Neutral Citation Number: [2012] IEHC 211

THE HIGH COURT

[2012 No. 481 J.R.]

BETWEEN/

PEARSE DOHERTY

APPLICANT

AND

THE REFERENDUM COMMISSION

AND

THE HONOURABLE MR. JUSTICE KEVIN FEENEY

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 6th June, 2012

1. This application for judicial review of certain statements and utterances of the Referendum Commission ("the Commission") raises difficult and profound questions concerning the role of the courts in the referendum process. This application has been brought by a Dáil Deputy for Donegal South West, Pearse Doherty. Deputy Doherty is the Sinn Féin spokesman on Finance and he was a prominent campaigner on the "No" side in the referendum which was held on 31st May 2012 in respect of the Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Bill 2012 ("the Fiscal Stability Treaty referendum").

2. At about 12.30pm on 29th May, 2012, counsel on behalf of Deputy Doherty, Mr. Humphreys S.C., moved the court for an application for leave to apply for judicial review in respect of certain statements and utterances issued by the Commission. Having listened to Mr. Humphreys' submission for perhaps the best part of an hour and a half or thereabouts, I took the view that the Commission was a body corporate and, therefore, struck out the proceedings so far as it concerned the Chairman of the Commission, Mr. Justice Feeney who had been named on the pleadings as a co-respondent. I will presently set out in more detail the reasons for that conclusion, but it suffices to say that no issue was thereafter raised about the status of the Commission as a juristic person and the striking out of Mr. Justice Feeney as a co-respondent had no bearing whatever on the course of the proceedings.

3. In the course of that original application for leave I also took the view that Deputy Doherty's contention regarding the *vires* of the Commission in respect of comments which it made about the European Stability Mechanism were not well founded and I again struck out this aspect of the proceedings. I will give reasons for that conclusion in the course of this judgment.

4. So far as the balance of the application was concerned, I concluded that it raised profound and very difficult questions, which at their heart involved complex and intricate issues in relation to constitutional law, European Union law, international law, the role of the courts in the referendum process, the judicial power to supervise the Commission, the method of treaty ratification, the role of the Government in treaty ratification and the role of the Houses of the Oireachtas in respect of treaty ratification generally and more specifically in relation to treaties with what can be loosely called a European Union dimension. I therefore adjourned the application for leave until 8pm later that evening so that the Commission could be placed on notice. I also invited the applicant to send a courtesy copy of the proceedings to the Attorney General, although I stressed that it would be a matter for her decide as to whether she would intervene in the proceedings and, if so, in what capacity.

5. On the resumption of the hearing at 8pm, counsel for both the Commission, Mr. Michael Collins SC and for the Attorney General, Mr. Travers, indicated that they were ready to proceed with a full hearing of the matter. Mr. Travers further confirmed that he represented the Attorney in her capacity as legal adviser to the Government. It was thus agreed that the full hearing of the application would then proceed. Following full argument, the hearing concluded just before midnight later that evening.

6. As all parties had urged me to give a ruling immediately, I delivered an oral ruling at 10.30am that following morning. Given the importance of the matters raised I had, however, indicated that I would give more detailed reasons in writing for that judgment, which I now do.

Background to referendum on the Fiscal Stability Treaty

7. The collapse of the US investment banking firm Lehman Brothers in September 2008 has brought about deep-seated and systemic convulsions in the global financial system. There thus began a financial crisis of almost unparalleled severity, the ultimate resolution of which none can presently foresee. It ushered in an era of toxic bank debt, failed banks and banking systems and elevated levels of sovereign debt. Within the seventeen members of the Eurozone, particular financial and economic problems emerged in many Member States.

8. All of this in turn has meant that taxpayers in many states – not least our own - have been burdened with the huge costs associated with bank rescues, often at a time when they can least afford this. At the root of the present problems facing the European Union is the fact that it would seem that the architects of the Eurozone system did not originally envisage a situation in which a Member State would not be able to borrow (or, at least, borrow at reasonable rates) on capital markets. This is reflected in Article 123 TEU (the so-called 'no overdraft clause') and Article 125 TEU (the 'no bailout clause'). It is all too obvious that the original hopes and aspirations of the drafters of the original Maastricht Treaty (1992) have not been fully borne out or brought to fruition in the way that they envisaged. Specifically, there is a real danger - which has sadly manifested itself in the case of three Member States, including our own - that Member States could effectively be shut out of capital markets.

9. In an effort to deal with this, the European Council in its decision of 25th March 2011 (O.J. L91/1, 6th April, 2011)("the European Council decisions") sought to amend Article136 TFEU to allow for a permanent stability mechanism to provide a system of emergency

loans to distressed Eurozone Member States, albeit one subject to strict conditionality. The special amendment procedure provided for in Article 48(6) TEU allows for the use of this "simplified revision procedure" (rather than a full scale inter-governmental conference) where (as here) the proposed amendment concerns "all or part" of Part Three TFEU "relating to the internal policies and action of the Union", save that any amendment using this procedure "shall not increase the competences conferred on the Union in the Treaties." It is not in doubt but that the simplified revision procedure requires unanimity and "requires to be approved by Member States in accordance with their respective constitutional requirements", a clause which is of some significance and to which I will later revert.

