



***CONSTITUTIONAL CHANGE THROUGH EURO CRISIS LAW:
IRELAND***

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I POLITICAL CONTEXT

POLITICAL CHANGE

I.1

WHAT IS THE POLITICAL CONTEXT OF THE EUROZONE CRISIS PERIOD IN IRELAND? HAVE THERE BEEN CHANGES IN GOVERNMENT, ELECTIONS, REFERENDA OR OTHER MAJOR POLITICAL EVENTS DURING THE PERIOD OF 2008-PRESENT?¹

Considering the depth of the economic downturn, the cuts in government spending and the dramatic rise in unemployment in Ireland since 2008 the political system has remained remarkably stable with a single change of government and limited demonstrations of popular discontent.

There have been three relevant nationwide political campaigns since the beginning of the financial crisis, the second referendum to approve the Lisbon Treaty in 2009 ('Lisbon II'), the general election of 2011 and the referendum to approve the Fiscal Treaty in July of 2012.² Outside structured political events there has been some extra-parliamentary political activity and protests. Finally much of the Government's dealings with public sector workers has also been the focus of much political activity culminating in a comprehensive wage and productivity agreement.

A referendum to adopt the Treaty of Lisbon was held on 12 June 2008 and was rejected by 53.4% of the votes cast.³ Following a number of 'guarantees' in various forms and of uncertain legal nature the Treaty was again put before the Irish people on 2 October 2009, this time with the public voting in favour by 67.1% of the votes cast,⁴ a swing of 20.5%. A more vigorous campaign on behalf of the 'Yes' side, the disintegration of one of the main anti-Treaty organizations, changes in the broadcasting rules regarding referendum coverage, and the sharp downturn in the Irish economy all contributed to this change in public opinion. The importance of a positive result to economic recovery was stressed by the pro-treaty campaign. Fears regarding workers rights and the potential impact of the Treaty of Lisbon on the minimum wage were raised as issues by anti-Treaty campaigners and in particular the weak nature of the assurances that were obtained by the Irish government following the initial rejection of the Treaty. However this was vigorously contested by the 'yes' side.⁵

¹ Much of the answer to question I.1 draws on work completed in November 2012 as part of a research project on the impact of the Euro crisis on Ireland and in particular on social legislation.

² Note that amendment of Bunracht na hÉireann (the Irish constitution) requires a popular referendum, not all of which are relevant to the Eurocrisis per se (although the financial crisis has triggered a general period of political and legal reform in the state). Thus referenda on rights of children and the holding of enquiries by parliamentary committees have also taken place in the relevant period.

³ Turnout of 53.13%.

⁴ Turnout of 58.9%.

⁵ Stephen Quinlan, 'The Lisbon Experience in Ireland: 'No' in 2008 but 'Yes' in 2009 - How and Why?' (2012) 27 Irish Political Studies 139, 145 ff.

A series of political events triggered by the entry of Ireland into a programme of financial assistance and mismanagement by the Taoiseach Brian Cowen of his coalition led to the withdrawal of the junior party (the Green party) in early 2011 and the holding of a general election in May of that year. The terms of the bailout were a central issue in the campaign and in particular the interest rate of 5.8% was considered punitive.⁶ The two main opposition parties, Fine Gael and Labour argued for a renegotiation and a lowering of the rate which was achieved in parallel with an amendment of the terms of the Greek bailout in July of 2011.⁷ The opposition parties focused on reversing one particularly iconic measure associated with the bailout and its austerity regime, the reduction in the minimum wage, a promise that was carried out when in Government in July of 2011.⁸

While perhaps not as widespread, frequent or intense as in other peripheral Member States the crisis in Ireland has produced a number of protests. Two general protests against austerity measures organised by the trade union movement took place in February 2009⁹ and in November 2010¹⁰ drawing up to one hundred and fifty thousand protestors. Other protests against specific policies or measures have also taken place. One of the earliest of such protests was a march by older people against the withdrawal of an automatic entitlement to a medical card (allowing for free medical services) to retired people.¹¹ Three separate protests by third level students over the possibility of reintroducing third level fees took place in October of 2008,¹² November 2010 (which turned violent at times)¹³ and in November of 2011.¹⁴ Students also occupied the offices of various politicians and those of the Department of Social Protection.¹⁵ Finally, the introduction of a 'household charge', a precursor to the introduction of a general property tax became an issue around which popular opposition to

⁶ Conor Little, 'The General Election of 2011 in the Republic of Ireland: All Changed Utterly?' (2011) 36 *West European Politics* 1304, 1308.

⁷ Council of the European Union, *Statement by the Heads of State or Government of the Euro Area and EU Institutions* (Brussels, 21 July 2011).

⁸ Social Welfare and Pensions Act 2011, s 22.

⁹ 'Huge Protest over Irish Economy' (*BBC News*, 21 February 2009)

<<http://news.bbc.co.uk/2/hi/europe/7903518.stm>> accessed 20 October 2012.

¹⁰ 'Thousands march against austerity measures' (*RTE News*, 29 November 2010)

<<http://www.rte.ie/news/2010/1127/economy.html>> accessed 20 October 2012.

¹¹ 'Fine Gael medical card motion defeated' (*RTE News*, 23 October 2008)

<<http://www.rte.ie/news/2008/1022/budgethealth.html>> accessed 20 October 2012.

¹² '10,000 students at fees protest' (*RTE News*, 22 October 2009)

<<http://www.rte.ie/news/2008/1022/fees.html>> accessed 20 October 2012,

¹³ 'Gardaí, students clash in Dublin' (*RTE News*, 3 November 2010)

<<http://www.rte.ie/news/2010/1103/education.html>> accessed 20 October 2012.

¹⁴ 'Thousands of students hold Dublin protest over fees' (*Irish Times*, 16 November 2011)

<<http://www.irishtimes.com/newspaper/breaking/2011/1116/breaking15.html>> accessed 21 October 2012.

¹⁵ 'Nine students arrested after Galway protest' (*RTE News*, 30 November 2011)

<<http://www.rte.ie/news/2011/1130/galway.html>> accessed 21 October 2012, 'Maynooth students refuse to

leave TD's office' (*RTE News*, 3 December 2011) <<http://www.rte.ie/news/2011/1203/education.html>>

accessed 21 October 2012 and 'Student leaders in protest over fees' (*RTE News*, 30 November 2011)

<<http://www.rte.ie/news/2011/1129/students.html>> accessed 21 October 2012

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the government and the policy of austerity focused and drew a crowd of 5000 in Dublin. This protest took place outside the party conference ('Ard Fheis') of the largest government party (Fine Gael).¹⁶ Various other localised protests included a general protest in Donegal¹⁷ and at the Labour Party (the junior Government party) conference in Galway. Branches of the Occupy movement also appeared in Dublin¹⁸ and Cork, where a building in the city centre was occupied.¹⁹ In November of 2012 teachers in Dublin staged a protest against cuts in the education budget generally and more specifically regarding the pay differential between newly qualified teachers and other colleagues.²⁰

Much political comment and activity has centred on the treatment of public sector workers. During the economic boom there was an increase in the numbers employed in the Irish public service and a significant rise in wages, particularly amongst higher earners. A significant reduction in the public sector wage bill was a key condition in the Programme of Financial Assistance. After a number of unilaterally imposed cuts to wages, rises in the employee contribution to pensions and recruitment freezes the Government and the major public sector trade unions negotiated the Croke Park agreement (named after the venue where it was concluded) promising neither mandatory job losses nor further pay cuts in exchange for greater productivity and flexibility. The 'Public Service Agreement 2010-2014' has been a major plank in the state's industrial relations policy and budgetary policy. The Croke Park Agreement is not a legal document but rather operates at the level of a political agreement a fact that has been confirmed by the High Court.²¹ Recently the Government has sought to replace and extend the Agreement with the Croke Park II an agreement that was initially rejected but later, after amendments, accepted by a majority of Unions.²²

¹⁶ Maire O'Halloran, 'Thousands Protest against Household Charge' *Irish Times* (Dublin) 7.

¹⁷ "Thousands of Families with Empty Chairs at Christmas' TD Tells Protest' (*Donegal Daily*, 3 December 2011) <<http://www.donegaldaily.com/2011/12/03/thousands-of-families-with-empty-chairs-at-christmas-td-tells-protest/>> accessed 21 October 2012.

¹⁸ "Occupy Dame Street' protest in Dublin' (*RTE News*, 10 October 2011) <<http://www.rte.ie/news/2011/1008/damestreet.html>> accessed 21 October 2012.

¹⁹ 'Occupy movement takes over Cork building' (*RTE News*, 3 January 2012) <<http://www.rte.ie/news/2012/0103/occupy.html>> accessed 21 October 2012.

²⁰ 'Teachers from Dublin Schools protest over new pay structures' (*RTE News*, 24 October 2012) <<http://www.rte.ie/news/2012/1024/teachers-pay-protest.html>> accessed 25 October 2012.

²¹ *Holland v Athlone Institute of Technology* (n 153).

²² 'Unions mollified by Haddington Road concessions' *Sunday Business Post* (Dublin, 26 May 2013)

II CHANGES TO THE BUDGETARY PROCESS

BUDGETARY PROCESS

II.1

DESCRIBE THE MAIN CHARACTERISTICS OF THE BUDGETARY PROCESS (CYCLE, ACTORS, INSTRUMENTS, ETC.) IN IRELAND.

The budgetary process in Ireland is remarkably informal and centralised with Government and in particular the Department of Finance playing a key role in the elaboration of policy and the Oireachtas (Parliament) having a minimal role with the Dáil authorising the relevant appropriations and spending and performing ex post review through committee hearings. The Seanad does not have legislative power in relation to money bills but instead may give recommendations.²³ It should be noted that Ireland operates a fused executive-legislative system with the Government being elected by a majority of the Dáil (lower house) and Ministers being members of the Oireachtas (Parliament). A system whereby 11 of the 60 members of the Seanad are nominated by the Taoiseach (Prime Minister) of the day generally ensures that the Government also holds a majority in the Upper House. The Irish state was founded at a time when the party whip system had been firmly established and it has remained a dominant element of the political culture.²⁴ Thus, while in theory the Parliament is to control the Government in reality the Government, through the party whip system effectively controls the Parliament.²⁵ This control follows through to the budgetary process.

The following description of the Budgetary Process is that which operated prior to reforms introduced by Euro crisis law.²⁶ Changes are described in the answer to question II.2.

In June or July of each year the Government considers a Budgetary Strategy Memorandum (BSM) drawn up by the Department of Finance as a basis for planning the following year's budget. This document is not made public.

Between July and September individual government Departments prepare requests for resources for the following year in light of the BSM.

²³ Bunracht na hÉireann art 21.

²⁴ 'Modern Ireland was born in an age of party government and its parliamentary institution has never acquired the dignity and respect of older bodies which knew real power in the Nineteenth Century. [Parliament lacks] any but the most nominal role in the formulation of public policy and the management of the State', Barry Desmond as quoted by Gwynn Morgan, 'The Constitution and the Financial Crisis in Ireland' (n 139) 69.

²⁵ Discussion has recently focused on possible reform to the Dáil in an effort to provide a larger role for the opposition (such as election of the Speaker by secret ballot and supermajorities for certain organizational matters), particularly in light of the Government's stated desire to abolish the Seanad (upper house).

²⁶ The following description is drawn from *Reforming Ireland's Budgetary Framework - A Discussion Document* (Department of Finance, March 2011, 2011) 1-2.

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By the end of September the Department of Finance submits and publishes the Eurostat figures for the previous four years and the forecasts for the following year.

Between September and November negotiations take place between the Department of Finance and other Departments regarding the forthcoming Budget and decisions on the annual 'Estimates of Expenditure' are made collectively at cabinet level.

In October or November the Government publishes a 'Pre-Budget Outlook' giving an indication of the state of public finances and containing medium term macro-economic growth prospects.

On the Saturday before the Budget the 'White Paper on Receipts and Expenditure' is published showing the pre-Budget position for the following year.

In December the Minister for Finance makes a Budget speech, known as the Financial Statement and contains a list of budget measures, statistics and tables with multi-year projections and a stability programme update. Any immediate changes in taxation (usually excise measures) are contained in the financial resolutions that are passed on the evening of Budget day. The Social Welfare Bill and the Pensions Bill are passed by the Dáil in the following weeks and the Finance Bill, the final component, is usually signed into law within 120 days of Budget day (generally April of the following year).²⁷

In January the Department of Finance publishes monthly profiles for tax revenues and debt servicing with expenditure profiles published. The Revised Estimates of Expenditure are published in February and contain the expenditure profiles of each month and may include some minor additional expenditure. These Revised Estimates of Expenditure are considered by Dáil committees before being voted on by the Dáil.

GENERAL CHANGE

II.2

HOW HAS THE BUDGETARY PROCESS CHANGED SINCE THE BEGINNING OF THE FINANCIAL/EUROZONE CRISIS?

There has been a general tendency to reform the budgetary process over the past number of years under a variety of documents including the National Recovery Plan 2011-2014,²⁸ the Memorandum of Understanding completed as part of the programme of financial assistance, the six pack of regulations, the Fiscal Compact and the two pack. Reform of the budgetary process was proposed in a Discussion Document published by the Department of Finance in March of 2011²⁹ that proposed reforms of the budgetary process in order to achieve two broad goals:

²⁷ See Theresa Reidy, 'The Budget Process' (*The Irish Politics Forum*, 7 December 2010) <<http://politicalreform.ie/2010/12/07/the-budget-process/>> accessed 11 June 2013.

²⁸ Finance, *National Recovery Plan 2011-2014*, 59-60.

²⁹ *Reforming Ireland's Budgetary Framework - A Discussion Document* (n 26).

- Firstly to introduce a more year-long process in contrast to the then procedure that focused on a number of events leading up to the beginning of December. It was proposed that publication of the Stability Programme would be brought forward to the early part of the year to be discussed by the relevant Oireachtas committees and a fiscal advisory council before being finalised and forwarded to the EU in April in accordance with the European semester.
- Secondly to place a greater emphasis on multi-annual planning, in particular by placing greater emphasis on the medium term budgetary objective as laid out in the Stability Programme as an ‘anchor’ in budgetary policy. This would be supplemented by a detailed multi-annual expenditure framework including general economic assessments and expenditure envelopes for individual departments.

The Stability Programme Update is now produced and published in April rather than being included in the Budget Speech. In 2012 it was forwarded to the Joint Committee on Finance and Public Expenditure on 30 April and was discussed with the Minister the same day. In response to questioning the Minister was not forthcoming on whether more time would be allocated to the Joint Committee or whether the Stability Programme Update would be debated by the Dáil in plenary in following years.³⁰

Following the adoption of Regulation 473/2013/EU the Budget Speech will now take place on or before October 15 and the legislative process for the subsequent year will be completed by the end of December.³¹

INSTITUTIONAL CHANGE

II.3

WHAT INSTITUTIONAL CHANGES ARE BROUGHT ABOUT BY THE CHANGES IN THE BUDGETARY PROCESS, E.G. RELATING TO COMPETENCES OF PARLIAMENT, GOVERNMENT, THE JUDICIARY AND INDEPENDENT ADVISORY BODIES?

The major institutional change has been the creation of the Irish Fiscal Advisory Council (IFAC) that was given a statutory footing in the Fiscal Responsibility Act 2012.³² The purpose of the IFAC is to assess whether the Government is complying with its financial targets, in particular the fiscal rules established under the Fiscal Responsibility Act 2012. It shall also provide an assessment of each Budget and stability programme.³³ It is envisaged that the IFAC will take over responsibility for providing official forecasts on which the

³⁰ See comments of Stephen Donnelly and Michael Noonan Joint Committee on Finance, Public Expenditure and Reform: Stability Programme Update: Discussion with Minister for Finance, 30 April 2013, 14-15.

³¹ See comments of Aidan Carrigan Joint Committee on Finance, Public Expenditure and Reform, Six Month EU Scrutiny Report: Discussion with Department of Finance, 9 May 2013, 3-4. Thus the 2014 Budget was announced on 15 October 2013.

³² See Fiscal Responsibility Act 2012, pt 3.

³³ *ibid*, s 8.

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Budget is based (currently provided by the Department of Finance).³⁴

CHANGE OF TIME-LINE

II.4

HOW HAS THE TIME-LINE OF THE BUDGETARY CYCLE CHANGED AS A RESULT OF THE IMPLEMENTATION OF EURO-CRISIS LAW?

See answer to questions II.1 and II.2 above.

MISCELLANEOUS

II.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO IRELAND AND CHANGES TO THE BUDGETARY PROCESS?

The Irish High Court has decided a case on the issuance of promissory notes by the Irish Minister for Finance (see below and Annex I.1 for an analysis).

Collins v Minister for Finance and Others [2013] IEHC 530

(26 November 2013)

1. *Name of the Court*

Irish High Court (Divisional Court – Kelly, Finlay Geoghan and Hogan JJ)

2. *Parties*

Joan Collins (independent Member of Parliament) vs Minister for Finance, Ireland and the Attorney General.

3. *Type of action/procedure*

Constitutional challenge (Plenary Summons)

4. *Admissibility issues*

The defence raised two issues of admissibility. Firstly, whether the fact the plaintiff was elected after the date impugned legislation was adopted affected her standing to bring the case. Secondly, whether the delay in bringing the case compromised the action. The defendants expressly dropped the matter in relation to standing. It was unclear whether the defence maintained the objection based on delay. In any event the point was moot in light of the conclusions of the Court.

5. *Legally relevant factual situation*

³⁴ See comments of Aidan Carrigan Joint Committee on Finance, Public Expenditure and Reform, Six Month EU Scrutiny Report: Discussion with Department of Finance, 9 May 2013, 2.

In late September 2008 the Irish government issued a blanket guarantee covering all the liabilities and obligations of the Irish banks in an effort to stabilise the banking sector in Ireland. On 2 October 2008 the Credit Institutions (Financial Support) Act 2008 was passed by the Oireachtas (Irish Parliament) in order to provide for financial support to credit institutions covered by the guarantee. Under section 6 of the 2008 Act the Minister was authorised to extend financial support to credit institutions if he was of the opinion that it was necessary to safeguard the financial stability of the institution, that there was a threat to the stability of the financial system and finally that there was a threat to the stability of the economy as a whole. The Minister was to make such support available with regard to the resources available to him for that purpose. That support was to be funded from the Central Fund.

