

# THE IMPLEMENTATION OF DIRECTIVES IN IRISH LAW

## 1. Background

The basic law of the Irish State is its written Constitution which was adopted by the people in 1937. Article 15 of the Constitution established the national Parliament; provided that it should be referred to as the Oireachtas and then provided as follows in section 2 of the Article:

*"2.1 The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State. "*

When Ireland joined the European Economic Community in 1973 the Constitution had to be amended so that laws emanating from the European Communities would also have the force of law in the State. And after the adoption of the Treaty of Maastricht this amendment had to be further altered and the relevant provision as so altered is as follows :-

*"29.4.5 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 competent under the Treaties establishing the communities, from having the force of law in the State. "*

The effect of this provision of the Constitution is that the courts must give effect to community law even though it may be inconsistent with the Constitution and that legislation necessitated by our membership of the communities which is enacted by the Oireachtas is also valid and effective even if inconsistent with the Constitution. Furthermore, where there is a conflict between community law and the provisions of

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statute law or the common law, it is community law which prevails - see the decision of the Supreme Court in Meagher v. Minister for Agriculture 1994 1 ILRM p. 1. It can be seen, accordingly, that community law takes precedence over our domestic law whether deriving from the Constitution or from statute or the common law.

As is no doubt very well known by now, Ireland has no separate system of administrative tribunals. There is a single court system and all administrative or constitutional cases are heard by the same courts as deal with the whole range of civil litigation. Article 34.3.1. provides that -

*"the courts of first instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."*

The same Article also provides that the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution.

## **2. THE METHOD OF IMPLEMENTATION.**

Directives are implemented in either of two ways, by statute passed by the Oireachtas, or by secondary legislation, i.e., by regulations made by a government Minister. The latter of the two methods is the more frequently used. The power to make such regulations is given by the European Communities Act, 1972. The relevant sections are as follows:-

*"2. From the 1st day of January 1973, the Treaties governing the European Communities and the existing and future Acts adopted by the institutions of those communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those Treaties.*

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*3(1) A Minister of State may make regulations for enabling section 2 of this Act to have full effect.*

*(2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modifications, other law, exclusive of this Act).*

*4(1) Regulations under this Act shall have statutory effect and, unless they are confirmed by Act of the Oireachtas passed within six months after they are made or are regulations merely revoking wholly regulations previously made under this Act, they shall cease to have statutory effect on the expiration of that period, but without prejudice to the validity of anything previously done thereunder. "*

The general manner in which Directives are implemented by a regulation is that the substance of the Directive is given effect to by the terms of the regulation. The actual wording used in the Directive may or may not be reproduced, but it is not the practice to incorporate the entire of the Directive into the regulation, as for example by including it in a schedule, as appears to be the practice in some countries.

The European Communities (Control of Oestrogenic, Androgenic, Gestagenic and Thyrostatic Substances) Regulations 1988 (Statutory Instrument No. 218 of 1988) are an example of the manner in which Directives are implemented by secondary legislation. These regulations were made by the Minister for Agriculture and Food in exercise of the powers conferred on him by section 3 of the European Communities Act, 1972 for the purpose of giving effect to six Council Directives. The regulations reproduced the substance of the Directives and created the necessary sanctions in Irish law to ensure that the obligations imposed by the Directives could be enforced.

### 3. THE JURIDICAL EFFECTS OF A DIRECTIVE

#### A. Prior to implementation.

There does not appear to be any case law on this issue but in principle the position would appear to be reasonably clear. Until the time comes when the State is obliged to implement the Directive, it is difficult to see how the courts could give any effect to it. Until that time arrives, the State is not in default and so no individual could claim rights derived from the Directive since such rights arise only on the failure of the State to implement the Directive within the period prescribed, the State being precluded from relying on its own failure in order to deprive its citizens of rights which they would have under the Directive.

