

# A Critical Examination of the Legislative Processes and Practices Applied in the Implementation of Directive 91/308/EEC on Money Laundering and Regulation 3677/90/EEC on Psychotropic Substances in the Republic of Ireland

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## A. Introduction<sup>1</sup>

The Irish legal system is a common law system, based on a blend of case-law and legislation. It is similar to the English legal system, but not the same, as the two legal systems started to diverge in the nineteenth century, before the 1921 settlement.<sup>2</sup> Since 1922, Ireland has had a written Constitution, the first Constitution being the Irish Free State Constitution of 1922, which was subsequently replaced by the current *Bunreacht na hÉireann* of 1937. All case-law and legislation is required to comply with the provisions of the constitution. Laws can be struck down for being unconstitutional pursuant to Articles 26 34.3.2 of the Constitution. Article 26<sup>3</sup> provides that proposed legislation, prior to being signed into law by the President of Ireland, can be referred by the President, after having consulted the Council of State,

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<sup>1</sup> This paper is based on the Irish National Report under the Grotius programme (2000/GR/109).

<sup>2</sup> V.T.H. Delany, *The Administration of Justice in Ireland*, (Dublin, The Institute of Public Administration, 1975).

<sup>3</sup> Article 26 1.1 provides that 'The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof'.

Article 26.3.1 'In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this Article is repugnant to this Constitution or to any provision thereof, the President shall decline to sign such Bill'.

to the Supreme Court to examine its constitutionality. Article 34.3.2<sup>4</sup> provides for 'the invocation of the High Court's power to strike down legislation, in the course of litigation between parties'.<sup>5</sup> It should be noted that Irish government legislation is regularly challenged in the Courts to test its constitutionality, and if it is found unconstitutional, is struck down as being illegal.

Enshrining Constitutional rights for the protection of the citizen must be borne in mind when dealing with any criminal legislation within the Irish jurisdiction. This issue is relevant when enacting legislation pursuant to the Money Laundering Directive 91/308/EEC, but was not perceived to be an issue in implementing legislation pursuant to Regulation 3677/90/EEC on Psychotropic Substances. The Constitution of Ireland required amendment by way of referendum upon Ireland's accession to the European Economic Community, and requires further referenda each time the EC or EU concludes an amending treaty to the Treaty of Rome. Articles 29.4.3 to 29.4.7 of the Irish Constitution deal with Ireland's membership in the European Community and Union.<sup>6</sup> The adoption of EC and EU law into Irish law presupposes that EC and EU law have been properly enacted.

This article considers the processes and practices involved in transposing EU Directives and Regulations into Irish law by examining the Money Laundering Directive and the Regulation on Psychotropic Substances.

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<sup>4</sup> Article 34.3.2 provides that 'Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court'.

<sup>5</sup> D. Gwynn Morgan, *Constitutional Law of Ireland*, (The Round Hall Press, 1985).

<sup>6</sup> Article 29.4.3 of Bunreacht na hÉireann provides that 'The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on 18 April 1951), the European Economic Community (established by Treaty signed at Rome on the 25 March 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25 March 1957). The State may ratify the Single European Act (signed on behalf of the Member States of the Communities at Luxembourg on 17 February 1986, and at the Hague on 28 February 1986).

4 The State may ratify the Treaty on European Union signed at Maastricht on 7 February 1992, and may become a member of that Union.

5 The State may ratify the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts signed at Amsterdam on 2 October 1997.

6 The State may exercise the options or discretions provided by or under Articles 1.11, 2.5 and 2.15 of the Treaty referred to in subsection 5 of this section and the second and fourth Protocols set out in the said Treaty but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

7 No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.

## B. The Articulation of EC Law into the Irish Legal System

The usual method of adopting European Community Directives into Irish law is by way of Statutory Instrument pursuant to section 3 of the European Communities Act, 1972.<sup>7</sup> The transposal by way of statutory instrument can be either through a direct translation of the EC Directive, or through a rephrasing of its words, in order to create a coherent whole with pre-existing law in the area and in the overall Irish legal landscape. While the Irish approach to EC Regulations is that they have direct effect, accompanying Irish legislation is enacted to 'make breaches of...Community Regulations an offence and to attach penalties'.<sup>8</sup> In the case of the Regulations dealing with narcotic drugs and psychotropic substances, this legislation took the form of a statutory instrument. Statutory instruments are a form of delegated legislation, delegated by a 'parent' act of the Oireachtas. This method of delegating legislative power by way of act is permitted by the Statutory Instruments Act, 1947. Statutory Instruments operate as more than administrative measures, but are laws enacted to 'give effect to policies and principles' contained in a relevant Act of Parliament.<sup>9</sup>

Irish national legislation pursuant to Directive 91/308/EEC on Money Laundering and Regulation 3677/90/EEC on Psychotropic Substances reached the Irish Statute book through different routes. The Department of Justice, Equality & Law Reform,<sup>10</sup> formerly known as the Department of Justice, would normally be responsible for legislating Criminal Law, and it is this Department which drafted the Criminal Justice Act, 1994.<sup>11</sup> Given the criminal nature of the content of Directive 91/308/EEC, and the continuing uncertainties regarding the nature of EU law, with regard to supremacy and direct effect principles, allied with concerns with regard to

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<sup>7</sup> European Communities Act, 1972 s. 2 provides: 'From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties.' S. 3. (1) 'A Minister of State may make regulations for enabling section 2 of this Act to have full effect.

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

(3) Regulations under this section shall not create an indictable offence.

(4) Regulations under this section may be made before the 1st day of January, 1973, but regulations so made shall not come into operation before that day'.