Under s 6 of the 2008 Act a number of banks were recapitalised. Three particularly problematic institutions, Anglo-Irish Bank, Irish Nationwide Building Society (INBS) and the Educational Building Society (EBS) were issued with promissory notes to be paid at yearly intervals. These promissory notes totalled approximately €30 billion out of a total €64 billion provided to recapitalise the Irish banking sector. They were considered assets and were deposited with the Irish Central Bank in exchange for emergency liquidity funding.

Anglo-Irish Bank and INBS were later merged to form the Irish Bank Resolution Corporation (IBRC) and EBS was merged with another, largely nationalised Irish bank, Allied Irish Banks (AIB). After securing the agreement of the ECB and European partners, the IBRC was liquidated in 2013. Pursuant to a Special Master Repurchase Agreement the ownership of the notes would then vest in the Central Bank. However, under the Irish Bank Resolution Corporation Act 2013 (the 2013 Act) they were exchanged for a set of government bonds with low interest rates and a long maturity. The promissory notes issued to Anglo-Irish Bank and INBS were therefore transformed into government bonds with more favourable conditions attached, thereby reducing the real financial burden on the State. The promissory note of €250 million issued to EBS remained.

A member of the public, David Hall, challenged the issuance of the promissory notes before the High Court in 2012 claiming that issuing the notes by the Minister without any further authorisation circumvented the legislative and budgetary powers of the Parliament.³⁵ His claim was rejected for want of standing with both the High and Supreme Courts finding only a Member of Parliament (Teachta Dála (TD)) would have standing. Joan Collins, a member of the Dáil (lower house), then challenged the issuance of the promissory notes before the High Court. She claimed that in issuing the notes the Minister had gone beyond

³⁵ *Hall v Minister for Finance and others* [2013] IEHC 39 (before the High Court) and *Hall v Minister for Finance and others* [2013] IESC 10 (before the Supreme Court).

the powers delegated to him under the legislation (had acted *ultra vires*) and secondly that the 2008 Act itself was an unconstitutional delegation of legislative authority and a circumvention of the powers of the parliament in budgetary matters.

6. *Legal questions*

- Whether, in issuing the promissory notes without further Dáil authorisation, the Minister had acted outside his powers (*ultra vires*) under the 2008 Act and the 2013 Act.
- Whether the 2008 Act breached provisions of Bunreacht na hÉireann (the Irish Constitution) relating to the legislative and budgetary prerogatives of the Parliament.

7. *Arguments of the parties*

In relation to the first claim, the Plaintiff argued that the actions of the Minister in issuing the notes went beyond the powers (*ultra vires*) delegated to him under the 2008 Act and the 2013 Act under three headings. Firstly, she claimed that the notes were issued in contravention of time limits contained in s 6(3) of the 2008 Act providing that support could not be provided after a date specified in the act. Secondly, she argued that by providing that the Minister shall have regard to the ‘resources available to him or her for that purpose’ under s 6(1)(c) of the 2008 act the legislator intended that a further act of appropriation was required for the purpose of providing specific financial support. Thirdly, she argued that the promissory notes were not ‘obligations or liabilities’ owed by the Government to the Central Bank under s 17 of the 2013 Act. In particular she contended that the promissory notes only constituted obligations of the Government to Anglo Irish Bank and not the Central Bank. Accordingly the Minister was not authorised to issue bonds in exchange for the notes under the 2013 Act.

She also claimed that the section 6 of 2013 Act was unconstitutional. The plaintiff contended that the concept of appropriation contained in Article 11 read in combination with Article 15.2.1 of Bunreacht na hÉireann implied that ‘neither the Dáil may vote supply nor the Oireachtas pass a law appropriating public moneys unless the sums to be so disbursed are pre-determined in advance’.

The defendants arguments were not mentioned specifically by the Court.

8. *Answer by the Court to the legal questions and legal reasoning of the Court*

The Court dealt first with the arguments based on the powers of the Minister under the legislation before dealing with the constitutionality of the 2008 Act.

a) Whether the Minister acted within his powers under the legislation.

Firstly, the Court found that the time limits contained in s 6(3) prohibited both the issuance of support measures and their continued payment after the dates specified. However, the notes were issued within the relevant period. The notes issued to Anglo-Irish Bank and INBS were also paid within the relevant period by means of a government bond. However, payments would continue beyond the specified date in the case of the EBS promissory note. Accordingly, in order for the continued payments on the EBS note to be lawful that period will have to be extended. Following amendment of the legislation the Minister is now empowered to extend the period by ministerial order.

Secondly, the Court found that, given the context in which the 2008 Act was passed and the reference to the Central Fund in that act, it was clear that by referring to ‘the resources available to him or her for that purpose’ in s 6(1)(c) the Oireachtas did not intend that a further vote was required to authorise specific funds for the purposes of the act.

Finally, the Court found that under the Special Master Repurchase Agreement ownership of the promissory notes had vested in the Central Bank. The Government therefore had incurred an obligation or liability under the promissory notes vis-à-vis the Central Bank and was empowered to issue bonds in exchange for the notes under the 2013 Act.

b) Whether section 6 of the 2008 Act was unconstitutional.

The Court considered the constitutional question in two stages. It firstly considered whether by failing to provide for a predetermined limit on the financial support to be advanced by the Minister, the 2008 Act constituted an unauthorised delegation of legislative power under Article 15.2.1 Bunreacht na hÉireann (the Irish Constitution). It then considered whether the term ‘appropriation’ contained in Article 11 Bunreacht na Éireann, read in light of the broader budgetary process contained in the constitution, implied a need for the amount of any appropriation to be determined by the authorising legislation.

The Court found that the power to provide financial support under s 6 did not constitute an unconstitutional delegation of legislative power from the Oireachtas to the Minister. After considering the relevant test developed in the case law, the Court concluded that the general principles and policies were contained in the 2008 Act. Section 6 outlined detailed conditions under which the Minister was authorised to provide financial support. Furthermore, any such decision by the Minister would be reviewable before the Courts in light of these conditions. It did not provide the Minister with an unfettered discretion but rather was tailored to meet a specific need and pursue a particular policy outlined in the legislation.

Secondly, the Court did not consider that the concept of appropriation contained in Articles 11 and 17 Bunreacht na hÉireann implied that the Oireachtas was

required to provide a pre-determined limit when it authorised the Government to appropriate moneys. An assessment of the text of the provisions and a comparison of the linguistic versions (Irish and English) did not lead to the conclusion that the concept ‘appropriation’ contained in Articles 11 and 17 implied an upper limit. The Court pointed out that a variety of policies required an open-ended financial commitment including health, social welfare and educational policies. A requirement that upper limits be placed on moneys that could be spent by Government on such matters would either lead to a continuous raising of the limit or the creation of absurdly high ceilings. The result would be either manifest inconvenience or a legislative charade. Furthermore, the existence of an upper limit would have a negative impact on the State’s ability to borrow money on the international markets. Finally, the Court noted that the equivalent provision in the US constitution was described by Alexander Hamilton and confirmed in US practice as meaning that ‘no money can be expended, but for an object, to an extent and out of a fund, which the laws have prescribed’. This interpretation was applied to Article 11 Bunreacht na hÉireann. It concluded that the 2008 Act properly described the object, extent and fund out of which the money shall be paid. While the Oireachtas did not know the precise sums that were at stake under the 2008 Act, the conditions on the issuance of financial support contained in the act did circumscribe the extent of the appropriation by reference to the objects of the legislation.

9. Legal effects of the judgment

The promissory notes provided to Anglo-Irish Bank and INBS were found to have been legally issued and paid. The promissory notes provided to EBS were found to be legally issued. However, the relevant date in the legislation would have to be amended in order to ensure that the Government could continue to make payments on the outstanding promissory note.

Section 6 of the 2008 Act was held to be in conformity with the constitution. More generally, the court found that authority to appropriate and spend funds flowed from the Oireachtas by means of legislation. When authorising expenditure the Oireachtas should specify the ‘object, extent and the fund’ out of which the money can be spent. However this did not extend to including a precise amount or pre-determined limit on the amount the Government was authorised to spend under the legislation.

10. Main outcome of the judgment and its broader political implications

The promissory notes were politically symbolic. The payments under the promissory notes were being made to what was effectively a dead bank, no longer in operation and one that had cost the taxpayer a considerable sum of money. They were perceived as a particularly absurd consequence of the banking

guarantee and attracted considerable political opposition and also constituted a lightning rod for criticism of the ECB's supposed role in forcing Ireland to fully support all its banks. To some extent the challenge was moot in light of the liquidation of IBRC and the exchange of the promissory notes for bonds issued on more favourable terms. However, the case did discuss important issues relating to the constitutional roles of the Oireachtas and the Government in the budgetary process. A useful discussion of the constitutional provisions relating to the budgetary process and its underlying democratic philosophy is contained in paragraphs 82 to 97. While emphasising the democratic nature of the budgetary process and the key role played by the Oireachtas in the appropriation and control of moneys raised, the judgment nonetheless reserved the possibility of granting considerable and effectively unlimited discretion to the Government regarding the amount of money to be spent in pursuing a particular goal. It therefore contained a balance between parliamentary and democratic control and Governmental discretion and effectiveness. This was based on both textual but also policy based arguments. While claiming to eschew an analysis of the merits or demerits of a particular economic policy, the Court was clearly cognisant of the financial and economic context under which the guarantee was extended and the notes issued and mentions it at a number of points in the judgment. In a tone that is repeated in other cases dealing with the effects of the financial crisis the Court describes a state of national economic emergency.

Ms Collins has appealed the judgment to the Supreme Court that is currently pending.

III CHANGES TO NATIONAL (CONSTITUTIONAL) LAW

NATURE NATIONAL INSTRUMENTS

III.1

WHAT IS THE CHARACTER OF THE LEGAL INSTRUMENTS ADOPTED AT NATIONAL LEVEL TO IMPLEMENT EURO-CRISIS LAW (CONSTITUTIONAL AMENDMENT, ORGANIC LAWS, ORDINARY LEGISLATION, ETC)?

Euro-crisis law has primarily been implemented through ordinary legislation (ex the Fiscal Responsibility Act 2012). A single constitutional amendment was employed to ensure the compatibility of the Treaty on Stability Coordination and Growth (TSCG) with the Constitution.

CONSTITUTIONAL AMENDMENT

III.2

HAVE THERE BEEN ANY CONSTITUTIONAL AMENDMENTS IN RESPONSE TO THE EURO-CRISIS OR RELATED TO EURO-CRISIS LAW? OR HAVE ANY AMENDMENTS BEEN PROPOSED?

There has been a single constitutional amendment to implement the TSGC. It was successfully adopted through a referendum in May of 2012 (see section IX below).³⁶

CONSTITUTIONAL CONTEXT

III.3

IF NATIONAL CONSTITUTIONAL LAW ALREADY CONTAINED RELEVANT ELEMENTS, SUCH AS A BALANCED BUDGET RULE OR INDEPENDENT BUDGETARY COUNCILS, BEFORE THE CRISIS THAT ARE NOW PART OF EURO-CRISIS LAW, WHAT IS THE BACKGROUND OF THESE RULES?

National constitutional law did not already contain any relevant elements with the possible exception of the Comptroller and Auditor General (CAG) that may constitute a ‘supreme audit institution’ for the purposes of Regulation 473/2013/EU.

PURPOSE CONSTITUTIONAL AMENDMENT

III.4

WHAT IS THE PURPOSE OF THE CONSTITUTIONAL AMENDMENT AND WHAT IS ITS POSITION IN THE CONSTITUTION?

The 30th amendment to the constitution allowing in relation that resulted in the new Article 29.10 of the Irish constitution firstly allows the state to ratify the Fiscal Treaty and secondly provides any piece of legislation necessitated by that Treaty with immunity from constitutional challenge (‘the necessitated clause’).

³⁶ As mentioned above there have been other constitutional referendums, however these are not directly related to the Euro Crisis.

RELATIONSHIP WITH EU LAW

III.5

IS THE CONSTITUTIONAL AMENDMENT SEEN AS CHANGING THE RELATIONSHIP BETWEEN NATIONAL AND EUROPEAN CONSTITUTIONAL LAW?

The only constitutional amendment adopted in relation to the Euro Crisis is the 30th amendment permitting the ratification of the TSCG thereby giving it and any legislation adopted under it immunity from constitutional challenge. This construction mirrors that adopted to accommodate Union law in the Irish constitution.³⁷

ORGANIC LAW

III.6

HAVE THERE BEEN CHANGES TO ORGANIC LAWS OR OTHER TYPES OF LEGISLATION THAT ARE OF A DIFFERENT NATURE OR LEVEL THAN ORDINARY LEGISLATION, IN RELATION TO EURO-CRISIS LAW OR THE BUDGETARY PROCESS?

There are no organic laws or types of legislation other than ordinary acts of the Oireachtas and secondary or delegated legislation (primarily Ministerial orders known as statutory instruments).

CONSTITUTIONAL AMENDMENT AND ORDINARY LAW

III.7

IF ORDINARY LEGISLATION WAS ADOPTED IN CONJUNCTION WITH A CONSTITUTIONAL AMENDMENT, WHAT IS THE RELATIONSHIP BETWEEN THE TWO?

The balanced budget rule contained in Article 3(2) TSGC is implemented in Ireland through the Fiscal Responsibility Act 2012 and in particular its sections 3 and 4.³⁸ It is an ordinary piece of legislation and can be repealed or amended by the Oireachtas (Parliament) at any time according to the ordinary legislative process. However it will enjoy immunity from constitutional challenge per the second clause of Article 29.10 of the constitution.³⁹

PERCEPTION SOURCE OF LEGAL CHANGE

III.8

IN THE PUBLIC AND POLITICAL DISCUSSIONS ON THE ADOPTION OF ORDINARY LEGISLATION, WHAT WAS THE PERCEPTION ON THE APPROPRIATE LEGAL FRAMEWORK? WAS THE ORDINARY LEGISLATION SEEN AS IMPLEMENTING NATIONAL CONSTITUTIONAL LAW, OR EURO-CRISIS LAW?

Sinn Féin and at least one independent TD, Thomas Pringle, believed that the ESM Treaty

³⁷ See generally art 29.4 of Bunreacht na hÉireann (the Irish constitution).

³⁸ For a detailed discussion on the parliamentary debates of the Fiscal Responsibility Act 2012 see the answer to question IX.3 below.

³⁹ See comments by Minister of State at the Department of Foreign Affairs and Trade, Joe Costello TD Seanad Debates, 24 April 2012, Vol 214 No 15, 960.

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should have been adopted through constitutional amendment. Mr Pringle challenged the ESM Treaty before the Courts and arguing that it ceded sovereignty to an international institution and thus required a constitutional amendment per *Crotty v An Taoiseach*.⁴⁰ This view was treated sceptically by commentators⁴¹ and ultimately rejected by the Supreme Court (see answer to question VIII.4 below). Instead the ESM Treaty was adopted by an ordinary piece of legislation, the ESM Act 2012. There has been no significant public discussion regarding other aspects of Euro crisis law.

MISCELLANEOUS

III.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO IRELAND AND TO CHANGES TO NATIONAL (CONSTITUTIONAL) LAW?

There have been no other changes to national (constitutional) law originating in changes at a supranational level to the Euro crisis. The financial crisis in Ireland is however a major collective national shock that has triggered significant economic, political and ultimately constitutional reform. In response to the programme for financial assistance significant changes have been introduced or are planned on being introduced in areas of economic (particularly professional) regulation and labour relations. Furthermore in its programme for government, the Fine Gael-Labour Government promised far reaching reform of the political system and established a constitutional convention to look at issues such as the voting system. A referendum on the abolition of the Senead (upper house) was narrowly defeated in October 2013.⁴²

⁴⁰ *Crotty v An Taoiseach* [1987] IESC 4 [1987] IR 713.

⁴¹ Darren O'Donovan, 'That Other Treaty: Ratifying the European Stability Mechanism Treaty' (*Human Rights in Ireland*, 22 May 2012) <<http://humanrights.ie/constitution-of-ireland/that-other-treaty-ratifying-the-european-stability-mechanism-treaty/>> accessed 11 June 2013 and Barrett, 'The Treaty Amendment on the European Stability Mechanism: Does It Require a Referendum in Ireland?' (n 98).

⁴² 'Undecided voters turn into No voters' *Sunday Business Post* (Dublin, 6 October 2013).

IV EARLY EMERGENCY FUNDING

Prior to 2010, loan assistance to States was made primarily via bilateral agreements (to Latvia, Hungary, Romania, 1st round of Greek loan assistance).

The European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) are two temporary emergency funds, both resulting from the turbulent political weekend of 7-9 May 2010. On May 9, a Decision of the Representatives of the Governments of the Euro Area Member States was adopted expressing agreement on both funds.

The EFSM is based on a ‘Council regulation establishing a European financial stabilisation mechanism’ of May 11, 2010 adopted on the basis of article 122(2) TFEU and therefore binding on all 27 member states of the EU.

([http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF))

The EFSF is a special purpose vehicle created under Luxembourgish private law by the 17 member states of the Eurozone. The EFSF Framework Agreement was signed on June 7, 2010. On June 24, 2011, the Heads of State or Government of the Eurozone agreed to increase the EFSF’s scope of activity and increase its guarantee commitments.

(http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf and http://www.efsf.europa.eu/attachments/faq_en.pdf)

NEGOTIATION

IV.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER IN THE NEGOTIATION OF THE EFSF AND THE EFSM, IN PARTICULAR IN RELATION TO (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

The EFSF and EFSM agreements were not discussed in Parliament before their announcement in May of 2010. No details are available regarding the Government’s negotiating strategy in relation to the Regulation or the Framework Agreement.

ENTRY INTO FORCE

IV.2

ARTICLE 1(1) EFSF FRAMEWORK AGREEMENT PROVIDES THAT IT WILL ENTER INTO FORCE IF SUFFICIENT EUROZONE MEMBER STATES HAVE CONCLUDED ALL PROCEDURES NECESSARY UNDER THEIR RESPECTIVE NATIONAL LAWS TO ENSURE THAT THEIR OBLIGATIONS SHALL COME INTO IMMEDIATE FORCE AND EFFECT AND PROVIDED WRITTEN CONFIRMATION OF THIS. WHAT DOES THIS PROCEDURE LOOK LIKE IN IRELAND AND IN WHAT WAY DOES IT INVOLVE PARLIAMENT?