#### B. Effect of non-implementation.

In the case of *McDermott and Cotter v. Minister for Social Welfare* 1987 ILRM 324 the High Court referred to the European Court of Justice under Article 177 of the Treaty of Rome the question of whether the provisions of Directive 79/7/EEC, and in particular Article 4 thereof, had direct effect in the Republic of Ireland on and from the 23rd December 1984, the date by which it ought to have been implemented by the Member States. The Court held that where the Directive had not been implemented, Article 4(1) which prohibits all discrimination on the grounds of sex in matters of social security could be relied on as from the 23rd December 1984 in order to preclude the application of any national provision inconsistent with it. The Court held that women were entitled to have the same rules applied to them as were applied to men who were in the same situation since, where the Directive had not been implemented, these rules remained the only valid point of reference.

### C. Effect of partial implementation.

This is illustrated by the recent decision of the Supreme Court in the case of Nathan v. Bailey Gibson Limited. The Irish Print Union and the Minister for Labour (unreported 29th February 1996). The plaintiff, who is a woman employed by the first defendant, Bailey Gibson and Son, claimed that she had been the subject of indirect discrimination contrary to the provisions of the Employment Equality Act, 1977. One of the purposes of this Act was to implement Directive 76/207/EEC which deals with equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions. The 1977 Act does not make any reference to indirect discrimination but the Supreme Court held that the section of the Act which provides that an employer shall not discriminate against an employee should be construed as referring to both direct and indirect discrimination and the plaintiff's claim was referred back to the Labour Court to consider whether the plaintiff had been the victim of indirect discrimination.

In the course of his judgment, Hamilton C.J. said:-

*"It is also well established that national or domestic courts in interpreting a provision of national law designed to implement the provisions of a directive, should interpret the national law in the light of the wording and purpose of the Directive in order to achieve the results envisaged by the Directive. "*

Hamilton CJ. then went on to quote the following passage from the judgment of the European Court of Justice in the case of Von Colson and Kamann v. Land Nordrhein Westfalen 1984 ECR 1891 at paragraph 26:-

*"However the Member States obligation arising from a directive to achieve the result envisaged by the Directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that*

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*obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows, that in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No. 76/207 national courts are required to interpret the national law in the light of the wording and the purpose of the Directive in order to achieve the results referred to in the third paragraph of Article 189. "*

## **THE TRANSPOSITION INTO IRISH LAW OF THE DATA DIRECTIVE**

In Ireland the Data Protection Act, 1988 (hereinafter referred to as "the Act") was enacted to give effect to the 1981 Convention for the protection of individuals with regard to automatic processing of personal data. The main purpose of the Act was to regulate the collection, processing, keeping, use and disclosure of certain information relating to individuals that is processed automatically. Persons who believe that data concerning them is held on an automated information system may request copies of the data subject to exemptions in respect of data kept by the revenue authorities or for the investigation of offences. A person who is prejudiced by non-compliance with the Act may have effective remedies in constitutional law or the law of contract and section 7 of the Act provides a supplementary action by creating a statutory duty of care between data controllers and data subjects. Data processors and some data controllers have to register with the Data Protection Commissioner if they are to lawfully process, collect, store, use or disclose personal data relating to others. The Data Commissioner has extensive powers of enquiry, search and seizure and has the right to initiate summary prosecutions for breach of criminal provisions contained in the Act

### **ANNEX CONCERNING DIRECTIVE 95/46 EC ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND THE FREE MOVEMENT OF SUCH DATA**

#### **1. IMPLEMENTING PROCEDURE:**

Can implementation be effected by delegated legislation, or will it be necessary to adopt a new Act or amend existing legislation, perhaps even the Constitution?

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Implementation may be effected by delegated legislation or by an amending Act. It will not be necessary to amend the Constitution.

Will the administrative legislative council or the supreme administrative court play a certain role in connection with the process of transfer?

Not applicable in Ireland.

## 2. CONTENT OF IMPLEMENTING MEASURES:

- (a) Will there be any need to reduce some of the guarantees enjoyed by citizens under current domestic law with a view to preventing the free movement of data being restricted or prohibited?

There should not be any need for this. The Data Protection Commissioner has power to prohibit the transfer of personal data from the State to a place outside the State, but in exercising his discretion he must have regard to Article 12 of the 1981 Convention.