<sup>8</sup> Text of e-mail correspondence with Tom McGuinn, Chief Pharmacist, Department of Health and Children, Hawkins House, Dublin 2.

<sup>9</sup> D.G. Morgan, *Constitutional Law of Ireland*, (Dublin, The Round Hall Press, 1985) at p. 108.

<sup>10</sup> An Roinn Dlí agus Cirt, Comhionannais agus Athchóirthe Dlí.

<sup>11</sup> Criminal Law Reform Division, Department of Justice Equality & Law Reform, Republic of Ireland.

Irish Constitutional Fundamental Rights, the Directive was enacted into Irish law by way of an Act of the Oireachtas, rather than by way of Statutory Instrument. This approach also added to the overall coherency with the existing criminal law procedures and structures.<sup>12</sup>

By contrast, the person responsible for legislating on the pharmaceutical aspect of drug control in Ireland is the Chief Pharmacist of the Department of Health & Children,<sup>13</sup> and it is he who dealt with the Irish accompanying legislation for Regulation 3677/90/EEC, and Regulations 900/92/EEC, 3769/92 and 2093/97/EEC. The implementation of this legislation is through the Community Health: Drugs/HIV/AIDS division of the Department of Health & Children. The criminal aspects of drug control are dealt with by the Department of Justice. These are primarily covered by the Misuse of Drugs Acts 1977 and 1984. In both of these areas the Chief Pharmacist of the Department of Health & Children works closely with the Department of Justice.<sup>14</sup>

### **C. Narcotic Drugs and Psychotropic Substances: Legal Framework**

The EC regulations on narcotic drugs and psychotropic substances, together with supporting Irish Statutory Instrument, fit into an existing legal framework dealing with controlled drugs. The Irish legal framework that deals with narcotic drugs and psychotropic substances prior to the passing the EC regulations was contained in the Misuse of Drugs Act, 1977,<sup>15</sup> and the Misuse of Drugs Act, 1984,<sup>16</sup> which were complemented by the Misuse of Drugs Act, 1977 (Controlled Drugs) (Declaration) Order, 1993.<sup>17</sup> The European Communities (Monitoring of External Trade in Scheduled Substances) Regulations, 1993<sup>18</sup> was passed in Ireland to complement both Council Regulation (EEC) No. 3677/90<sup>19</sup> and Council Regulation (EEC) No.

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<sup>12</sup> *Supra*, note 10.

<sup>13</sup> An Roinn Sláinte agus Leanaí.

<sup>14</sup> T. McGuinn, Chief Pharmacist, Department of Health & Children.

<sup>15</sup> Number 12 of 1977. Long title: An act to Prevent the misuse of certain dangerous or otherwise harmful drugs, to enable the Minister for Health to make for that purpose certain regulations in relation to such drugs, to enable that Minister to provide that certain substances shall be poisons for the purposes of the Pharmacy Acts, 1875 to 1962, to amend the Pharmacopoeia Act, 1931, the Poisons Act, 1961, the Pharmacy Act, 1962, and the Health Acts, 1947 to 1970, to repeal the Dangerous Drugs Act, 1934, and section 78 of the Health Act, 1970, and to make certain other provisions in relation to the foregoing. [16 May 1977]

<sup>16</sup> Number 18 of 1984. Long title: An act to amend and extend the law relating to the misuse of certain dangerous or otherwise harmful drugs. [18 July 1984]

<sup>17</sup> S.I. No. 328 of 1993

<sup>18</sup> S.I. No. 6 of 1993.

<sup>19</sup> OJ No. L 357, 20.12.90, p. 1.

900/92,<sup>20</sup> and to meet the international law obligations of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. It is complemented by the Misuse of Drugs (Scheduled Substances) Regulations, 1993,<sup>21</sup> and the Misuse of Drugs (Scheduled Substances) (Exemption) Order, 1993.<sup>22</sup> These statutory instruments, read in conjunction with the Misuse of Drugs Acts, 1977 and 1984, classify the precursor substances specified under the EC Regulations, as 'controlled drugs' within the Irish state, and are treated accordingly. In addition the statutory instruments are passed to provide that breach of the EC Regulations is to be an offence under Irish law, and to provide penalties for such offences.<sup>23</sup>

The European Communities (Monitoring of External Trade in Scheduled Substances) Regulations 1993<sup>24</sup> designates the relevant national competent authorities to implement and operate the provisions of Regulation (EEC) No. 3677/90 (as amended). It also specifies penalties both for the breach of Regulation (EEC) No. 3677/90 (as amended), and for the provision of 'false information for the purpose of obtaining documentation required under said EC regulation'.<sup>25</sup>

The Misuse of Drugs (Scheduled Substances) Regulations, 1993,<sup>26</sup> operates to implement Council Directive 92/109/EEC.<sup>27</sup> It deals with restrictions on the production, possession, supply, importation and exportation of scheduled substances, together with the labelling, 'documentation, record-keeping, and furnishing of information with regard to scheduled substances'.<sup>28</sup> The Misuse of Drugs (Scheduled Substances) (Exemption) Order, 1993<sup>29</sup> exempts certain medical and veterinary preparations from the provisions of section 3 of the Misuse of Drugs Act, 1977.<sup>30</sup>

<sup>20</sup> OJ No. L 96, 1.4.92, p. 1.

<sup>21</sup> S.I. No. 338 of 1993.

<sup>22</sup> S.I. No. 341 of 1993.

<sup>23</sup> *Supra*, note 13.

<sup>24</sup> *Supra*, note 17.