10. Article 1 of the Decision provides:-

> "The following paragraph shall be added to Article 136 of the Treaty on the Functioning of the European Union:
> 'The Member States whose currency is the Euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.'"

11. Article 2 of the Decision provides:-

> "Member States shall notify the Secretary-General of the Council without delay of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements.
>
> This Decision shall enter into force on the 1st January, 2013, provided that all the notifications referred to in the first paragraph have been received, or failing that, on the 1st day of the month, following receipt of the last of the notifications referred to in the first paragraph."

12. Assuming the new Article 136(3) enters into force – recalling here that it requires to be "approved" by all 27 Member States of the Union - this will, in turn, form the legal foundation for the Treaty establishing the European Stability Mechanism ("the ESM Treaty") to which the Fiscal Stability Treaty, or, to give its proper title, the Treaty on Stability, Coordination and Governance in the European and Monetary Union ("TSCG") cross-refers.

13. The TSCG seeks to improve the governance of the Eurozone by ensuring that all Eurozone Member States adhere to strict fiscal discipline. This had been the original aim of the Maastricht Treaty, as Article 1 of the Protocol on the Excessive Deficit Procedure had envisaged that participating states would avoid excessive government budgetary deficits, i.e., an annual budget deficit of less than 3 *per cent* of Gross Domestic Product (GDP) and an overall public debt ratio not exceeding 60% of GDP. This was further reflected in the Stability and Growth Pact (1997)("SGP"), an inter-governmental agreement which was designed to facilitate the fiscal monitoring of Eurozone Member States by the European Commission. The SGP further envisaged that the Commission would have a reporting system, ultimately leading to fines for offending States. Unfortunately, the SGP proved to be ineffective, not least when no meaningful action was taken in the period from 2003 onwards against certain larger and more influential Member States who had persistently breached the Pact during this period. The fact that currently only three Eurozone Member States – Estonia, Finland and Luxembourg - satisfy the original Maastricht criteria tells its own story regarding the ineffectiveness of the SGP.

14. The TSCG is accordingly designed to reinforce fiscal discipline by obliging the Contracting Parties to adopt a balanced budget rule (with some exceptions)(Article 3) and by empowering the Court of Justice to impose sanctions in certain situations on defaulting Member States (Article 8). One critical overlap between the ESM Treaty and the TSCG is that both agreements state that the granting of financial assistance to distressed Contracting Parties under the ESM is conditional on the State in question ratifying the TSCG. Thus, recital (5) to the ESM Treaty provides that:

> "….This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of the new programmes under the ESM will be conditional, as on 1 March 2013, on the ratification of the TSCG by the ESM member concerned and, upon the expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that article."

15. At the heart, however, of the issue now before the Court is the meaning of the phrase "constitutional requirements" as it appears in Article 2 of the European Council decision. Specifically, can the Government refuse to take steps not to have the European Council decision approved, as Deputy Doherty contends, or is it the case that the Government have no further role in this matter, as the Commission and the Attorney General contend, albeit for somewhat different reasons? Some indication of the complexity of the issues that were raised in some respects fundamentally different arguments in relation to this issue have been advanced by the three protagonists in the present proceedings. Before considering any of these questions, however, it is necessary first to address the question of delay.

Whether Deputy Doherty has delayed unduly

16. While the following observations are not made by way of criticism, it was nonetheless deeply unfortunate that the application was made on the eve of the referendum itself. This means that both the legal teams for both the Commission and the Attorney General were obliged to deal at extraordinarily short notice with very complex questions, without any real opportunity for reflection and consideration. In that respect, the delay was prejudicial or, at least, was capable of being so regarded. It might also be noted that delay in moving the courts with respect of applications for judicial review of aspects of the referendum process is in itself a ground for refusing relief: see, *e.g., Riordan v. An Taoiseach (No.2)* [1999] 4 I.R. 343, 349, per Kelly J.

17. I confess that at one level, it would have been enormously tempting for me, faced with hugely complex and daunting questions to say that the application was simply made too late. As Mr. Collins S.C. observed, the argument was taking place under rushed and suboptimal conditions. These temptations notwithstanding, in the end I concluded that the issues raised were so important and so fundamental that I should endeavour, however inadequately, to grapple with the merits of these issues, even in the very short time which was available to me (*cf.* in this context the similar approach taken by Geoghegan J. in *Eastern Health Board v. Farrell* [2000] 1 I.L.R.M. 446). Accordingly, I do not find against the applicant on grounds of delay.

Is the Commission a Juristic Person?

18. As has already been noted, the application for leave to apply for judicial review as originally drafted made it plain that Mr. Justice Feeney was being sued in his capacity as Chairperson of the Commission. When I raised this issue with Mr. Humphreys S.C. for the applicant, it was explained that there was apprehension on the part of the applicant that the point would be taken against that the Commission was not a body corporate. Section 2 of the Referendum Act ("the Act of 1998") provides for the establishment of a Commission whenever, *inter alia*, a constitutional referendum may fall to be held. Section 2(3) provides that the Commission shall be

independent in the performance of its functions and s. 3(4) provides that the Commission shall consist of a Chairperson for ordinary members. Section 3(10) provides that the Commission may act "notwithstanding one or more vacancies among its members".