- (b) Will it be necessary to adapt certain concepts in national legislation to the definitions of the Directive (Article 2)?

It is standard procedure for a piece of legislation to include a definition section. The definitions in the Act are not identical to those in the Directive. It may be necessary to adopt new definitions. For example, the definition of "processor" under the Directive *"shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the Controller"*. "Data processor" under the Act is defined as a person who processes personal data on behalf of a Data Controller but does not include an employee of a Data Controller who processes such data in the course of his

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employment.

- (c) Does the field of application of national legislation correspond to the field of application of the Directive, especially with regard to the non-automated processing operations (Article 3(1)) and the processing operations the purpose of which are public security, defence, national security or areas "of criminal law (Article 3(2))?

No. The Act was specifically intended to give effect to the Convention for the protection of individuals with regard to automatic processing of personal data.

- (d) Do the principles relating to the "quality" of the data, as the principles are expressed in the Directive (Article 6) add anything to national legislation?

Nothing of significance. The data protection principles are based on the provisions found in the OECD guidelines and the Council of Europe Convention. Data shall be obtained and processed fairly, accurately, kept up to date, kept only for one or more specified and lawful purposes and shall not be used or disclosed in any manner incompatible with those purposes.

- (e) Does national legislation permit the processing of data in cases other than the cases at which the Directive is aimed (Article 7)?

No. The principles and the guidelines to be followed are set out at section 2 of the Act.

- (f) Are the terms used in the Directive to describe these cases sufficiently precise, or do they have to be "*translated*" into more precise terms conforming to national legislation?

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Not applicable.

- (g) Does national legislation concerning "*sensitive*" data, including health data and data concerning the relationship to the judicial system and the police correspond to the requirements of the Directive (Article 8(1) - (6))?

Section 2 sub-section 6(a) of the Act sets out that the Minister may for the purpose of providing additional safeguards in relation to personal data as to racial origin, political opinions, religious and other beliefs, physical and mental health, sexual life or criminal convictions, by regulation, amend subsection (1) of the section.

This leaves the way open to the Minister to regulate areas where sensitive data may be in issue. This subsection of the Act is comparable to Article 8(1) of the Directive. However, there are no provisions in the Act which could be related to Article 8 (2) - (6).

- (h) Does national legislation contain a set of rules relating to a national identification number or other identifier of general application (Article 8(7))?

No. It is not a requirement under Irish law for citizens to possess identity cards.

- (i) Does national legislation provide for exemptions or derogations for the benefit of journalists or artists (Article 9)?

No. There are no exemptions under the Act for the benefit of journalists or artists.

- (j) Do the conditions enjoined by national legislation with regard to

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the information to be given to the data subject when the data is being obtained from him correspond to the conditions contained in the Directive?

No. The Act does not require any particular information to be given to the data subject when the data is being obtained.

- (k) The same question, when the data has not been collected from the data subject himself.

The national legislation makes no provision for this.

- (l) Does national legislation contain appropriate safeguards concerning the processing for statistical purposes or for the purpose of historical or scientific research? As our national legislation does not require any information to be given to the data subject, this question does not arise.

- (m) Does national legislation recognise a right of access on the same conditions as mentioned in the Directive (Article 12)?

Section 4 of the Act confirms a right of access. This section lays down detailed provisions in regard to the right of access and is broadly comparable to Article 12 of the Directive. Subject to certain limitations, an individual who requests in writing data kept by the Data Controller shall be informed whether the data kept by the Data Controller includes personal data relating to that individual and the applicant shall be supplied with a copy of the information constituting the data. The request must be complied with as soon as may be but no later than forty days after the applicant has satisfied the procedural requirements.

- (n) Does national legislation permit exceptions to the right of access beyond those permitted by the Directive (Article 13)?

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The exceptions are broadly comparable. Section 5 of the Act lays down the restrictions on the right to access.

- (o) Does national legislation give the data subject a right to make objections on the same conditions as those mentioned in the Directive (Article 14)?

Yes. Complaints can be made to the Data Protection Commissioner under section 10 of the Act.

