An Chúirt Uachtarach

The Supreme Court

O'Donnell CJ
Charleton J
Murray J
Collins J
Donnelly J

Supreme Court appeal number: S:AP:IE:2023:0106
[2024] IESC 45
High Court record number: 2014 No 773 JR
[2023] IEHC 409

Between

Gerry Gearty and Sean Beirne
Applicants/Appellants

- and -

The Director of Public Prosecutions, the District Court Judge for the Time Being Assigned to the District Court Area of Longford and the Minister for Arts, Heritage and the Gaeltacht, Ireland and Attorney General
Respondents

Judgment of Mr Justice Peter Charleton delivered on Thursday 17 October 2024

1. In these proceedings, the creation by Ministerial regulation of indictable offences, carrying up to 3 years imprisonment, to protect bog habitats is challenged as an infringement of the "sole and exclusive power of making laws for the State" vested in the Oireachtas under Article 15.2.1º of the Constitution, whereby "no other legislative authority has power to make laws for the State." Subsidiary legislation is a necessary part of the legal landscape, since without legislative instruments to fill in the logistical details of Acts of the Oireachtas, legislation would become over-complex and prolix. In *John Conway v An Bord Pleanála, The Minister for Housing, Local Government and Heritage, Ireland, The Attorney General, and Silvermount Limited* [2024] IESC 34, and in many other cases, subsidiary legislation has been sought to be impugned by arguing that the Oireachtas had not sufficiently constricted the necessary area of choice of, and given sufficient guidance as to content to, the delegate. Here, the parent legislation is of European origin. Hence, Article 29.4.6º of the Constitution exempts "laws enacted, acts done or measures adopted by the State" provided these "are necessitated by the obligations of membership" of the European Union. Whether the parent legislation originates in the Oireachtas or is a measure which Ireland is required to implement by virtue of European obligations, the fundamental test in all the case law remains that set out in *Conway*: in permitting the provision in question to be made by Statutory Instrument has there been an abdication by the Oireachtas of the constitutional mandate in Article 15.2.1º?

Background

2. The appellants, Gerry Gearty and Sean Beirne, have traditionally exercised turbary rights on boglands in county Longford, specifically at Cloneen bog. With the increasing realisation of the value of bog habitats, and in pursuit of the preservation of these eco-systems as carbon sinks, over several decades, rights to cut turf have been severely curtailed by law. Bog-habitat conservation has been a policy pursued by the European Union over those decades; but there has been an issue as to the effectiveness of Ireland's response. An instance is the European Commission's referral of Ireland to the Court of Justice of the European Union, on 13 March 2024, for failing to halt the continued cutting of peat in areas designated to conserve raised bogs and blanket bogs; https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1232 refers.

3. Legislation to preserve Ireland's boglands does not have its origin in Acts of the Oireachtas. Rather, the legislation is of a subsidiary kind, promulgated through Ministerial regulations, and expressed to implement measures obligated by the European Union. At question here is Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora; https://eur-lex.europa.eu/eli/dir/1992/43/oj refers. This parent legislation is given effect in the European Communities (Birds and Habitats) Regulations 2011, Statutory Instrument 477/2011; https://www.irishstatutebook.ie/eli/2011/si/477/made/en/print refers. In effect, these provisions provide that the various families traditionally using boglands to harvest turf have become subject to a host of legal obligations. The measures applicable to this case are the prohibition of turf cutting in many instances and this is coupled with a duty to allow authorised officers of the Minister to enter onto and inspect the state of privately-owned boglands. The purpose of the latter is enforcement, whereby unauthorised turf-cutting can be detected and evidence gathered for possible prosecution of offenders. In this case the appellants are not charged with illegal turf harvesting, but with refusal to allow authorised officers of the Minister to enter their private boglands in June 2012. Their response to that charge, now dating back over 12 years, is this challenge to the transposition of the European Union prohibition and in particular through the creation of indictable, as opposed to summary, offences by Ministerial regulation. Another protective layer is imminent, requiring a criminal law response, in the form of Directive on the Protection of the Environment through Criminal Law (Directive 2024/1203), that came into force on 20 May 2024 that ultimately will replace, taking account of the transposition period, of Directive 2008/99/EC; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401203

Fundamentals

4. Hence, the issue on this appeal is very narrow. By reason of the decision of the High Court in *O'Connor & McCarthy v The People (DPP) & Others* [2015] IEHC 558, upheld by the Court of Appeal at [2017] IECA 101, the appellants accept that they cannot maintain a direct challenge to the validity of the 2011 Regulations. This case is reduced, therefore, to a challenge to the validity of the amendment introduced in 2007 to section 3 of the European Communities Act permitting a Minister, in implementing a measure required by European law, to create indictable offences punishable by up to 3 years imprisonment or a fine of up to €500,000, where the Minister considered such an approach necessary to give full effect to a provision of the treaties of the European Union or an act or provision of an institution of the European Union, and for the purposes of ensuring that penalties in respect of an offence are effective, proportionate and have a deterrent effect. This was an argument that was both narrow and difficult to advance in the light of the decisions in *O'Connor*. In a compellingly reasoned judgment in the High Court by Simons J, [2023] IEHC 409, and quoted below, that claim was dismissed. The analysis which follows conforms to that reasoning and accepts that judgment.

5. The argument here is that the power conferred on a Minister by the 2007 amendment, or other subsidiary legislative body, to make secondary legislation creating an indictable offence, is a function exclusively for the Oireachtas under Article 15.2.1° of the Constitution. Directives of the European Union leave to Member States the choice as to how to achieve the objectives set out in the legislation. In some Member States, compliance with the obligations set out in Directives may be through administrative measures. That is not the usual model adopted in Ireland. Since the European Communities Act 1972, the preferred method of the State for the transposition of Directives has been by statutory instrument giving effect to the substance of the relevant prohibition. These were invariably enforced through summary criminal prosecution for breach. From 1972 to 2007, newly promulgated summary offences, passed by Ministerial regulation made under s 3 of the 1972 Act, were prosecutable only in the District Court. Hence, no indictable offences, tried in ordinary course before a judge and jury in the Circuit Court, were created. With summary conviction, penalties are limited to the District Court's jurisdiction; up to 12 months imprisonment, with a maximum penalty for two or more offences of 24 months, where consecutive terms are appropriate, and/or a fine of up to €5,000. Section 3(3) of the 1972 Act, as originally enacted, provided expressly that "Regulations under this section shall not create an indictable offence." Denham J commented on the rationale for this preclusion in *Browne v Ireland* [2003] 3 IR 205, stating at [242 – 243] that this limitation to summary prosecutions recognised "the significance of indictable offences" but she also remarked that "the legislature is not barred from revising the issue".

6. The European Communities Act 2007 removed that limitation, whereby transposed European legislation was enforced through summary offence prosecution only and, for the first time, provided for Ministerial regulations to create offences which were triable either summarily or on indictment. Section 2 of the 2007 Act substituted s 3(3) of the 1972 Act which enables the creation of indictable offences, but with a maximum penalty for each offence of up to 3 years imprisonment.

7. Every offence created by the Oireachtas, or by the prior authority of the Parliament of the United Kingdom of Great Britain and Ireland and carried over under Article 50 of the Constitution, has an express provision providing for a maximum penalty. In contrast, the common law is generally unlimited as to how an offender is sentenced, but with certain offences traditionally triable on indictment. Hence, inchoate offences, attempts at or incitement to or conspiracy to commit crimes, have no fixed penalty, unless these offences were created by statute. The classification as between felonies and misdemeanours has been removed in this jurisdiction; this is notwithstanding felony being part of a classification in Article 15.13 of the Constitution as to arrest by public representatives. Replacing that arcane distinction is a statutory taxonomy based on seriousness. Here the choice made by the Oireachtas for the enforcement of Ireland's obligations to the European Union has been to enable the enforcement through delegated legislation by both summary prosecution and a form of indictable offence where the penalty is limited; s 2 of the 2007 Act. The choice made by the Oireachtas in the legislation is to set the maximum period for indictable offences created under the 1972 Act, as amended in 2007, at 3 years. This period of imprisonment is below the penalty which makes such offences arrestable without warrant. These offences are sometimes referred to as serious offences. That has significance. Powers of arrest are conferred on police officers only on the basis of reasonable suspicion that an arrestable offence has been committed and has been committed by the person to be arrested. That general power of arrest arises only where an offence carries at least 5 years imprisonment; the Criminal Law Act 1997, s 4. Similarly, the general power of police officers to issue search warrants of dwellings and other premises is based upon the existence of a suspicion that is reasonably held that "evidence of, or relating to" the commission of serious offences may be found in a dwelling or business premises and where the offence being investigated carries that same penalty of at least 5 years

imprisonment or is a homicide or rape offence; Criminal Justice (Miscellaneous Provisions) Act 1997, s 10.