While the power to commit the State to international agreements is vested in the Government pursuant to Article 29.4 of the Irish constitution, Article 29.5.1° provides that ‘[t]he State

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shall not be bound by any international agreement involving a charge upon the public funds unless the terms of the agreement shall have been approved by Dáil Éireann [the lower house].⁴³ Additionally, Article 29.6 establishes Ireland as a dualist legal system providing that '[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [Parliament]' The EFSF Framework Agreement, being an international agreement involving a charge on public finances was accordingly implemented in Ireland by the passage of an ordinary piece of legislation, the European Financial Stability Facility Act 2010 (the EFSF Act 2010). The EFSF Act 2010 gives powers to the Minister for Finance to issue guarantees for the purposes of the EFSF (s 2) and provides that funds dispensed and received by Ireland pursuant to any operations under the EFSF be paid from and to the Central Fund (ss 3-4). The Minister is obliged to report Ireland's on-going involvement in EFSF operations to the Dáil (lower house) on a regular basis (s 5). The EFSF Framework Agreement itself was attached as a schedule to the 2010 Act.

It was presented by the Government on 18 June 2010. The Bill was debated in the Dáil (lower house) and passed on the 24 June 2010. It was debated in the Seanad (upper house) and passed on the 1 July 2010. A motion for early signature in the Seanad was also passed on 1 July 2010. It received the signature of the President and passed into law on the 7 July 2010.

The 2010 Act was amended in 2011 by the European Financial Stability Facility and Euro Area Loan Facility (Amendment) Act 2011 to provide for changes to the EFSF Framework Agreement and the terms of the original Greek loan facility. The 2011 Act incorporated those changes to the EFSF Agreement agreed in June 2011 and increased the amount that could be drawn down from the Central Fund from €7 billion to €12.5 billion.

GUARANTEES

IV.3

MEMBER STATES ARE OBLIGED TO ISSUE GUARANTEES UNDER THE EFSF. WHAT PROCEDURE WAS USED FOR THIS IN IRELAND? WHAT DEBATES HAVE ARISEN DURING THIS PROCEDURE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE GUARANTEES FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

Under s. 2 of the EFSF Act 2010 the Minister for Finance is empowered to issue guarantees of up to €7 billion on behalf of the state.

In the Dáil a question was raised surrounding the provision for fact that a guarantee would have to be given for 120% of the amount stipulated and whether this in fact increased Ireland's overall liability.⁴⁴ In his response the Minister for State for Finance explained that the 120% figure was only with respect to guarantees issued with respect to individual

⁴³ See generally G W Hogan and G F Whyte, *JM Kelly: The Irish Constitution* (LexisNexis Butterworths 2003) 545 ff.

⁴⁴ See comments of Kieran O'Donnell, Dáil Debates, 24 June 2010, Vol 713 No 3.

assistance programmes and that Ireland's total potential liability of €7 billion was not affected by that provision.⁴⁵ Sinn Féin opposed the measure with a spokesman arguing in the Dáil that 'one cannot treat a debt-fuelled over-consumption problem by adding much more debt.'⁴⁶

In the Seanad a single independent Senator queried the potential liability that Ireland was exposing itself to stating that 'I worry when the Minister of State says, apropos of nothing, that the Government will guarantee another large sum of €7 billion in this case on top of what we guaranteed to Greece.'⁴⁷

ACTIVATION PROBLEMS

IV.4

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER DURING THE NATIONAL PROCEDURES RELATED TO THE ENTRY INTO FORCE OF THE EFSF FRAMEWORK AGREEMENT AND/OR THE ISSUANCE AND INCREASE OF GUARANTEES?

No significant difficulties were encountered during the procedures relating to either the entry into force of the EFSF Framework Agreement or the issuance of guarantees.

Opposition parties were largely supportive of the EFSF during the debate on the EFSF Act 2010 and concurred with the Government's position that it was in Ireland's interest to secure the stability of the Eurozone via the establishment of such a facility and the Bill passed with a majority.

The debate took place in the backdrop of the first Greek Bailout and measures to introduce a greater coordination of budgets in the Eurozone. The opposition Labour party tabled one amendment to subject the information held by Irish authorities in relation to the EFSF to the Freedom of Information Act. This was rejected by the Government (and hence a majority of the Dáil) who pointed to the need to protect confidential business and political information. The opposition Fine Gael party tabled an amendment to create more detailed reporting obligations for the Government under the Act. This was rejected by the Government (hence majority of the Dáil) who claimed that sufficient reporting obligations already existed in s. 5 of the 2010 Act.⁴⁸ Sinn Féin was the only party to oppose the 2010 Act arguing that a broader European stimulus strategy was required.⁴⁹

Guarantees were issued by the Minister for Finance under s. 2 of the 2010 Act. The Amendment Act 2011 likewise enjoyed cross party support. The Bill was presented as a follow up to the renegotiation of Ireland's financial assistance package in June of 2011 in which EFSF loans were extended and their interest rate reduced. The amendment was thus

⁴⁵ See comments of Minister for State Martin Mansergh, *ibid.*

⁴⁶ Arthur Morgan, *ibid.*, 536.

⁴⁷ Senator Shane Ross, *Seanad Debates*, 1 July 2010, Vol 203 No 13, 907.

⁴⁸ *Dáil Debates*, 24 June 2010, Vol 713 No 3.

⁴⁹ Arthur Morgan, *ibid.*

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seen as in both Ireland's immediate interest and in the interest of achieving/maintaining broader stability in the Eurozone. At this stage Fine Gael and the Labour Party had formed a governing coalition. Fianna Fáil, in opposition supported the amendment. Some independent and Socialist Party deputies opposed the Bill on the grounds of an opposition to the general response to the Eurozone crisis.

In the Seanad the debate 'did not necessarily...examine the Bill's specifics, which are in the main not controversial but [examined] the wider issues around the euro and the stability of the single currency.'⁵⁰ Some concerns were raised regarding the dominance of Germany and France in developing on-going solutions to the Eurozone crisis and the rushed Parliamentary procedures being used to pass them in Ireland. A motion was also passed allowing for an early signature of the legislation by the President.

CASE LAW

IV.5

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ABOUT THE EFSM OR EFSF IN IRELAND?

There is no constitutional court judgment concerning the EFSF.

IMPLEMENTATION

IV.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE EFSF, FOR EXAMPLE WITH REGARD TO DECISIONS ON AID PACKAGES (LOAN FACILITY AGREEMENT AND MEMORANDUM OF UNDERSTANDING) AND THE DISBURSEMENT OF TRANCHES, BOTH OF WHICH NEED UNANIMOUS APPROVAL BY THE SO-CALLED GUARANTORS, I.E. THE EUROZONE MEMBER STATES?

There is no formal role for Parliament in the application of the EFSF.

S 5 of the 2010 Act provides that the Minister shall lay a report before the Dáil every 6 months of the EFSF's operation detailing the value of the guarantees issued, money paid and money received by the State. These figures are to be provided for the preceding 6 months and the total period.

IMPLEMENTING PROBLEMS

IV.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER IN THE APPLICATION OF THE EFSF?

There have been no known significant difficulties encountered in the application of the EFSF.

BILATERAL SUPPORT

⁵⁰ Aideen Hayden, Seanad Debates, 22 September 2011, Vol 210 No 5, 281.

IV.8

IN CASE IRELAND PARTICIPATED IN PROVIDING FUNDING ON A BILATERAL BASIS TO OTHER EU MEMBER STATES DURING THE CRISIS, WHAT RELEVANT PARLIAMENTARY DEBATES OR LEGAL ISSUES HAVE ARISEN?

Ireland participated in one instance of bilateral funding to another EU Member State during the crisis, namely the first Greek programme of assistance in 2010.⁵¹ Ireland's contribution of €1.3 billion (1.64% of the total of the Euro area contribution of €80 billion) was authorised by the Euro Area Loan Facility Act 2010. It was debated on the 18th and 19th of May in the Dáil (lower house) and on the 20th of May in the Seanad (upper house). In the Dáil Ministers and opposition spokespeople spoke of the need to show solidarity with Greece on the basis of the principle of solidarity itself and also because it was in Ireland's interest.⁵² This was particularly the case given Ireland's then vulnerable financial position.⁵³ Some concerns were raised about proposed plans to deepen economic coordination, in particular the role of the Commission in budgetary policy. While generally in favour of such a development opposition speakers stressed the need for Parliament to be properly involved, particularly in light of the then (and arguably continuing) lack of parliamentary involvement in the budgetary process.⁵⁴ Similar concerns were raised in the Seanad.⁵⁵

MISCELLANEOUS

IV.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO IRELAND AND THE EFSM/EFSF?

Not other relevant information.

⁵¹ Although it should be noted that this was part of a broader package of loans that were centrally managed by the European Commission. They were in effect quasi-multi-lateral.

⁵² See comments of Minister for Finance, Brian Lenihan, Dáil Debates, 18 May 2010, Vol 709 No 2, 254 and comments of Richard Bruton (Fine Gael spokesman for finance), *ibid*, 258 and Joan Burton (Labour spokesperson for finance), *ibid*, 264.

⁵³ 'It is not in our interest to let the hunter gatherers in the bond markets kill Greece and eat it because, having done so, they will undoubtedly turn their attention to the next weakest animal in the pack' *ibid*, 265.

⁵⁴ Indeed Richard Bruton described Ireland's budgetary system as 'not fit for the running of a corner shop...We do not have any system for independent assessment of whether the fiscal stance being taken by Government is appropriate. As a result we have seen numerous reckless budgets introduced which poured fuel onto flames, in terms of economic strategy' *ibid*, 260. For his general concerns regarding what was then being termed the 'pre-vetting' process see *ibid*, 261-262. See also comments of Joan Burton, *ibid*, 264.

⁵⁵ See comments of Alex White, Seanad Debates, 20 May 2010, Vol 202 No 14, 895.

V TREATY AMENDMENT ARTICLE 136(3) TFEU

At the 16/17 December 2010 European Council a political decision was taken to amend the Treaties through the simplified revision procedure of article 48(6) TFEU. On March 25, 2011 the European Council adopted the legal decision to amend article 136 TFEU by adding a new third paragraph: “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

The process of approval of this decision by the member states in accordance with their respective constitutional requirements as prescribed by article 48(6) has been completed and the amendment has entered into force on 1 May 2013.

NEGOTIATION

V.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER IN THE NEGOTIATION OF THE AMENDMENT OF ARTICLE 136 TFEU?

No significant political or legal difficulties were encountered in the negotiation of the amendment of Article 136 TFEU.

Statements by Government Ministers in both Houses of Parliament during the debate on the Act of ratification suggest that the Irish Government was very much in favour of the adoption the Decision and the amendment of the Article 136 TFEU. The Government’s argument in favour of the Article 136 TFEU amendment was linked to the ESM itself.⁵⁶ The Government’s strong position in favour of the ESM arose from the particular political and economic position of Ireland at the time. Suggestions had been raised that Ireland would experience difficulties raising funds on the financial markets upon exit from the programme of financial assistance at the end of 2013. The ESM was seen as essential for avoiding such a situation and for providing a secure source of financing beyond 2013 in the event that international financial markets could not be accessed.

APPROVAL

V.2

HOW HAS THE 136 TFEU TREATY AMENDMENT BEEN APPROVED IN IRELAND AND ON WHAT LEGAL BASIS/ARGUMENTATION?

The Article 136 TFEU Amendment has been ratified in Ireland through a legislative act of

⁵⁶ ‘Throughout the referendum campaign the Government made clear our strong view that the coming into force of the ESM is very much in Ireland’s interests. It follows logically that providing for the amendment to Article 136 of the TFEU, which underpins it, is also strongly in our national interest’, comments of Tánaiste (deputy Prime Minister) and Minister for Foreign Affairs, Eamon Gilmore, Dáil Debates, 6 June 2012, Vol 767 No 1, 72-73.

Parliament. The European Communities (Amendment) Act 2012 amended the European Communities Act 1972 to include the European Council Decision amending Article 136 TFEU in the definition of ‘treaties governing the European Union’ for the purposes of Irish law. The Act received the signature of the President on the 3 of July 2012, notification of ratification was transmitted to the European Council on the 1 of August 2012.

RATIFICATION DIFFICULTIES

V.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER DURING THE RATIFICATION OF THE 136 TFEU TREATY AMENDMENT?

The Article 136 TFEU amendment was firstly raised in the context of the referendum on the Fiscal Compact and secondly during the parliamentary debates on the 2012 Act itself.

During the referendum campaign opponents of the Fiscal Compact argued that the amendment of Article 136 TFEU provided the Irish government with leverage in their approach to the Fiscal Compact and in obtaining an improved package of financial assistance. They argued that the amendment of Article 136 TFEU was necessary for the ESM to come into effect. As the European Council Decision amending that article required approval by all Member states it was argued that Ireland could effectively veto the amendment of Article 136(3) TFEU and consequently the creation of the ESM by not approving the amendment. This ‘veto’ supposedly gave Ireland political leverage to be used against the ‘blackmail clause’ of the ESM/Fiscal Compact (see s. IX on the Fiscal Compact) and in securing an improvement on the terms of the programme of financial assistance.

During the course of the referendum on the Fiscal Compact a statement by the Referendum Commission (charged with providing objective information and analysis to the public on issues pertinent to a referendum) to the effect that Ireland did not in fact retain any choice in approving a decision validly adopted was challenged before the High Court by a Sinn Féin TD, Pearse Doherty (see below).

Parliamentary debates on the ratification of the decision took place in the wake of the Fiscal Treaty referendum and in parallel with debates to ratify the ESM Treaty and the three issues were not treated separately by the majority of contributors. A number of TDs and Senators raised complaints surrounding the short period (four hours) allocated by the Government for debate on the amendment.

There was generally widespread support for the 2012 Act in Parliament. Most parties saw the amendment as supporting the establishment of the ESM, an instrument that was seen as vital for the successful exit of Ireland from the programme of financial assistance at the end of 2013 and/or to securing funding subsequently. The debate on Decision 2011/199/EU was therefore very much linked to discussions on the ESM. The act of ratification enjoyed cross-party support with the exception of a small number of independent TDs (members of the

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lower house of Parliament) and the United Left Alliance grouping (ULA).⁵⁷ Sinn Féin supported the principle of a permanent bail-out fund while opposing the specific form it took in the ESM. It therefore voted in favour of ratification. The supposed de facto ‘veto’ represented by Decision 2011/199/EU on the establishment of the ESM was raised by a number of independent and ULA members. This assessment was rejected by government members, relying on the fact that the ESM would come into existence upon the ratification by states paying 90% of its capital, whereas Ireland was to pay only 1.59%.⁵⁸ Finally, some concerns were raised regarding the democratic accountability of the ESM and the transparency of its operations in the context of the debate on the amendment.

CASE LAW

V.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT IN IRELAND ON THE 136 TFEU TREATY AMENDMENT?

There are three relevant cases (see for an analysis below and Annex I.2-I.4):

1. *Doherty v Referendum Commission [2012] IEHC 211* (Annex I.2)
2. *Pringle v Government of Ireland and others [2012] IEHC 296 [High Court]* (Annex I.3)
3. *Pringle v Government of Ireland and others [2012] IESC 47 [Supreme Court]* (Annex I.4)

Doherty v Referendum Commission [2012] IEHC 211

Name of Court: High Court of Ireland (Hogan J)

Parties: Pearse Doherty TD (Plaintiff) v The Referendum Commission (Defendant), Attorney General (Intervener)

Type of Action/Procedure: Judicial Review of a statement by the Referendum Commission.

Admissibility Issues: Three questions of admissibility were raised.

Firstly whether the Referendum Commission (the Commission) was a body corporate and hence a judicial person that could be sued. The Chairperson of the Commission, Feenly J, was listed as a defendant in his personal capacity in the event that the Commission was found not to be a body corporate. Nonetheless, despite the fact that the Act establishing the Referendum Commission did not explicitly specify its status, it did in fact have juridical capacity. Feenly J was therefore struck from the list of defendants.

Secondly it was questioned whether the statements of the Commission were in fact amenable

⁵⁷ See *ibid*, 70 ff.

⁵⁸ See comments of Eamonn Gilmore Minister for Foreign Affairs and Trade, *ibid*.

to judicial review. While the orthodox position, based on a desire not to interfere with political matters, may have been that such statements were not amenable to legal standards of review, Hogan J found that given the legislative and constitutional framework of referenda and the role played therein by the Commission, its statements could be subject to review. Nonetheless, given the sensitive nature and discretion enjoyed by the Commission, a high threshold was established. Its statements, in order to be successfully challenged in judicial review proceedings would have to be ‘plainly wrong’.

Finally it was claimed that Mr Doherty had exercised undue delay, introducing the proceedings on the eve of the referendum on the Treaty on Stability, Coordination and Growth (TSCG). Given the importance of the issues Hogan J agreed to accept the proceedings despite reservations.

Legally Relevant Factual Situation:

Following a series of challenges to the use of public funds by the Government to promote a particular outcome in a referendum⁵⁹ a Referendum Commission was established in order to make impartial information and analysis publically available during the course of a referendum.⁶⁰

During the referendum on the TSCG the Chairman of the Commission, Mr Justice Feenly, made an oral statement and the Commission issued a written statement to the effect that while Ireland had had a veto when the Decision was adopted by the European Council, once that Decision had been adopted it was now under an effective obligation to ‘approve’ the amendment contained in that Decision.⁶¹ Mr Doherty contested this assessment claiming that the Government in fact retained a discretion to approve or not approve the Decision.

Legal Questions:

Aside from the admissibility questions referred to above there were two substantive legal questions, namely whether the Commission in making its statement was acting *ultra vires* (outside its powers) and whether the Commission’s statements were ‘plainly wrong’.

Arguments of the Parties:

The arguments of the parties in relation to the first question are not detailed in the judgment.

The arguments of the parties in relation to the second question turned on the appropriate interpretation to be given to the meaning of ‘approved by Member States in accordance with their respective constitutional requirements’ contained in Article 48(6) TEU and in particular

⁵⁹ *McKenna v An Taoiseach* (No. 2) 2 IR 10.

⁶⁰ The Referendum Act 2001.

⁶¹ Counsel for the plaintiff did make the claim that there was some discrepancy between the two statements. However in light of the Commission’s role to provide general information to the public Hogan J found that broadly speaking the Commission’s communications were to the effect that Ireland had had a veto but, now that the Decision was validly adopted, it was under an obligation to approve it.

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whether this implied that Member States retained a discretion to refuse to approve a European Council Decision validly adopted under Article 48(6) TEU.

Mr Doherty argued that the Decision was to be treated as a normal international agreement under Article 29 of the Irish Constitution. Accordingly it was entirely within the Government's executive power to ratify or not ratify the agreement.

