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# **LAW AND POLICY RESPONSES TO COVID-19 IN IRELAND: SUPPORTING INDIVIDUALS, COMMUNITIES, BUSINESSES, AND THE ECONOMY**

**Editors:**

**Deirdre Ahern and Suryapratim Roy**

**A Public Policy Report of the**

**COVID-19 LEGAL OBSERVATORY**

**School of Law, Trinity College Dublin**

**<https://www.tcd.ie/law/tricon/covidobservatory/>**

***Harnessing Trinity's Collective Expertise for the Greater Good***



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## ABOUT THE COVID-19 LEGAL OBSERVATORY

### *Harnessing Trinity's Collective Expertise for the Greater Good*

COVID-19 presents an unprecedented public health crisis. New laws were introduced at a rapid pace on the basis of compelling public health and economic concerns. Universities play a vital role in ensuring that laws are effective but also that rights and fundamental freedoms are protected insofar as possible, even in emergency circumstances.

To address this, the COVID-19 Law and Human Rights Observatory<sup>1</sup> of Trinity College Dublin engages in research across the full range of Ireland's legal response to COVID-19. Academics in the Observatory the work with research assistants to identify, aggregate, contextualise, explain, and analyse the legal components of Ireland's COVID-19 response. We aim both to inform the public and to provoke public debate.

The Observatory's Blog<sup>2</sup> publishes academic commentary on Ireland's legal response to COVID-19 as it evolves. The Observatory also provides an unofficial consolidated version of Ireland's regulatory response to COVID-19, as well as a range of official guidance documents. This is the first public policy report of the Observatory. Other policy work of the Observatory is focused on data protection issues relating to the pandemic, and the public health response to the pandemic. The Observatory is also completing a report on behalf of the Irish Human Rights and Equality Commission that analyses how Ireland has deployed emergency powers in response to the pandemic.

The work of the Observatory is supported by the Trinity College Dublin COVID-19 Response Fund.

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<sup>1</sup> <https://www.tcd.ie/law/tricon/covidobservatory/index.php>.

<sup>2</sup> <https://tcdlaw.blogspot.com/>.

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## INTRODUCTION

The aim of the Observatory's policy report series is to contribute actively to public debate and to shape public policy and law reform through analysing and evaluating Ireland's response to COVID-19.

Crucially, unlike the last recession arising out of the global financial crisis of 2008-2009, the current recession is caused by an unprecedented health crisis and not economic mismanagement. As matters stand, a vaccine is not available that would readily permit life to resume as before. This affects the policy levers that can be used to address living with COVID-19.

Ireland, like most of the world, has responded to the COVID-19 pandemic with an unprecedented series of restrictions on everyday life, designed to stem the spread of the virus in the interests of the common good. These restrictions have, in turn, imposed significant costs on individuals, families, and businesses. There have been specific State measures taken on social welfare, housing, business protection, disability and employment. Major issues of public policy arise in relation to the implications of COVID-19 responses from the State. In this Report, the contributors outline some of those costs and chart the various measures taken by the State in an attempt, insofar as is possible, to preserve normal individual, family, and business life through the pandemic. They also identify a number of issues that require attention and make recommendations for reform—focused both on further stages of pandemic and lessons learned for resuming normal life after the pandemic.

Looking outside of Ireland, the European Commission's establishment of the Generation EU fund provides hope to Ireland and other Member States where the financial prognosis of coping with COVID-19 can only get worse before it gets better and a vaccine against COVID-19 is rolled out. Notably, if Ireland wants to access grants and loans from the fund it will have to have a credible plan not just for economic recovery, but also for enabling the sustainability, circular economy agenda of the Green Deal and digital transition. This may have important beneficial public policy ripple effects for the future of our country.