8. In none of the cases that will be cited later in this analysis which have challenged the transposition of European legislation through Ministerial regulation, was an argument raised that it was legally impermissible to use summary trial and sentencing as the method of enforcement. Here, there has been a quantitative change in penalty from what would have been possible in enforcing a European Union obligation through summary conviction. This is argued also to be a qualitative alteration in subsidiary legislative powers which could only be exercised by the Oireachtas on an individualised basis for the creation of each individual indictable offence. Indictable offences, as "non-minor offences", are prosecuted before a jury, apart from cases going to the Special Criminal Court or to a military tribunal, under Article 38 of the Constitution, whereas summary offences are tried by a judge sitting alone in the District Court, subject to appeal by full rehearing to a judge of the Circuit Court, again sitting alone. Where the method of disposal is limited to summary jurisdiction with the consequent limitation as to penalty, no argument has heretofore been raised that thereby an infringement of the "sole and exclusive law-making power" vested in the Oireachtas under Article 15.2.1° of the Constitution has occurred, through delegation to a Minister or other body of the power to create summary offences. The argument pursued here is that it is a matter for the Oireachtas alone to create a non-minor offence.

9. In addition to Article 15.2.1° of the Constitution providing that the "sole and exclusive law-making power is vested in the Oireachtas", there is a parallel legal order created by Ireland's membership of the European Union. Thereby, where a measure is necessitated by our membership of the European Union, there are two essential contexts which impact on the validity of delegated legislation. Firstly, the parent legislation of the subsidiary Ministerial regulation, instead of being an Act of the Oireachtas, becomes the European Union measure. Secondly, the duty of compliance with European law enables such subsidiary legislation to have validity on a different basis than subsidiary domestic legislation, but only where that regulation is necessary by virtue of the obligation to comply with the parent legislative measure. Even still, European legislation must set appropriate boundaries and give sufficient guidance as to the content of any enabling subsidiary legislation. In so far as the norm derived from the Constitution is the concept of necessity, the authority of bypassing other constitutional norms cannot be mis-used whereby the Oireachtas having, as it does, a choice as to whether to legislate through a primary Act or to delegate particular legislation to a Minister, or other subsidiary, forgoes authority under Article 15.2.1°. 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 referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—
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> > i the said European Union or the European Atomic Energy Community, or institutions thereof,
> > ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or
> > iii bodies competent under the treaties referred to in this section, from having the force of law in the State.

10. Section 3 of the 1972 Act, as amended in 2007 to enable the creation of indictable offences in aid of European law obligations, provides:

(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 may—

(a) make provision for offences under the regulations to be prosecuted on indictment, where the Minister of the Government making the regulations considers it necessary for the purpose of giving full effect to—

(i) a provision of the treaties governing the European Union, or
(ii) an act, or provision of an act, adopted by an institution of the European Union, an institution of the European Communities or a body competent under those treaties, and

(b) make such provision as that Minister of the Government considers necessary for the purpose of ensuring that penalties in respect of an offence prosecuted in that manner are effective and proportionate, and have a deterrent effect, having regard to the acts or omissions of which the offence consists, provided that the maximum fine (if any) shall not be greater than €500,000 and the maximum term of imprisonment (if any) shall not be greater than 3 years.

(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.

11. In all issues as to the sole and exclusive law-making power of the Oireachtas, under Article 15.2.1°, the degree to which any control is retained over subsidiary legislation is important; see the judgment of O'Donnell CJ in *Conway* [30], of Charleton J in *Bederev v Ireland* [2016] IESC 34 [33], [2016] 3 IR 1 and of Charleton J in *Naisiúnta Léictreach Contraitheoir Éireann Coideachta Faoi Theorainn Ráthaoichta v Labour Court, The Minister for Business, Enterprise and Innovation, Ireland and the Attorney General* [2021] IESC 36 [7-9], [2022] 3 IR 515, [2021] 2 ILRM 1, [2021] 6 JIC 1803 where the usual forms of taxonomy for reversion of delegated legislation to the Oireachtas for consideration is set out. The three models are: 1) that delegated legislation should be made by a Minister or by some other body and the subsidiary legislation never revert to the Oireachtas (an example being rules of court under the Courts of Justice Act 1924 and 1936, as amended), but where the delegated legislation is from a Minister, that official is, as part of the Government, of course responsible, in Irish "answerable", to Dáil Éireann under Article 28.4 of the Constitution ("Tá an Rialtas freagarach do Dháil Éireann"); 2) that delegated legislation returns to the Oireachtas but a resolution is required to nullify it; and 3) that delegated legislation returns to the Oireachtas and assumes validity only after a positive vote. The 1972 Act adopts a version of the second model through the amendment in 2007 by the following insertion:

3A.— Every regulation to which subsection (3) (inserted by section 2(a) of the European Communities Act 2007) of section 3 of this Act applies shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House sits

> after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.

Two models

12. Where legislation comes from a European law obligation, it is against that parent measure that the delegated legislation is to be assessed. In *Maher v Minster for Agriculture* [2001] IESC 32, [2001] 2 IR 139, Keane CJ identified two categories of case in which a regulation made in purported exercise of powers conferred by s 3 of the 1972 Act, in aid of the enforcement of European law obligations, might be found to be ultra vires to the powers conferred in the parent legislation:

> The first category would be cases in which the making of the regulation was found not to be "necessitated" by the obligations of membership referred to in Article 29.4.5º and to have violated some constitutional right of the plaintiff. The challenge in such a case would be no different from the challenge mounted to an Act of the Oireachtas allegedly necessitated by the obligations of membership which prima facie violated a constitutional right of the plaintiff. The second category of cases in which such a challenge could be successfully mounted to a Regulation is where the implementation of a Directive or defined parts of an EC or EU Regulation by ministerial regulation rather than an Act of the Oireachtas would be in conflict with the exclusive legislative role of the Oireachtas under Article 15.1 and would not be saved by the provisions of Article 29.4.5º. That would arise in a case where the ministerial regulation went further than simply implementing details of principles or policies to be found in the Directive or Regulation in question and determined such principles or policies itself and the making of the Regulation in that form, rather than in the form of an Act of the Oireachtas, could not be regarded as necessitated by the obligations of membership.

13. Here, the central issue is whether moving from a limitation of summary prosecution in order to enforce European law to one of disposal on indictment, with the potential penalty increased under the 2007 Act to three years imprisonment and a potential fine of up to €500,000, is an abdication by the Oireachtas of their sole and exclusive law-making power. These concerns are contended to particularly arise because of the significance afforded under Article 38.1 of the Constitution to the distinction between minor and non-minor offences. As matters currently lie, however, it appears that these criminal proceedings will, in fact, be disposed of summarily. Furthermore, since the State in argument have emphasised the necessity for such higher penalty for many infringements of many European legal measures, most especially here in order to protect crucial bog habitats, some comment is required as to whether a decision by a Minister to legislate to create indictable offences may ever be reviewed by a court on judicial review and, if so, on what grounds.