The Attorney General argued that Ireland no longer had any discretion to approve the Decision. This was based on a joint reading of Article 228(4) TFEU stating that decisions are binding and Article 4(3) TEU establishing a duty of sincere cooperation. In fact she maintained that the references to the constitutional requirements of the Member States was a pure formality. She argued that the Decision was already 'approved' by Ireland within the meaning of Article 48(6) TEU and that the Bill then before the Parliament was simply necessary to introduce the decision into Irish law.

The Commission adopted a slightly different position. It argued, similarly to the Attorney General, that Ireland no longer retained any discretion in approving the decision. Nonetheless it maintained that the constitution required approval through an Act of Parliament in line with Article 29.4 of the Irish Constitution on the exercise of executive powers in foreign affairs.

Conclusion and Reasoning of Court:

In relation to the first question, that is whether the Commission in making the statements on the ESM and the Decision acted *ultra vires*, the Court found that it had in fact acted within its remit as defined by s. 3 of the Referendum Commission Act 1998 as amended by the s. 1 of the Referendum Commission Act 2001 given that 'the ESM and the TSCG are inextricably interlinked' and that 'certainly, one could not realistically seek to explain the likely impact of the TSCG without reference to the question of the ESM.'⁶² In fact, this point was so obvious that the Court refused to admit this claim beyond the initial application.

The second question, and in particular the assessment of the correctness or otherwise of the Commission's statement was more complex. The Court did not decide on the substantive question of whether Ireland retained a discretion under Article 48(6) TEU to approve the Decision. Rather it came to the opinion that all three positions of the parties were valid and worthy interpretations. Any definitive judgment would require a reference to the Court of Justice under Article 267 TFEU. Given the complexity and novelty of the legal question the opinion as stated by the Commission was not "plainly wrong".

Legal Effects of the Judgment:

The claim was dismissed.

Main Outcome and Broader Implications:

⁶² *Doherty v The Referendum Commission* [2012] IEHC 211, para 29.

The claim was dismissed. There was no conclusive statement by the Court on the substantive claim that Ireland retained a veto on the Decision and indirectly on the establishment of the ESM (see above). The claim was still made in the context of the parliamentary debate on the Act approving the Decision.

On other issues it would appear that the Commission has juridical capacity and can sue and be sued before the Courts. Furthermore, its statements are in fact subject to review. Nonetheless, it would appear that a strict test will not be applied to the Commission's statements. A potential complainant will have to prove that such statements are 'plainly wrong' in order successfully challenge a statement.

In addition to *Doherty v the Referendum Commission* there was a single case directly challenging Decision 2011/199/EU. Thomas Pringle, an independent TD, initiated proceedings challenging the decision alongside the Fiscal Compact and the ESM on 13 April 2012. After approval of the Fiscal Compact by referendum on 31 May 2012 that aspect of the challenge was dropped. Justice Laffoy in the High Court rejected most of the claims of the plaintiff while agreeing to refer a single question regarding the relationship between the Decision and the ESM Treaty to the Court of Justice.⁶³ The decision of the High Court was appealed to the Supreme Court. A hearing was held during the week of the 23 July 2012 and judgement on those issues it deemed urgent, namely the compatibility of the ESM with the Irish constitution, was delivered on 31 July 2012.⁶⁴ On the same day the Supreme Court referred those matters relating to EU law to the Court of Justice.⁶⁵ The use of the urgent procedure was requested and granted by order of the President of the Court on 4 October 2012, a hearing was held on 23 October 2012. Judgment was delivered on 27 November 2012 upholding the legality of both the Decision and the ESM itself.⁶⁶

Pringle v Government of Ireland and others [2012] IEHC 296 [High Court]

Name of Court: High Court of Ireland

Parties: Thomas Pringle v Government of Ireland and the Attorney General

Ref No: [2012] IEHC 296

Date: 17 July 2012

Type of Action:

Admissibility Issues: The Defendant raised an issue regarding the standing of the plaintiff to contest the validity of Decision 2011/199/EU. It was claimed that the plaintiff was directly and individually concerned by the decision and should have contested the decision by a

⁶³ *Pringle v The Government of Ireland* [2012] IEHC 296.

⁶⁴ *Pringle v Government of Ireland* [2012] IESC 47.

⁶⁵ *Pringle v Government of Ireland* [2012] IESC 47 (Reference by the Supreme Court to the Court of Justice of the European Union, 31 July 2012).

⁶⁶ Case C-370/12 *Pringle v Government of Ireland and others* (Court of Justice, 27 November 2012).

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direct action under Article 263 TFEU. Given the nature of the Act as one of general application across the Union, Laffoy J was not satisfied that the plaintiff could have been considered ‘individually and directly concerned’ for the purposes of Article 263 TFEU (paras 164 -179) and allowed the plaintiff to challenge the validity of Decision 2011/199/EU via a preliminary reference procedure.

Legally Relevant Factual Situation: As part of a broader effort to reform the governance of the Euro zone in late 2011 and early 2012 a number of instruments were adopted. The European Stability Mechanism (ESM) is established by Treaty and is intended to be a permanent rescue fund intended to replace the temporary instruments, the European Financial Stability Fund (EFSF) and the European Financial Stability Mechanism (EFSM). In order to ensure the ESM’s compatibility with the European Treaties it was decided to amend the Treaties by inserting a new paragraph into Article 136 TFEU providing for the establishment of a mechanism such as the ESM. Finally the ‘Fiscal Compact’ was adopted by all but two EU Member states and introduces constitutional or equivalent rules on budgetary discipline. Thomas Pringle, an independent member of the lower house of Parliament (Dáil) challenged three related instruments, namely the ESM Treaty, the Decision amending Article 136 TFEU and finally the Fiscal Compact before the High Court. The challenge to the Fiscal Compact was dropped following a positive result in the Fiscal Compact referendum (see question IX.2).

Legal Questions:

1. Whether the ESM is compatible with Union law and with the Irish constitution.
2. Whether the decision of the European Council to amend Article 136 TFEU was compatible with Union law and with the Irish constitution.
3. What, if any, impact the delay in the entry into force of the decision to amend Article 136 TFEU would have on the legality of the ESM under Union law.
4. If the plaintiff was entitled to an interlocutory injunction restraining the government from ratifying the ESM Treaty and from giving effect to Decision 2011/199/EU.

Arguments of the Parties:

Before the High Court Mr Pringle claimed that the Council Decision breached both Union law and the Irish constitution. In relation to Union law he maintained that the creation of an ESM-type institution would in fact alter the competences of the Union, in particular those relating to economic and monetary matters. As a consequence, Article 48(6) TEU was an inappropriate means of amending the Treaties. He furthermore argued that by breaching Union law it also breached the Irish constitution by virtue of the special status afforded Union law in the Irish constitution. Finally, he argued that as an act that delegated sovereignty the decision should have been adopted in Ireland by an amendment of the constitution and hence by popular referendum rather than by legislation. The act ratifying the

decision (European Communities (Amendment) Act 2012) was therefore unconstitutional.

The Government argued that the Decision merely confirmed a pre-existing power of the Member States. It did not expand the competences of the Union, was merely technical in nature and was therefore correctly adopted on the basis of Article 48(6) TEU. As with the plaintiff's arguments this assessment depended on an analysis of the ESM itself. Similarly as an ESM type institution did not violate Union law by affecting the competences of the Union the Decision itself did not violate Union law. In its submissions the Government relied on the opinions on the amendment issued by Union institutions in particular the European Parliament and the European Central Bank. Furthermore, it contended that an amendment to the TFEU adopted pursuant to that Article did not require a referendum in Ireland. The amendment of the constitution as part of the adoption of the Treaty of Lisbon had made the use of Article 48(6) TEU compatible with the Irish constitution and no further referendum was required in order to give effect to amendments adopted under that Article.

Answer by the Court to the legal questions and legal reasoning of the Court:

Laffoy J, accepted for the most part the arguments of the defence and found that Council Decision 2011/199/EU, enabling as it did the establishment of an extra-Union institution, did not increase the competences of the Union. It was therefore correctly adopted under Article 48(6) TEU. Accordingly Decision 2011/199/EU was 'completely valid' within the meaning of Foto-Frost and the High Court was not under an obligation to make a reference to the Court of Justice. As to the question of the appropriate means to give effect to the European Council Decision in Irish law the High Court found that subsequent to the adoption of the Treaty of Lisbon no constitutional amendment was required for amendments to the Treaties adopted under the simplified revision procedure.

In considering the question of legal standing for the plaintiff, Laffoy J. rejected the contention of the Government that Mr Pringle was time-barred by the rule in TWD. In particular she found that he could not be considered individually and directly concerned by Decision 2011/199/EU and thus could not have challenged the decision via Article 263 TFEU (para 176).

While accepting the submissions of the Government on almost all issues Laffoy J was troubled by what she termed the 'temporal' aspect of the interaction of the European Council Decision and the ESM, noting that while the Decision was intended to facilitate the creation of the ESM, that Decision did not enter into force until 1 January 2013 at the earliest, ie subsequent to the establishment of the ESM. In particular she was unsure of the binding nature of the Council Decision and what the effect of non-notification by one or more Member states would be on the legality of the ESM. Accordingly she decided to refer the matter to the Court of Justice.

After considering both the domestic (Campus Oil) and Union (Zuckerfabrik and Atlanta) tests for the granting of an interlocutory injunction she found that the balance of convenience favoured refusal and accordingly did not restrain the government from ratifying the ESM

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Treaty.

Legal effects of judgement: The judgment was appealed to the Supreme Court (see below) by the plaintiff. In the appeal the High Court's finding on the standing of the plaintiff was not contested by the defence.

Main Outcome of judgment and political implications: The judgement was appealed to the Supreme Court (see below).

Pringle v Government of Ireland and others [2012] IESC 47 [Supreme Court]

Name of Court: Supreme Court of Ireland

Parties: Thomas Pringle (appellant) v Government of Ireland, Ireland and the Attorney General (defendants)

Ref No: [2012] IESC 47

Date: 19th of October, 2012

Type of Action/procedure: Appeal

Admissibility Issues: N/A

Legally Relevant factual situation: See above summary of High Court decision.

Legal Questions:

1. Whether the European Council Decision was in fact validly adopted.
2. Whether an EU Member State is entitled under the Union treaties to enter an agreement such as the ESM.
3. Whether any such entitlement is dependent on the validity of the European Council Decision and its entry into force.

Arguments of Parties:

Mr Pringle argued that the European Council Decision is invalid in light of its adoption using the simplified revision procedure. He alleged that the decision amends the provisions of the Treaty in relation to economic and monetary policies in particular by allowing Member states to establish an institution outside the main body of Union law. It thus alters the competences of the Union in relation to the definition and conduct of the single currency. He argued that the Council decision is contrary to general principles and tenets of Union law by circumventing prohibitions on bailouts contained in Article 125 TFEU. He alleged that any such change should be adopted through the ordinary revision procedure. For similar reasons he alleged that the ESM is incompatible with Union law, in particular that it circumvents prohibitions contained in Article 125 TFEU and breaches the allocation of competences between national and Union legal orders.

Answer and legal reasoning of Court:

The court divided the issues into three groups. Those issues relating solely to Irish law that were deemed urgent were dealt with directly, namely the question of the compatibility of the ESM with the Irish constitution. Those issues relating to Union law were referred to the Court of Justice. Finally the remaining issues, in particular the question of the appropriate means of giving effect to the ESM in Irish law, were not considered urgent and were postponed to a later date. The substance of the Supreme Court judgment focused on the compatibility of the ESM with the Irish constitution and is summarised in question VIII.4 below.

MISCELLANEOUS

V.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO IRELAND AND THE 136 TFEU TREATY AMENDMENT?

No other relevant information.

VI EURO-PLUS-PACT

On March 11, 2011 the Heads of State or Government of the Eurozone endorsed the Pact for the Euro. At the 24/25 March 2011 European Council, the same Heads of State or Government agreed on the Euro Plus Pact and were joined – hence the ‘Plus’ - by six others: Bulgaria, Denmark, Latvia, Lithuania, Poland, Romania (leaving only the UK, Czech Republic, Sweden and Hungary out).

The objective of the pact is to foster competitiveness, foster employment, contribute to the sustainability of public finances and reinforce financial stability. In the Euro-Plus-Pact the Heads of State or Government have entered into commitments on a number of policy areas, in which member states are competent.

(http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf)

NEGOTIATION

VI.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER IN THE NEGOTIATION OF THE EURO-PLUS-PACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE PACT FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

There were no publically known significant political or legal difficulties encountered in the negotiation of the Euro Plus Pact.

The government was broadly supportive of the measures with the Taoiseach (Prime Minister) stating prior to the European Council Summit of 24 March 2011 that ‘[c]learly, Ireland will support measures that can contribute to a restoration of confidence in the markets, foster economic growth and job creation and help Europe move beyond the economic crisis.’⁶⁷ The summit was the first attended by the Taoiseach after the general election of March 2011. A general concern was to restore Ireland’s reputation amongst European colleagues and to secure a renegotiation of the financial programme including a reduction on interest rates.

A number of contributors to the Dáil debates focused on the issue of Ireland’s corporation tax rate and the need to resist any attempt by European actors to force a change on this issue. Media reports in preceding weeks had focused on comments made by Nicolas Sarkozy and Angela Merkel to the effect that a change in Ireland’s corporation tax rate may be a condition for any renegotiation of the deal. Cross-party support existed for maintaining a low rate with the leader of the opposition stating that ‘Ireland’s Government has changed but its negotiating position has not for the simple reason that it cannot. A deal on the support programme is worthless if to win it we would have to undermine a major proportion of economic activity in the country.’⁶⁸

⁶⁷ An Taoiseach Enda Kenny Dáil Debates, 22 March 2011, Vol 728 No 3, 190.

⁶⁸ Micheál Martin TD *ibid*, 192.

Only one deputy from the opposition Sinn Féin party raised possible implications for Ireland's sovereignty resulting from the Euro Plus Pact. Pádraig MacLochlain, while noting that 'there are no provisions for compulsion or sanctions' maintained that 'the pact for the euro will be converted into a binding agreement for euro area countries, representing a deep European penetration into national political and policy freedoms without any genuine democratic mandate.'⁶⁹

MISCELLANEOUS

VI.2

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO IRELAND AND THE EURO-PLUS-PACT?

National measures are broken down into the four areas covered by the Euro-Plus-Pact; fostering competitiveness; fostering employment; maintaining sustainability of public finances and reinforcing financial stability.⁷⁰

1. Fostering Competitiveness.

- Changes have been introduced in the procedure to create employment wage agreements through the Industrial Relations (Amendment) 2012.
- State assets are to be sold and some of the proceeds invested into the economy.
- Legislation has been enacted or proposed to introduce greater competitiveness into the legal sector (Legal Services Regulation Bill 2011 – not yet enacted, in committee stage) medical services (Health (Provision of General Practitioner Services) Act 2012 – enacted) and pharmaceutical services (regulations on profit levels).

2. Fostering Employment

- Employer paid social insurance is to be reduced for lower income jobs for the first 18 months following the commencement of employment.
- 20,900 work placement, training and education positions have been made available.
- A 'Micro-Finance Fund' of €100 million to lend to small and medium enterprises.

⁶⁹ Pádraig MacLochlain *ibid*, 194.

⁷⁰ *Euro Plus Pact Commitments made by Ireland in May 2011: Update as of April 2012*. Available at ec.europa.eu/europe2020/pdf/nd/eppcommittment2012_ireland_en.pdf. No more up to date documents are available. Efforts have been made to determine the current status of proposed legislation.

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3. Maintaining sustainability of public finances

- A Comprehensive Expenditure Report 2012-2014 was completed and published on 5 December 2011.
- A Fiscal Advisory Council was established and later given a legislative basis in the Fiscal Responsibility Act 2012.
- The pension age was increased from 65 to 68 years of age, to be implemented in three steps between 2014 and 2028.
- Undertakings were made to broaden the tax base including introducing a property tax. The introduction of a property tax has since become a focus of political debate.

4. Reinforcing financial stability

- Measures have been proposed to enhance the supervisory framework of banks in Ireland in the Central Bank (Supervision and Enforcement) Act 2013.
- There has been a downsizing and radical restricting of the Irish banking sector focusing on two core 'pillar' banks namely Allied Irish Banks and Bank of Ireland.
- Capital injections into the Irish banking sector totalling €73 billion have taken place since the beginning of the crisis.

VII SIX-PACK

The ‘Six-Pack’ is a package of six legislative measures (five regulations and one directive) improving the Economic governance in the EU. The Commission made the original proposals in September 2010. After negotiations between the Council and the European Parliament, the package was adopted in November 2011 and entered into force on December 13, 2011. Part of the ‘Six-Pack’ measures applies only to the Eurozone member states (see the individual titles below).

The ‘Six-Pack’ measures reinforce the Stability and Growth Pact (SGP), among others by introducing a new Macroeconomic Imbalances Procedure, new sanctions (for Eurozone member states) and reversed qualified majority voting. Also, there is more attention for the debt-criterion.

(http://ec.europa.eu/economy_finance/economic_governance/index_en.htm)

NEGOTIATION

VII.1

WHAT POSITIONS DID IRELAND ADOPT IN THE NEGOTIATION OF THE ‘SIX-PACK’, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE ‘SIX-PACK’ FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

The Government, speaking after the European Council Summit of November 2011, described itself as in favour of greater economic and budgetary coordination within the Eurozone. It accepted that states within a monetary union would have to accept their interdependence and that surveillance of each other’s economic and budgetary policies was necessary and legitimate.⁷¹ The six-pack was welcomed as addressing the ‘root causes’ of the crisis rather than simply reacting to events. However, while broadly in favour of further reform efforts, ministers were in favour of reforms that could be achieved within the existing Treaty framework and would only be in favour of Treaty changes if necessary.⁷² Finally in the negotiations Ireland was in favour of ‘institutional balance’ and in particular for maintaining a role for the European Commission rather than taking an intergovernmental

⁷¹ See comments of An Taoiseach (Prime Minister) Enda Kenny, Dáil Debates, 2 November 2011, Vol 745 No 2, 221. (‘As we have seen time and again over the past three years, what happens in one European country, particularly within the euro area, has the potential to spill over on to others.’)

⁷² Minister for Finance, Michael Noonan, *ibid*, 279. (‘Ireland is firmly in favour of improved, balanced governance that offers correct safeguards. We believe this is in all our interests. The urgency of the current situation demands prioritization of value-added measures that will be implemented quickly and preferably within the existing treaty.’). See also comments by Minister for State at the Department of Foreign Affairs and Trade (with responsibility for European Affairs), Lucinda Creighton, Seanad Debates, 8 November 2011, Vol 211 No 4, 321. No doubt this stance is attributable to the fact that in practice any general renegotiation of the Treaties requires a constitutional amendment and hence referendum in Ireland, something that can prove a challenge at times for Government and indeed the political establishment as the original failures of both the Nice and Lisbon referenda illustrate.

