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L&RS Note

Making and Scrutiny of Secondary Legislation

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Abstract

Every year between 550 and 700 pieces of secondary legislation are given force of law. The legislation derives from the executive – it does not originate in the Oireachtas and the Oireachtas has no authority to amend this legislation. The Oireachtas does have power to scrutinise some secondary legislation, where provision is made for scrutiny in primary legislation.

This *Note* looks at the process of making secondary legislation and scrutiny of the legislation – covering scrutiny by Cabinet, Oireachtas Committees, the Houses of the Oireachtas and the Courts.

Contents

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Legal Disclaimer

Introduction

Article 15.2 1° of the Constitution states that:

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

However, an Act may delegate legislative powers to a Minister, regulatory body or an authority. This power to legislate is limited to procedural matters,[1] to allow for the effective administration of the provisions of the delegating Act (the 'Parent Act'). The power is realised by the making of a piece of secondary legislation, commonly referred to as a statutory instrument (SI), or sometimes referred to as delegated legislation.[2]

In 2019, 700 different SIs were issued. The variety of SIs over the course of the year illustrates not only the diverse nature of the business of the State, but also the complexity of secondary legislation.

The purpose of this *Note* is two-fold. It aims to provide the reader with an understanding of the procedures associated with the making of secondary legislation and it looks to identify the relevant procedural safeguards in place to assist with scrutiny of secondary legislation.

[1] Using this mechanism to implement a new policy is prohibited – see Scrutiny by the Courts, below

[2] SIs may take the form of regulations, rules, orders, bye-laws and schemes:

- Regulations are often used to prescribe details which cannot fit into the primary legislation.
- Rules are a form of secondary legislation that are mainly used to outline procedural norms.
- Orders may be used to define important dates, boundaries, standards and rates, among other things – they are usually quite specific and targeted. For example, a commencement order defines the date an Act or part of an Act comes into force.
- Bye-laws are made by authorised bodies. They only regulate the constituents of that body.
- Schemes are very targeted forms of secondary legislation. They consist of formal plans or arrangements that are used to attain a particular object or a policy goal.

Background

The potential of secondary legislation was made obvious during the period that immediately followed the last sitting of the Seanad on 27 March 2020, prior to the Seanad general election, after which time (until Monday 29 June 2020) the Oireachtas only comprised one properly constituted House.[3] During this period, the Ministers of the (continuing) government of the 32nd Daíl made a number of statutory instruments which had immediate effect. As both Houses of the Oireachtas had not been properly constituted and Oireachtas Committees from the 32nd Daíl no longer sat, these instruments were not subject to proper scrutiny of the Houses of the Oireachtas nor the relevant Oireachtas Committees.[4]

However, to put this in context, very few pieces of secondary legislation are challenged in the Oireachtas, let alone debated. The only time in the history of the State that a statutory instrument has been annulled by a House was on 29 May 2018, when the Daíl passed a motion to annul an SI that introduced a penalty point system for fishermen engaging in unregulated, unreported, or illegal fishing. Previous iterations of the SI had already been challenged in the courts on two occasions, in 2014 and 2016 respectively, resulting in the withdrawal of those instruments prior to the hearings.[5]

This paper describes source of and the process behind making secondary legislation in Ireland. The *Note* also identifies the various levels of scrutiny that have been put in place to ensure that secondary legislation is scrutinised from a political and legal perspective, ensuring the secondary legislation is *intra vires* (made within the limits of the delegated power) and it is constitutionally sound. A companion infographic, covering this material will be published shortly after this *Note*.

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[3] See *Senator Ivana Bacik v An Taoiseach* [2020] IEHC 313.

[4] Orders made under primary legislation amended by the *Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020* and the *Emergency Measures in the Public Interest (Covid-19) Act 2020* were laid before the Daíl but were not laid before the Seanad, as the Seanad was not properly constituted. This did not affect the validity of the SIs as the respective provisions qualified the requirement to lay the SI by the words 'as soon as may be after it is made'. That said, it does raise questions on whether these SIs were subject to proper scrutiny by the Houses of the Oireachtas.

[5] See *European Union (Common Fisheries Policy) (Point System) Regulations 2018*; Pat The Cope Gallagher TD, 'European Union (Common Fisheries Policy) (Point System) Regulations 2018: Motion' *Dáil Éireann debate*, 23 May 2018; 'European Union (Common Fisheries Policy) (Point System) Regulations 2018: Motion' *Dáil Éireann debate*, 29 May 2018; Aoife Cusack, 'Dáil votes to annul penalty point system for fishermen' *Green News*, 30 May 2018.

Source of authority

Secondary legislation must be consistent with, and based on, the primary legislation that is the source of the delegated power, the Parent Act. The Parent Act delegates the power to make secondary legislation, defining the limits of that power. If either of these elements are missing, the legislation may be overturned by the courts (see Scrutiny by the Courts, below).