High Court judgment

14. The High Court, Simons J [2023] IEHC 409 dismissed the appeal concluding that s 3(3) of the 1972 Act does not constitute an unconstitutional delegation of legislative power by the Oireachtas. The Court stated:

> 72. The provisions of section 3(3) of the European Communities Act 1972 are capable of being interpreted and applied in a manner which is consistent with the requirements of Article 15.2.1° of the Constitution of Ireland. The Irish State, as a Member State of the European Union, is required to put in place effective, proportionate, dissuasive penalties for an infringement of European law In some instances, the range of discretion left over

> to Ireland, as Member State, under a particular piece of EU legislation will be narrowed to the point that the Irish State will have no discretion but to create a criminal offence with significant sanctions. In such circumstances, it is permissible to delegate the function of implementing the particular EU legislation to the executive branch of government to be done by way of secondary legislation, subject to the maximum penalties prescribed by Section 3(3) of the European Communities Act 1972. The range of discretion left over to the Minister of the Government, *qua* delegate, in such circumstances is narrow. A criminal offence must be created in order to give effect to the EU legislation. The delegate's discretion confined to deciding on the detail of the offence subject to the maximum penalties prescribed by the Oireachtas, and the precise sanction will be guided by the principles and policies articulated in the relevant EU legislation.

Leave to appeal

15. Leave was granted by this Court (Charleton, Murray, Donnelly JJ) on 31 October 2023; [2023] IESCDET 132. In the determination and subsequent case management it was decided that the appeal should centre on the single issue of whether it is constitutionally permissible for a Minister of the Government to create an indictable offence by Regulations made under s 3 of the European Communities Act 1972, as amended.

Democratic context

16. Article 6 of the Constitution is predicated on the basis that the powers of government are of three types: legislative, executive, and judicial. The effect of Article 6 combined with Articles 15, 28 and 34 is to "entrench the different arms of government in varying degrees and prescribe their sovereignty in their own areas, without, however, hermetically insulating the different powers from one another in all respects"; Hogan and Whyte, *JM Kelly, The Irish Constitution* (4th edn, Lexis Nexis Butterworths 2003) 109. Fundamental to our tripartite system of government are the points of contact between the executive and the legislative branches; Hogan et al, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) 693. The system is democratic, but this does not mean that Article 5 informs any decision as to where the Oireachtas has foregone legislative responsibility. In *Conway*, one of the issues was the degree to which the lawful promulgation of a law was dependent upon notice. The values of certainty of law and the duty of compliance with the law are fundamentals in any legal system based on the rule of law. But, Article 15.2.1º is the basis for deciding a single question: whether there has been an abdication, as opposed to a valid delegation, of legislative responsibility. In *Conway*, O'Donnell CJ, for the majority on this point, commented thus:

> 25. Accessibility of the law is treated as a basic requirement of the rule of law by the late Lord Bingham in *The Rule of Law* (1st edn, Allen Lane 2010 at 37). As I understand it, publication of law has always been seen as an aspect of legality, but until now not derived from the concept of democracy, nor in Irish law from Article 5's reference to the democratic nature of the state. As one distinguished scholar put it: "[i]t is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man" (Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) p. 211), and there are other statements to like effect. Similarly, shortly after the expansion of the European Union in 2004, the European Court of Justice had to consider the question of the applicability and enforceability of a regulation in a Member State where it had not been formally published in the language of the Member State (although it was available on a database), and held, unsurprisingly, that such provisions could not be enforced while it was not published in

accordance with law, relying, not on democracy but on the principle of legal certainty: Case C161/06 *Skoma-Lux sro v. Celní ředitelství Olomouc* [2007] ECR I-10841 paragraph 38; see also Case C-345/06 *Gottfried Heinrich* [2009] ECR I-01659.

26. My concern is not to dispute that Irish law recognises publication as essential to the validity of any law or any provision having binding force, or that the provisions of the Constitution which together make Ireland a democracy may be and have been relied upon in litigation. Nor do I dispute the importance of those provisions, or that the principle of legality is a basic element of the State established by the Constitution. If anything, I think it understates the significance of that principle to attempt to locate it in a single provision of the Constitution when it can be said to be intrinsic to it. My concern, however, is that I do not see Article 5's reference to the democratic nature of the State as a receptacle for specified values thought important, not comprehensively specified but necessarily of very broad scope if it is capable of encompassing matters such as the promulgation and publication of rules regulations and legislation. In particular, Article 5 of the Constitution should not be introduced into the Article 15.2 question as a requirement of democratic accountability under the rubric of the question whether the Oireachtas is to be understood as having abdicated its constitutional duty.

27. In addition, I do not think that the reference by the High Court judge to the requirements for laying of the guidelines before the Oireachtas has "the bare minimum in this regard", can or should be understood as creating a separate test which, if not satisfied, could be decisive on the Article 15.2 issue. The law may develop, and indeed progress, through case law which can be a continuous process of tacking and gybing – correcting a course adopted and then seeking to avoid over-correction. In this regard, the correct course was, I consider, set in the *Cityview Press* case, and in the judgment of O'Higgins C.J. at page 398:-

> "Sometimes, as in this instance, the Legislature, conscious of the danger of giving too much power in the regulation or order-making process, provides that any regulation or order which is made should be subject to annulment by either House of Parliament. This retains a measure of control, if not in Parliament as such, at least in the two Houses. Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution." [emphasis added]

28. It is clear that subsequent consideration by the Oireachtas, whether negative by reference to a power of annulment, or positive by requiring adoption by resolution, or passive by the laying of the relevant rules or guidelines before the Houses of the Oireachtas, is a relevant factor in considering whether there has been excessive delegation. Indeed, it was a factor which the Court took into account in considering that Article 15.2 was not exceeded in the *Cityview Press* case (page 399).

17. The context here can be considered as collaborative, whereby the Oireachtas has responsibility, but may lawfully delegate within particular contexts, and to where a subsidiary measure may return, with the judiciary exercising the role of ensuring compliance with the constitutional norm by all actors; for an illuminating theoretical discussion see Kavanagh, *The Collaborative Constitution* (2024, Cambridge) chapter 7. To properly consider this issue in the context of European law, it is necessary to firstly summarise the legal position as to when delegated legislation is valid where the

subsidiary legislation challenged comes from an Act of the Oireachtas enabling a Minister or other body to create offences through statutory instrument. Here, the law has been most recently reviewed by Collins J in *Delaney v Personal Injuries Assessment Board* [2024] IESC 10 [169-173]. It is preferable to quote that analysis since that judgment was unchallenged on that point by any other member of the court. The principles derived can then be applied:

> 169. The permissible limits of legislative delegation under Article 15.2 of the Constitution and the approach to be taken where legislation is challenged on the basis of exceeding those limits, are comprehensively considered and authoritatively and finally settled in a number of recent decisions of this Court, including *Bederev*, *O'Sullivan*, NECI and *McGrath*. This Court's earlier decision in *McGowan v Labour Court* [2013] IESC 21, [2013] 3 IR 718 is also relevant.
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> 170. These authorities make it clear that the ultimate issue that arises under Article 15.2 is whether (as it was put by McMenamin J for the Court in *NECI*) "there has been a usurpation, arrogation, or trespass on the legislative power of the Oireachtas" (at para 61) or (as it was put by O' Donnell J (as he then was) for the Court in *McGrath*), "whether the Oireachtas has abdicated its function under Art 15.2.1" (at para 69). The "principles and policies"/"filling in the details" test articulated in *Cityview Press* may be helpful in making that assessment but "cannot be considered an infallible guide" (*McGrath*, at para 68). The breadth of the delegation is a significant consideration: an apparently wide delegation may be limited by principles and policies clearly discernible in the parent legislation whereas a very narrow area of delegation may require very little in terms of principles and policies (*O'Sullivan*, at para 41; *NECI* at para 65; *McGrath* at para 70). The subject matter of the delegation – "the area in which the subordinate has freedom of action" – is also relevant.
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> 171. That the delegate is given some discretion or choice does not of itself point to any impermissible delegation. As this Court stated in *Bederev*, "[e]very delegation of legislative authority involves, of necessity, a power to do something or to refrain from doing something" (at para 44). The "entire concept of subordinate depends upon and contemplates decisions being made between a range of options. Any decision involves consideration of what the decision maker considers is the best solution in the circumstances. The question is the scope of the decision-making left to the subordinate rule maker" (*O'Sullivan*, at para 40). Similarly, in *NECI*, this Court observed that it was "inevitable" that delegates would have to make choices, some of which may "depend on expertise" and involve areas of decision-making in which "the Oireachtas itself would not be the appropriate forum" to make the choices involved (per McMenamin J at para 70). The Oireachtas must be permitted a "degree of legislative flexibility" (ibid; see also per Charleton J at para 31). However, a subordinate body cannot be "vested with an absolute and untrammelled discretion" (NECI, per McMenamin at para 64).
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> 172. One further relevant factor identified in the caselaw is whether and to what extent the Oireachtas retains a supervisory role. In *Cityview Press*, the statutory provision at issue (section 21 of the Industrial Training Act 1967) provided that levy orders made by ANCO were subject to annulment by either House of the Oireachtas. That, the Court noted, retained a measure of control, if not in the Oireachtas as such, at least in the two Houses and was a "safeguard": page 399. In *Bederev*, similarly, the Court gave weight to the fact that all additions to the list of scheduled drugs were required to be laid before the Houses and could be annulled, thus retaining control by the legislature: para 49.