The Report begins with an examination of how individuals have been protected in their homes and in their workplaces, before exploring the social protection supports for those who have lost their jobs. We then move to the supports for businesses, with a focus on the opportunities and limits of insurance for business disruption, alongside measures that enable the continued functioning of corporate governance mechanisms. Conditional governmental support to companies can be consistent with influencing them to broaden their corporate purpose beyond profit maximisation and considering broader stakeholder interests. One can see elements of this in the requirement that companies accessing the *COVID-19 Wage Subsidy Scheme* retain their employees on the payroll. The Report then analyses how the international financial markets have enabled the continued borrowing of funds by the State to support the State's response.

While these responses are, at one level, a matter for public policy, they can also be seen as an implementation of the socioeconomic rights of citizens. The Report therefore concludes with an analysis of the State's response through a human rights lens.

Although this Report does not purport to be a legal guide to relevant measures in force, it bears mentioning that the rules, regulations and restrictions associated with the presence of COVID-19 in Ireland in 2020 have adapted and evolved, often rapidly. The chapters in this Report were submitted by the authors for review and copy-editing at the beginning of October 2020, before the announcement of the national Level 5 lockdown applicable from 21 October 2020.

We are very thankful to our colleagues for providing their expertise and insights in the chapters of this Report and to the Observatory in order to contribute to national public debate on COVID-19.

**Dr Deirdre Ahern and Dr Suryapratim Roy (editors).**

**15 November 2020**

School of Law, Trinity College Dublin



## EXECUTIVE SUMMARY

This public policy report is focused on reflections on how public policy can provide support to underpin individuals, communities, businesses and the economy in Ireland against the contextual backdrop of COVID-19.

The main conclusions and recommendations of the Report are as follows:

1. We recommend that in publicising the expanded protections for tenants with respect to rent increases, the Government should ensure that all Pandemic Unemployment Payment recipients receive this information;
2. We recommend that the Government reviews the current statutory regime around holiday lettings in the medium term;
3. We recommend that the Government considers limiting no-fault evictions to landlords with no more than three residential properties available for let or being let;
4. We recommend the introduction of a code of conduct in respect of dealing with mortgage arrears accruing in respect of commercial premises and in respect of non-primary principal residences in order to assist in arrears management during and after the COVID-19 crisis;
5. We recommend clarification of the manner in which COVID-19-related hardship can be taken into account by judges in repossession proceedings in order to ensure consistency in treatment of defaulting mortgagees;
6. Given that the pandemic is impacting in different ways on specific groups in the workplace, we recommend that public bodies integrate consideration of equality concerns when making decisions about workers and the workplace during the pandemic in accordance with their statutory equality and human rights duty;
7. When deciding upon the criteria for selecting workers for redundancy, we recommend that employers should ensure that these do not have an adverse effect on workers with protected

characteristics under the Employment Equality Acts 1998-2015 which prohibit discrimination on grounds of gender, civil status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community;

8. We recommend that employers take due care to protect employees and members of their households from being exposed to COVID-19 and appropriately consider other dimensions of their wellbeing in the workplace including when working from home. Furthermore, if occupational stress causes damage to an employee's health, personal and family relationships, then Article 8 of the European Convention in Human Rights may have an indirect horizontal effect;
9. Working time legislation must be carefully considered by employers in light of COVID-19 to protect employees from burn-out and to ensure that appropriate work-life balance can be maintained;
10. We recommend that policy consideration is given to enacting measures to directly address protection of the right of an employee to enjoy their leisure time free from encroachment by 'always-on' working by means of a 'right to disconnect', as is recognised in several jurisdictions.
11. It is important that employers are aware of their potential liability for injuries suffered by remote workers whether because of unsuitable working environments or stress, and provide workers with any equipment or working arrangements necessary to alleviate these. We recommend that consideration be given to enhancing taxation measures available to workers and employers to fund purchase of appropriate equipment for working from home;
12. Statutory confirmation of the power of the Workplace Relations Commission and the Labour Court to conduct remote hearings is a crucial step to avoiding backlogs in their hearings and resolution of workplace disputes;
13. Government departments must observe rule of law, data privacy and transparency principles in the provision of social services;