<sup>25</sup> Explanatory note attached to S.I. 6 of 1993.

<sup>26</sup> *Supra*, note 21.

<sup>27</sup> Which deals with the manufacture and placing on the market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances.

<sup>28</sup> Explanatory note attached to S.I. No. 338 of 1993.

<sup>29</sup> *Supra*, note 22.

<sup>30</sup> Section 3, Misuse of Drugs Act, 1977 provides:

'(1) Subject to subsection (3) of this section and section 4 (3) of this Act, a person shall not have a controlled drug in his possession.

(2) A person who has a controlled drug in his possession in contravention of subsection (1) of this section shall be guilty of an offence.

(3) The Minister may by order declare that subsection (1) of this section shall not apply to a controlled drug specified in the order, and for so long as an order under this subsection is in force the prohibition contained in the said subsection (1) shall not apply to a drug which is a controlled drug specified in the order.

(4) The Minister may by order amend or revoke an order under this section (including an order made under this subsection)'.  
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## D. Money Laundering: Legal Framework

Initial consideration of the need for legislation dealing with money laundering commenced with the negotiations leading to the drafting of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>31</sup> together with the negotiations leading up to the Council of Europe's Convention on Laundering, Search, Seizure and Confiscations on the Proceeds of Crime 1990.<sup>32</sup> Consideration of what became the Criminal Justice Act, 1994 commenced between three to four years before the enactment of the Act. The act was preceded by a report from the Irish Law Reform Commission. The preliminary documentation for the Criminal Justice Act, 1994 originated in November 1993, and while the act was going through the pre-drafting and drafting stages the Money Laundering Steering Committee, established by the Department of Finance was drafting the administrative guidance<sup>33</sup> which was to become the 'Criminal Justice Act, 1994, Money Laundering: Guidance Notes for Financial Institutions (Excluding Credit Institutions) supervised by the Central Bank of Ireland'.<sup>34</sup>

The effectiveness of transposing the content of Directive 91/308/EEC into Irish law has been greatly assisted by the drafting of the Directive by working parties of all member states at an EC level. This procedure has ensured that the original text is drafted in such a way as to make the Directive as transposable as possible into the law of Member States. This input of Member States at an official level, into the drafting of EU legal texts is seen as of crucial importance.<sup>35</sup>

Directive 91/308/EEC has been enacted by means of an act of the Oireachtas, the Criminal Justice Act, 1994.<sup>36</sup> As the subject matter of Directive 91/308/EEC is of a criminal nature, with individuals, rather than business organisations being the main target of the legislation, and with the law being criminal rather than the usual civil law nature of transposed EC Directives, it was felt that an Act of the Oireachtas would be the most appropriate method of transposing Directive 91/308/EEC into Irish Law. Further, there was a need to comply with the Fundamental Rights given to individuals pursuant to Bunreacht na hÉireann.<sup>37</sup> In addition, the need to keep

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<sup>31</sup> Concluded in Vienna, December 1988.

<sup>32</sup> *Supra*, note 10.

<sup>33</sup> *Ibid.*

<sup>34</sup> Issued in April 1995, <http://www.centralbank.ie>

<sup>35</sup> Criminal Law Reform Division, Department of Justice Equality & Law Reform, Republic of Ireland.

<sup>36</sup> 'An act to make provision for the recovery of the proceeds of drug trafficking and other offences, to create an offence of money laundering, to make provision for international co-operation in respect of certain criminal law enforcement procedures and for forfeiture of property used in the commission of crime and to provide for related matters' [30<sup>th</sup> June, 1994].

<sup>37</sup> The full text of the Bunreacht na hÉireann (the Constitution of Ireland) is available at <http://www.irlgov.ie/taoiseach/publication/constitution/intro.htm>

criminal law procedures for money laundering as normal as possible for ease of use by both practitioners and the judiciary was a major factor which led to the decision to enact an Act of the Oireachtas to deal with the contents of Directive 91/308/EEC.<sup>38</sup>

The issue of Irish constitutional rights, allied to the fact that the money-laundering Directive was created pursuant to the policy area of Justice and Home Affairs, could cause some serious problems within the Irish jurisdiction. While the findings of the Bundesverfassungsgericht<sup>39</sup> would be considered highly persuasive in the context of the EC law's relationship with a national constitution,<sup>40</sup> the same could not be said of the enforcement of EU criminal law in the Irish jurisdiction particularly if there was not the political will to adopt it, which is not the case for Directive 91/308/EEC and Regulation 900/92/EEC. It should be noted that it is perceived by the Irish authorities that they are operating on a co-operative, and not a coercive, basis within the policy area of Justice and Home Affairs. While recognising that the contents of Directive 91/308/EEC and Regulation 900/92/EEC were in line with Irish Government policy, it is to be questioned whether the EU, as opposed to the EC, could successfully require the Oireachtas to pass law which would be contrary to Irish Policy, and more particularly, would infringe Irish constitutional fundamental rights.

Given the potential for questioning whether Justice and Home Affairs provisions, to the extent that they have not been transferred into Pillar 1 of EC law, should be classified as EU law rather than EC law, and considering the current lack of clarity of the nature of EU law,<sup>41</sup> it would appear that an Act of the Oireachtas, rather than a statutory instrument pursuant to the European Communities Act 1972, would be most appropriate. This is best evidenced by the fact that the Criminal Justice Act, 1994 is still on the statute books some years later, and has not been struck down by the courts as being unconstitutional. The redrafting of the provisions of Directive 91/308/EEC into wording commonly used in Irish legislation, while taking a risk that there will be a discrepancy between the national implementing measure and the Directive, ensures that the resulting act, the Criminal Justice Act, 1994, will be compatible with the provisions of the Irish Constitution, and will work well within the laws of the Irish jurisdiction and the mechanisms of the Irish legal system.<sup>42</sup>

The Criminal Justice Act, 1994 is a new legal text created by the Irish legislative

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<sup>38</sup> *Supra*, note 10.