173. However, while undoubtedly a relevant factor (and in some cases – as in *NECI* – a very significant factor), the presence or absence of some such supervisory mechanism is not determinative in itself: see per Charleton J in *NECI*, at paras 24-28. None of the cases suggest that an otherwise permissible delegation of rule-making authority by the Oireachtas might be invalidated by the absence of such a mechanism. Notably, rules of court are not subject to any form of supervision (positive or negative) by either House of the Oireachtas. The Courts of Justice Act 1924 vested the power to make rules in the Minister for Justice, with the concurrence of the relevant rules committee and section 101 of that Act provided that such rules would not come into operation unless and until approved by resolution of both Houses. The provisions of the 1924 Act gave rise to significant difficulties in practice and were restructured by the Courts of Justice Act 1936.29 That Act vested the power to make rules directly in the relevant rules committee (subject to the approval of the Minister for Justice) and repleaded section 101 of the 1924 Act. There is no suggestion in *McGrath* that the removal of any supervisory mechanism cast doubt on the rule-making powers in the 1936 Act. On the contrary, O' Donnell J clearly considered that those provisions validly conferred broad powers on the rule-making committees to decide the content of the rules, extending to the adoption of rule changes which "introduced novel procedures and concepts which have significant effects on litigation" and embodied "some conception of policy in relation to the fair and efficient processing of the myriad claims that come before a court" (at para 73). The difficulty in *McGrath* was that not that the particular rule at issue - Order 36 – involved a choice per se but rather that "the underlying choice here goes beyond any question properly consigned to the rule-making authority as to practice and procedure including costs, and involves a broad ranging policy decision which lies within the function of the Oireachtas under Art. 15.1.2" and one which might be said to require "democratic justification rather than technocratic expertise" (at para 78).

Legislative function

18. It follows that the fundamental test in this case, and in every other Article 15.2 delegation or *vires* case, is whether the Oireachtas in making the legislation that conferred subsidiary law-making powers on a Minister or other delegate to make regulations has abdicated its own constitutional function and duty to make laws for this State. In general, the principles and policies approach, which considers if the parent Act has actually sanctioned the delegation of power beyond the mere giving effect to principles and policies, is only a method of seeking to answer that question; see the judgments of Hogan J in *Conway* [25-27] and O'Donnell CJ [17-20]. Thus, while the modern-day exposition of this test began some fifty years ago in *Cityview Press v An Chomhairle Oilina* [1980] IR 381, the notion of principles and policies is apt to detract from what was then, and is more explicitly in modern case law, the holistic approach to assessing whether there has been an abdication of legislative authority. That test, viewed in the round, is apparent from *Bederev v Ireland* [2016] 3 IR 1, *O'Sullivan v Sea Fisheries Protection Authority* [2017] 3 IR 751 and *Náisiunta Leithreacht v Labour Court* [2021] IESC 36. Thus, this analysis is not required to re-visit, except on the level of principle, earlier authorities such as *Cooke v Walsh* [1984] IR 710; *Harvey v Minister for Social Welfare* [1990] 2 IR 232; and *McDaid v Sheehy* [1991] 1 IR 1. It is therefore wrong to approach a *vires* issue by treating the principles and policies approach as either a self-standing requirement or as the only way in which to address the question. This is in error because that rigid approach can give rise to problems particularly where the power pursuant to s 3 of the 1972 Act, as amended, is used when giving effect to EU legislation, in particular, Directives. A particularly extreme version of the principles and policies test can suggest a test which was either incapable of being satisfied, or one that was absurd. If, for example, the legislation was required to have dictated the manner in which

the power to make regulations would be exercised in any particular respect, then it is a futile test: the Oireachtas should simply have provided for that itself.

19. Thus, in more recent times, the scope of the Article 15.2.1° inquiry has been distilled by this Court into an analysis typified by the judgments in *Conway*; subject to the issue, not here important, identified by Hogan J at [28]. This is what is set out in *NECI* [63], [2022] 3 IR 515 at 544-545, by MacMenamin J:

> First, an assessment of the Act in order to determine whether or not it contains sufficient principles and policies, should be based on a reasonable, but not far-reaching, examination of the provisions. Second, the purpose of the various principles and policies criteria is to ask whether the legislation sets boundaries, in the sense of defining rules of conduct, or guidelines. Third, does the legislation have defined subject matter, and contain basic conditions of fact and law? Fourth, is the legislative purpose of the provisions discernible by identification of objectives or outcomes, as well as principles? Fifth, is the power delegated sufficiently delimited? Sixth, does the exercise of the subordinate power contain sufficient safeguards? Seventh, the primary question, is there an abdication by the Oireachtas of its constitutional role?

20. The judgment in which that concurred, that of Charleton J, bases its deployment of the principles and policies yardstick on whether sufficient guidance is given as to the import of subsidiary legislation and the degree to which boundaries can be discerned. It was also important in *NECI* and in *Bederev*, that some degree of control is retained by the Oireachtas, in the sense of voting being necessary for the subsidiary legislation to be given legal effect. As the taxonomy set out in *NECI* [7-9] elucidates, however, whether the Oireachtas ever gets to consider a new rule of the Superior Courts or, for instance, a harbour charge is only part of the overall assessment. Subsidiary legislation is a necessary part of the landscape of legal regulation. It is self-evident that some degree of choice must be afforded to the delegates; the whole point is that there should be a capacity to provide for some detailed regulations by a body or person with some degree of expertise. This logic is apparent from Hanna J's judgment in *Pigs Marketing Board v Donnelly* [1939] IR 413, where he considered the expert knowledge of the Pigs Marketing Board's power to fix prices as necessary to give effect to the will of the Oireachtas. By virtue of a lack of resources, expertise, technocratic skills, and time constraints, a "subordinate body may be a much more suitable vehicle (indeed on occasions perhaps the only suitable vehicle) for the implementation of legislative objectives"; *BUPA Ireland v Health Insurance Authority* [2006] IEHC 431 [146]. The logic also being that subordinate law-making may be capable of being more flexible in that it can be changed more readily to take account of changing circumstances; as in *Bederev*.

21. If the area of delegation is designated in the legislation in a well-focused fashion and presented with explicit or implied boundaries, then the delegate can simply be let proceed with its functions, and there is no question of an abdication of law-making functions. There is no real sense in which it can be said that the making of the choice in that limited area is one which must have been carried out by the Oireachtas. If, however, there is an apparently broad area of delegation, then principles and policies, or as *NECI* and *Bederev* express it, direction and boundaries, within the parent legislation may, in fact, wither the apparent scope of that choice, to the point where it is not so broad and ranging as to constitute the type of decision which can only be made by the Oireachtas under Article 15.2. The point being this: the normative legitimacy of delegated rule-making authority does not exist in a vacuum. A Dáil motion recognising the necessity to strike a balance between habitat conservation and the freedom of the people of Ireland to benefit from their local natural resources, was presented by counsel for the appellants, in written submissions and on oral argument, as indicative of subordinate rulemaking being an esoteric threat to the imperative of

Article 15.2 rather than an everyday occurrence of parliamentary debate. That control by the Oireachtas, on the contrary, in approving significant delegated legislation, is an exercise whereby a Minister seeks approval through the People's representatives of the form arrived at for the law in subsidiary form which, following a vote, is thereby given force. The plethora of case law on this subject may seduce judges into a re-examination of what are well-settled principles. This can be avoided and the underlying law perhaps made even simpler than the very helpful propositions set out by MacMenamin J in *NECI*. Some general propositions may therefore be restated, based on the judgments in *NECI* and *Conway*:

1) The only test for a challenge to subsidiary legislation on the basis of *vires*, or authority to promulgate the measure, is whether there has been an abdication by the Oireachtas of its sole and exclusive law-making authority under Article 15.2.1º of the Constitution.