14. Where there is ambiguity in the terms of an insurance policy concerning its application to COVID-19-related business interruption, we recommend that insurance providers resolve this in favour of the insured party being covered;
15. We recommend that the outcome of individual test cases on important questions of legal interpretation relating to business interruption insurance should be applied across the sector to obviate the need for costly and time-consuming duplicate litigation;
16. We recommend that policy consideration be given to the establishment of a State-backed insurance fund to cover pandemics, which would eliminate disputes on cover and ensure businesses receive needed economic support;
17. Faced with a combined health and economic crisis giving rise to a global recession of a scale unseen since the Great Depression, companies are being asked to reflect on their values and to reconnect with society. Requiring companies to adopt a Purpose Statement could allow greater reflection on the interests of stakeholders such as employees and suppliers. Accordingly, we recommend that listed companies and public interest companies should be required to publish a purpose statement and to embed this purpose within their corporate strategies;
18. In order to provide and enhance shareholder democracy, we recommend that hybrid general meetings should be encouraged and facilitated by companies. This would allow shareholders the option of attending company meetings in person or virtually. In such cases, technology should be available to enable shareholders joining remotely to be in the same position to participate and ask questions as those present in person;
19. A transformational recovery of the EU economy and achievement of green and digitalisation agendas would require a more sizeable and long-term investment programme than the Next Generation EU fund as currently modelled. This could be financed by the issuance of debt at EU level;
20. Overall, from our analysis in this Report does not give rise to significant concerns around discrimination in Ireland's public policy treatment of COVID-19. Having said that, there is scope for an analysis of structural inequality concerns in vulnerability towards catching the disease, accessing treatment, and the impacts of COVID-19.





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## **CHAPTER 1: COVID-19'S CHANGES TO RENTAL HOUSING: A PANDEMIC SUCCESS STORY IN SEARCH OF A SEQUEL**

**Rachael Walsh and Sarah Hamill**

### **Introduction**

Even without the COVID-19 crisis, changes to Irish housing law and policy were likely to be on the agenda for any government formed after the 2020 General Election. Prior to the pandemic, Ireland was in the midst of an extended crisis over housing and homelessness. Given the need for people to restrict their movements as a result of the pandemic, the emergency measures contained provisions related to rental housing. In particular, the government introduced a rent-freeze and a prohibition on evictions.

During the lockdown period, Ireland saw a marked reduction in levels of homelessness,<sup>3</sup> an increase in the number of properties available to rent,<sup>4</sup> a reduction in rents in some of the nation's most expensive rental markets,<sup>5</sup> and a prohibition on evictions. Some of these results are directly tied to the emergency measures, while others are likely the result of a

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<sup>3</sup>Number of people in emergency accommodation remains below 10,000, latest figures show *The Journal.ie* (4 June 2020) <https://www.thejournal.ie/homeless-emergency-accommodation-eoghan-murphy-5115262-Jun2020/>

<sup>4</sup> Christina Finn, 'Extending rent freeze might have to be considered, says Taoiseach' *The Journal.ie* (22 April 2020) <https://www.thejournal.ie/rent-freeze-taoiseach-5081289-Apr2020/>

<sup>5</sup> Stephen McDermott, 'Number of rental properties continues to rise – charity says former Airbnbs won't solve housing crisis' *The Journal.ie* (24 April 2020) <https://www.thejournal.ie/airbnb-rental-market-simon-communities-survey-5083867-Apr2020/>

combination of factors. Regardless, the fact remains that these results illustrate that Ireland's housing and homelessness crisis *can* be tackled if there is the political will to do so.

With a new government finally in place and a long-term strategy for living with COVID-19 emerging, it is for the coalition government to see that the successes of the emergency measures related to housing and homelessness are continued and built upon. The government does face significant challenges in seeing that the Irish housing crisis does not resurge. Three key challenges are the continuing debate about the constitutionality of continuing some of the emergency measures, the fact that Irish housing policy's emphasis on ownership and owner-occupation are longstanding, entrenched, and mesh with the popular and, indeed, political understanding of constitutional property rights, and, finally, the risk that an uneven economic recovery will lead to increased levels of homelessness as the emergency rental provisions are unwound.