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route.⁷³

Much of the debate concerned Ireland's banking debt and the broader Eurozone crisis including the second bailout for Greece. One Senator from the main opposition party did note that the six-pack consisted of more intrusive detailed policy constraints thereby potentially involving a more significant loss of sovereignty than even under the EU/IMF Programme of Financial Assistance.⁷⁴ In her reply the Minister for State spoke of the broader developments in the Eurozone and acknowledged the need to balance the need for action and leadership by larger Member States such as France and Germany while avoiding domination.⁷⁵ At the same time, when speaking the Minister acknowledged the need for 'a solution to the urgent and serious crisis we face' that that the issue of institutional design and democratic governance of the Euro was 'a discussion for another day.'⁷⁶

DIRECTIVE 2011/85/EU

[Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States](#)

IMPLEMENTATION

VII.2

WHAT MEASURES ARE BEING TAKEN TO IMPLEMENT DIRECTIVE 2011/85/EU ON REQUIREMENTS FOR BUDGETARY FRAMEWORKS (REQUIRED BEFORE 31 DECEMBER 2013, ARTICLE 15 DIRECTIVE 2011/85/EU)?

Irish law currently (July 2013) meets some of the requirements of Directive 2011/85/EU (the Directive) and accordingly no legislative change is envisaged in those areas. That is the case for provisions relating to the production and publication of financial statistics and auditing arrangements. Government is considering publishing Local Authority (the principal form of Local Government) financial information that is already transmitted on a quarterly basis to the European Commission as part of the financial assistance programme.

⁷³ Minister for State Lucinda Creighton, Seanad Debates, 8 November 2011, Vol 211 No 4.

⁷⁴ Senator Thomas Byrne, *ibid*, 228. ('It may be necessary in the context of receiving aid from other countries but in terms of the normal run of countries we are ceding even more sovereignty to the European Commission because currently under the EU-IMF arrangement, we have broad capacity to decide what will be in our budget as long as we reach the targets set out in terms of annual deficits.')

⁷⁵ 'We clearly have a political crisis. I have spoken about it many times since my appointment as Minister of State with responsibility for European affairs. On the one hand some Members have talked about the unedifying intervention or interference in the democratic processes in sovereign member states, but on the other hand we want to see political leadership at European level...There is a double standard of which we are perhaps all guilty. It is clear that the engine of the European project has always been a Franco-German one. That is what rose from the ashes of the Second World War. We need that engine to maintain the political momentum and underpin the European project. That is in all of our interests. There is a fine line between that momentum becoming some sort of domination. We must be clear about that. That is where the institutional balance is so important.' Minister for State Lucinda Creighton, *ibid*, 232.

⁷⁶ *ibid*, 233.

Financial forecasting is currently undertaken by the Department of Finance. This may change with the adoption of the Two Pack (see below) with the Irish Fiscal Advisory Council (IFAC) assuming this role. The IFAC, established in June 2011 and placed on a statutory basis under the Fiscal Responsibility Act 2012, conducts an ex-post assessment of the Department's forecasts.

Fiscal rules have been implemented via the Fiscal Responsibility Act 2012, which contains two fiscal rules:⁷⁷

- A *budgetary rule* requires the Government to either maintain its budgetary position in balance or surplus (the '*budget condition*')⁷⁸ **or** to ensure that the annual structural general government balance is converging towards the medium term budgetary framework as set out in accordance with the Regulation 1467/97/EC as amended (Excessive Deficit Regulation) (the '*adjustment condition*').⁷⁹
- A *debt rule* applies when the government debt to GDP ratio exceeds 60% and requires that the ratio be reduced in accordance with the Excessive Deficit Regulation.⁸⁰

Finally, provisions for medium term budgetary framework are contained in the Ministers and Secretaries (Amendment) Act 2013.⁸¹ The Bill was presented before the Dáil on 26 September 2012, was debated by the Dáil in June of 2013 and by the Seanad in July of 2013. It received the signature of the President on the 23 July 2013. It amends s 17 of the Ministers and Secretaries (Amendment) Act 2011. Under the new s 17 the Government, upon a proposal of the Minister for Finance, shall make an annual decision fixing the upper limit of government expenditure for the subsequent three years, broken down per year. At the same time annual expenditure ceilings will be provided for individual departments.

IMPLEMENTATION DIFFICULTIES

VII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER IN THE IMPLEMENTATION PROCESS, IN PARTICULAR IN RELATION TO IMPLICATIONS OF THE DIRECTIVE FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

The only significant piece of legislation to have been adopted in the implementation of the Directive was the Fiscal Responsibility Act 2012 (the 2012 Act). Furthermore, that Act was seen as implementing the Fiscal Compact and no reference was made to Directive 2011/85/EU. At the same time the Department of Finance intends to implement Directive

⁷⁷ The Fiscal Responsibility Act was described as implementing the requirements of the Fiscal Compact. However its provisions equally implement Directive 2011/85/EU.

⁷⁸ Fiscal Responsibility Act 2012, s 3(2).

⁷⁹ *ibid*, s 3(3).

⁸⁰ *ibid*, s 4.

⁸¹ Ministers and Secretaries (Amendment) Act 2013.

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2011/85/EU by a combination of the Fiscal Responsibility Act 2012 and statutory instruments (a form of secondary legislation by Ministers). Debate in Parliament focused on the fiscal rules and the placing of the Irish Fiscal Advisory Council on a statutory footing.

The Bill was presented before the Dáil on the 16 July 2012 and debated between the 9 and 11 of October of 2012. The Seanad discussed the Bill on the 14 November 2012. It was signed by the President on the 27 November 2011. The government and the main opposition party were in favour of the rules. A number of parliamentarians made reference to the fact that the Act was merely implementing the referendum on the Fiscal Compact and hence people's directly expressed will (see question IX.2).⁸² The measures were seen as restoring credibility to the management of Irish budgetary policy and would facilitate a return to the financial markets at the end of the programme of financial assistance.⁸³ In contrast to Sinn Féin accusations that the Act would see a diminution of economic sovereignty (see below) some contributors to the debate were of the opinion that Ireland's economic sovereignty had already been 'ripped from our hands when the troika arrived into town on a bleak October morning.'⁸⁴ The implementation of these rules, by avoiding a reoccurrence of that incident, would in fact promote Ireland's economic sovereignty in the future. Similarly Michael McGrath (spokesperson for the main opposition party, Fianna Fáil) highlighted the fact that while future governments would be obliged to keep spending within certain limits the policy choices, including levels of expenditure and taxation, spending within those limits would remain a national prerogative.⁸⁵

The Bill was opposed by Sinn Féin and a number of smaller parties and independent members. Sinn Féin argued that the rules would not have prevented Ireland's financial crisis (Ireland would have easily complied with the rules until 2007), that it would prolong austerity policies currently imposed under the programme of financial assistance and that finally it would exchange the tutelage of the Troika for that of the European institutions, particularly in the event that Ireland breached obligations under the Stability and Growth Pact.⁸⁶

MACROECONOMIC AND BUDGETARY FORECASTS

VII.4

WHAT INSTITUTION WILL BE RESPONSIBLE FOR PRODUCING MACROECONOMIC AND BUDGETARY FORECASTS (ARTICLE 4(5) DIRECTIVE 2011/85/EU)? WHAT INSTITUTION WILL CONDUCT AN UNBIASED AND COMPREHENSIVE EVALUATION OF THESE FORECASTS (ARTICLE 4(6) DIRECTIVE 2011/85/EU)?

The Department of Finance currently conducts detailed economic forecasting. It will

⁸² See contribution of Dara Murphy, Dáil Debates, 10 October 2012, Vol 778 No 1, 111.

⁸³ See contribution of Alan Farrell, *ibid*, 90.

⁸⁴ Paschal Donohoe, *ibid*, 99.

⁸⁵ Micahel McGrath, Dáil Debates, 9 October 2012, Vol 777 No 4, 540.

⁸⁶ See contribution of Pearse Doherty, *ibid*, 543 ff.

continue to fulfil this role although there are indications this may change with the adoption of the Two Pack (section forthcoming). The Irish Fiscal Advisory Council will then conduct evaluations of these forecasts.⁸⁷

FISCAL COUNCIL

VII.5

DOES IRELAND HAVE IN PLACE AN INDEPENDENT FISCAL COUNCIL (ARTICLE 6(1) DIRECTIVE 2011/85/EU: ‘INDEPENDENT BODIES OR BODIES ENDOWED WITH FUNCTIONAL AUTONOMY VIS-À-VIS THE FISCAL AUTHORITIES OF THE MEMBER STATES’)? WHAT ARE ITS MAIN CHARACTERISTICS? DOES IRELAND HAVE TO CREATE (OR ADAPT) A FISCAL COUNCIL IN ORDER TO IMPLEMENT DIRECTIVE 2011/85/EU?

The Irish Fiscal Advisory Council was established in June of 2011. It was placed on a statutory footing by the Fiscal Responsibility Act 2012.⁸⁸ It was established as part of a reform of Irish budgetary procedures under the EU-IMF programme of financial assistance.

It is composed of 5 members of national or international standing for terms of 4 years. Its independence is assured by a fixed budget of €800,000 provided for by statute and index linked to inflation. Independence is also guaranteed by security of tenure. Removal shall be for stated reasons of incapacity or stated misbehaviour and shall only take place upon a resolution of the Dáil (lower house of parliament).

Its main functions are to conduct and publish periodic reviews of government economic forecasts, Government budgetary policies and of Government compliance with the fiscal rules contained in the Fiscal Responsibility Act 2012.

REGULATION NO 1176/2011 ON THE PREVENTION AND CORRECTION OF MACROECONOMIC IMBALANCES

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1176:EN:NOT>

MEIP DIFFICULTIES

VII.6

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

No legal or political difficulties have arisen, nor have debates taken place on the implications of the regulation for sovereignty, constitutional law and the budgetary process outside the

⁸⁷ See European Commission, *Interim Progress Report on the implementation of Council Directive 2011/85/EU on requirements for Budgetary Frameworks of the Member States* (European Economy, Occasional Papers 128, February 2013, 2013), 45-46.

⁸⁸ Fiscal Responsibility Act 2012, pt 3.

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broader debates on Euro governance.

Ireland as a programme country was subject to a separate surveillance procedure and was not covered by the alert mechanism for 2012 or 2013.⁸⁹

REGULATION No 1175/2011 ON STRENGTHENING BUDGETARY SURVEILLANCE POSITIONS

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1466:20111213:EN:PDF>)

MTO PROCEDURE

VII.7

WHAT CHANGES TO THE RULES ON THE BUDGETARY PROCESS ARE MADE TO ACCOMMODATE THE AMENDED MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) PROCEDURE?

The MTO is now included in the Stability Programme Update laid before the Dáil annually in April.

EUROPEAN SEMESTER

VII.8

WHAT CHANGES HAVE TO BE MADE TO THE RULES AND PRACTICES ON THE NATIONAL BUDGETARY TIMELINE TO IMPLEMENT THE NEW RULES ON A EUROPEAN SEMESTER FOR ECONOMIC POLICY COORDINATION (SECTION 1-A, ARTICLE 2-A CONSOLIDATED REGULATION 1466/97)?

The Stability Programme Update (SPU) was published on the same day as the general budget towards the end of December of the year preceding the reference year of the budget (ie Budget 2011 would be announced by the Minister for Finance before the Dáil in December 2010). The SPU is now laid before the Dáil in April and discussed with the Minister for Finance by the Joint Committee on Finance, Public Expenditure and Reform.⁹⁰

MTO DIFFICULTIES

VII.9

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

⁸⁹ See Alert Mechanism Report: Report prepared in accordance with Articles 3 and 4 of the Regulation on the prevention and correction of macro-economic imbalances COM(2012) 68 final, 19 and Results of in-depth reviews under Regulation (EU) 1176/2011 on the prevention and correction of macroeconomic imbalances COM(2013) 199 final, 3, fn 5.

⁹⁰ See Department of Finance, *Irish Stability Programme April 2013 Update* (2013), Foreword, 2. See Joint Committee on Finance, Public Expenditure and Reform: *Stability Programme Update: Discussion with Minister for Finance*, 30 April 2013.

No political or legal difficulties were encountered nor were there debates specific to Regulation 1175/2011/EU outside the general debate on the six pack (see answer to question VII.1 above).

RESPECT MTO

VII.10

HOW IS RESPECT OF THE MEDIUM-TERM BUDGETARY OBJECTIVE INCLUDED IN THE NATIONAL BUDGETARY FRAMEWORK (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)?

The Medium Term Budgetary Objective (MTBO) has been incorporated within the ‘budgetary rule’ contained in s 3 of the Fiscal Responsibility Act 2012 requiring that the annual structural balance of the general government be at the MTBO or converging towards the MTBO in accordance with Regulation 1466/97/EC.⁹¹ The MTBO is defined in s 5 of the Fiscal Responsibility Act 2012.

CURRENT MTO

VII.11

WHAT IS IRELAND’S CURRENT MEDIUM-TERM BUDGETARY OBJECTIVE (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)? WHEN WILL IT BE REVISED?

Upon exit from the programme of financial assistance Ireland’s MTBO will be a balanced budget in structural terms from 2016 onwards.⁹² There is no indication of when it will be revised.

ADOPTION MTO

VII.12

BY WHAT INSTITUTION AND THROUGH WHAT PROCEDURE IS IRELAND’S MEDIUM-TERM BUDGETARY OBJECTIVE ADOPTED AND INCORPORATED IN THE STABILITY PROGRAMME (EUROZONE, ARTICLE 3(2)(A) CONSOLIDATED REGULATION 1466/97)?

Ireland’s MTBO is defined in section 5 of the Fiscal Responsibility Act and incorporated into the Stability Programme by the Department of Finance. Limits on government spending will be adopted by the Government upon a proposal of the Minister for Finance.⁹³

REGULATION NO 1177/2011 ON THE EXCESSIVE DEFICIT PROCEDURE

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1467:20111213:EN:PDF>

⁹¹ Regulation 1467/97/EC on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L 209/1 as amended by Regulation 1056/2005/EC and Regulation 1175/2011/EU.

⁹² Department of Finance, *Irish Stability Programme April 2013 Update*, ch 8, 48.

⁹³ See Ministers and Secretaries (Amendment) Act 2013.

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EDP DIFFICULTIES

VII.13

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

No legal or political difficulties were encountered nor did any significant debates specific to Regulation 1177/2011/EU arise outside the general debate on the six pack (see answer to question VII.1). There are no known specific changes to the budgetary procedure to accommodate the amended excessive deficit procedure.

REGULATION NO 1173/2011 ON EFFECTIVE ENFORCEMENT OF BUDGETARY SURVEILLANCE

[\(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1173:EN:NOT>\)](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1173:EN:NOT)

SANCTIONS

VII.14

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

No legal or political difficulties were encountered nor did any significant debates specific to Regulation 1173/2011/EU arise outside the general debate on the six pack (see answer to question VII.1).

GENERAL CHANGES

VII.15

WHAT FURTHER CHANGES HAVE TO BE MADE TO THE RULES ON THE BUDGETARY PROCESS IN ORDER TO COMPLY WITH THE SIX-PACK RULES?

There were no known changes to the rules on budgetary process to accommodate the possibility of sanctions for non-compliance with the MTBO.

MISCELLANEOUS

VII.16

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO IRELAND AND THE SIX-PACK?

No other relevant information

VIII ESM TREATY

The European Stability Mechanism (ESM) Treaty was signed on July 11 2011. It was later renegotiated and a new ESM Treaty was signed on February 2, 2012. The Treaty provides a permanent emergency fund that is intended to succeed the temporary emergency funds. It entered into force on September 27, 2012 for 16 contracting parties (Estonia completed ratification on October 3). The 17 contracting parties are the member states of the Eurozone, but the ESM Treaty is concluded outside EU law.

(<http://www.european-council.europa.eu/eurozone-governance/esm-treaty-signature?lang=it> and <http://www.esm.europa.eu/pdf/FAQ%20ESM%2008102012.pdf>)

NEGOTIATION

VIII.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER IN THE NEGOTIATION OF THE ESM TREATY, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

Outside statements made in Parliamentary debates the position of the government in negotiations are not known.

RATIFICATION

VIII.2

HOW HAS THE ESM TREATY BEEN RATIFIED IN IRELAND AND ON WHAT LEGAL BASIS/ARGUMENTATION?

Under the Irish Constitution the Government is vested with executive powers in relation to external relations including the conclusion and ratification of international agreements.⁹⁴ All international agreements, except those of a technical and administrative character,⁹⁵ must be laid before the Dáil (lower house) and those implying a charge on public finances require approval by the Dáil in order to bind the State.⁹⁶ Ireland operates a dualist system and international agreements have no formal legal standing unless incorporated into domestic law. This is usually done through an Act of the Oireachtas (Parliament). Its provisions were implemented in Irish law through an act of the Oireachtas, namely the European Stability Mechanism Act 2012 (the ESM Act 2012). The ESM Act 2012 was debated before the Dáil on 7 June 2012 and before the Seanad on 26 June 2012. It was signed by the President on 3 July 2012. The ESM Treaty was subsequently ratified by the Government and the instrument

⁹⁴ Article 29.4 Bunracht na hÉireann (Constitution of Ireland).

⁹⁵ Hogan and Whyte, *JM Kelly: The Irish Constitution* (n 1) 546.

⁹⁶ Article 29.5 Bunracht na hÉireann (Constitution of Ireland).

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of ratification was deposited on 1 August 2012.⁹⁷ In *Pringle v Ireland* the ESM Treaty was deemed not to require an amendment of the constitution and hence a referendum. It did not involve a delegation of policy making power to an international institution per *Crotty*. Rather it was a clear and limited commitment to participate in an international organisation for a specified purpose (see further answer to question VIII.4 below).⁹⁸

RATIFICATION DIFFICULTIES

VIII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER DURING THE RATIFICATION OF THE ESM TREATY?

No significant political or legal difficulties were encountered during the ratification of the ESM Treaty with the exception of the constitutional challenge initiated by Thomas Pringle and independent member of the Dáil (lower house) (see next questions).