The Parent Act also defines any formal requirements and identifies ways in which an SI may be approved or annulled by the Oireachtas (see Houses of the Oireachtas Scrutiny, below).

Making and Commencement of a Statutory Instrument[6]

Secondary Legislation (or Sis) are made by the Minister or body duly authorised by the Parent Act to do so.

In practice, the relevant government department (the 'Parent Department') drafts the SI or prepares a preliminary draft of it, requesting the Office of the Parliamentary Counsel to the Government (the 'OPC') to draft and/or settle the SI.

The following categories of SI should be drafted and settled in the OPC:

- instruments that amend primary legislation;
- commencement orders for Acts of the Oireachtas or provisions thereof;
- government orders and
- orders requiring government approval (See Cabinet Scrutiny, below).

In some cases, if the SI is significant, the Parent Department may need to draft a regulatory impact analysis (RIA) of the SI to facilitate the consideration of alternatives to regulations.

After an SI is made, the Parent Department arranges for it to be promulgated in line with the requirements of section 3 of the *Statutory Instruments Act 1947*, as amended.

An SI will commence on the specified date or, where no commencement date is specified, the SI commences on the date it is made by the Minister or other body.

[6] Ben Mannering, 'Pedigree Chum', *Law Society of Ireland Gazette*, July 2018, pp 42-45.

Cabinet Scrutiny

As per Chapter 5 of the *Cabinet Handbook*, a Parent Department is required to submit an initial outline of a government SI to Cabinet in any of the following scenarios:

1. Where approval is required by statute.
2. Where directed to do so by Cabinet.
3. Where the relevant minister decides to do so.
4. Where the Attorney General advises the relevant minister to do so.

Exceptions to pre-approval are provided for instruments of an urgent or recurring nature or where the terms of the SI are clearly within what is envisaged in the Parent Act.

The (approved) outline of the SI is then sent to the OPC for formal drafting, settling, and proofing.

An official draft of the government SI must then be submitted to Cabinet, together with a memorandum setting out the background, OPC's approval, the full title in English and Irish, and any formal requirements needed from the Oireachtas.

An officer of the Department of the Taoiseach will notify the Parent Department, and any concerned departments, of Cabinet approval if it is forthcoming. An officer of the Parent Department may then lay it before the Oireachtas as required (See Houses of the Oireachtas Scrutiny, below).

Oireachtas Committee Scrutiny

The relevant Oireachtas Committee is empowered to scrutinise SIs (including those laid or laid in draft before either House and those made under the European Communities Acts 1972 to 2009) to make sure that the law it contains is clear and follows the powers given by the Parent Act.[7] SIs may be sent from the Parent Department to the relevant committee by correspondence. Whether a committee scrutinises an SI or not is a matter for its members.

If the Committee identifies an issue, it will publish recommendations on the (draft) SI and, where it considers action is warranted, it may recommend that the Minister or authority should amend the SI or that a House of the Oireachtas should annul it.[8]

Although there has been an Oireachtas Committee dedicated to European affairs (covering secondary legislation deriving from Europe) running consistently from the early 1970s, there has not been a committee solely dedicated to the scrutiny of secondary legislation since the mid-1960s. In 1965, the Seanad Select Committee on Statutory Instruments was last appointed to consider statutory instruments laid, or laid in draft, before the Seanad, with a view to determining whether the special attention of Seanad Éireann should be drawn towards them.[9]

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[7] Daíl SO95(4)(i), Seanad SO71(3)(h) – Functions of Departmental Select Committees.

[8] Daíl SO96(6), Seanad SO72(6) – Powers of Departmental Select Committees.

[9] See Third Report of the Seanad Select Committee on Statutory Instruments, printed 11 June 1967. The Committee's selection criteria looked at whether the relevant SI:

- imposed a charge on the Public Revenue or contained provisions requiring payments to be made to a public body or authority for a licence, consent or any service, or prescribed the amount of any such charge or payment;
- was made in pursuance of any enactment containing specific provisions excluding it from challenge in the Courts;
- appeared to make an unusual or unexpected use of the powers conferred by the Parent Act;
- purported to have retrospective effect where the Parent Act did not expressly confer authority to do so;
- was laid before the Seanad or published, but only after an unjustifiably delay; or
- had a form or purport that piqued the attention of the Committee.

Houses of the Oireachtas Scrutiny

The provision of the Parent Act that delegates powers to make the SI may include certain safeguards. For example, the Parent Department may be required to lay a copy of the SI or draft SI before one or both Houses of the Oireachtas.

The Parent Act may then specify a period (usually 21 sitting days, but occasionally 7 or 10 sitting days) during which time the relevant House may, by motion, approve or annul the SI.

On the rare occasion where approval is required, a failure by the relevant House(s) to pass a motion of approval within the specified period will render the SI void. If no period is specified, the SI will be ineffectual until such time as the motion for approval is passed.