19. It is true that the Act of 1998 does not specify in terms that the Commission is a juristic person which can sue and be sued. In this respect, there is, for example, no counterpart here to s. 2 of the Ministers and Secretaries Act 1924, which expressly provides that Ministers of the Government are to be a corporation sole which can sue or be sued. Nevertheless, it seems to me inescapable from the terms of the Act of 1998 that the Oireachtas intended that the Commission should have legal personality. The very fact that the Commission was established by statute carries with it the inevitable corollary that it is a juristic person created by statute.

20. If the Commission has legal personality, then this inevitably implies that the Commission can sue and be sued. It was for these reasons I took the view that the applicant's (precautionary) endeavour to join the Chairperson of the Commission was unnecessary and that is why I immediately struck out Mr. Justice Feeney from the name of the proceedings. No legal consequence flows one way or another from that decision so far as the merits of this application are concerned.

The nature of the referendum process and the judicial role

21. It is next necessary to examine the nature of the referendum process and the judicial role. This is central to a resolution of many remaining issues, not least the question of whether decisions of the Commission are amenable to judicial review at all. The Constitution envisaged a plebiscitary as well as a parliamentary democracy and, in doing so, it has created a State which can demonstrate – in both word and deed - that it is a true democracy worthy of the name. By providing in Article 6(1) for popular sovereignty in which the People would "in final appeal...decide all questions of national policy", it envisaged a society in which all citizens would be called upon from time to time to make critical decisions regarding their future, the future of their neighbourhood and, ultimately, the future of their country.

22. It is necessary implicit in this Constitution thus places a premium on honest and fearless debate. The drafters of the Constitution must have understood than an inert, supine and indifferent public posed the greatest threat to the public welfare, since a plebiscitary democracy will simply not function under such circumstances. The Constitution, therefore, calls, especially at a time of referendum, for robust political debate from an informed public. This is, in many respects, also reflected in Article 9.3 of the Constitution, which speaks of the duty which all of us as citizens owe, namely, fidelity to the Nation and loyalty to the State. It calls upon each of us to perform that duty for ourselves, for our neighbours and for our country, to inform ourselves and to make our own decision, informed as best as we can be, on difficult issues to which there is often no easy answer. It is not easy, but we must all try. Article 9.3 of the Constitution accordingly places considerable emphasis on individual civic responsibility of each citizen: see, e.g., by analogy the comments of Finnegan J. in the context of tax and social welfare fraud in *The People (Director of Public Prosecutions) v. Murray* [2012] IECCA 60.

23. The referendum process reflects this by urging the citizenry to engage in robust political debate so that the forces of deliberation will prevail over the arbitrary and irrational so that, in this civic democracy, reasoned argument would prevail in this triumph of discourse. At the heart, therefore, of the Constitution, there are three core principles which are relevant to the issues raised by this application. The first of these is the concept of popular sovereignty (to which we have just alluded) which is reflected in Article 5, Article 6, Article 46 and Article 47 of the Constitution. It may thus be said, adapting freely the words of Holmes, that the theory of popular sovereignty for which Griffith argued and Pearse fought and Collins died and de Valera spoke and Hearne drafted and Henchy wrote and Walsh decided has become our own constitutional cornerstone. It is that very cornerstone on which the entire referendum edifice is constructed.

24. The second core principle is that of freedom of speech which is, of course, protected by Article 40.6.1 of the Constitution. As we have already observed both now and in the past, the People have been asked difficult and troubling questions via the referendum process on which there is, of course, rule for legitimate political dispute and argument. The Constitution trusts in the power of argument and debate and reasoned discussion and, again, the informed citizenry of which I spoke, who will discharge their civic responsibility to inform themselves in their own interests, that of their neighbours and that of their country.

25. The third principle is that of equality. This ensures that during the referendum period, the arguments are fairly balanced so far as the public institutions of the State are concerned. As Denham C.J. stressed delivering the judgment of the Supreme Court in *MD v. Ireland* [2012] IESC 12, Article 40.1 reflects a commitment to equality as a core constitutional value. It is reflected in well known Supreme Court judgments such as *McKenna (No. 2), Coughlan v. Broadcasting Complaints Commission* [2000] 3 I.R. 1, *Kelly v. Minister for the Environment* [2002] 4 I.R. 191 which all stress the principle of equality during the election and referendum process. Article 40.1 thus reflects a deeply moral premise of strict equality of citizens. In the referendum context, the value of all votes and each vote and the opinion of all citizens from the most humble to the most exalted are valued equally. It is in that context that, to aid political debate, the Commission was established by the Referendum Act of 1998 ("the Act of 1998").

The Functions of the Commission

26. Section 1 of the Referendum Act, 2001 ("the Act of 2001") amends s. 3 of the Act of 1998 and bestows on the Commission the power, *inter alia*, to:

> "prepare one or more statements containing a *general* explanation of the subject matter of the proposal and of the text thereof in the relevant Bill *and any other information relating to those matters that the Commission considers appropriate*." (emphasis supplied).