2) What requires examination in such a challenge is whether what the delegate is to do is sufficiently bounded by the terms of the parent legislation, be it an Act of the Oireachtas or a measure necessitated by European law, and guided as to the nature of the choices to be made by the subsidiary.

3) Of necessity, a choice as to the subject matter of what is delegated may lawfully, within those boundaries and subject to that guidance, be left to be made by the delegate.

4) Where the choice made is one of fundamental policy, as opposed to a limited and guided choice based on the overall text of the legislation delegating the power to make subsidiary legislation, then an abdication of the exclusive lawmaking power of the Oireachtas is manifest.

5) That control has been retained by the Oireachtas, either in the form of requiring a positive vote to confirm subsidiary legislation or by the less strong control of requiring a vote of nullification within a particular timeframe, may be important but is not essential since some subsidiary legislation is not subject to that scrutiny.

6) Article 15.2.1º is the issue and Article 5 and Article 6 are not to be brought into the equation, being liable both to confuse and being instead addressed to the fundamental structures of the Constitution, rather than representing components of the validity of delegation of the legislative function.

22. No prior authority setting forth the basis for domestic legislation conferring on Government Ministers the power to create indictable offences was put before this Court. Notwithstanding that, the standard model seems to be for the Oireachtas to create the offence while conferring on the executive the authority to specify the behaviour, breach of which will constitute an offence. Outside of European law, there is such a concept; the Misuse of Drugs Act 1977 being an example where the Misuse of Drugs Regulations were appended to the legislation as originally passed by the Oireachtas and these specified the drugs subject to criminal penalties for possession but providing that the list could be added to. Once any such addition followed the guidance in the legislation and stayed within the limits of dangerous drugs, that delegation whereby an indictable offence could be added to the existing prohibitions was lawful; see *Bederev*.

Necessitated by EU law

23. Regulations transposing EU legislation are not immune from constitutional challenge; Hogan et al, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018 [4.2.58]). The appellant's case taken at its height is that the creation of a serious criminal offence by Ministerial Regulation, triable on indictment, abdicates the law-making responsibility of the Oireachtas, albeit that there is a limitation of penalty to three years and/or a fine of €500,000. Could, it might be asked rhetorically, a Minister create an indictable offence punishable by life imprisonment merely because that meets the constitutional exemption of necessitated by membership of the European Union? Whether or not the offence with which the appellants are charged was lawfully created is thus dependent on: (i) if it was lawful to utilise the provision of s 3 of the 1972 Act to create the offence; (ii) whether it was objectively necessary to create the offence; and (iii) whether sufficient guidance in the parent European law instrument, usually a Directive, and clear boundaries as to competency in that limited conferral of choice, enables a measure of the scope in question.

24. As to the first consideration, it can readily be said that if, hypothetically, the Oireachtas were to provide either in a criminal law statute, or in a specific field such as sexual violence, that the Minister could by regulation create indictable offences if the Minister considered that measure was desirable, that would infringe Article 15.2.1°. Similarly, for the Oireachtas to define criminal offences and then abdicate the level of maximum penalty to the Minister would be problematic, since on any view, the nature of a crime and the maximum penalty appropriate to the worst cases are both questions of fundamental policy. By way of example, commentators have suggested that the regulations in question here could equally have created a civil enforcement mechanism, allowing interested parties, such as the respondent Minister, to bring actions for damages against illegal turf cutters; Hogan and Morgan, *Administrative Law in Ireland* (4th edn, Thomas Reuters 2010) 25. Besides the difficulties of how such a measure would work in practice, it also does not negate the reality of s 3(3) and the fact that breach of the 2011 Regulations is now an indictable offence pursuant to statute. This promulgation occurred to uphold the Habitats Directive as a national imperative pursuant to European law. This is equally a heuristic of the mechanics of democratic decision-making. As stated in the opinion of the Advocate General in C-440/05 [2007] *Commission v Council* "the Community legislature can, whenever criminal measures are necessary to ensure the full effectiveness of Community law and essential to combat serious offences in a particular area, require Member States to penalise certain conduct and to adopt in that regard, effective, proportionate and dissuasive criminal sanctions". That, however, is not a specific requirement of the Directive. Furthermore, the Court of Justice of the European Union did not endorse this statement. What matters more is the seriousness of the conduct sought to be brought under control.

25. Thus, the second qualification on the exclusive law-making power vested in the Oireachtas derives from the State's membership of the European Union. Section 2(1) of the 1972 Act grants legal status, within Ireland, to EU law, it 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.

26. Clearly, s 2 of the 1972 Act may involve executive action in the context of giving effect to EU regulations and the transposition of EU directives into domestic law. Its constitutionality is saved by Article 29.4.6° where a measure is necessary to ensure the State's compliance with EU law. As for EU Directives, Article 288 of the Treaty on the Functioning of the European Union provides

that "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". Hence, as stated in Bailey and Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition, LexisNexis 2020) at 881, a "directive may leave it to Member States to decide for themselves certain points in the national law required to be made to implement it". Again, it is the potential seriousness of breaches of the Habitats Directive which suggest that more than a summary prosecution is warranted for the worst offences that may involve the destruction of bog habitats.

Decisions in *Meagher* and *Maher*

27. Hence, what is in issue here is whether the enactment of s 3(3) of the 1972 Act, as amended was necessitated by membership of the EU. The constitutionality of the power to amend primary legislation by regulations made under the 1972 Act was upheld in *Meagher v Minister for Agriculture* [1994] 1 IR 329. The case concerned a challenge to secondary legislation designed to implement a directive prohibiting the administration of certain substances to cattle, which were potentially deeply injurious to human health, leading on occasion to death. Here, by Ministerial regulation, a pre-1937 statute providing for limitations of time in commencing a case, was altered because of the complex and time-consuming nature of the laboratory examinations not just involved, but necessary to properly prosecute such cases. Finlay CJ stated at pp 351 – 353:

> The power to make regulations contained in section 3, subs 1 of the Act of 1972 is exclusively confined to the making of regulations for one purpose, and one purpose only, that of enabling s 2 of the Act to have full effect. Section 2 of the Act which provides for the application of the Community law and acts as binding on the State and as part of the domestic law subject to conditions laid down in the Treaty which, of course, include its primacy, is the major or fundamental obligation necessitated by membership of the Community. The power of regulation-making, therefore, contained in s 3 is prima facie a power which is part of the necessary machinery which became a duty of the State upon its joining the Community and therefore necessitated by that membership.
>
> The Court is satisfied that, having regard to the number of Community laws, acts done and measures adopted which either have to be facilitated in their direct application to the law of the State or have to be implemented by appropriate action into the law of the State, the obligation of membership would necessitate facilitating of these activities, in some instances at least, and possibly in a great majority of instances, by the making of ministerial regulation rather than legislation of the Oireachtas.
>
> The Court is accordingly satisfied that the power to make regulations in the form in which it is contained in s 3, sub-s 2 of the Act of 1972 is necessitated by the obligations of membership by the State of the Communities and now of the Union and is therefore by virtue of Article 29, s 4, sub-ss 3, 4 and 5 immune from constitutional challenge. In so far as it may be possible to point to hypothetical instances of certain types of laws, measures or acts of the Community or Union which in their implementation or application within the national law might not, as to the method of implementation or application, be necessarily carried out by ministerial regulation, but rather should have been carried out by enactment of law by the Oireachtas, the Court is satisfied, without deciding that such instances do occur, that the principles laid down by this Court in the decision *of East Donegal Co-Operative Livestock Marts Ltd v Attorney General* [1970] IR 317, must be applied to the construction of the impugned subsection in the manner in which it was applied by the decision of this Court in *Harvey v The Minister for Social Welfare* [1990] 2 IR 232 to the

> construction of the section of the statute impugned in that case, namely, s 75 of the Social Welfare Act, 1952.
>
> That principle is that it must be implied that the making of regulations by the Minister, as is permitted by the section, is intended by the Oireachtas to be conducted in accordance with the principles of constitutional justice, and therefore that it is to be implied that the Minister shall not in exercising the power of making regulations pursuant to the section, contravene any provisions of the Constitution. If therefore in such an instance challenge were to be made to the validity of a ministerial regulation having regard to the absence of necessity for it to be carried out by regulation instead of legislation and having regard to the nature of the content of such regulation it would have to be a challenge made on the basis that the regulation was invalid as ultra vires being an unconstitutional exercise by the Minister of the power constitutionally conferred upon him by the section.