<sup>39</sup> German Constitutional Court.

<sup>40</sup> The series of cases commencing with *Brunner v. European Union Treaty*, [1994] 1 CMLR 57, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1974] 2 CMLR 540, and *Re Wunsche Handelsgesellschaft*, [1987] 3 C.M.L.R. 225 (1987).

<sup>41</sup> B. Meyering, 'Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality' in (1997) 22 *ELRev* 221.

<sup>42</sup> *Supra*, note 10.

body, Parts IV<sup>43</sup> and VIII<sup>44</sup> of which, when read in conjunction with the 'Guidance Notes on Money Laundering',<sup>45</sup> which were prepared by the Money Laundering Steering Committee, established by the Department of Finance, deal with the provisions of Directive 91/308/EEC. The provisions of the Act 'do not really go beyond the text of' the Directive,<sup>46</sup> its scope being broader than the equivalent UK legislation,<sup>47</sup> with reliance for fuller elaboration of provisions being made on the Guidance Notes, with 'the thrust of the Notes for all sectors (being) more or less the same'.<sup>48</sup> These guidance notes were based heavily on the UK guidance notes of the Joint Money Laundering Steering Group.<sup>49</sup> This reliance on Guidance Notes to flesh out the provisions of the Irish legislation has drawn some criticism from legal academics in Ireland, who are concerned that this form of 'self-regulation' is not as robust as is necessary to ensure that Money laundering cannot take place undetected and unreported.<sup>50</sup>

It should be noted that the Guidance notes are not law, but are recommendations for good practice. They may however be taken into account by any court in determining whether a person has complied with any of the requirements of section 57 of the Act,<sup>51</sup> which deals with disclosure of information. It has been pointed out by Rider and Ashe<sup>52</sup> that this obligation does not 'carry over to the customer identification and retention of record obligations' outlined in section 32 of the Act. However, they go on to say that in practice it would be 'difficult to envisage an Irish

<sup>43</sup> Parts IV of the Act covers sections 31 and 32. Section 31 creates the new offence of money laundering. An offence is created under the act if 'any property including money is concealed, disguised, converted or removed from the State which is or represents the proceeds of drug trafficking or other criminal activity, for the purpose of avoiding prosecution or making or enforcement of a confiscation order'. It is also offence to 'provide assistance to a person who is engaged in money laundering'. *Supra*, note 34 (Guidance Notes for Financial Institutions). Section 32 specifies the 'persons or bodies' to which section 31 is to apply.

<sup>44</sup> Part VIII covers sections 57 to 68 of the Act.

<sup>45</sup> 'Criminal Justice Act, 1994, Money Laundering Guidance Notes for Financial Institutions (Excluding Credit Institutions) supervised by the Central Bank of Ireland' which were issued with the approval of the Money Laundering Steering committee, April 1995, <http://www.centralbank.ie>.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Supra*, note 13.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Section 57 imposes obligations on designated bodies and their employees to report to the Garda Síochána (National Police Force) suspicions that under s. 31 or s. 32 an offence has been committed. It further provides that such reporting is not to be treated as a 'breach of customer confidentiality as long as it is made in good faith'. Section 58 provides for offences which can be committed by interfering in or prejudicing investigations. This includes the provision of 'tipping off' a customer the subject of a report to the Garda Síochána.

<sup>52</sup> *Supra*, note 13.

Court refusing to take these notes into account in the event of a prosecution'. The Directive itself is felt by Irish legal academics to be 'hopelessly vague on a number of key issues'<sup>53</sup> such as the definition of suspicion. The key points in dealing with suspicion are to be found in the Guidance notes, which requires a 'subjective intuitive process', as once 'suspicion has been aroused then the institutions must make a report'.<sup>54</sup>

Offences under the Criminal Justice Act, 1994 are not however limited to drug trafficking. Section 31 of the Act extends the offence of money laundering to the proceeds of all criminal activity to include revenue offences.<sup>55</sup> The intention of the drafters of the legislation was to facilitate, within the Irish Republic, the approach taken by law enforcers of the United States in the 1930s in the investigation of the 'Chicago-based criminal gangs (such as those headed by Al Capone)'.<sup>56</sup> In addition to dealing with the requirements of the Directive, the 1994 Act also introduced a legal framework for the confiscation and seizure of the proceeds of drug trafficking and other criminal activity. These additional provisions have been supplemented by further legislation which build up the Money Laundering legal framework for the Republic of Ireland.<sup>57</sup> The Irish legislature has not made use of Article 6 of the Directive in the Criminal Justice Act, 1994. This Article permits national authorities to allow information disclosed pursuant to this legislation to be used for other purposes.<sup>58</sup>

Questions have been raised with regard to what standard of proof will be required in determining whether a member of staff failed to report a suspicious transaction: whether the test will be that of a reasonable person, a reasonable person of the relevant professional or occupational standard, or whether it will require a subjective test.<sup>59</sup> This omission in the Directive is reflected in the Irish national legislation. An issue also arises as to the exact extent of the designated bodies. Included in the list of designated bodies in the legislation is 'a person providing a service in relation to

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<sup>53</sup> M. Ashe and P. Reid, 'Money Laundering – An Overview' in (Sept. 2000) Vol. 7 No. 8, *Commercial Law Practitioner*, 181.