- (p) Does national legislation contain a rule dealing with individual decisions taken on the basis of automated processing of data?

Section 2(1)(d) provides that appropriate security measures shall be taken against unauthorised access to, or alteration, disclosure or destruction of the data and against their accidental loss or destruction.

- (q) Does national legislation impose rules in regard to the confidentiality and security from disclosure of processing operations?

No.

- (r) As regards the level of security, is the same criterion adopted as in the Directive?

No.

- (s) Does national legislation make provision for the notification of processing operations to a supervisory authority (Article 18(1))? Section 16(2) of the Act imposes upon the Data Protection

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Commissioner the statutory duty to establish and maintain a register of Data Controllers and Data Processors. These persons are obliged to apply for registration. This is the nature of the notification rather than notification of the processing operations as provided for in the Directive.

- (t) Does national legislation provide for a simplified notification procedure or exemption from this obligation?

Yes. Not every Data Controller and Processor has to register.

- (u) If the answer is yes, are such operations then within the limits laid down in the Directive (Article 18(2))?

Yes.

- (v) Does the national legislation provide for controls, either individual or general, taking place before certain processing operations?

No.

- (w) Does national legislation provide for public inspection of processing operations, particularly via a public register of notified processing operations (Article 20)?

Under section 16(3) of the Act, the public may inspect the Register of Data Controllers and Data Processors free of charge.

- (x) How can citizens complain, via the administrative system or via the courts, in the case of infringement of the rights guaranteed

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to them by national legislation under the protection of data (Article 22)?

Citizens may complain to the Data Protection Commissioner who is independent from government control. The Commissioner has powers of enforcement and the power to commence proceedings in respect of offences. If an investigation is initiated following a complaint by an individual, the Commissioner must notify the individual of the decision taken in respect of the complaint. Within twenty one days of receipt of the notification, the individual, if aggrieved, may appeal to the Circuit Court.

- (y) Does national legislation provide for damages as a remedy for an unlawful processing operation (Article 23)?

Not specifically within the Act. However, section 7 of the Act states that *"for the purpose of the law of torts and to the extent that law does not so provide, a person, being a Data Controller or a Data Processor, shall so far as regards the collection by him of personal data or information, intended for inclusion in such data or his dealing with such data, owe a duty of care to the data subject concerned."*

- (z) What sanctions does national legislation prescribe in case of violation of the rules on the protection of data (Article 24)?

Section 31 of the Act sets down penalties. A person guilty of an offence under the Act shall on summary conviction be liable to a fine not exceeding £1,000, or on conviction on indictment, to a fine not exceeding £50,000.

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- (aa) Is the existence of codes of conduct recognised in national legislation (Article 27)? If so, what normative value do these codes possess?

Yes. Section 13(1) of the Act provides that *"the Commissioner shall encourage trade associations and other bodies representing categories of Data Controllers to prepare codes of practice to be complied with by those categories in dealing with personal data."* If a code of practice is approved by the Commissioner it may be laid before each House of the Oireachtas by the Minister for Justice and if each House passes a resolution approving of it the code of practice shall have the force of law in accordance with its terms.

- (bb) Is there an independent supervisory authority in the national legal system (Article 28)? What are its powers and functions? Do they correspond to the powers and functions mentioned in the Directive?

Yes. The Data Protection Commissioners' principal areas of responsibility are the enforcement of the Data Protection Principles (section 2), the regulation of trans border flows (section 11), approval of codes of practice (section 13), providing mutual assistance to other States who are bound by the Council of Europe Convention (section 15) and the establishment and maintenance of the Register (sections 16-20). The Commissioner also has powers of enforcement and the power to commence summary proceedings in respect of offences. The Data Protection Commissioner has similar powers and functions to those of the supervisory authority mentioned in the Directive.

- (cc) General.

The provisions of Articles 7, 10, 11 and 20 in the Directive do not appear to be reproduced in our current legislation. This can be remedied either by a statute amending the 1988 Act or by

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secondary legislation. In view of the current provisions in relation to data protection being contained in a statute, the more likely course for the Government to adopt is to pass an amending Act rather than deal with the matter by secondary legislation.