In this chapter, we first set out the emergency measures as they operated during the lockdown period, then we examine the arguments about the constitutionality of the changes to rental laws, with a particular focus on the rent freeze. The third part examines the rollback of the rent freeze and eviction prohibitions. As will be seen, the rollback maintains rent freezes for certain categories of tenants and only makes minor changes to the normal working of notices of termination. The final part gestures towards what policy changes should be adopted to ensure that the gains of the lockdown period are maintained.

## **The General COVID-19 Rent Freeze and Prohibition of Evictions**

The emergence of a global pandemic necessitated rapid changes to many areas of life in Ireland. Given that the public health advice was to stay home as far as possible, it should be no surprise that housing law was affected by the pandemic. In Ireland, the government introduced two main emergency measures to protect tenants: a rent freeze and a prohibition on evictions (with a few exceptions). Both were introduced for a period of three months from 27 March 2020 (the date of commencement of the Emergency Measures in the Public Interest (COVID-19) Act 2020). The Emergency Measures Act allowed for the emergency period to be extended, which it ultimately was on 22 June and again on 20 July 2020.

Both measures applied to all forms of rental accommodation, including, for example, student accommodation and accommodation shared with a landlord. The Act also expressly included licensees and licensors as tenants and landlords respectively. In terms of the rent freeze, valid notices for rent increases that were due to take effect in the emergency period did not take effect. They could be applied upon expiry of the freeze, but not backdated to cover time captured by the freeze. Similar provisions applied to valid termination notices where the date of termination was to be during the emergency period. Such valid notices acquired a statutorily-defined revised date consisting of the unexpired time between the start of lockdown and the original date of termination, *and* the emergency period itself. Thus, for example, a termination notice due to take effect on 3 April 2020 would, once the emergency period ended, take effect one week plus length of the emergency period later.

What is often missed in the media commentary on the prohibition of evictions is that the emergency measures also affected the acquisition of security of tenure. Under the Residential Tenancies Act 2004, residential tenancies lasting longer than six months will normally acquire security of tenure. In effect this reduces the potential grounds for termination of the tenancy and allows tenants to stay in the property for six years where the tenancy began after 24 December 2016. The 2020 Act was careful to avoid the acquisition of security of tenure for those tenants who would have only spent more than six months in the property as a result of the 2020 Act itself. It is somewhat unclear if, for example, a tenant under a year-long lease who passed the six-month milestone during lockdown acquired security of tenure during lockdown. Given that the Act makes no statement about acquiring security of tenure after the emergency period ended, it is to be assumed that such a tenant would acquire security of tenure. A tenant under a three-month, or six-month lease who passed the six-month milestone during lockdown, on the other hand, probably did not and could not acquire security of tenure.

The Minister for Housing had statutory power to request that the Government extend the measures relating to rental housing upon consultation with the Minister for Health and the Minister for Public Expenditure and Reform, provided that an extension was in the public interest having regard to: (i) the threat to public health presented by COVID-19; (ii) the highly



contagious nature of that disease, and (iii) the need to restrict the movement of persons in order to prevent the spread of the disease among the population.<sup>6</sup> Notably absent from these criteria was any mention of hardship flowing from the COVID-19 crisis, for example unaffordability of rent flowing from unemployment. Therefore, the ability to retain the rent freeze and prohibition of evictions as an exercise of the emergency powers conferred on the Government in the context of the COVID-19 crisis depended on a public health rationale, in particular on the need for restricted movement of persons.