<sup>54</sup> *Supra*, note 13.

<sup>55</sup> *Ibid.*

<sup>56</sup> R. Byrne and W. Binchy, 'Confiscation of Proceeds of Crime' in *Annual Review of Irish Law 1996*, (1997), 232, (Dublin, Round Hall/ Sweet & Maxwell 1997).

<sup>57</sup> Relevant legislation includes; Disclosure of Certain Information for Taxation and other purposes Act 1996, No. 25 of 1996, Criminal Justice (Drug Trafficking) Act, 1996, No. 29 of 1996, (which came into force on 9 September 1996, pursuant to the Criminal Justice (Drug Trafficking) Act, 1996 (Commencement) Order, 1996, S.I. No. 257 of 1996), the Proceeds of Crime Act 1996, No. 30 of 1996, Criminal Assets Bureau Act 1996, No. 31 of 1996, (which came into force on 15 October 1996 pursuant to the Criminal Assets Bureau Act, 1996 (Establishment Day) Order, 1996, S.I. No. 310 of 1996), and the current Prevention of Corruption (Amendment) Bill 2000.

<sup>58</sup> Reid, P.I., *Money Laundering – An Irish Perspective* in *Money laundering Control* (B. Rider and M. Ashe (eds.)) (Dublin, Round Hall Press/Sweet & Maxwell 1996), Ch. 8, p. 206.

<sup>59</sup> *Ibid.*

buying and selling stocks, shares and other securities'. While the Directive, pursuant to Article 12, envisages that the reporting requirement would extend to solicitors and accountants, in addition to stockbrokers,<sup>60</sup> this is unclear from the Criminal Justice Act, 1994. Professionals have also raised concerns with regard to the 'precise ambit' of the 'tipping-off' offence in section 58 of the Act, which, as currently drafted, places the professional in a difficult position between complying with the provisions of the act, and properly advising his client, and thereby holding on to his client base.<sup>61</sup>

There have been some omissions from the act, including 'deposit taking activity',<sup>62</sup> which were subsequently inserted by a statutory instrument in 1994.<sup>63</sup> Equally, credit reference agencies<sup>64</sup> appear to be excluded from the scope of the Act.<sup>65</sup> It should be noted, however, that the Criminal Justice Act, 1994, by virtue of section 32(10), grants statutory power to the Minister of Finance to sign into law statutory instruments to further elaborate on the list of designated bodies under the act. It should be noted that many of the concerns of Irish legal academics with regard to the original enactment of the Criminal Justice Act, 1994 have been subsequently addressed by such statutory instruments, or by the enactment of a further Act of the Oireachtas.

## **E. Drafting Strategies: Money Laundering Legislation**

The drafting of the Criminal Justice Act, 1994 took place in the normal way for Irish legislation. The procedure to be followed is set down by the Government Secretariat in a confidential document, 'Governmental Procedural Instructions'.<sup>66</sup> The relevant department initially consults the Department of Finance, the Department of Public Service, and other departments interested in the subject matter of the Bill. Following this consultation, a memorandum outlining the proposal, together with its costings and with the views of all departments, whether for or against the proposal, is submitted to the Government. If the Government approves the proposal then the relevant department draws up the heads of the bill 'indicating the content of each section' of the Bill.<sup>67</sup> In the case of the Criminal Justice Act, 1994, this drawing up of

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<sup>60</sup> *Ibid.*

<sup>61</sup> P. Reid, 'Cleaning up the financial system: Money Laundering and the Criminal Justice Act 1994: A new Regime for Banks' in (1994) 1 *C L Pract.* 279.

<sup>62</sup> Annex to the Second Banking Directive (Directive 89/646 [1989] OJ 386/1).

<sup>63</sup> The Criminal Justice Act 1994, s.32 (10)(b) Regulations, 1995 (SI. No. 105 of 1995). This order was passed on 26 April 1995 and came into effect on 2 May 1995.

<sup>64</sup> Item 13 of Directive 89/646/EEC

<sup>65</sup> *Supra*, note 13.

<sup>66</sup> *Supra*, note 15.

<sup>67</sup> *Ibid.*

the heads of the bill was done with 'due regard to the requirements' of Directive 91/308/EEC and those of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>68</sup> as well as the Council of Europe's Convention on Laundering, Search, Seizure and Confiscations on the Proceeds of Crime 1990.<sup>69</sup>

The next step is to forward the draft bill to the Parliamentary Draftsman's office, which forms part of the Attorney General's office. It is while the document is with the Parliamentary Drafters that legal issues with regard to the proposed legislation will be raised and considered. The resulting full draft of the bill is then submitted to the Government, and if approved, it is then examined by the Minister for Finance. Subsequent to this step, the draft bill is printed as a 'white paper',<sup>70</sup> which then goes through the two houses of Parliament and relevant committee stages of those houses. Once the legislation is enacted 'the necessary notification to the European Commission was made', to include a 'table setting out how the relevant sections of the act correspond to the articles of the directive'.<sup>71</sup> This is the procedure used with regard to the enactment of the Criminal Justice Act, 1994.

Directive 91/308/EEC required the enactment of national legislation by 31 December 1992. The Irish national legislation was neither passed nor in force by that date. Different parts of the Criminal Justice Act, 1994 came into effect on different dates. The act was signed into law by the President of Ireland on 30 June 1994. Section 31 of the 1994 act came into force on 14 November 1994.<sup>72</sup> Section 32(10) came into force on 6 March 1995.<sup>73</sup> The balance of Section 32 came into force on 2 May 1995.<sup>74</sup> Section 58(2)<sup>75</sup> came into force on 14 November 1994.<sup>76</sup> Sections 57 and 58, with the exception of section 58(2) of the Criminal Justice Act, 1994, came into force on 2 May 1995.<sup>77</sup>

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<sup>68</sup> Concluded in Vienna in December 1988.