It is, I think, significant that the word "explanation" is preceded and qualified by the word "general", so that the object of these words is that the Commission's explanation is one best designed to assist the public. It is fair to infer that the Oireachtas did not anticipate or envisage that the general explanation put forward by the Commission would reflect the level of debate such as might be seen among constitutional law scholars or in specialist textbooks or in legal commentaries. It was designed fundamentally to assist the public.

27. It follows, therefore, that the Commission's statements should not be parsed or analysed for the absolute precision and complete accuracy of discussion or analysis which would be expected in, for example, an authoritative constitutional law textbook. Most members of the public would not have either the time, inclination or the training to examine or follow commentary of this kind. They would quite understandably be repelled by the thought of digesting what they would (rightly) regard as the terse and almost incomprehensible verbiage of the lawyer. This means in practice that the Commission must be given a wide freedom to communicate its message to the wider public.

Whether the Commission acted *ultra vires* in making statements about the European Stability Mechanism

28. As we have just noted, the Commission is also given the power by s.3 of the Act of 1998 to prepare a statement or statements in

relation to the subject matter of the proposal and of the text thereof in the relevant Bill "and any other information relating to those matters that the Commission considers appropriate." The first part, however, of Deputy Doherty's case was to the effect that inasmuch as the Commission had made a statement on 3rd May 2012 on the issue of whether Ireland could veto the ratification of the European Council Decision was *ultra vires* its powers under s.3 of the Act of 1998.

29. I took the view that this part of the case was doomed to failure and I accordingly refused to grant Deputy Doherty leave to apply in respect of this point following the initial application. The critical issue here, of course, is the fact that the ESM and the TSCG are inextricably interlinked, certainly so far as the critical question of whether a Member State could access the ESM lending facility is concerned. Certainly, one could not realistically seek to explain the likely impact of the TSCG without reference to the question of the ESM and, indeed, it would be wholly artificial to seek to do so.

30. While the Commission was careful not to engage in a discussion of the substantive merits of the ESM, it could not but address the inter-action of the two treaties. At the very least, therefore, the references to the ESM treaty constituted "other information relating to those matters that the Commission considers appropriate" within the meaning of s.3 of the Act of 1998 (as amended). It follows, in turn, that the Commission was fully entitled to publish the information concerning the ESM treaty which it did.

Whether the statements made by the Commission are amenable to judicial review?
31. This brings us next to examine the question of whether statements made by the Commission are even amenable to judicial review. It is in the nature of the referendum process that the electorate are called upon to make judgments about relatively abstract propositions, some of which may be relatively obtuse or removed from ordinary life. In practice this gave rise to two types of particulars problems.

32. The first arose from the fact that the wording of certain proposals may lead to consequences which were not foreseen, certainly by the mass of the general public. A case in point here perhaps was the 19th Amendment of the Constitution Act 1998 which provided for the ratification of the Belfast Agreement. The new Article 2 of the Constitution as thereby substituted conferred the right of Irish citizenship on all persons born on the island of Ireland. Most lawyers could readily foresee that such an amendment would have consequences for immigration law and migration patterns, but this was probably far removed from the minds of most voters in 1998. But by 2004 the consequences had become obvious and so Article 2 was changed by the 27th Amendment of the Constitution Act 2004.

33. The second type of problem was that extravagant and extreme claims were made often made during the course of a referendum campaign. While some of these claims were so extreme, far-fetched and fanciful that one might assume that they would have been instantly dismissed by any rational observer, nevertheless at times even downright outlandish claims of this kind were believed to have had the effect of distorting genuine political debate.

34. This, accordingly, was the background to the establishment of the Commission. It was considered desirable that a specialist body would be established which would seek impartially to ascertain the true facts (insofar as they could be ascertained) and to communicate general information to the public. This is reflected in s 3(1) of the Act of 1998 which provides that any statements made by the Commission shall be fair "to all interests concerned" and this is complemented further by s. 3(11) which states that a member of the Commission "shall not advocate or promote a particular result in the referendum in respect of which the Commission was established." Given that the Commission was publicly funded, it could not, in any event, deviate from the principle of strict neutrality, since this would be to violate the constitutional principle of equality in the referendum process as explained by the Supreme Court in *McKenna v. An Taoiseach (No.2)* [1995] 2 I.R. 10 and in subsequent case-law.

35. The orthodox position, heretofore, was, of course, that judicial review would not lie in respect of matters of this kind. This was in part because a misleading statement of the law uttered by a public body was considered not to affect legal rights and in part because it was thought to raise a non-justiciable controversy which was beyond the range of judicial adjudication in the absence of appropriately cognisable legal standards. This is reflected in the approach taken by Costello J. in *McKenna v. An Taoiseach (No.1)* [1995] 2 I.R. 1. *In McKenna (No.1)* - which was actually decided on the eve of the Maastricht referendum in 1992 – the plaintiff had complained that a publication issued by the Government regarding the Maastricht Treaty contained expressions of partisanship and advocacy "characteristic of a political and commercial advertisement". Costello J. concluded ([1995] 2 I.R. 1, 7) that the issue was non-justiciable:-

> "But it seems to me that…the criticisms of the plaintiff…arise from differences of opinion between them and the Government on the construction of the Treaty and its likely effects. It is, in my view, entirely inappropriate for the courts to adjudicate on the controversy which these differences have engendered. It is a staple of political debate for protagonists to accuse their opponents of misrepresentation of fact and even of uttering untruths. Whether the Government has been guilty of such conduct in this case is a matter for others, not for the High Court to decide."