28. Necessity is to be considered by reference to the content of the implementing instrument; *Maher v The Minister for Agriculture* [2001] 2 IR 139. Hence, Keane CJ stated in *Maher* that:

> *Meagher v Minister for Agriculture* . . . is clear authority for the proposition that, where a provision of Community law imposes obligations on the State, leaving no room (or perhaps no significant room) for choice, then Article 15.2.1 of the Constitution is not infringed by the use of ministerial regulation to implement it. Both the judgment of the court and that of Denham J expressly preserve the force of that provision, as it has been interpreted, for cases where such an obligation does not exist. The 'principles and policies' test applies *mutatis mutandis* where the delegated legislation represents an exercise of a power or discretion arising from Community law secondary legislation. It applies with particular clarity to the case of directives where Article 249(EC) leaves the choice of forms and methods to the member states. The question will not arise so frequently in the case of regulations since they are directly applicable without the need for national implementing measures.

Interpretation of EU law

29. European legislation typically comprises a number of components, involving a general duty or prohibition and the components of the subjects to which it applies; Dodd, *Statutory Interpretation in Ireland* (Bloomsbury Professional 2008) 370. The duties on the State in respect of peat extraction from protected bogs are imposed under Article 23(1) of the Habitats Directive, which obliges Member States to bring into force the laws, regulations, and administrative provisions necessary to comply with the Directive within two years of its notification. This is the enabling power that must be construed to determine its scope. Counsel for the appellants have suggested that looking directly to the text of the Habitats Directive as a source of principles and policies does very little to assist the Minister in deciding whether to create an offence, or more specifically an indictable offence, and indeed, its precise parameters. It seems that this question can, at least in part, be addressed by reference to Article 6(2) of the Habitats Directive:

> Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

30. Notwithstanding that the Habitats Directive does not expressly require, or even suggest the desirability of, criminal measures, it does empower Member States to “take all appropriate steps”

to protect habitats. The following general guide to the construction of instruments of the European Community is provided in the Court of Justice Reports, Kuscher (a former member of the European Court of Justice), 'The methods of interpretation common to the national legal orders and Community law' (1976):

> You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules which it is a part, may be taken into consideration.

31. Thus, construing the Habitats Directive on the whole, regard must also be afforded to Directive 2008/99/EC, on the protection of the environment through criminal law. That Directive requires Member States to ensure that any conduct which causes the significant deterioration of a habitat within a protected site shall constitute a criminal offence; as noted this will be strengthened in due course by Directive 2024/1203. Significantly, the annexes to this 2008 Directive include the Habitats Directive as part of a list of legislation which must be made the subject of criminal law measures. Article 5 of the Directive on the protection of environment through criminal law requires Member States to take the necessary steps to ensure that offences are punishable by effective, proportionate and dissuasive penalties. The following recitals in the preamble are of significance to the resolution of the necessity question:

> (3) Experience has shown that the existing system of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.
>
> (5) In order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species.
>
> (10) This Directive obliges Member States to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment...
>
> (12) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment…

32. Further, Member States are bound by the duty of cooperation which is set out in Article 4(3) Treaty on European Union:

> Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Objectives and necessary penalties

33. Recitals are not operative components of European law but provide an aid in the detail and background to interpreting a Directive as to its purpose. Generally, one of the basic principles of statutory interpretation is that those subject to its terms cannot ignore an enactment binding on them because its meaning is difficult to discern. The provisions outlined above are more than prescriptive of the type of behaviour that should be criminalised, if not the precise level of penalty such behaviour should attract. Given that the method of choice of implementation of Directives is left open to Member States, it can be incorrect to automatically use Article 29.4.6° to justify what would otherwise be a breach of Article 15.2.1°; Hogan et al, *Administrative Law in Ireland* at 42. That is not the case here. As Blaney J said in *Meagher* "If the State were free not to implement the Directive, then clearly, if it were to do so, it would be a voluntary act not necessitated by the obligations of membership and would not be protected by Article 29 of the Constitution. But the State is not free".

34. The very nature of a Directive is that it is binding as to the result to be achieved. It follows, that the Habitats Directive cannot be said to provide prescriptive and inflexible guidance as to how that issue should be resolved. That would no longer be guidance. The whole point of a Directive is the discretion it affords to Member States in its implementation. This is different from the other methods of implementation of European law. While a Directive may not assist in choosing between, for example, two equally effective means of achieving an objective, all it can do in that regard, is require that the objective be capable of being fully achieved by the method chosen. Thus, as has been stated by this Court many times, the fact that the delegate "is given some discretion or choice does not of itself point to an impermissible delegation"; Collins J at [171] in *Delaney*. This reasoning must extend to delegated powers to create indictable offences.

35. While legislating at a subsidiary level for a measure in protection of the environment, any choice by the Minister is a narrow one and has to be within the confines of what is directed under European law. Whatever choice is left open to Member States, it is one that demands to be commensurate with the objectives envisaged by the Habitats Directive. What must be realised here is that there is a range of behaviours that may attack a protected environment. Within that range there is a higher and a lower scope. That is the same with many sentencing exercises, legislatures typically only providing a maximum penalty applicable to the gravest commission of what is proscribed. Turning to what is outlawed here, it is obvious that to cut some turf to bring comfort to traditional living may be a minor transgression, unless repeated on a scale of many multiples, and may necessitate a fine or imprisonment at minor level. But, very serious infringements of habitats readily must be within the scope of the kind of conduct that the Directive forbids. What if, instead of at a domestic level of occasional exploitation, an entire blanket bog was stripped of turf to turn it into a meadow for cattle rearing? Or, what if a raised bog were deprived of its water source either through diversion of waterways or through unblocking the landscape feature that preserved the integrity of the habitat? Instead of a small offence, instead there could be an environmental disaster. Or instead of individual conduct, what if concerted flouting of the law were involved?

36. Here it might be said that all that might be involved is that inspectors sent by the Minister were dissuaded (how, is not known) from entering the protected bog. But what if the motivation were to prevent the discovery of drainage, diversion of watercourses or widespread environmental degradation. Thus, there is not much doubt that the power of the Minister to choose creating indictable offences as well as summary offences, because of the range of offences that the Directive embraces, is the clear object of the parent European law measure. As Fennelly J explained in *Maher*, arising from EU law a Minister could be seen "as acting as the delegate of the Community". Hence, the fact that the Habitats Directive does not specifically call for the creation of criminal offences, is not decisive. It is not open to the State to permit further damage to be done to protected sites; that would be a clear breach of its legal obligations under the Directive; see O'Malley J's comments in *O'Connor* at [89]. In this respect, it must also be observed that the necessity to create a criminal offence could also be derived from changes in the overall context – the few methods of enforcement available to the authorities in Irish law and continued environmental degradation in raised bogs generally. Consequently, in an effort to bring about compliance the Minister introduced the indictable criminal sanction. This is not to say that the legality of a regulation can change according to a mere sidewind. As stated in Bailey and Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) at [26.2] 825 "all enactments are presumed to be for the public benefit . . . this means that the court must always assume that it is in the public interest to give effect to the intention of the legislature, once this is ascertained".