<sup>69</sup> *Supra*, note 10.

<sup>70</sup> *Supra*, note 15.

<sup>71</sup> *Supra*, note 10.

<sup>72</sup> Pursuant to s. 2 Criminal Justice Act, 1994 (Commencement) Order, 1994, S.I. No. 324 of 1994.

<sup>73</sup> Pursuant to s. 3 of the Criminal Justice Act, 1994 (Commencement) Order, 1995 S.I. No. 55 of 1995.

<sup>74</sup> Pursuant to section 4 of the Criminal Justice Act, 1994 (Commencement) Order, 1995 S.I. No. 55 of 1995. Section 57 and 58(2) of the 1994 Act also came into force under the same provision.

<sup>75</sup> Along with sections 59 and 68, which deal with matters other than those covered by Directive 91/308/EEC.

<sup>76</sup> Pursuant to s.2 of the Criminal Justice Act, 1994 (Commencement) Order, 1994, S.I. No. 324 of 1994. All sections of the Act other than sections 32, Part V (sections 33 to 37), part VII (sections 46 to 56), Section 57 and section 58(2) and the First Schedule and the Second Schedule of the 1994 Act came into force under this provision on the 14<sup>th</sup> November 1994.

Part V (Sections 33 to 37) and Part VII (Sections 46 to 56) and the First Schedule and the Second Schedule to the Act came into force of the 15<sup>th</sup> day of November, 1996, pursuant to Criminal Justice Act, 1994 (Commencement) Order, 1996, S.I. No. 333 of 1996.

<sup>77</sup> Pursuant to section 4 of the Criminal Justice Act, 1994 (Commencement) Order, 1995 S.I. No. 55 of 1995. Section 32, other than subsection 10, also came into force on the same date under this statutory instrument.

While there were some omissions in the original legislation, such as the issue of training staff, these have subsequently been rectified.<sup>78</sup>

The issue of the constitutionality of money laundering legislation has already been raised by Irish legal academics with regard to the Proceeds of Crime Act 1996, one of the Criminal Justice Act, 1994 accompanying pieces of legislation. McCutcheon and Walsh query the constitutional status of, among other matters, the 'reversal of the onus of proof coupled with the requirement to produce evidence to rebut the suspicion that the property represents the proceeds of crime'.<sup>79</sup> Similar facts arose in the case of *Clancy v. Ireland*,<sup>80</sup> where the Offences against the State (Amendment) Act 1985, provided for a similar reversal of the onus of proof with regard to the seizure of the assets of a proscribed organisation. In that case the High Court upheld the reversal of onus of proof provisions as being constitutional. McCutcheon and Walsh state that, despite the finding in *Clancy v. Ireland*, 'it cannot be said that the constitutional questions have been conclusively dealt with by the courts. In particular, given that property rights are constitutionally protected, a convincing case remains to be made for allowing seizure of assets on the civil standard of proof' in the Proceeds of Crime Act 1996.

Similar arguments could be made with regard to the provisions of the Criminal Justice Act, 1994. The Law Society of Ireland has already raised Constitutional issues with regard to the Criminal Justice Act, 1994, with the proposed designation of solicitors under section 32 of the Criminal Justice Act, 1994, particularly with regard to 'on a client's constitutional right against self-incrimination and on a client's constitutional rights of access to a solicitor'.<sup>81</sup> The Law Society goes on to state that solicitor/client privilege is 'no mere technical rule of law, but is the very foundation of the relationship between solicitor and client'.<sup>82</sup>

## **F. Drafting Strategies: Narcotic Drugs and Psychotropic Substances**

The national accompanying legislation to Regulation 3677/90/EEC was by way of Statutory Instrument drafted by the Chief Pharmacist of the Department of Health and Children. All legislation from this Department is checked by an in-house lawyer.

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<sup>78</sup> The training of staff with regard to the implementation of the Money Laundering provisions was legislated for by way of section 14 of the Criminal Justice Miscellaneous Provisions Act, 1997.

<sup>79</sup> J.P. McCutcheon and D.P.J. Walsh, 'Seizure of criminal assets: An Overview', in (1999) 9 *Irish Criminal Law Journal* 127.

<sup>80</sup> *Alan Clancy and David McCartney v. Ireland and the Attorney General* [1985 No. 2912P] (unreported).

<sup>81</sup> 'Section 32 and the rights of clients' GILSI 1998 92(6) 3.