36. In my view, however, there are at least two major reasons why that approach would not be followed today, certainly so far as the statements issued by a statutory body such as the Commission are concerned. First, unlike the position which obtained in 1992 in *McKenna (No.1),* the Oireachtas has itself subsequently stipulated by law since 1998 that the Commission's statements must be fair and non-partisan, so that the court would necessarily have a jurisdiction to review such statements on *vires* grounds where this statutory requirement had been breached. Second, it is clear from the Supreme Court's decision in *McKenna (No.2)* decided three years later that equality in the entire referendum process is a clear fundamental value, so that a court can interfere where that principle has been violated.

37. In *R. v. Environment Secretary, ex p. Greenwich LBC, The Times,* 17th May, 1989, the applicants sought to impugn a British Government leaflet explaining a local government tax. While the application was dismissed on the merits, Woolf J. held that the courts had a jurisdiction to intervene if the publication in question was "manifestly inaccurate or misleading." One might also apply by analogy the language of s. 43(3) of the Referendum Act 1994 (as substituted by s. 12 of the Referendum Act of 1998). Section 43(3) of the 1994 Act (as so substituted) provides:

> "A provisional referendum certificate shall not be questioned by reason of a non-compliance by the Referendum Commission with any provision contained in the Referendum Act, 1998, or mistake made by the Referendum Commission if it appears to the High Court that the Referendum Commission complied with the principles laid down in that Act and that such non-compliance or mistake did not materially affect the result of the referendum."

38. For these reasons, I am driven to the conclusion that statements made by the Commission are capable of review by the courts and they do not present an entirely non-justiciable matter. Indeed, I did not understand Mr. Collins S.C. for the Commission to argue to the contrary. Nevertheless, it has to be said that the court could, I think, only interfere where the statement was plainly wrong or,

to adopt the words of Woolf J. in Greenwich LBC, "manifestly inaccurate or misleading". It would also be necessary to demonstrate such an erroneous statement was likely materially to affect the outcome. The courts must also take care to ensure that applications of this kind do not become a surreptitious vehicle whereby advisory opinions can effectively be obtained in respect of contentious issues in the course of a referendum campaign.

39. Subject, however, to the parameters of the quite exceptional jurisdiction which I have identified, the courts must otherwise refrain from any involvement in the referendum process other than ensuring and preserving these core constitutional principles of popular sovereignty, freedom of speech and equality in the entire referendum campaign, so far as it concerns the institutions of the State.

The statements made by the Commission

40. I have said very little thus far about the actual complaint in relation to the words used by the Referendum Commission. I think it is impossible to understand even on a summary basis any of these issues without comparing the text of the two statements in

question. The first statement - and perhaps even to call it a statement might be taking a liberty - is a transcript of the words used by the Chairman of the Commission, Mr. Justice Feeney at press conference held by the Commission, on the 3rd of May, 2012. In the course of that press conference Mr. Justice Feeney stated the position in relation to it as regards the veto in the following terms:-

> "Ireland could have done that, but Ireland has already agreed to it by the establishment of the ESM. The agreement still has to be ratified by the Dáil and the Senate. That is the factual position. That is the extent to which we have looked and clarified it and the extent to which we can comment in relation to it. It is clear that a veto could have been exercised but Ireland has already agreed to the establishment of the ESM and the agreement still has to be ratified by the Dáil and the Senate."

The second statement of which complaint is made was placed on the Commission's website on 18th of May, 2012, and it reads:-

> "Proposed amendment of Article 136 of the Treaty on the Functioning of the EU
>
> The Treaty on the Functioning of the EU ("TFEU") is one of the two main treaties on which the EU is based. It controls how the EU functions or works. The European Council (the heads of state or government of all 27 EU member states) has decided to amend Article 136 of the TFEU by adding a clause which provides that the 17 euro area states may set up a stability mechanism if this is essential for the stability of the euro area. Ireland agreed to that decision – in other words, Ireland chose not to exercise a veto when the decision was being made. In order for the amendment to Article 136 of the TFEU to come into effect, however, all 27 member states of the EU must ratify it. *It would be possible for Ireland to decide not to ratify the change* (despite agreeing to make the change). However, the Irish Government has announced its intention to have the amendment to the TFEU ratified by the Oireachtas. It is possible that Ireland might still decide not to ratify the change to the TFEU but whether Ireland would or would not do so is a matter of speculation given that it is legally possible not to ratify the amendment but the Government has declared its intention to have the amendment ratified by Ireland." (emphasis supplied)

41. If one were to subject these two statements in relation to highly technical matters to detailed exegetical scrutiny, as it was subjected to by Mr. Humphreys S.C. during the course of a very closely constructed argument one might, perhaps, detect certain nuanced differences between the two statements. It is true that the second statement was fuller than the first, but some allowance has to be made for the fact that the first statement was made orally. The key point in both statements is that Ireland could have refused to agree to the establishment of the ESM Treaty, but that now that the Treaty had been agreed to, ratification was nonetheless subject to parliamentary ratification.