Preservation

37. These provisions and those developments inform the minor/non-minor or summary/indictable issue raised at the hearing. As suggested by the High Court decision at [47] "the parameters of discretion are curtailed by the terms of the particular piece of EU legislation being implemented". Further, the decision being made is that the drafter of the regulation is required to choose one which will achieve the objective of the Directive, which Article 2 clearly states as contributing towards "…ensuring bio-diversity through the conservation of natural habitats…" and to "restore, at favourable conservation status, natural habitats…". This is about preservation. Even that choice, which could readily be construed as a normative goal, is constrained by the decisions of the High Court and Court of Appeal in *O'Connor & McCarthy v The People (DPP) & Others* [2015] IEHC 558, [2017] IECA 101, which has held that the introduction of criminal sanctions was necessitated to give full effect to the Habitats Directive, since other efforts by the State to protect designated sites have not been fully successful. Arguably, therefore, the question of whether the sanction is adequate is the issue as to what is necessitated by the obligation to uphold the imperative in the Directive. While there are less safeguards than would apply to a trial on indictment, a District Court judge is still required to ensure that an accused person gets a fair trial; Article 38.1 of the Constitution. That remains the case on indictment.

38. Denham J elaborated on the rationale for the test in *Meagher*, where this Court determined that the principles and policies had been determined in the parent European Directive at issue:

> In the Directives herein the policies and principles have been determined. Thus, there is no role of determining policies or principles for the Oireachtas. That being the case the role of the Oireachtas in such a situation would be sterile. To require the Oireachtas to legislate would be artificial. It would be able solely to have a debate as to what has already been decided … Such a sterile debate would take up Dáil and Senate time and act only as a window on Community directives for the members of the Oireachtas and the nation.

39. As this Court stated in *Bederev* at [44] "every delegation of legislative authority involves, of necessity, a power to do something or refrain from doing something". The very nature of a

Directive is that it is binding as to the result to be achieved. It follows, that almost as a matter of law the Habitats Directive cannot be said to provide guidance as to how that issue should be resolved. The whole point of a Directive is the discretion it affords to Member States in its implementation. This may be different from the other methods of implementation of European Union law in other Member States and it may be different as to the choices that can be exercised in this jurisdiction. A Regulation, as a European law instrument leaves little room for choice, being directly effective, but perhaps needing to be backed by penalties or administrative measures. No European measure can be considered as a *tabula rasa* for a Minister to create policy. Hence, there is an objective necessity to create an offence at indictable level. Finally, it is clear that sufficient guidance as to the boundaries of decision-making and the limits as to choice have been made explicit on analysis of the parent European law instrument.

Supervisory controls

40. A further relevant factor, though not a necessary one, in considering the contours of permissible legislative delegation, is whether and to what extent, the Oireachtas retains a supervisory role. Thus, of significance in this case is that the wielder of the delegated rule-making power in question is a Minister. But that is not all, though important in itself. The Government is always accountable to Dáil Éireann for the exercise of such authority; Article 28.1 of the Constitution. Herein lies the lynchpin that fastens the actions of rule-making actors, other than the legislature, to an electoral mandate, informing the important separation of executive and legislative functions.

41. The procedures of Oireachtas control vary in the level of scrutiny delegated legislative measures are subjected. These are discussed in detail in *NECI* in the judgment of Charleton J:

> 7. There are three common formulations in delegated legislation whereby democratic scrutiny is potentially to be reaffirmed by the Oireachtas. These models are in the Westminster procedure of the British parliament as well; Craig, *Administrative Law* (8th edition, London, 2016) 16-008. The first, and most common to legislation which delegates powers to local authorities, is where the local authority sets rates or other charges, such as harbour fees, or makes rules for the use of public spaces: there is no potential for debate before the Oireachtas as to the balance or lack thereof of these decisions. The only remedy for those claiming to be affected would be judicial review as to reasonableness and vires under the primary legislation. Partly, the reason for such local rules not returning to the Oireachtas is that the local authorities have their own debating bodies and their membership is subject to local election. Hence, harbour charges for using ports are laid down by local authorities but the classification of vessels, the extent of the charges and the conditions of use are matters outside the remit of any body save that of local government, properly so called for this reason but exercising democratic powers devolved from central government; see *Island Ferries Teoranta v Ireland* [2015] IESC 95, [2015] 3 IR 637 as an example. In that first instance, there is no reappraisal by the Oireachtas. The second and third models involve the Oireachtas sending away within a package of legislation some issue, one usually requiring detailed expert assistance or technical assessment, with an imperative for it to return and, hence, carrying the prospect of fresh scrutiny. That model may be that the subordinate measure be laid before the Dáil and Seanad where it will pass unless taken up by a sufficient number of representatives to require that it be debated before being passed or rejected.
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> 8. A common formulation, in this second instance, found in almost 300 pieces of legislation, is that the subordinate legislation passes automatically if laid before the

Oireachtas and will only fail "if a resolution annulling the regulation is passed by either such House". Of the examples helpfully provided in argument, there appears to be no discernible gradation of importance. For instance, an example of this second instance was the formulation in s 38 of the Misuse of Drugs Act 1977 whereby newly invented or discovered dangerous drugs could be added by ministerial regulation to the schedule to that legislation, provided any such statutory instrument was not annulled by the Oireachtas; see *Bederev v Ireland* [2016] IESC 34, [2016] 3 IR 1.

9. Finally, and most commonly of recent times, a statutory provision may call for a positive consideration of a subordinate legislative measure by one or more houses of the Oireachtas before a statutory instrument may achieve the force of law. This is found in around 200 pieces of legislation where "a resolution approving of the draft has been passed by each such House" which means the Dáil and Seanad. This requires more in terms of the mechanism of scrutiny, if not in its actuality, than a provision requiring merely the passing of time and the absence of sufficient public representatives being exercised enough to cause the matter to be placed on the order of business of either house; which is the second instance. In this example, according to the explanation of the Attorney General on this appeal, that scrutiny is already there. The subordinate legislation does not achieve the force of law without a democratic vote by the people's representatives. While it may be difficult to see democratic representatives becoming energised by such a provision as the conferral of additional functions onto the board of Bord Gáis Éireann, under s 34(3) of the Gas Regulation Act 2013, no such Ministerial order is valid unless actively passed by the Dáil and Seanad. Exceptionally, only one house may be involved, as in s 2 of the Financial Provisions (Covid-19) (no. 2) Act 2020 which requires a Ministerial Order varying the amount, percentage, reduction or period of wage subsidy to be passed by Dáil Éireann alone. Within that same legislation, s 4(2) requires other provisions to have the positive approval of both houses.

42. The model adopted here is also a common formulation, one particular to European law measures. This is termed, in statutory interpretation, the "negative procedure". The 2011 Regulation can be annulled within one year, if brought before the Houses of the Oireachtas on the recommendation of the Joint Committee on European Affairs; s 4(a) of the 1972 Act, as amended. The negative procedure gives the legislature, on the motion of a specialist Joint Committee, the opportunity to object to the impugned provision of the 2011 Regulation. In accordance with sections 4(2)(a) and 4(2)(b) of the 1972 Act, as amended, the Regulation can be debated if 1/3 of either Houses of the Oireachtas requests a debate. The availability of the negative procedure was a significant factor in *Cityview Press*; the levy orders made by AnCo at issue were subject to annulment by either House of the Oireachtas. Similarly, in *Bederev,* the Court, at paragraph 49, gave weight to the fact that all additions to the list of scheduled drugs were required to be laid before the Houses of the Oireachtas and could be annulled, thus retaining control by the legislature. The "ultimate responsibility", however, to ensure that the exclusive lawmaking function of the Oireachtas is not eroded by such delegation of power rests with the courts; *Cityview Press* at [398]. This oversight is stronger but not at the level in *NECI*, where a positive vote was necessary. Since the case law does not require oversight, the level and degree are merely factors in the wholistic assessment of the validity of the delegated legislative measure.