The power to annul an SI by motion is far more commonly found in Parent Acts than a requirement for approval.[10] A motion to annul an SI may succeed by a simple majority in the relevant House. However, it is most unusual for SIs to be debated, still less vetoed or revoked (this has only occurred once in the history of the State), so this is a passive rather than an active process.

The relevant House does not have the power to amend the instrument – the power to amend is retained by the Minister or authority that made the instrument.

Where a regulation is made under *section 3 of the European Communities Act 1972* and contains a provision for an indictable offence, that instrument must be laid before both Houses of the Oireachtas for a period of 21 sitting days, allowing either House to pass a motion annulling the regulation. Regulations made under this Act often transpose European law into domestic law.

Annulment of secondary legislation takes effect on the date of annulment – it does not have the retrospective effect of invalidating actions authorised by the legislation prior to that date.

[10] R. Byrne, P. McCutcheon, C. Bruton and G. Coffey, *Byrne and McCutcheon on the Irish Legal System* (4th ed.) Bloomsbury Professional, Dublin: 2001, p. 461.

Scrutiny by the Courts

As noted above, Article 15.2.1° of the Constitution declares that the 'sole and exclusive power of making laws for the State is hereby vested in the Oireachtas.' This means that the ultimate law-making power resides in the Oireachtas. However, it is also permissible for the Oireachtas to delegate limited legislative functions under certain restricted circumstances.[11]

In *Cityview Press v AnCo*,[12] the then Chief Justice of the Supreme Court, Tom O Higgins, outlined a test for the constitutional validity of secondary legislation. First, to be valid, delegated law may only fill in the details of a policy that is already contained in primary legislation – it cannot incorporate an entirely new policy. Secondly, the primary legislation must include sufficient guidance for the secondary legislation to follow – the delegation may not be overly broad or unfettered. To date, the courts have been cautious in their application of the 'principles and policies' test, being sure not to read too much into the intention of the Oireachtas when determining whether the primary legislation sufficiently outlines the principles and policies upon which an SI is based.[13]

The judgment of Justice Hogan in the Court of Appeal in the case of *Bederev v Ireland*[14] implies that the courts may begin to apply a stricter interpretation of the 'principles and policy' test. Justice Hogan found that where the relevant primary legislation contains no meaningful 'principles and policies' constraining the delegated power, the resulting secondary legislation would be constitutionally invalid. The primary legislation must be sufficiently clear in its expression of policy for the secondary legislation to be valid. The Supreme Court[15] overturned the findings of the Court of Appeal on the facts, finding that the particular Act contained sufficient principles to allow the Minister to make the relevant secondary legislation, and it was "not an abrogation of the democratic responsibility of the Oireachtas". However, the decision of the Supreme Court did not expressly overrule the rationale behind the Court of Appeal's decision.

European Regulations

It is important to note that secondary legislation which transposes a European Regulation has a special status under the Constitution. Article 29.4.6° of the Constitution provides:

> "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union …"

It follows that the courts have limited jurisdiction to examine the constitutional validity of regulations made under the *European Communities Act 1972*. This is supported by the words of Finlay CJ in *Meagher v Minister for Agriculture*[16]:

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[11] See further Hogan, Morgan and Daly, *Administrative Law in Ireland*, 5th Ed., Round Hall, Dublin: 2019, Ch. 2 Section B (Separation of Powers and Delegated Legislation).

[12] [1980] IR 381.

[13] See Dr Oran Doyle, *Constitutional Law: Text, Cases and Materials*, Clarus Press, Dublin: 2008, p. 318.

[14] [2015] IECA 38.

[15] *Bederev v Ireland* [2016] IESC 34.

[16] [1993] IESC 2; [1994] 1 IR 329.

> "The court is accordingly satisfied that the power to make regulations in the form in which it is contained in section 3(2) of the [*European Communities Act 1972*] is necessitated by the obligations of the State of the Communities and now of the Union and is therefore by virtue of Article 29.4 subsections 3, 4 and 5 immune from constitutional challenge."

In *Meagher v Minister for Agriculture,*[17] the court found that the 'principles and policies' (as outlined in the Cityview Press case) were to be found in European Law and consequently the making of an SI based on that law was not an unauthorised delegation of legislative power.

Until 2007, it was accepted that delegated legislation (whether it derived from European Law or not) could not create an indictable offence. This was supported by the decision of the Supreme Court in *Browne v Attorney General*.[18] However, this principle was reversed by the commencement of the European Communities Act 2007, which amended the *European Communities Act 1972* to expressly allow relevant Ministers to make secondary legislation containing indictable offences for the purpose of giving full effect to European law. The amending Act also created a requirement for any secondary legislation made under the *European Communities Act 1972* containing an indictable offence to be laid before each House of the Oireachtas for a period of 21 sitting days respectively, during which time the relevant House may annul the secondary legislation (see Houses of the Oireachtas Scrutiny above).

[17] [1993] IESC 2; [1994] 1 IR 329.

[18] [2003] IESC 43.

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