The Government (Fine Gael and the Labour Party) and the largest opposition party (Fianna Fáil) were in favour of the ESM Treaty and the ESM Act 2012 and voted in favour of the act. Sinn Féin and the United Left Alliance were opposed to the Treaty and the Act. The Act was published during the referendum on the Fiscal Compact and was passed by the Oireachtas (Parliament) shortly after a positive result in that referendum. In the Parliamentary debates on the Act a number of contributors made reference to that context and the link between the Fiscal Compact and the Act. A number of contributors also raised the possibility of the ESM being used to directly recapitalise banks rather than the current method of routing such funds through national Governments.

Those in favour of the Act saw it as a credible funding mechanism for Ireland in the event that it would be forced into a second programme of financial assistance. Thus ‘[the] Government believes the availability to Ireland of a credible funding backup as provided by the ESM treaty will be very important in terms of market re-entry and leaving the EU-IMF programme of support. There is no clear answer to the question as to where else financial assistance could be found were a situation to evolve in which we require further assistance. Enacting the ESM Bill 2012 and ratifying the ESM treaty will ensure that Ireland has access to this funding safety net if our efforts to re-access the market are delayed in any way and we need to resort to further assistance.’⁹⁹

⁹⁷ Treaty Series 2013 No 14 European Stability Mechanism Treaty available at <http://www.dfa.ie/uploads/documents/Legal%20Division%20Documents/Treaty%20Series%202013/no.14%20of%202013t.pdf> (last visited 19 November 2013).

⁹⁸ For a discussion of whether the decision to amend Article 136(3) TFEU required a constitutional amendment see answer to question V.4 above and Gavin Barrett, ‘The Treaty Amendment on the European Stability Mechanism: Does It Require a Referendum in Ireland?’ (2011) 29 *The Irish Law Times* 152.

⁹⁹ See contribution of Minister for Finance, Michael Noonan, Dáil Debates, 7 June 2012, Vol 767 No 2, 600.

Those opposed to the Act focused on a number of issues. A number of contributors opposed the Act on the grounds that it, through its conditionality, would further the policies of austerity. In the opinion of Sinn Féin ‘at the core of the fund are the failed policies of unlimited bailouts and crippling austerity.’¹⁰⁰ Similarly the ESM was described as ‘a sinister Trojan horse being driven into the heart of Europe to impose more poisonous austerity on ordinary citizens and further dismantle democracy within the European Union. It is a permanent austerity mechanism, not a stability mechanism.’¹⁰¹ A number of contributors also objected to the immunities and privileges of the ESM and its officers.¹⁰² The question of Ireland’s contribution was also raised both before the Dáil (lower house) and the Seanad (upper house) and was dealt with extensively before the Dáil sub-committee on finance.¹⁰³

CASE LAW

VIII.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE ESM TREATY?

Thomas Pringle v Ireland and others contained a challenge to the constitutionality of the ESM Act.¹⁰⁴ It was tried at first instance in the High Court before Justice Laffoy who rejected those aspects of the challenge based on Irish law. For an assessment of the High Court judgement see question V.4. This judgement was appealed to the Supreme Court. The below description summarises the Supreme Court judgment with respect to the ESM Treaty. The claim relating to Decision 2011/199/EU amending Article 136 TEU is detailed in question V.4 above.

Thomas Pringle v The Government of Ireland, Ireland and the Attorney General

1. *Name of Court:* Supreme Court of Ireland
2. *Parties:* Thomas Pringle TD (appellant) vs Government of Ireland, Ireland and the Attorney General (defendants).
3. Appeal

Citation: [2012] IESC 47

Date of Judgment: 19 October 2012

¹⁰⁰ Pearse Doherty TD, *ibid*, 609.

¹⁰¹ Richard Boyd Barret TD, *ibid*, 611.

¹⁰² See as an example the contribution of Senator David Norris, Seanad Debates, 27 June 2012, Vol 216 No 5, 311 ff.

¹⁰³ European Stability Mechanism Bill 2012, Committee Stage, 14 June 2012 available at <http://debates.oireachtas.ie/F11/2012/06/14/00003.asp> (last visited 19 November 2013).

¹⁰⁴ For the High Court case see *Pringle v The Government of Ireland* (n 63). For the Supreme Court case see *Pringle v Government of Ireland* (n 64).

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4. *Admissibility Issues:* N/A
5. *Legally Relevant factual situation:* N/A
6. *Legal questions:* The Appellant raised various questions that were grouped by the Court under the following headings:
 1. That the ESM Treaty (the Treaty) represented a delegation of sovereignty to an international institution that was prohibited under the Irish constitution as interpreted in *Crotty* (the “sovereignty claim”).
 2. That the ESM Act, implementing the ESM Treaty in Irish law, represented an unconstitutional delegation of legislative authority to the Government (the “transfer of powers claim”).
 3. That the ESM Treaty breached Union law (the “ESM claim”).
 4. European Council Decision amending Article 136 TFEU breached Union law (the “Council Decision claim”).
 5. The appellant argued that the breach by the ESM of Union law implied a parallel breach of the Irish constitution due to the special status that Union law enjoys under Article 29 of the Irish Constitution.
 6. That an injunction should be granted restraining the Irish government from ratifying the ESM Treaty.
7. *Arguments of the Parties:*

The appellant argued that the Treaty breached Union law. It was pointed out that in the recital to Decision 2011/119/EU that the European Council considered a treaty amendment was “required” for the entry into force of the ESM. This, according to the appellant, was evidence that the European Council itself considered the ESM incompatible with the TFEU as it then was. More specifically he argued that the ESM breached the Treaty’s provisions on EMU, namely Articles 122, 123, 125 and 126 TFEU, both in their substance and with regard to the objective and spirit of those provisions. The ESM also conferred competence for monetary and economic matters to a non-Union body, the ESM, and conferred new competences on Union institutions, namely the ECB and the Court of Justice. Finally, the principle of sincere cooperation prohibited Ireland from ratifying a Treaty that was incompatible with its obligations under Union law.

The appellant argued that the ESM Treaty and the ESM Act breached the Irish constitution. The Treaty, particularly when read in combination with the Fiscal Treaty went beyond the mere provision of aid but was intended to be an instrument of a more general policy of economic and financial stability and solidarity within the Eurozone. As such it represented an unconstitutional delegation of sovereignty to an international institution per *Crotty*. He argued that the Treaty was a permanent commitment and

surrendered to an international body decision making power that could have severe budgetary implications for Ireland. The defendants argued that the treaty at issue in *Crotty*, namely Title III of the SEA, Ireland's membership of the ESM Treaty would not reduce or fetter the executive or legal powers of the state, in particular in relation to foreign affairs. It pointed to the fact that Ireland's contribution was limited and could only be increased with the future consent of the Irish Parliament.

8. *Conclusions of the Court:*

The Court referred the Union matters (Points 3 and 4) to the Court of Justice under a separate judgement and requested the use of the accelerated procedure.

Point 2, the transfer of powers claim, was not considered urgent by the Supreme Court as it related not to Ireland's ability to ratify the ESM Treaty but rather giving internal effect to Ireland's obligation under the Treaty.

The Court found it unnecessary to address Point 5 as any determination would not have any practical effect. If the Treaty was contrary to Union law then it would not go ahead in which case a determination of its compatibility with Irish constitution would be moot. In the alternative and the Treaty was in fact compatible with Union law then it would, for the purposes of this argument, also be compatible with the Irish constitution.

The Court therefore dealt with Points 1 and 6 in the present judgment, namely whether the ESM Treaty was compatible with the Irish constitution (Point 1) and whether an injunction restraining the Irish government from ratifying that Treaty should be granted (Point 6).

A majority of the seven member Court found against the appellant under both points. It held that the ESM Treaty did not constitute an unconstitutional delegation of sovereignty per *Crotty* and that the balance of convenience overwhelmingly favoured refusing an injunction. A minority of one, Hardiman J, dissented, finding that a referendum and a constitutional amendment would be required in order for the State to legally ratify the ESM Treaty.

Point 1 - The Sovereignty Claim

A majority consisting of Denham CJ, Clarke, Fennelly, MacKechnie, Murray and O'Donnell JJ, (judgements by Denham CJ, Clarke, MacKechnie and O'Donnell JJ) found that the Treaty did not represent an unconstitutional delegation of power as defined in *Crotty*.

The majority contrasted the international treaty at issue in *Crotty*, namely Title III of the SEA dealing with coordination between members of the EC in the conduct of their foreign policies with the ESM Treaty. *Crotty* found that under the Irish constitution sovereignty flowed from the Irish people. This sovereignty was exercised by various organs established by the Constitution in accordance with the provisions of that

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constitution. The government had a wide discretion in the exercise of foreign policy. This discretion did not however include the ability to limit or delegate that power. Title III of the SEA was an open-ended, vague and wide-ranging commitment to adjust the State's foreign policy in accordance with the concerns and actions of other states. As such it was a delegation of the Government's freedom to direct the State's foreign policy. It was therefore an unconstitutional delegation of sovereign authority to an international institution.

The ESM Treaty by contrast had a clearly defined scope. It was a narrow, if important, commitment on behalf of the state. The policy, namely the maintenance of stability in the Eurozone by the provision of appropriate financial assistance to members of the ESM, was defined and set down by the parties to the Treaty. The institution itself only implemented this policy. As stated by MacKechnie J '[i]n effect the fundamental difference between [Title III of the SEA and the ESM Treaty] is the fact that the ESM Treaty is essentially policy implementing and not policy making.' Furthermore it was not an open-ended financial commitment. The liability of Ireland was limited and any increase in the capital would have to be approved by the Irish Parliament by legislation. Finally the limited circumstances in which Ireland would not exercise its voting rights (in the event of a failure to meet its commitments or in the event that a threat existed to the sustainability of the Euro zone) would not represent instances of policy making.

Hardiman J wrote the single dissenting judgement. After an assessment of the various judgments in *Crotty* he came to a different conclusion to the majority regarding its *ratio*, finding that the essence of that judgment was the point of reference for which the sovereign powers of the state should be exercised.¹⁰⁵ In particular he found that when exercising its powers the State was to have reference to the 'common good' as mentioned in Article 6 of the Irish constitution, where that 'common good' was to mean the common good of the Irish people. By contrast the ESM Treaty delegated decision making power over a considerable sum of money of the Irish people to be disbursed in the interest of maintaining the stability of the Eurozone as a whole. An interest that may, or may not, coincide with the "common good" of the Irish people. Furthermore, he found that under the ESM the Irish government would be obliged to submit to decisions regarding expenditure according to 'particular procedures', something that amounted to a delegation of sovereignty within the meaning of *Crotty*. Finally, Hardiman J had 'considerable doubts' regarding whether the procedures of the ESM and in particular the accountability of the Minister for Finance when exercising his powers as a member of the Board of Governors of the ESM.

Point 6 - The Injunction Claim

The appellant sought an injunction restraining the Government from ratifying the ESM

¹⁰⁵ This point was also made by Denham CJ (paras 14 xviii and 17 ii) but did not play as significant a role in her reasoning.

Treaty pending the outcome of the Article 267 TFEU reference to the Court of Justice. A question arose as to the appropriate test with the appellant arguing that a test based on Union law should be used, in particular as articulated in *Zuckerfabrik* and *Atlanta*. This was not however evident, as the ESM Treaty is not a Union measure, and Ireland in ratifying it would not in fact be implementing Union law.

The majority found against the appellant with the most substantial treatment of the injunction question by Clarke J. A definitive judgment was not made on whether the domestic test based on *Campus Oil* or that based on Union law should be used or in fact what might be the substantial differences between the two tests. Rather it was found that the appellant's case failed under either test. Based on an affidavit provided by a senior civil servant in the Department of Finance stating that it was in the financial interest of Ireland and other members of the ESM that it enter into force as soon as possible and that it was in Ireland's interest to be involved in the ESM as early as possible, it was concluded that the balance of convenience overwhelmingly favoured the refusal of an injunction.

9. Legal effects of judgment:

The judgment confirmed the compatibility of the ESM Treaty with the Irish constitution.¹⁰⁶

10. Outcome and implications:

The Government was not prevented from ratifying the ESM Treaty. In particular it was not obliged to hold a referendum amending the constitution in order to accede to the ESM.

Mr Pringle has indicated he is dropping the outstanding claim relating to the constitutionality of the ESM Act (in particular the appropriateness of the delegation of power under the Act to the Minister). Accordingly, following the judgement of the Court of Justice in the preliminary reference proceedings, it is expected that the Supreme Court will make an order refusing the appeal from the High Court leaving that Court's judgment standing.¹⁰⁷

CAPITAL PAYMENT

VIII.5

WHAT IS THE ROLE OF PARLIAMENT IN THE PAYMENT OF THE (FIRST INSTALMENT OF) PAID-IN CAPITAL REQUIRED BY THE ESM TREATY (ARTICLE 36 ESM TREATY)? WHAT RELEVANT DEBATES HAVE ARISEN IN RELATION TO THIS PAYMENT?

¹⁰⁶ Point 5 on the effect of a finding of incompatibility with Union law would have on the constitutionality of the ESM Treaty was not determined in the present judgment (see judgment of Denham CJ para 11 ii).

¹⁰⁷ Correspondence with Mr Pringle, TD, 13 June 2013, on file with author.

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The ESM Act 2012 authorises the Minister of Finance on behalf of the State to make payments of authorised capital into the ESM out of the Central Fund¹⁰⁸ up to a maximum of €11,145,400,000.¹⁰⁹ As payments made from the Central Fund they shall be subjected to the usual (ex post) accountability procedures of Parliament. Parliament has no further role in authorising payments under the Act. An amendment to the Act would be necessary to raise the ceiling above the figure mentioned above.

APPLICATION & PARLIAMENT

VIII.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE ESM TREATY, FOR EXAMPLE WITH REGARD TO DECISIONS TO GRANT FINANCIAL ASSISTANCE AND THE DISBURSEMENT OF TRANCHES, WHICH BOTH REQUIRE UNANIMOUS ADOPTION BY THE BOARD OF GOVERNORS COMPOSED OF THE NATIONAL FINANCE MINISTERS?

Section 8 of the ESM Act 2012 requires that the Minister compile a report to be laid before the Dáil every six months. This report shall include the total value of contributions made to and received from the ESM. Beyond normal parliamentary procedures regarding executive accountability, Parliament does not have any formal role in the activities of the ESM or in determining the actions of the Minister for Finance when acting as a member of the Board of Governors of the ESM.

APPLICATION DIFFICULTIES

VIII.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER IN THE APPLICATION OF THE ESM TREATY?

A number of members of Parliament and public commentators raised the question of the provision of financial assistance to Spain in order to recapitalise its banking system. In particular a common position across the political spectrum was that it would be desirable for the ESM to directly provide funds to banks and for that mechanism to be retrospectively applied to the Irish banking sector. Thus '[i]t is the policy of the Irish Government that recapitalisation of sovereigns should be separated from recapitalisation of banks and that a mechanism should be found to recapitalise banks in such a way that the recapitalisation would not form part of the general government debt and in normal parlance, would be of the sovereign balance sheet.'¹¹⁰

Opposition parties criticised severely the handling of the Cypriot financial situation in March 2013. In particular they criticised what was termed the incompetence and complacency of the European Council. They also criticised the levy imposed on deposits of more than €100,000,

¹⁰⁸ European Stability Mechanism Act 2012, s 2.

¹⁰⁹ *ibid*, s 3.

¹¹⁰ See comments of Minister for Finance Michael Noonan, Select Sub-Committee on Finance, 14 June 2012, European Stability Mechanism Bill 2012: Committee Stage.

claiming it would undermine confidence in the banking systems as a whole.¹¹¹ Ireland's support or at least acquiescence of the original deal, imposing a levy on all bank deposits was also questioned and a number of deputies argued that the deal reflected a distinct lack of solidarity with the Cyprus.¹¹² Micheál Martin, the leader of the opposition did welcome the inclusion of bondholders and shareholders in the final package claiming that '[i]t reinforces the fact that equity demands further significant relief for Ireland'.¹¹³

IMPLEMENTATION

VIII.8

HAVE THERE BEEN ANY RELEVANT CHANGES IN NATIONAL LEGISLATION IN ORDER TO IMPLEMENT OR TO COMPLY WITH REQUIREMENTS SET BY THE ESM-TREATY?

Beyond the passage of the ESM Act 2012 there have been no other legislative changes in order to implement or comply with the requirements of the ESM Treaty.

MISCELLANEOUS

VIII.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO IRELAND AND THE ESM TREATY?

The ESM and in particular its recital 5 making access to ESM funding conditional on ratification and transposition of the Treaty on Stability and Coordination and Growth (TSCG) was a central issue in the referendum on TSCG itself. Advocates of a 'no' vote argued that recital 5 was a 'blackmail clause' while advocates of a 'yes' vote argued that it was a reasonable request that states accessing the ESM would make commitments to fiscal discipline.¹¹⁴

During the referendum campaign there was also a discussion regarding the exact relationship between the ESM and the amendment of Article 136 TFEU during which a pronouncement of the referendum commission on the matter was challenged before the High Court by Pearse Doherty (see question V.4 above).

¹¹¹ See comments of Gerry Adams TD, Dáil Debates 27 March 2013 Vol 798 No 1, 23.

¹¹² Mick Wallace TD, *ibid*, 28.

¹¹³ Micheál Martin TD, *ibid*, 21.

¹¹⁴ 'Is it not reasonable for citizens of other EU states to ask if we need additional funding why should we receive it in the absence of bring debt under control and supporting the essential legal architecture being put in place to ensure we do not get into similar difficulties in future?' Minister for Justice and Defence Alan Shatter, Dáil Debates, 19 April 2012, Vol 762 No 1, 92-93.

IX FISCAL COMPACT

The Fiscal Compact (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) was signed on March 2, 2012. Negotiations on this Treaty began between 26 member states of the EU (all but the UK) after the 8/9 December 2011 European Council. 25 contracting parties eventually decided to sign the Treaty (not the Czech Republic). After ratification by the twelfth Eurozone member state (Finland) in December 2012, the Fiscal Compact entered into force on 1 January 2013. For several contracting parties the ratification is still on-going.

(<http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=it>)

NEGOTIATION

IX.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER IN THE NEGOTIATION OF THE FISCAL COMPACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

In Parliamentary debates it was stated that a key concern for Ireland was that the TSGC mirror Union law as closely as possible.¹¹⁵ Ireland sought, and obtained, a provision that the parameters of the existing EU/IMF programme would not be affected by the TSGC.¹¹⁶ Finally while the Irish government did not seek the insertion of recital 5, making ratification and implementation of the TSGC a condition for accessing the ESM it did view it as a reasonable provision.¹¹⁷

RATIFICATION

IX.2

HOW HAS THE FISCAL COMPACT BEEN RATIFIED IN IRELAND AND ON WHAT LEGAL BASIS/ARGUMENTATION?