42. Mr. Humphreys placed considerable stress on the italicised words ("*It would be possible for Ireland to decide not to ratify the change....*") as amounting to a belated and tacit acknowledgement that the Government could still elect through executive action not to ratify the Treaty. I am not convinced, however, that there is any real difference of substance between the two statements and I would suggest that the construction offered by Mr. Humphreys is an over-interpretation of these words. If the Commission had intended thereby to acknowledge that the Government retained a full and autonomous discretion to refuse to ratify the ESM Treaty this would, I believe, have been stated in express and direct language.

43. In that respect, the complaint made by Deputy Doherty to the effect that the Commission, so to speak, took no active steps to give any meaningful publicity to a clarifying statement -- or what Mr. Humphreys on his behalf described as a clarifying statement – is not well founded. I think a far more likely, plausible and coercive explanation is, indeed, that offered by Mr. Collins S.C. on behalf of the Commission, namely, that the Commission considered that there was no real difference of substance as between the two statements so that there was nothing new to merit the giving of any publicity to the second statement. In that respect, therefore, I will find against the applicant.

May the Government refuse to ratify (i) international treaties generally and (ii) treaties with an EU dimension?

44. There remains the most important and, in many respect, the most difficult question of all. Can it be said that the Commission's statement in respect of what might be loosely called the ratification process in relation to the Article 136 amendment is plainly wrong? It be observed that all three protagonists before me, Deputy Doherty, the Commission and the Attorney, have advanced powerful and legitimate arguments for their own points of view. Deputy Doherty's arguments reflected in many respects orthodox thinking in relation to the effect and ratification of international treaties and the burden of Mr. Humphreys' argument was that, in this respect, the ultimate ratification of a treaty remained under the control of the executive branch of Government until the treaty was accepted or ratified by the ultimate deposit of the instrument ratification with the depositary.

45. I propose to test this argument by examining first the position of the executive with regard to the ratification of international treaties generally before then proceeding to consider whether the position is any different with regard to the amendment of Article 136 TFEU.

Article 29 of the Constitution

46. The key provisions of Article 29 of the Constitution so far as the present application is concerned are as follows:-

> "Article 29.4.1°: The executive power of the State in or in connection with its external relations shall be in accordance of Article 28 of this Constitution be exercised by or on the authority of the Government.
>
> Article 29.5.1°: Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.

> Article 29.5.2°: The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.
>
> Article 29.5.3°: This section shall apply to agreements or conventions of a technical and administrative character.
>
> Article 29.6: No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

47. So far as the general treaty making power is concerned, Deputy Doherty is correct to say that, in view of the provisions of Article 29.4.1, the executive retains control of all aspects of this function. This is subject only to two constraints. First, the approval of Dáil Éireann is required where the international agreement (other than agreements of a technical or administrative character) involves a charge on public funds (Article 29.5.1). Second, Article 29.6 reflects the classic dualist theory of international law in that it provides that no international agreement will be part of the domestic law of the State unless the Oireachtas so provides by law.

48. These provisions are designed to provide democratic legitimacy and control in respect of international agreements by providing for varying degrees of advance parliamentary approval. They nonetheless do not take from the executive's control of the treaty-making power. Thus, even where, for example, the Oireachtas had stipulated that a particular treaty should be part of the law of the State, the decision as to whether the treaty should be ultimately ratified so as to bind the State as a matter of international law remains with the executive. Even though this precise issue has not heretofore been judicially considered, Deputy Doherty's contentions that the Government retained the right not to accept or approve a particular treaty in the stages leading up to the ultimate ratification by depositing the instruments of ratification is *generally* correct is the argument which best fits the dualist nature of the State and the assignment of the foreign affairs power to the Executive by Article 29.4.1. The next question is the most fundamental one of all. Does this remain true in the special context of an EU-treaty amendment?

Article 48(6) TEU and the European Council decision of 25 March 2011

49. At the heart of the present case lies the question of whether Government of its own motion can still refuse to give effect to the European Council decision permitting the amendment of Article 136 TFEU. It is plain from the recitals to that decision that its legal basis is Article 48(6) TEU, the simplified revision procedure. Indeed, recital 3 recites that it was the Belgian Government which submitted that this additional paragraph creating the stability mechanism be added to Article 136 TFEU.