<sup>82</sup> *Ibid.*

In the event of legal complexity, legislation from the Department of Health and Children would be referred to the office of the parliamentary draftsman, part of the Attorney General's office, to be dealt with. Such a legal complexity did not arise with regard to Regulation 3677/90/EEC and amending regulations.<sup>83</sup> The implementing statutory instrument operated to give effect to the contents of the regulation, and to provide for offences within Irish law, and to provide for penalties for breach of those offences. Every effort was made at each stage of the process to ensure compliance with EC law.<sup>84</sup>

Statutory instruments can be passed quickly. The passing of an act of the Oireachtas, by contrast, would take a considerable amount of time. Speed is one of the main benefits of utilising a statutory instrument pursuant to the European Communities Act 1972.<sup>85</sup> A statutory instrument, however, can only carry a penalty of 1,000 IRP and/or 6 months imprisonment. If an Act of the Oireachtas was to be used the penalty could carry a maximum penalty of life imprisonment and/or a monetary punishment, the amount of which is imposed at the discretion of the court. The lack of severity of the penalties under statutory instruments in this policy area may become an issue in the future. In many cases, however, the instances of an offence under the statutory instrument, one will also have been committed under either the 1977 or 1984 Misuse of Drugs Acts, which will provide for stiffer penalties.<sup>86</sup>

The European Communities (Monitoring of External Trade in Scheduled Substances) Regulations, 1993<sup>87</sup> was signed into law on 11 January 1993 and was published in 'Iris Oifigiúil'<sup>88</sup> on 30 November 1993. The Misuse of Drugs (Scheduled Substances) Regulations, 1993<sup>89</sup> was signed into law on 22 November 1993, and the Misuse of Drugs (Scheduled Substances)(Exemption) Order 1993<sup>90</sup> was also signed into law on 22 day November 1993.

## G. Statutory Interpretation

The differing approaches taken by the two departments in legislating psychotropic substances and money laundering could result in the implementing legislation being

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<sup>83</sup> *Supra*, note 34.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Supra*, note 57.

<sup>86</sup> *Supra*, note 34.

<sup>87</sup> *Supra*, note 24.

<sup>88</sup> *Iris Oifigiúil* is the official newspaper of the state. 'Each statutory instrument must be printed, as soon as possible after it has been made and notice given, in *Iris Oifigiúil*, of its making and of where copies may be obtained' *Constitutional Law of Ireland, Supra* note 5.

<sup>89</sup> *Supra*, note 22.

<sup>90</sup> *Supra*, note 23.

interpreted in differing ways. The issue of legislative drafting and interpretation had recently been subject to intense examination in Ireland, being the subject matter of two colloquia,<sup>91</sup> a Law Commission Report,<sup>92</sup> and a bill (the Interpretation Bill, 2000). The current law of legislative interpretation in Ireland is set out in the Interpretation Act, 1937.<sup>93</sup> This, combined with common law traditions, has resulted in a 'strict legal approach' to legislative interpretation. Over the years, however, membership in the European Union, and the influence of European legal traditions, have influenced Irish practice, particularly with regard to the interpretation of European Laws, or Irish laws enacted pursuant to European Community Directives. Irish judges have 'considered themselves bound to use a purposive approach' to interpreting European Community laws.<sup>94</sup>

With regard to the interpretation of EU law, Barr J<sup>95</sup> has stated that it 'is a primary rule of European law that a court should adopt a teleological or schematic approach to the interpretation and construction of EU legislation'. This means that judges look to the 'literal meaning of the words' or the 'grammatical structure of the sentence', rather than looking to the 'design or purpose which lies behind it'.<sup>96</sup> In the later case of *Murphy v. Board Telecom*,<sup>97</sup> Keane J. accepted the overturning of one of his judgements on the basis that he 'had erred in law in holding that there was not an alternative teleological approach available to him' in interpreting legislation, in order to give effect to the EC treaty and other sources of EU law.<sup>98</sup>

Membership of the EC has resulted in the general broadening of horizons throughout Ireland, with an 'increasing consciousness' of 'international legal trends'.<sup>99</sup> The approach taken in dealing with European originated law has begun to influence the interpretation of domestic law. This can be seen in the adoption of the teleological approach in *Nestor v. Murphy*,<sup>100</sup> a case dealing with the interpretation of the Family Home Protection Act 1976, which is solely domestic in origin.

The Irish Law Commission has advocated the adoption of a 'moderately

<sup>91</sup> 13 and 18 April 2000.

<sup>92</sup> Report on Statutory Drafting and Interpretation: Plain Language and the Law, (LRC 61-2000).

<sup>93</sup> An Act to make, for the purpose for the Constitution of Ireland lately enacted by the people, divers provisions in relation to the form, operation, and interpretation of acts of the Oireachtas and of instruments made under such acts, 8 December 1937.

<sup>94</sup> 'Report on Statutory Drafting and Interpretation: Plain Language and the Law', (LRC 61-2000).

<sup>95</sup> in *HMIL (Formerly Hibernia Meats Ltd.) v. Minister for Agriculture*, High Court, (unreported) 8 February 1996.

<sup>96</sup> *Supra*, note 94.

<sup>97</sup> *Murphy v. Board Telecom*, [1989] ILRM 53.

<sup>98</sup> *Supra*, note 94.

<sup>99</sup> Report on Statutory Drafting and Interpretation: Plain Language and the Law, (LRC 61-2000).

<sup>100</sup> *Nestor v. Murphy* [1979] IR 326.

purposive approach' to legislative interpretation for inclusion in the Interpretation Bill, 2000. They advocate maintaining the literal rule as the general governing principle, but with the 'moderately purposive approach' being used where either 'the literal construction of a statutory provision is ambiguous' or where 'such a construction is absurd'.<sup>101</sup> Considering the accepted divergence in practice in interpreting laws originating from the EU and Irish domestic law, it is possible that the approach to interpreting the money laundering provisions in the Criminal Justice Act, 1994 may differ from the interpretation of the statutory instruments implementing European Directives, given its legal status as domestic Irish law.