The Fiscal Compact has been ratified by a combination of constitutional amendment and legislation.

In April of 2012 following advice from the Attorney General Máire Whelan the government decided to hold a referendum on the ‘Treaty on Stability, Coordination and Governance in

¹¹⁵ Minister for Foreign Affairs and Trade Eamonn Gilmore, Dáil Debates, 20 April 2012, Vol 762 No 2, 247.

¹¹⁶ Minister for State at the Department of Foreign Affairs and Trade Joe Costello, Seanad Debates, 23 April 2012, Vol 214 No 14, 884.

¹¹⁷ ‘Some opponents of this treaty try to argue that linking the ESM to the treaty is some form of blackmail. This is fundamentally disingenuous in my view. Let me be very clear about this. Ireland did not seek this link in the negotiations but, if I am asked if its unreasonable, I say that it is not. It is logical that those who are prepared to offer financial support in time of difficulty should be assured that those receiving it are prepared to run sound and sensible policies.’ Minister for State at the Department of Health Róisín Shorthall, *ibid*, 913.

the Economic and Monetary Union' (Fiscal Compact).¹¹⁸

Amendment of the Irish constitution is only possible by popular referendum initiated as a Bill in the Dáil and passed by both houses of Parliament in accordance with Article 46 and 47 Bunracht na hÉireann (the Irish Constitution). Upon approval by a majority of electors the Bill is to be signed by the President and the constitution is deemed to be amended. Thus, while amendment is only possible with approval of the people, any such amendment must be passed by a majority in the Dáil, which in effect means with Government support.

According to statements of the Taoiseach in the Dáil the opinion of the Attorney General was based on the fact that the Fiscal Compact Treaty did not form part of the framework of the European Treaties and hence required a referendum. Presumably this comment referred to the fact that the Fiscal Treaty could not be considered a measure necessitated by EU membership within the meaning of Article 29 of the Irish Constitution and therefore did not enjoy automatic compatibility with the constitution. The opinion of the Attorney General is not made public. On 31 May 2012 the referendum was passed by a majority of 60% of the votes cast.¹¹⁹

The Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Act 2012 was enacted on 27 July 2012 and inserted the new section 10 into Article 29 of the Irish constitution:

‘10 The State may ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union done at Brussels on the 2nd day of March 2012. No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by the obligations of the State under that Treaty or prevents laws enacted, acts done or measures adopted by bodies competent under that Treaty from having the force of law in the State’

RATIFICATION DIFFICULTIES

IX.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID IRELAND ENCOUNTER DURING THE RATIFICATION OF THE FISCAL COMPACT?

The Fiscal Compact was implemented by a constitutional amendment requiring a popular referendum and an act of parliament. The Act initiating the referendum was debated in the Oireachtas (Parliament) prior to the referendum.

¹¹⁸ ‘Referendum to be held on Fiscal Treaty’ (*RTE News*, 2 March 2012)

<<http://www.rte.ie/news/2012/0228/referendum.html>> accessed 21 October 2012.

¹¹⁹ ‘Ireland passes fiscal treaty referendum by 60.3% to 39.7%’ (*RTE News*, 26 July 2012)

<<http://www.rte.ie/news/2012/0601/fiscal-treaty-referendum-count-to-begin.html>> accessed 1 November 2012.

Oireachtas Debates

In parliament the Government parties (Fine Gael and Labour) and the largest opposition party (Fianna Fáil) supported the Treaty while Sinn Féin, the United Left Alliance (ULA) and a number of independent politicians opposed it.

Those in favour of the Treaty presented two main arguments; that it would facilitate budgetary discipline and that it would allow access to ESM funding. The latter was said to be important for generating confidence in the Irish position on the international bond markets thereby helping in a successful exit from the programme of financial assistance and secondly, in the event that market funding was not possible, an alternative source of financing the state.¹²⁰ Some politicians noted that the Treaty would put an end to ‘auction politics’ whereby politicians sought to essentially buy the votes of electors through expansive budgetary policies and electoral promises.¹²¹ A further argument that was frequently raised related to the likely impact of ratification on the investment policies of multinational corporations.¹²²

Those opposed to the Treaty in Parliament based their arguments on two principal grounds; a general opposition to a policy of austerity (that they saw as being ‘locked in’ by the TSGC) and anti-democratic elements of the TSGC.¹²³ The latter argument was best expressed by Clare Daly of the ULA who described the TSCG as ‘a fundamental attack on the basic democratic right to elect a Government and have that Government decide on budgetary and economic strategy.’¹²⁴ In particular she pointed to the balanced budget rule, ‘which effectively ties the hands of future Governments to the same economic policies as this one. In principle we are being wedded to neoliberalism and austerity’ and Article 5 of the TSGC, described by Deputy Daly as a ‘mechanism for countries to be effectively placed into administration.’¹²⁵ In response the Minister for Foreign Affairs and Trade, Eamon Gilmore pointed to Articles 12 and 13 of the TSGC providing for involvement of the European

¹²⁰ See comments of Minister for Foreign Affairs and Trade, Dáil Debates, 18 April 2012, Vol 761 No 3, 470 ff.

¹²¹ See Mary Mitchell O’Connor, Dáil Debates, 19 April 2012, Vol 762 No 1, 101.

¹²² ‘Mr. O’Neill the managing director of IBM Ireland, speaking on behalf of the US multinationals in Ireland said a “Yes” vote will promote stability, investment and growth in the economy. By voting “Yes” we will maintain our position as an attractive location for investment, continue to put in place the necessary economic and budgetary reforms and preserve our strategically important place in Europe’, Senator Mary White, Seanad Debates, 23 April 2012, Vol 214 No 14, 886. Similarly see the contribution of Dan Neville TD, ‘This is a treaty on stability and is about ensuring a stable currency for Ireland; ensuring a stable euro. It is about confidence abroad and maintaining and enhancing the influence which we have built up with many investors. We have seen progress in that area in recent weeks and month in international companies looking to invest in the country...’, Dáil Debates, 19 April 2012, Vol 762 No 1, 107.

¹²³ See in particular the contribution of the Sinn Féin spokesperson Pádraig Mac Lochlain TD, Dáil Debates, 19 April 2012, Vol 762 No 1, 101 ff.

¹²⁴ *ibid*, 109.

¹²⁵ *ibid*, 109-110.

Parliament and national parliaments.¹²⁶ These provisions were however described by Richard Boyd Barrett TD, a colleague of Deputy Daly in the ULA, as ‘a democratic fig leaf.’¹²⁷

When discussing the text of the provision to be inserted into the constitution to allow for ratification of the TSGC one Member of Parliament sought to remove the so-called ‘necessitated’ clause, providing that:

‘No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by the obligations of the State under that Treaty or prevents laws enacted, acts done or measures adopted by bodies competent under that Treaty from having the force of law in the State.’

Such a clause is commonly used to provide for constitutional immunity for Union based legislation.¹²⁸ Catherine Murphy argued that the TSGC was an ordinary international agreement that did not warrant such constitutional immunity. Deputy Boyd Barrett appeared to fear that that provision would protect any measures adopted on foot of advice from the European Commission in the context of the TSGC from constitutional challenge.¹²⁹ While this provision was not elaborated upon at length by the government, bar statements that it was on foot of advice of the Attorney General, Minister of State at the Department of Foreign Affairs and Trade, Joe Costello TD did suggest that it would cover the Fiscal Responsibility Bill (now the Fiscal Responsibility Act 2012 see section II. 4 above).¹³⁰

Referendum Campaign

While opponents of the TSCG did seek to raise questions of democratic accountability the main focus of the referendum campaign was on the funding question and in particular whether Ireland would have access to the ESM in the absence of ratification. The ‘No’ side provided no satisfactory answer to this question. Sinn Féin disputed the premise of the question and asserted that in practice, in the self-interest of ESM members, Ireland would in fact be given access to the fund. The United Left Alliance argued that funds could be raised from internal taxation by targeting corporations, wealthy individuals and high earners. Despite some fluctuations in polling data support for the Treaty remained relatively high at 60%.¹³¹ Concerns regarding the potential social implications of the Treaty, in particular by

¹²⁶ Dáil Debates, 20 April 2012, Vol 762 No 2, 250.

¹²⁷ *ibid*, 251.

¹²⁸ See Article 29.4 Bunreacht na hÉireann (the Irish Constitution).

¹²⁹ Dáil Debates, 20 April 2012, Vol 762 No 2, 252.

¹³⁰ ‘The second sentence of the amendment is intended simply to facilitate the introduction of legislation in accordance with the treaty, namely the laws we will design such as the fiscal responsibility Bill.’ Minister of State, Joe Costello TD, Seanad Debates, 24 April 2012, Vol 214 No 15, 960.

¹³¹ See ‘How the Yes was Won’ *Sunday Business Post* (Dublin, 3 June 2012). Thus ‘[i]n the long contest between fear and anger, fear was the winner. Fear of the consequences of a No vote won the day for the Yes campaign – fear for the future of the euro, fear about voters’ own circumstances and fear – above all – that the country would be cut off from future funding proved decisive in the end.’ ‘When fear outgunned anger’ *Sunday Business Post* (Dublin, 3 June 2012).

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locking austerity in as a general economic policy, were also raised by commentators during the campaign.¹³² In May the referendum was passed by a majority of 60.3% to 39.7% of the votes cast.

BALANCED BUDGET RULE

IX.4

ARTICLE 3(2) FISCAL COMPACT PRESCRIBES THAT THE BALANCED BUDGET RULES SHALL TAKE EFFECT IN NATIONAL LAW THROUGH “PROVISIONS OF BINDING FORCE AND PERMANENT CHARACTER, PREFERABLY CONSTITUTIONAL, OR OTHERWISE GUARANTEED TO BE FULLY RESPECTED AND ADHERED TO THROUGHOUT THE NATIONAL BUDGETARY PROCESSES.” HOW IS THE BALANCED BUDGET RULE (INTENDED TO BE) IMPLEMENTED IN IRELAND? WILL THERE BE AN AMENDMENT OF THE CONSTITUTION? IF NOT, DESCRIBE THE RELATION BETWEEN THE LAW IMPLEMENTING THE BALANCED BUDGET RULE AND THE CONSTITUTION. IF THE CONSTITUTION ALREADY CONTAINED A BALANCED BUDGET RULE, DESCRIBE THE POSSIBLE CHANGES MADE/REQUIRED, IF ANY.

It is important to note that the 30th amendment to the constitution that resulted in the new Article 29.10 of the Irish constitution firstly allows the state to ratify the TSGC and secondly provides any piece of legislation necessitated by that Treaty with immunity from constitutional challenge (‘the necessitated clause’).¹³³ It does not incorporate either the TSGC or the balanced budget rule into the Irish constitution.

Rather the balanced budget rule contained in Article 3(2) TSGC is implemented in Ireland through the Fiscal Responsibility Act 2012 and in particular its sections 3 and 4.¹³⁴ It is an ordinary piece of legislation and can be repealed or amended by the Oireachtas (Parliament) at any time according to the ordinary legislative process. However, it will enjoy immunity from constitutional challenge per the second clause of Article 29.10 of the constitution.¹³⁵ There is no provision in the Irish constitution for quasi-constitutional legislative measures. One attempt has been made to give a specific piece of legislation a constitutional status through the adoption of a constitutional amendment to that effect. While the technique itself was ruled compatible with the constitution¹³⁶ the associated constitutional amendment was rejected at referendum.

¹³² See Vincent Browne, ‘Fiscal Treaty will increase gap between rich and poor’ *Irish Times* (Dublin, 4 April 2012) 14 and Patrick Kinsella, ‘Treaty is a social, political and economic threat’ *Irish Times* (Dublin, 24 May 2012) 14.

¹³³ For a discussion on the interpretation of the analogous clause contained in Article 29.4.6° relating to EU treaties see Gavin Barrett, ‘The Evolving door to Europe: Reflections on an eventful forty years for Article 29.4 of the Irish Constitution’ (2012) 48 *Irish Jurist* 132

¹³⁴ For a detailed discussion on the parliamentary debates of the Fiscal Responsibility Act 2012 see the answer to question IX.3 above.

¹³⁵ See comments by Minister of State at the Department of Foreign Affairs and Trade, Joe Costello TD, Seanad Debates, 24 April 2012, Vol 214 No 15, 960.

¹³⁶ *Morris v Minister for the Environment and Local Government* [2002] 1 IR 326. See also Hogan and Whyte, *JM Kelly: The Irish Constitution* (n 43) paras 8.1.11 - 8.1.13.

DEBATE BALANCED BUDGET RULE

IX.5

DESCRIBE THE NATIONAL DEBATE ON THE IMPLEMENTATION OF THE FISCAL COMPACT/BALANCED BUDGET RULE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

The provisions of the fiscal compact, including the balanced budget rule were implemented in Ireland by the Fiscal Responsibility Act 2012. This also served to implement Directive 2011/85/EU and the relevant debate is covered in the answer to question VII.2 above. As mentioned above comments by Minister of State at the Department of Foreign Affairs and Trade, Joe Costello TD before the Seanad (upper house) suggested that at least in the view of the government that act would be protected from constitutional challenge by virtue of the second clause of Article 29.10 of the constitution (see answer to question IX.3 above).

RELATIONSHIP BBR AND MTO

IX.6

WHAT POSITIONS, IF ANY, ARE TAKEN IN THE NATIONAL DEBATE ABOUT THE RELATIONSHIP BETWEEN THE BALANCED BUDGET RULE OF ARTICLE 3(1)(B) FISCAL COMPACT AND THE MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) RULE IN THE SIX-PACK (SECTION 1A, ARTICLE 2A REGULATION 1466/97, ON WHICH SEE ABOVE QUESTION VII.10)?

There has been no public debate about the relationship between the balanced budget rule of the Fiscal Compact and the Medium term budgetary objective in the six-pack.

CASE LAW

IX.7

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE FISCAL COMPACT/IMPLEMENTATION OF THE BALANCED BUDGET RULE?

Yes, see question V.4.

NON-EUROZONE AND BINDING FORCE

IX.8

HAS IRELAND DECIDED TO BE BOUND BY PARTS OF THE FISCAL COMPACT ON THE BASIS OF ARTICLE 14(5) FISCAL COMPACT ALREADY BEFORE JOINING THE EURO AREA, OR HAS THIS OPTION BEEN DEBATED?

Not applicable.

MISCELLANEOUS

IX.9

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WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO IRELAND AND THE FISCAL COMPACT?

No other relevant information.

X QUESTIONS ABOUT MEMBER STATES RECEIVING FINANCIAL SUPPORT

A number of member states have received direct financial assistance through balance of payments support (Hungary, Rumania, Latvia), bilateral agreements/IMF (Greece), the temporary emergency funds/IMF (Ireland, Portugal, Greece), and the permanent emergency fund (Spain and Cyprus).

(http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm)

Several member states have (also) indirectly benefited through the Securities Markets Programme (SMP) created in May 2010, a bond-buying programme of the European Central Bank that was replaced in September 2012 by the Outright Monetary Transactions (OMT) programme (Greece, Ireland, Portugal, Italy, Spain).

(<http://www.ecb.int/mopo/liq/html/index.en.html#portfolios>)

CONTEXT

X.1

IF RELEVANT, DESCRIBE THE POLITICAL, ECONOMIC AND LEGAL SITUATION LEADING UP TO THE MOMENT OF THE FORMAL REQUEST OF DIRECT FINANCIAL ASSISTANCE.

The economic crisis and recession in Ireland was preceded by two decades of exceptionally high economic growth. Between the years 1987 and 2007 growth rates averaged 6.3%, achieved on the basis of economic and educational policies implemented over the preceding decades, a favourable demographic and labour market situation and a tax policy designed to attract foreign direct investment. In 2007 Ireland on the face of it appeared well placed to face the global economic slowdown with an exceptionally low GDP to debt ratio (25%) and financial reserves in the form of a National Pension Reserve Fund. However the economy was in fact dangerously exposed to underlying structural economic and financial weaknesses. The growth in the 1990's was export focused and was driven by highly skilled industries financed by foreign direct investment (FDI). From the early 2000s construction and credit related activities became increasingly important to general economic growth and to government revenue in particular. In a related development the Irish banking sector modified its business model and became increasingly reliant on domestic property related investment, activity that was funded by the issuance of bonds to international investors. Macroeconomic stabilisation policies during the economic boom were weak. The tax base was narrowed and became increasingly reliant on construction related revenue. With the onset of an economic slowdown and the effective end of construction as an economic sector, government revenue collapsed and a large fiscal deficit emerged. Ireland recorded a record contraction in the economy of a total of 20% over the period of the crisis.

After the collapse of Lehman brothers in the autumn of 2008 serious concerns amongst international investors materialised and the Irish banking sector faced what was presented as a liquidity crisis in September 2008. On 30 September 2008 the Irish government issued a blanket guarantee of all the liabilities of the domestic banking sector thereby linking the Irish

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state to the debts of the banking sector. The liabilities of the banking sector, in particular Anglo Irish Bank, proved considerable, especially in relation to the size of the Irish economy. Various policies to deal with the now clearly insolvent industry included the setting up of a 'bad bank' to nationalise much of the bad debts of the banks and subsequently recapitalisation of all banks and nationalisation of much of the sector. The resulting ballooning in the national debt to over 100% (from 25% in 2007) and the contraction in the economy lead to fears amongst international investors about the state's underlying solvency. Ireland risked being shut out of the international debt markets and its banks were already increasingly reliant on ECB liquidity funding. In November of 2010 Ireland entered into a programme of financial assistance with the EU and the IMF.¹³⁷

A coalition Government consisting of Fianna Fáil and the Green Party had been in place since the general election of 2007,¹³⁸ continuing a position that Fianna Fáil had occupied since 1997 as the main government party with its leader Bertie Ahern as Taoiseach (Prime Minister). Subsequent to revelations about his personal finances it was generally understood that Bertie Ahern would step down as leader of the party and Taoiseach. He stepped down as leader of the Fianna Fáil party in May of 2008 and was succeeded as leader of Fianna Fáil and as Taoiseach by Brian Cowen, the then Minister for Finance. In the subsequent two years leading to the signing of the Memorandum of Understanding the Government displayed remarkable resilience and discipline in the face of overwhelming unpopularity and 'even backbenchers did not step away from the sinking ship.'¹³⁹ Nonetheless the Government's authority was dealt a fatal blow by the Programme for Financial Assistance. Revelations surrounding Brian Cowen's previous contact with senior bankers initiated a tumultuous few weeks in early January. Amid speculation regarding his leadership Brian Cowen himself put forward a no confidence motion in himself as leader of the Fianna Fáil party and won. Nonetheless a cabinet reshuffle in which the Greens were not consulted lead that party to effectively withdraw from Government. Internally Cowen's leadership was again questioned and he announced his resignation of Fianna Fáil on 22 January 2011. He continued as Taoiseach until the general election in order to secure passage of the Finance Bill. The main opposition parties, Fine Gael and Labour, after a meeting with the then Minister for Finance Brian Cowen, agreed to drop their no confidence motions in the Government in exchange for an assurance that the Bill would be finalised by the end of February and the Dáil dissolved. In actual fact the Bill was passed early. The Dáil was dissolved on the 1 February 2011 and a general election was held on the 25 February 2011. Fine Gael and Labour won an overwhelming majority. Fianna Fáil suffered their worst

¹³⁷ For a summary of Ireland's financial and economic crisis see Karl Whelan, 'Ireland's Sovereign Debt Crisis' in Franklin Allen, Elena Carletti and Giancarlo Corsetti (eds), *Life in the Eurozone: With or Without Sovereign Default?* (FIC Press 2011).