Application

43. In this case, while it can be said that the Minister is creating a criminal offence, in fact, the area for decision is very substantially narrowed. The decision on (i) whether habitats should be protected, (ii) whether peat bogs are such habitats, (iii) whether it is necessary to protect all peat

bogs, or (iv) just some, and (v) the level of protection that is required (in this case high) are all decisions that have already been made prior to any delegation by the parent legislation, here at European law level and consequently necessitating implementation in domestic law, to the Minister.

44. Here, the obligation in the parent legislation is both explicit and inescapable. All that is left to the national authorities is the discretion to decide how, within their own legal system, those objectives are to be achieved. The national authorities have a very limited range of options. They must select from within their own legal system the method of enforcement. Even that choice is constrained; it must be a method of enforcement which achieves the objective.

Certainty

45. The common law presumes that a person should not be penalised except under clear law. As is apparent from Denham J's judgment in *Browne*, any provision purporting to give the Minister the power to create an indictable offence should be clear from the words of the statute as interpreted within the framework of what is involved. She was merely reflecting the position which had prevailed up until that point – namely, that regulations made under the 1972 Act could not create an indictable offence. That was a matter of the choice of the Oireachtas. In exceptional cases courts may declare delegated legislation invalid for uncertainty; *Bennion on Statutory Interpretation* [2.19] 122. The very basic requirement of legal certainty inherent in the rule of law requires that delegated legislation must be expressed in terms that are sufficiently certain to enable those at whom it is directed to comply with the law and to understand its consequences.

46. The law against uncertainty in statutory interpretation is reviewed by Murray J in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43. Uncertainty or ambiguity arises when on its face the text "clearly susceptible to more than one meaning, but it may also be contextual, so that seemingly clear words can, when placed in situation, bear a construction not always evident from the language alone"; *The People (DPP) v Brown* [2018] IESC 67, [2019] 2 IR 1. This involves two stages of inquiry that form part of a single continuum (1) words in context and (if there remained ambiguity), (2) purpose. For the reasons already outlined above, it is simply not possible to legislate without leaving some degree of uncertainty. The mere fact that delegated legislation uses broad terminology or gives rise to difficult questions when applying it should not result in it being invalid for uncertainty.

47. The decision from England & Wales in *Staden v Tarajanyi* (1980) 78 LGR 614 illuminates this point. There, a byelaw forbade a person from flying a glider over a particular park. The Divisional Court held that to be valid the byelaw must set some lower level below which a glider must not fly. The absence of any such limitation meant that the byelaw was invalid. It was clear that the court would have upheld the byelaw had it included a height limit set by reference to whether the flying would cause a nuisance to those on the ground. Here, no such uncertainty arises. Examining the words in context, the choice of an indictable offence is limited under the 2007 Act to the penalties set out viz three years imprisonment or €500,000 fine. Thus, no requirement for an examination of purpose of the Regulation arises.

48. Here, certainty arises from two points of perspective. Firstly, the Directive is clear as to the necessity to have proportionate penalties to infringements. Secondly, the necessity to act proportionately arises from the range of wrongs encompassed by the parent legislation.

Cases that cause systemic delay

49. At the time these proceedings were instituted in 2014, there were other on-going proceedings which raised a similar type of challenge to the validity of the 2011 Regulations. It was agreed that one such case would be heard first, with the other cases, including the present proceedings, being adjourned to await the outcome of the lead case. The lead case is the subject of written judgments by both the High Court and the Court of Appeal; *O'Connor & McCarthy v The People (DPP) & Others* [2015] IEHC 558, [2017] IECA 101. Both courts upheld the 2011 Regulations as having been validly made pursuant to the 1972 Act. This Court refused leave to appeal that decision; Clarke CJ, McKechnie, MacMenamin JJ [2018] IESCDET 92. The applicants then, it seems, pivoted their case to challenge the validity of the parent legislation itself, which led to the proceedings before this Court.

50. Notwithstanding that the proceedings were further delayed by the Covid-19 pandemic, given that there were very few issues, if anything, left to be decided after the decision in *O'Connor*, the issues presented to this Court were at a high level of abstraction and, at a minimum, close to the territory of impermissibly relying on a *jus tertii*. A more effective use of limited court resources would have been for the more comprehensive case to proceed, or that if it was the case that in the light of the *O'Connor* decision, there were still unresolved issues, it should have been immediately listed before the same judge. Furthermore, given the fact that there are now two potential layers of appeal, the fact that the proceedings are being case managed because of the impact on prosecution, should be something capable of being drawn to the attention of the Court of Appeal and/or this Court, so that appeals can be fast-tracked, and all remaining issues dealt with. While these proceedings were resolved fairly promptly, they still gave rise to additional unsatisfactory delay. It is the State which as defender of such challenges will know through its institutions just how many cases which challenge domestic or European law legislation. Any case that poses the systemic delay of legislation should, if leave is granted for judicial review, be immediately brought to the attention of the President of the High Court by the State so that it can be case managed, and if appealed, given priority. Further, such a case does not have to mean that every case, as in prosecutions for Clenbuterol and other forbidden hormones, stops. That happened in *Meagher*, but cases have become more complex. The parties have a duty to prioritise such litigation and that is an obligation that must effectively be placed on the State in the first instance with a concomitant duty of cooperation cast on any challenger.

51. A judicial review challenge should not, furthermore, comprise the death-knell of pursuing every related case. That is to be decided on an individual basis. Once leave to seek judicial review is granted, and the case involves a decision of systemic importance, for example, regarding the environment, planning, or the rights of victims, parties are duty-bound to cooperate with the State, in the first instance, applying to the President of the High Court to expedite the case. If a threshold of systemic importance is met, or if a challenge to the transposition of a European law obligation means a possible failure by the State to fully cooperate with the European Union, such a case, together with every other case dependent on the outcome, must be sought to be prioritised by the State respondents. A decision in such a case in the High Court may qualify for a direct appeal to the Supreme Court; see for instance *Karshan Midlands T/A Dominos Pizza v Revenue Commissioners* [2022] IESCDET 121.

Resolution of the issues

52. It having been necessary to enter a thicket of legal authorities to consider the issues in this case, it may be appropriate to briefly answer the issues posed in the Determination in giving leave for a further appeal, noting that the detailed reasons are in the text of this judgment:

(i) It is within the competence of the Legislature to delegate the power to create indictable offences to the Executive branch. This is not necessarily to be construed as an abdication of Article 15.2.1º.

(ii) The normative legitimacy of the power to create indictable offences, effected to implement EU law, derives from EU law obligations. Thus, the main normative commitments binding citizens in respect of care for the environment derive from EU obligations, in contrast to legislation providing for delegation of secondary legislation where an Act is passed by the Oireachtas. In truth, the prescriptive nature of the Habitats Directive means any command over policy left over to Member States has, like in the leading case of *Maher*, been reduced almost to vanishing point. In these circumstances, the defined subject-matter, objective, guidance and boundaries, for subsidiary law-making has already been decided. The crux of the matter is what is or what is not authorised and whether the delegation can be obligated in consequence a legally binding Directive. In a European law context, the measure must be necessitated since, apart from the general words of the European Communities Act 1972, as amended in 2007, the entire choice has been made as to what is to be achieved. The Directive or Regulation becomes the parent measure.

(iii) The case law clearly affords some weight to the safeguards providing for the review of regulations by the Houses of the Oireachtas. Here, there is that review. This is part of the holistic overview in the test as to whether there has been an abdication by the Oireachtas of its law-making responsibility under Article 15.2.1º of the Constitution.

(iv) Where the subsidiary legislation challenged comes from an Act of the Oireachtas, which enables a Minister or other body to create offences through statutory instrument, the threshold for a successful challenge is dependent on the principles of the scope of the delegation, the guidance given and the boundaries set. Where the measure comes from European law, expressly here the Oireachtas in the 1972 Act as amended in 2007, the subsidiary legislation must be necessary to fulfil Ireland's obligations and the objective, guidance and boundaries, for subsidiary law-making comes from the necessity of making that European law measure effective as transposed.

Result

53. In the result, the appeal should be dismissed and the order of the High Court affirmed.