## H. Money Laundering – Subsequent Developments

There has been a general acceptance in the Republic of Ireland for the need to deprive criminals of the fruits of their crimes. This is exemplified by an earlier piece of legislation targeted at unlawful organisations operating within the state, the Offences against the State (Amendment) Act 1985. This Act was quickly enacted in February 1985 in a direct response to a specific case (*Clancy v. Ireland*<sup>102</sup>). Section 2(1) of the Act permits the Minister for Justice, Equality & Law Reform to require a Bank to pay monies into the High Court when he or she believes that the monies are the property of an unlawful organisation.<sup>103</sup>

While the Criminal Justice Act, 1994 is minimalist in its implementation of the provisions of Directive 91/308/EEC, its introduction of the offence of money laundering into the Irish legal system, subsequent legislation has exhibited a determination to tackle the problems of money laundering. Two very high profile murders, that of Veronica Guerin, a journalist who specialised in investigating organised crime, and Detective Garda Gerry McCabe, shot dead during a paramilitary style armed robbery, both in June 1996, fuelled a public demand to properly tackle organised crime. In 1996, Ireland also assumed the Presidency of the European Union and 'adopted the need to tackle organised crime as one of the key themes of its Presidency'.<sup>104</sup> Within the Irish jurisdiction the Disclosure of Certain Information for Taxation and other Purposes Act, 1996,<sup>105</sup> the Criminal Justice

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<sup>101</sup> *Supra*, note 94 at point 6.40; 'We recommend that the Office of the Parliamentary Counsel to the Government should consider including purpose clauses in some Acts of the Oireachtas, and support the view that this ought to be done, in particular, where an Act gives effect to European legislation which itself has a purpose clause'.

<sup>102</sup> *Supra*, note 80.

<sup>103</sup> F. Murphy and B. Galvin 'Targeting the Financial Wealth of Criminals in Ireland: The Law and Practice' in 9(1999) *ICLJ* 133.

<sup>104</sup> *Ibid*.

<sup>105</sup> No. 25 of 1996. Long Title: An act to provide for the disclosure in certain circumstances of Information by the Revenue Commissioners to either or both the Garda Síochána and

(Drug Trafficking) Act, 1996,<sup>106</sup> the Proceeds of Crime Act, 1996,<sup>107</sup> and the Criminal Assets Bureau Act, 1996,<sup>108</sup> all form part of the Irish Money Laundering legal framework.

The current emphasis of the legislation in Ireland is to comprehensively 'attack one of the most important underlying causes of crime, namely the desire for money'.<sup>109</sup> It is also felt that this assault on crime contained in particular in the Proceeds of Crime Act 1996, which, when read in conjunction with the Criminal Justice Act, 1994, and ancillary legislation, deals with the freezing and seizing and disposal of proceeds of crime, is 'entirely consistent with the goals and objectives defined in the Irish Constitution and, in particular, that goal of protecting the community and ensuring that public order and peace are maintained'.<sup>110</sup> This is despite the fact that a 'natural right, antecedent to positive law to the private ownership of external goods' is enshrined in Article 43 of *Bunreacht na hÉireann*.<sup>111</sup>

The mechanism being used through the establishment of the Criminal Assets Bureau is an integrated approach between the Garda Síochána, the Revenue

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certain other persons, to provide for the receipt by the revenue commissioners of information from the Garda Síochána, to amend sections 32, 57 and 64 of the Criminal Justice Act, 1994, to amend sections 18 and 19 of the Finance Act, 1983, to amend the Bankers' Books Evidence Act, 1879, to provide for the anonymity of an officer of the Revenue Commissioners in certain circumstances and to provide for connected matters. Dated: 30 July 1996.

<sup>106</sup> No. 29 of 1996. Long Title: An act to make provision for additional powers of detention by the Garda Síochána of Suspected Drug Traffickers following arrest, to make provision for the issuance of search warrants by certain members of the Garda Síochána in the case of suspected drug trafficking offences and for the attendance of officers of customs and excise at, and the participation of such officers in, the questioning of certain arrested persons by the Garda Síochána and to provide for related matters. Dated 31 July 1996.

<sup>107</sup> No. 30 of 1996. Long Title: An act to enable the High Court, as respects the proceeds of crime, to make orders for the preservation and, where appropriate, the disposal of the property concerned and to provide for related matters. Dated 4 August 1996.

<sup>108</sup> No. 31 of 1996. Long Title: An act to make provision for the establishment of a body to be known as the Criminal Assets Bureau and to define its functions and to amend the Finance Act, 1983, and the waiver of certain tax, Interest and Penalties Act, 1993, and to provide for related matters. Dated: 11 October 1996.

<sup>109</sup> *Supra*, note 103.

<sup>110</sup> *Ibid.*

<sup>111</sup> Constitution of Ireland. Article 43 reads: 1.1 The State acknowledges that man, in virtue of this rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. 1.2. The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property. 2.1 The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of this Article ought, in civil society, to be regulated by the principles of social justice. 2.2 the State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

Commissioners and the Social Welfare authorities. The Criminal Assets Bureau, operating in conjunction with the provisions of the Criminal Justice Act, 1994 and ancillary legislation created a 'statutory mechanism for identifying the proceeds of criminal activity and for denying the benefits of such proceeds to those in possession of them'.<sup>112</sup> The law continues to be refined and tightened in this area, as is reflected in the current Criminal Justice (Theft and Fraud) Offences Bill 2000,<sup>113</sup> whose main aim will be to replace the Larceny Acts, but it will also contain measures which will affect the law of money laundering in Ireland if enacted.<sup>114</sup>

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<sup>112</sup> *Supra*, note 110.

<sup>113</sup> Which was presented on 28 June 2000 to the Oireachtas (Parliament) by the Minister for Justice, Equality and Law Reform on 28 June 2000.

<sup>114</sup> *Supra*, note 93.