50. There is, so far as this issue is concerned, a good deal of common ground between the parties and I will first endeavour to identify that common ground is first before going on to analyse the issues where the parties join issue. It is, accordingly, not in dispute that by virtue of Article 48(6) TEU, unanimity is required on the part of the European Council. This meant that the assent of Ireland was necessary before that decision could be adopted. It is further agreed that the decision on the part of Ireland in respect of the initial decision by the European Council is governed by Article 29 of the Constitution, which vests the executive power in relation to foreign affairs in the Government. So, quite plainly, the Taoiseach, as the representative of Ireland on the European Council, was fully competent to exercise the executive power of the State in relation to foreign affairs in the manner envisaged by Article 29 by consenting to this decision.

51. I think it is also plain - and Deputy Doherty accepts this - that, in that respect, it is now too late for that particular decision to be withdrawn. So when the Commission stated that Ireland has already agreed to the establishment of the ESM in the context of the Article 136 amendment, that statement was absolutely correct. The Commission was likewise correct to observe that Ireland chose not to exercise a veto when the decision was being made in March, 2011.

52. The major dispute at the heart of this application centres around the meaning of the words in Article 2 of the European Council decision -"That decision shall not enter into force until it is approved by the member states in accordance with their respective constitutional requirements". This raises the fundamental question as to what those constitutional requirements actually are.

53. Deputy Doherty contends that the constitutional requirements in relation to this Council decision are the same as with any international treaty, so that the ultimate decision on approval of this treaty amendment rests completely and entirely with the Executive. On this argument, therefore, it would be irrelevant that the Dáil had approved this if it involved a charge of public funds for the purposes of Article 29.5.2 or, indeed, that both Houses of the Oireachtas had passed a Bill which was signed into law by the President in accordance with Article 29.6 embodying that particular decision and giving it the force of law in the State. On this argument the ultimate step of approval- namely, depositing the approval with the depository in the manner envisaged by Article 2 of the Council decision - at all stages rested with the Government and the position with regard to the amendment of EU Treaties using the Article 48(6)TEU simplified revision procedure was no different.

54. It is important to stress that the Commission and the Attorney General meet Deputy Doherty's arguments at a different level. They do not dispute much of these arguments in relation to international treaties as a thing in themselves, but they rather contend that the position with regard to European Union treaty amendments is strikingly different, at least so far as the Article 48(6) simplified procedure is concerned. It has been clear at least since the decision of the Court of Justice in Case 26/62 *Van Gend en Loos* [1963] ECR 1 that while the European Union reflects and exhibits many features of international law, it is in many key respects an autonomous *corpus juris* which is, in many respects, *sui generis*, or, to use the words of the Court, a "new legal order of international law". In other words, principles which might be applied in the context of the ratification of a general international treaty might not necessarily be applicable - at least without significant qualifications - not least where a special procedure as provided for by Article 48(6) TEU is being employed.

55. We may start with a discussion of the impact of Article 288(4) TFEU: which provides that:-

> "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding on them."

56. Article 4(3) TFEU further provides:-

> "Pursuant to the principle of sincere co-operation, 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."

57. This is, accordingly, the important battleground between the three parties before the court because the argument of the Commission and the Attorney General that the Government could not consistently with existing - and I underline the word "existing" --

European Union obligations undermine the effectiveness of the commitment already given on behalf of Ireland in the European Council decision. In other words, the duty of loyal cooperation in relation to an act of the institution of the Union envisaged by Article 43 TEU would imply at the very minimum - and so the Commission and the Attorney argue - that the Government, having already exercised the executive power of the State in agreeing to the Council decision is obliged to take further steps to have that approved.

58. This is further underscored by the fact that the European Council decision is – on this argument - a "decision" for the purposes of Article 288TFEU which is binding in its entirety on the Member States and that no actions may be taken by individual Member States which would weaken the effectiveness of that decision or which exceed the range of discretion accorded to Member States by the decision: see, *e.g.*, Case C72/95 *PK Kraaijeveld* [1996] ECR I -5403. If this is correct, then it follows that the reference in Article 48(6)TEU to "approval" in accordance with the respective constitutional requirements is a pure formality. A further consequence of this argument would seem to be that the Government could agree to a Treaty amendment using the simplified revision procedure, leaving no role at all for even parliamentary ratification.

59. In this regard, nothing really turns on the use of the term "approval" rather than "ratification" in the decision, since "approval" in this context is really only another term for a simplified form of ratification. As Shaw, *International Law* (5th Ed.) (London, 2003) states, at p. 820:-

> "In some cases, signature to treaties may be declared subject to 'acceptance' or 'approval'. These terms - as noted by Articles 11 and 14(2) [of the Vienna Convention] - are very similar to ratification and similar provisions apply. Such variation in terminology is not of any real significance and only refers to a somewhat simpler form of ratification."

60. It is also here necessary to observe that there is an important but subtle difference between the position of the Commission and the Attorney. The Attorney argues that, in her view, having regard to the considerations that I have just mentioned, the approval for the purpose of Article 48(6) TEU is already in place and those are the respective constitutional provisions which have been satisfied. In other words, the Government has exercised the executive power of the State in Article 29.4.1 in agreeing to the decision. So that agreement is already in place it follows – on this argument - that no further steps are necessary in that regard.