The initial rent freeze and prohibition on evictions were extended by the Government until 20 July 2020.<sup>7</sup> A further extension beyond 20 July raised legal questions, with reports that the former Attorney General, Seamus Wolfe, advised the Government that an extension, particularly of the rent freeze, might be open to legal challenge in circumstances where the wider economy was reopening.<sup>8</sup> As a result, the Minister for Housing consulted with the Minister for Health about the public health rationale for extending the rent freeze. On foot of that consultation, the general rent freeze and prohibition of evictions was extended for a very short period, from 20 July to 1 August 2020. The Minister for Housing confirmed that he had consulted with the new Attorney General, Paul Gallagher, in relation to that extension.<sup>9</sup> The Minister indicated that only a short extension was possible on foot of the Emergency Measures in the Public Interest (COVID-19) Act 2020. He said he had been advised by the Attorney General ‘...that the need to restrict the movement of persons is increasingly at variance with the relaxations provided for in the roadmap for reopening society and

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<sup>6</sup> Section 4 of the Emergency Measures in the Public Interest (COVID-19) Act 2020.

<sup>7</sup> <https://www.gov.ie/en/publication/ef5ca-daily-briefing-on-the-governments-response-to-covid-19-monday-22-june-2020/#extension-of-rent-freeze>

<sup>8</sup> Philip Ryan, ‘Rent freeze blow: extension of emergency measures and ban on evictions may not be legally possible Government warned’, *Irish Independent* 11 July 2020, <https://www.independent.ie/world-news/coronavirus/rent-freeze-blow-extension-of-emergency-measures-and-ban-on-evictions-may-not-be-legally-possible-government-warned-39358708.html>.

<sup>9</sup> See Christina Finn, ‘Rent freeze and eviction ban extended to 1 August’ *The Journal.ie* (20 July 2020) <https://www.thejournal.ie/rent-freeze-4-5154437-Jul2020/>

business.’<sup>10</sup> The Attorney General was reported as being ‘exceptionally concerned’ about the risk of legal challenge to the general freeze from commercial landlords.<sup>11</sup>

All of this raised the question of how to address, on a more long-term basis, the impact of the COVID-19 crisis on the Irish rental sector. Prior to the crisis, monthly rents were at or near all-time highs, and vacancy rates were low. During the emergency period, 6,700 tenants were provided with Rent Supplement support with an additional 1,100 applications pending at the end of June 2020.<sup>12</sup> Research conducted by the Economic and Social Research Institute showed that in the short-term (in the three month period from mid-March-mid-June 2020), the COVID-19 crisis did not lead to a substantial build-up of rent arrears, due to the high levels of income support provided by the State and the reduced expenditure of households during lockdown.<sup>13</sup> However, it flagged significant affordability challenges if the economy reopened without incomes recovering to pre-COVID 19 levels, particularly in hard-hit sectors like hospitality and tourism where employees are more likely to be renters than homeowners. It identified continued income support, increased uptake of rent supplement, better data on rent arrears, and an orderly management of arrears as important policy responses to those challenges.

## **The Constitutional Backdrop to the Emergency Measures**

Of the two measures, the rent freeze had been mooted as a possible policy response to the housing crisis even prior to the emergency period. However, the Government and the leading opposition party in the Oireachtas prior to the 2020 General Election (Fianna Fáil) consistently argued that freezing rent increases would be an unconstitutional response to the housing and

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<sup>10</sup> Ibid.

<sup>11</sup> Pat Leahy, ‘Rent Freeze and Ban on Evictions Extended until Aug 1’, 20 July 2020, <https://www.irishtimes.com/news/education/rent-freeze-and-ban-on-evictions-extended-until-august-1st-1.4308766>.

<sup>12</sup> <https://www.gov.ie/en/publication/f3c5b-briefing-on-the-governments-response-to-covid-19-thursday-29-july-2020/#residential-tenancies-and-valuation-bill>.