¹³⁸ Stephen Collins, 'Greens and PDs to make Ahern Taoiseach again' *The Irish Times* (Dublin, 14 June 2007) 1. Note that the PDs, a small party that had seen their support effectively collapse in the general election, winning only two seats, later disbanded with their TDs supporting the government as independents.

¹³⁹ David Gwynn Morgan, 'The Constitution and the Financial Crisis in Ireland' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013), 67.

electoral defeat and the very survival of the up until then dominant party in Irish politics was questioned.

NEGOTIATION

X.2

DESCRIBE THE PUBLIC AND POLITICAL DEBATE DURING THE NEGOTIATIONS ON THE FINANCIAL ASSISTANCE INSTRUMENTS, NOTABLY THE MEMORANDUM OF UNDERSTANDING (MOU) AND FINANCIAL ASSISTANCE FACILITY AGREEMENT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

After the introduction of a guarantee of bank deposits in 2008 pressures on Ireland abated temporarily. Soon afterwards however the financial and budgetary situation continued to deteriorate. A number of estimates of likely bank losses were made in the period leading up to the bail out, all of which contained upwards revisions on the extent of bank losses, and the corresponding need for injection of government funds. At the same time the budgetary situation also continued to deteriorate despite the introduction of significant spending cuts and tax increases in the period through regular and supplementary budgets. After the grant of financial assistance to Greece in May of 2010, and comments by Chancellor Merkel and President Sarkozy in Deauville, the yields on Irish government bonds climbed steadily. In further response to this situation the Government announced a 4 year economic plan in November 2010 to run from 2011 to 2014, the National Recovery Plan, containing various targets for budgetary adjustments and structural economic reforms.¹⁴⁰

At this stage it was becoming increasingly clear amongst various actors that Ireland's funding situation was unsustainable and that a financial assistance package would have to be provided. The European Central Bank was at that point severely exposed to the Irish banking sector through the provision of emergency liquidity assistance and pushed strongly for a programme to be provided. The exact role of the ECB is still unclear but there are indications that it pressed the Irish government directly to move towards such a programme and made interventions through the media to apply public pressure.¹⁴¹ Nonetheless, with mounting media speculation, the government refused to publically announce it had entered into negotiations, despite having sent a large delegation of officials to Brussels to discuss a possible agreement. There was widespread public confusion surrounding a possible agreement that extended to senior Ministers. Eventually, on 18 November 2010, the Governor of the Central Bank, Patrick Honohan announced through a radio interview from Frankfurt that representatives of the IMF, the European Commission and the ECB would shortly be arriving in Ireland to negotiate a package. Subsequently he justified his decision to make such the intervention through a desire to minimise further uncertainty and damage to the Irish financial sector. Negotiations on the package proceeded swiftly and a deal was

¹⁴⁰ Department of Finance, *National Recovery Plan 2011-2014* (Dublin, 25 November 2010)

¹⁴¹ Donal Donovan and Antoin E Murphy, *The Fall of the Celtic Tiger: Ireland and the Euro Debt Crisis* (OUP 2013) 237 ff.

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announced ahead of schedule. The ease with which the negotiations were completed has been attributed to the existing National Recovery Plan, that provided a base for conditions attached to any aid and the prior familiarity between relevant officials.¹⁴²

While not legally required, a motion to approve the Memorandum of Understanding (MoU) between the Irish government and its institutional creditors was placed before the Dáil on 15 December 2010. Respecting the Irish parliamentary process, the IMF agreed to delay putting the agreement to its board until after approval by the Irish Parliament.¹⁴³ A number of motives were advanced for the Government's decision to hold the debate. Sinn Féin argued that it was due to a threat of legal action on its part¹⁴⁴ while a number of Fine Gael TDs (members of the Dáil [lower house of parliament]) argued that it was a political tactic of the Government to force opposition parties to offer an alternative to the Programme. Finally one member of the senior coalition party, Fianna Fáil argued that it was he and a colleague that had proposed it at an internal meeting of the Fianna Fáil party apparently moved by the belief that 'the Dáil should remain at the centre of Irish politics.'¹⁴⁵

In the Dáil the Government and in particular the then Minister for Finance, Brian Lenihan, stressed the fact that the Programme represented a central element of Ireland's recovery and was essential for the funding of public services and the functioning of the banking system. He pointed out that the MoU built upon the Government's own National Programme of Recovery, adopted in October 2010 stating that 'the programme builds on the bank-rescue policies that have been implemented by the Government over the past two and a half years and on the national recovery plan announced in November, 2010. It lays out a detailed timetable for the implementation of the measures contained in the national recovery plan. In other words, the national recovery plan is effectively embedded in the programme. This is a key point that needs to be emphasised, as some have suggested that control has been taken out of the Government's hands. This is not the case.'¹⁴⁶ Opposition parties generally accepted the need for financing, with Fine Gael in particular accepting the overall target of deficit reductions, but argued that the assumptions on which the programme was based, in particular GDP growth assumptions, were ill-founded and that there should be a greater emphasis on a strategy for growth and job creation. One point of contention between Government and opposition parties was the appropriateness or otherwise of continuing to pay in full holders of bank bonds that were now covered by the Government guarantee. The Government underlined the need to avoid any form of default while the opposition parties sought a 'bail-in.'¹⁴⁷

¹⁴² See generally *ibid* ch 11.

¹⁴³ See *Statement by IMF on Ireland* (Press Release No 10/482, 10 December 2010).

¹⁴⁴ Pearse Doherty TD, Dáil Debates, 15 December 2010, Vol 725 No 2, 319.

¹⁴⁵ Michael McGrath, *ibid*, 328.

¹⁴⁶ See comments by Minister for Finance, Brian Lenihan, *ibid*, 312-313.

¹⁴⁷ 'We support a more aggressive bail-in strategy for the banks that forces owners of these debts to participate in the recapitalization of selected financial institutions', Enda Kenny TD, *ibid*, 315.

STATUS INSTRUMENTS

X.3

WHAT IS THE STATUS OF THE FINANCIAL ASSISTANCE INSTRUMENTS IN THE NATIONAL LEGAL ORDER (POLITICAL AGREEMENT, INTERNATIONAL TREATY, ETC.)?

The financial assistance instrument, the MoU, is a political agreement and does not constitute a treaty either under public international law or under domestic Irish law.¹⁴⁸

TRANSPOSITION NATIONAL LEGAL ORDER

X.4

CONSIDERING THE STATUS OF THE FINANCIAL ASSISTANCE INSTRUMENTS, WHAT PROCEDURE DOES THE CONSTITUTION PRESCRIBE FOR THEIR ADOPTION/TRANSPOSITION INTO THE NATIONAL LEGAL ORDER?

As the MoU is not an international agreement it does not require authorisation by the Dáil per Article 29.5.2 of Bunracht na hÉireann (the Irish Constitution) providing that ‘[t]he State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann [the lower house of parliament]’. This appeared to be the view of the Government.¹⁴⁹ Sinn Féin contested this conclusion but never outlined in detail the grounds for that opinion. Nonetheless, the Government decided to hold a debate on the MoU in the Dáil (see answer to question X.2). A motion approving the MoU was approved by the Dáil by 81 votes to 75. This would not appear to have a legally binding effect.

ROLE PARLIAMENT

X.5

WHAT IS THE ACTUAL ROLE OF PARLIAMENT WITH REGARD TO THE ADOPTION/TRANSPOSITION INTO THE NATIONAL LEGAL ORDER OF THE FINANCIAL ASSISTANCE INSTRUMENTS?

See above.

ADJUSTMENT REQUIREMENTS

X.6

DESCRIBE THE RELEVANT CONTENT OF THE FINANCIAL ASSISTANCE INSTRUMENTS.

The Memorandum of Understanding containing the broad outline of the package was

¹⁴⁸ See further Darren O'Donovan, ‘IMF Conditionality, the Irish Constitution and the Need for a Dáil Vote on the Bailout Agreement’ (*Human Rights in Ireland*, 22 Nov 2010) <<http://humanrights.ie/constitution-of-ireland/imf-conditionality-the-irish-constitution-and-the-need-for-a-dail-vote-on-the-bailout-agreement/>> accessed 11 June 2013.

¹⁴⁹ ‘The [Irish] authorities have informed us that while parliamentary approval of the EU-IMF support package is not legally required, the Government has put the motion before parliament to strengthen political support for the agreement.’, *Statement by IMF on Ireland* (n 143).

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published on 1 December 2010 and a revised version published on 16 December 2010. The assistance was formally approved by a decision of the Council of Ministers on the 7th of December.¹⁵⁰ The total package was worth €85 billion of which €45 billion was to be provided by the European Union, €22.5 billion by the IMF and €17.5 billion from Ireland's own financial resources (principally the National Pension Reserve Fund). The stated goal of the program was to restore growth and financial health to the Irish economy and consisted of four elements: the downsizing and reorganisation of the banking sector, an ambitious plan of fiscal consolidation, reforms designed to facilitate renewed growth, and the use of substantial external financial assistance to support these policy objectives.

The EU element of the package of €45 billion consisted of funds drawn from the European Financial Stability Facility (EFSF), the European Financial Stability Mechanism (EFSM), and a series of bilateral loans between the Irish state and the United Kingdom, Sweden and Denmark.

The main documents of the programme consist of the Memorandum of Understanding (MoU) outlining a timetable of achieving certain policy goals and measures and a Memorandum of Economic and Financial Policies (MEFP), outlining the general policy goals.¹⁵¹ The Programme Documents to a large extent reflects policy goals already contained in the 'National Recovery Plan' announced by the Irish government on 3 November 2010 which contains a more complete picture of proposed policy and legislative measures.¹⁵²

The National Recovery Plan 2011 - 2014 underlines the importance of the export sector for the envisaged return to growth for the Irish economy. Its general approach in relation to economic and budgetary issues is 'pro-enterprise', an approach that colours the plan's treatment of social and employment matters. It envisages amendments of labour market regulations 'especially in sectors where unemployment among younger and less-skilled workers is more prevalent' (p.10) and calls for welfare reforms to provide a 'pathway' to employment (p. 10). It calls for a reduction in the minimum wage and reform of the welfare system to incentivise work and eliminate unemployment traps' (see p.10). Expenditure reductions, which are intended to account for two thirds of the adjustment, also include a reformed pension scheme for new entrants to the public service and a reduction in pay of 10%.

The Programme for Financial Assistance, consisting of two letters of intent, a Memorandum of Understanding (MOU) and a Memorandum of Economic and Financial Policies (MEFP), envisages structural reforms to reform the minimum wage and sectoral wage agreements and to enlarge the scope of the 'inability to pay clause' in relation to these wage measures (p. 10), a gradual increase in the pension age from 65 to 68 by 2028 (p.13). It also stipulates that the unemployment benefit system should be reformed to 'incentivise early exit' by the

¹⁵⁰ Council Implementing Decision 2011/77 of 7 December 2010 on granting Union financial assistance to Ireland [2011] OJ L 30/54.

¹⁵¹ *EU/IMF Programme of Financial Support for Ireland* (16 December 2010).

¹⁵² Department of Finance, *National Recovery Plan 2011-2014* (n 140).

introduction of ‘activation’ policies and making eligibility for benefits conditional on participation in such activation policies (see p. 10 ff). Additionally a general reduction in the social transfer payments is envisaged (p. 29, MFEP para 22). Other measures include a lowering of tax bands and credits, in effect lowering the threshold at which tax is paid and bringing more individuals into the taxation system (p. 30, MFEP para 23).

MISSIONS

X.7

WHAT LEGAL CHANGES, IF ANY, HAD TO BE MADE TO ACCOMMODATE ‘TROIKA’ REVIEW MISSIONS, POST-PROGRAMME SURVEILLANCE MISSIONS, ETC?

No known legal changes have been made to accommodate the ‘Troika’ review missions. These missions have generally been noted by the media and been reported as symbolic of a loss of sovereignty but have engendered no debate regarding their detailed implications for sovereignty, constitutional law etc beyond general statements surrounding the bailout.

CASE LAW INTERNATIONAL INSTRUMENTS

X.8

HAVE THERE BEEN DIRECT OR INDIRECT LEGAL CHALLENGES AGAINST THE FINANCIAL ASSISTANCE INSTRUMENTS BEFORE A NATIONAL (CONSTITUTIONAL) COURT?

No.

CASE LAW IMPLEMENTING MEASURES

X.9

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON NATIONAL POLICY MEASURES ADOPTED IN RELATION TO THE MEMORANDA OF UNDERSTANDING?

There is no court judgment on policy measures that raise an issue regarding the MoU itself. There have been judgements surrounding the legal status of the ‘Croke Park’ agreement on public sector pay and wages (see question I.1)¹⁵³ and the National Asset Management Agency.¹⁵⁴

¹⁵³ Public Service Agreement 2010-2014 available at <http://per.gov.ie/wp-content/uploads/Public-Service-Agreement-2010-2014-Final-for-print-June-2010.pdf> (accessed 11 June 2013). See *David Holland v Athlone Institute of Technology* [2011] IEHC 414. Hogan J of the High Court found that the Croke Park agreement does not create justiciable rights for individuals, nor does it create legitimate expectations on behalf of the parties.

¹⁵⁴ A ‘bad bank’ established to quarantine problematic loans and remove them from the balance sheets of the banks themselves. See National Asset Management Agency Act 2009. The constitutional arguments of the plaintiff relating to property rights and procedural rights were rejected by the Supreme Court in *Dellway Investments & ors v NAMA & ors* [2011] IESC 14. For a summary of the case see Gwynn Morgan, ‘The Constitution and the Financial Crisis in Ireland’ (n 139), 84-85.

BOND PURCHASES ECB

X.10

DESCRIBE THE POLITICAL, ECONOMIC AND LEGAL SITUATION LEADING UP TO THE MOMENT WHERE THE EUROPEAN CENTRAL BANKS STARTED BUYING GOVERNMENT BONDS ON THE SECONDARY MARKET (THROUGH THE SECURITIES MARKETS PROGRAMME, SMP).

The ECB had intervened in the bond markets to purchase Irish government bonds during 2010, in the immediate aftermath of the first Greek financial assistance package, presumably in an effort to slow or halt the rise in interest rates on Irish bonds. This was taking place in the context of a general deterioration of the Irish financial position (see response to question X.II). There was correspondence between the Minister for Finance Brian Lenihan and the President Trichet of the ECB in October and November of 2011. They have yet to be made publically available but it is believed that they refer to concerns the ECB had regarding the position of Irish banks.¹⁵⁵

CONDITIONALITY BOND PURCHASES ECB

X.11

WHAT NATIONAL POLICY MEASURES HAVE BEEN REQUESTED BY THE ECB IN EXCHANGE FOR THE ACQUISITION OF GOVERNMENT BONDS ON THE SECONDARY MARKET? HOW HAVE THESE REQUESTS BEEN SUBJECT TO DEBATE IN LIGHT OF THEIR IMPLICATIONS FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

No information has been found relating to any measures the ECB may have requested in exchange for its purchase of Irish government debts. Having said that given the IMF/EU programme was developed subsequent to the commencement of such purchases, and that ECB officials were involved in the negotiations, it is presumed that any such policy measures were included in the final Programme.

MISCELLANEOUS

X.12

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO IRELAND AND FINANCIAL SUPPORT?

In November of 2011 a draft budget was leaked after the document was circulated to the German Bundestag's Finance Committee in accordance with German constitutional requirements on parliamentary approval for any release of funds under the bailout programme. The affair was deeply embarrassing for the Government and led to allegations that Irish policy was being dictated from Berlin.¹⁵⁶ It also was said to reveal the weakness of the Irish Parliament in the budgetary process.¹⁵⁷ The general view however was that it simply

¹⁵⁵ Donovan and Murphy, *The Fall of the Celtic Tiger: Ireland and the Euro Debt Crisis* (n 141), 234.

¹⁵⁶ See Comments of Gerry Adams TD, Dáil Debates, 22 November 2011, Vol 747 No 3, 265.

¹⁵⁷ See Comments of Micheál Martin, Dáil Debates, 23 November 2011, Vol 747 No 4, 641 ff, and Dáil Debates, 22 November 2011, Vol 747 No 3, 261 and Editorial, 'The Shape of Things to Come' *Irish Times* (Dublin, 19 November 2011) 15 Dáil Debates, 22 November 2011, Vol 747 No 3 *ibid ibid ibid*

made transparent the loss of sovereignty inherent in the bailout process and presaged future budgetary coordination in the context of reformed European economic governance.¹⁵⁸ The Government responded that in the context of the bailout numerous documents were produced and distributed to a variety of actors and that in such a situation there was a real possibility that leaks could occur.¹⁵⁹ It insisted that the document was simply a draft and that its adoption had yet to be finalised. Finally, it complained to the European Commission, who in turn pointed out that responsibility for the leak lay with the national authorities in receipt of such documents.¹⁶⁰

¹⁵⁸ See Arthur Beesley, 'Our loss of economic sovereignty may be just the beginning' *Irish Times* (Dublin, 22 November 2011) 10.

¹⁵⁹ See Kathryn Hayes, 'Further leaks cannot be ruled out - Noonan' *Irish Times* (Dublin, 22 November 2011) 8.

¹⁶⁰ See Arthur Beesley, 'Leaking a matter for Berlin, says Commission' *Irish Times* (Dublin, 19 November 2011) 7.