community law directly. This power of review vests solely, however, in the Court of Justice; it is not within the power of the Irish courts to strike down such measures. It is possible, however, to seek to suspend the application of such measures by way of an application for interlocutory relief while the matter is referred to the Court of Justice for a decision under the preliminary reference procedure. Considering the very strict *locus standi* requirements for direct actions before the Court of Justice, this has the potential to serve as an effective means of challenging Community measures.

Finally, where one has overlooked to plead a relevant provision of Community law in Irish litigation it is generally open to the court to raise the matter of its own motion. If one fails to plead a provision of Community law, one might seek to avoid the necessity to seek an amendment of pleadings by raising the Community law issue at the presentation stage and asking the court to consider it of its own motion.