61. Mr. Travers nevertheless acknowledged that it is proposed via the European Communities (Amendment) Bill 2012 to alter the definition of the "treaties governing the European Union" as contained in s. 1 of the European Communities Act 1972 ("the Act of 1972") (as substituted by s. 2 of the European Union Act 2009)("the Act of 2009") as to include the European Council decision of 25th March, 2011 (and the proposed amendment to Article 136). Should this occur, it will mean that the European Council decision will have the force of law of the State: see s. 1 of the Act of 1972 (as substituted by s. 3 of the Act of 2009). Although neither the European Council decision nor the Article 136 amendment can be given the force of law in the State without a determination to this effect by the Oireachtas (Article 29.6), Mr. Travers' argument was to the effect that this proposed legislative change nonetheless was not an "essential constitutional requirement" within the meaning of Article 2 of the European Council decision.

62. The position of the Commission is somewhat different in that it says that the approval is contingent in the manner envisaged by Article 29.4.8.ii of the Constitution to approval by both Houses of the Oireachtas and that it comes in one of the special options and discretions clauses which post-Lisbon (and, indeed, post Nice) are reflected in Article 29.4.7 and Article 29.4.8 of the Constitution. Even if this particular argument is incorrect, the Commission takes the view that approval by the Houses of the Oireachtas is, in any event, a necessary constitutional requirement within the meaning of Article 2 of the European Council decision.

63. The critical point, it seems to me, however is this: in view of these competing arguments, it would be just impossible for this court at this juncture to express a definitive view on any of the three arguments that have been advanced. For this court to advance a definitive view, it would be absolutely necessary to make a reference pursuant to Article 267 TFEU to the Court of Justice concerning the interpretation, *inter alia*, of Article 4(3) TEU, Article 288(4)4 TFEU and the import of Article 2 and Article 3 of the Council decision of March, 2011. Perhaps other questions would have to be referred as well, not least the question of whether the European Council decision is a "decision" for the purposes of Article 288TFEU and, if it is, how is the reference to "respective constitutional requirements" consistent with the suggestion that the decision is already binding on all Member States in its entirety? Does this mean, for example, that where the Parliament of a Member State rejected a proposal to amend Article 136 that the Member State in question would already be in breach of Union law? If that argument were, moreover, correct it might be asked how this interpretation would be consistent with the *effet utile* of the requirement that each Member State must approve the decision in accordance with its own constitutional requirements?

64. I should also observe in passing that I am also conscious of the fact, as Mr. Travers reminded me, that there is separate litigation concerning this issue which is currently scheduled before the court on the 19th June and, therefore, it is important that I abstain from any unnecessary comment in respect of that other pending litigation.

65. It is nevertheless impossible for me at this juncture to express a definitive view on the ultimate question raised - namely where the Government could of its own motion refuse to approve the European Council decision – without an immediate reference of these questions to the Court of Justice pursuant to Article 267 TFEU. This is ultimately the reason why I am simply not in a position to reach a conclusion - one way or another – on the views on this question expressed by the Commission. There is unquestionably room for legitimate legal and political debate on this issue.

Conclusions

66. I am absolutely satisfied that the Commission's analysis is a considered, thoughtful, measured and legitimate analysis of complex legal issues. In the circumstances in which I find myself, however, I am not in a position (putting matters absolutely no lower) to pronounce that its statements are clearly wrong or likely to affect the referendum result. In other words, three overlapping and, in some respects, slightly different arguments have been advanced on behalf of the applicant, the Commission and the Attorney General. There is room for legitimate debate in respect of the merits of all three arguments. In the end, the final resolution of these questions can only be determined by a reference by the Court of Justice and perhaps, ultimately, by a form of dialogue between the Supreme Court and the Court of Justice in relation to interaction of European Union law, international law and our own domestic constitutional law. So it follows, therefore, that I cannot say at all that the Commission statement is plainly wrong or inaccurate, still less that it is likely to materially affect the result.

67. I conclude this ruling by saying that, of course, the courts must remain absolutely and strictly neutral on this issue because it is a matter which is committed ultimately to the resolution by the people according to that fundamental theory of popular sovereignty which has already been discussed. The Commission has performed its task of informing the public and it has done that, I am absolutely satisfied, to the best of its ability and its statements are sincere, genuine, measured and considered.

68. Like all human institutions, however, the Commission is not infallible and it does not claim to be. One of the difficulties for all of the protagonists is that the issue presented is one of such difficulty and such novelty. As I have already explained, before one could pronounce with any certainty on many of these questions, it would be necessary for many of the issues to be determined by the Court of Justice. Perhaps if the subject matter of the referendum had concerned a matter wholly governed by domestic law this court might have been able to intervene in an exceptional case, but this perforce is simply not possible here.

69. Inconclusive as this Court's ultimate judgment must be, nevertheless in its own way the issue which was so ably argued before me by all three legal teams should be regarded as a call to action on the part of the population at large not to be inert, but to inform themselves of the issues and, having considered both arguments, to make a reasoned judgment on the referendum question. This is what I hoped the People would do and this is what I trust they have done via the ballot box on 31st May, 2012.

70. Nevertheless, for all the reasons that I have offered, I found myself obliged to conclude that the application must stand refused.