<sup>13</sup> Conor O’Toole, Rachel Slaymaker, Kieran McQuinn, Cathal Coffey, Eoin Corrigan, ‘Exploring the Short-Run Implications of the COVID-19 Pandemic on Affordability in the Irish Private Rental Market’ (July 2020) ESRI Research Series No. 108, <https://doi.org/10.26504/rs108>.

homelessness crisis, indicating that they had legal advice to that effect. Doubts about the constitutionality of rent freezes can be traced to two decisions of the Supreme Court: *Blake v AG* (1982)<sup>14</sup> and *Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981* (1983).<sup>15</sup> *Blake* concerned the constitutionality of Parts II and IV of the Rent Restrictions Act 1960 as amended by the Rent Restrictions (Amendment) Act 1967 and the Landlord and Tenant (Amendment) Act 1971. The Supreme Court held that this rent control scheme was unconstitutional. Relevant factors included: the mandatory nature of the legislation; its unlimited duration; its impact on contractual arrangements; the lack of provision for review; the absence of compensation, and the potentially onerous repair obligations for landlords. Critically, the Supreme Court stated that the application of the Act was not connected to the relative needs and means of landlords and tenants, nor to 'any established social necessity'. Following *Blake*, the legislature introduced a new Bill, the Housing (Private Rented Dwellings) Bill, 1981. It provided that rent for controlled dwellings should be either agreed or fixed by the District Court on essentially a market value basis. The move to market rent was to be phased in over a four-year period. The Bill was referred to the Supreme Court by the President on foot of Article 26 of the Constitution. The Supreme Court held that it was unconstitutional because it deferred payment of market value rent. The Court did acknowledge that its decision could cause some tenants hardship, but it regarded such hardship as appropriately remedied by the State rather than private landlords.

Part of the reasoning of the Court in both *Blake* and *Private Rented Dwellings* was that discrete groups cannot be constitutionally required to bear burdens in the public interest above and beyond those imposed through general taxation. That principle also drove the decision of the Supreme Court in *Re Article 26 and the Employment Equality Bill*, which determined that a Bill that would have imposed the cost of adapting workplaces to the needs of disabled persons on employers was unconstitutional.<sup>16</sup> Such an interpretation of the property rights protected in the Constitution would pose a significant barrier to social and economic reforms that single owners out for burdens other than those imposed through general taxation measures.

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<sup>14</sup> [1982] IR 117.

<sup>15</sup> [1983] 1 IR 181.

<sup>16</sup> [1997] 2 IR 321.

However, that logic has not generally been applied by the Supreme Court as a basis for striking down legislation in subsequent decisions. For example, a Bill requiring developers to contribute to social and affordable housing provision as a condition of a grant of planning permission<sup>17</sup> and austerity measures imposed during the economic crisis that burdened some groups in society more than others<sup>18</sup> were all upheld against constitutional challenge. At the same time, *Blake*, *Private Rented Dwellings*, or *Employment Equality Bill* have not been overruled. The suggestions in the media of concerns on the part of the current and previous Attorneys General about the constitutionality of an extended blanket rent freeze indicate that the anti-redistribution logic of those decisions continues to exercise influence.

In terms of the constitutionality of the eviction ban, the ban necessarily impinged on the ability of landlords to recover possession. An important factor in *Blake* was that the invalidated rent-control scheme made it very difficult for landlords to recover possession of controlled premises. However, the legislation in that case was not time-limited as the 2020 eviction ban was. Given its time-limited nature, blanket (with one or two exceptions) application, and the emergency context, the eviction ban as structured during the lockdown period was consistent with the constitutional limits set out in *Blake* even though it clearly functioned as an interference with landlords' property rights. At the same time, it should be noted that the question of whether tenants have constitutionally protected property rights has not been conclusively excluded by the courts.<sup>19</sup> The eviction ban bolstered tenants' rights on the basis that a temporary pause on evictions was for the greater good in an emergency context.

## **A Move to a Tailored Rent Freeze and the Return of Evictions**

The constitutional background clearly influenced the approach seen in the Residential Tenancies and Valuation Act 2020 ('RTV Act'), which was signed into law on 2 August 2020. The Act moves away from a general rent freeze and prohibition of evictions to a more tailored

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<sup>17</sup> *Re Article 26 and Part V of the Planning and Development Bill, 1999* [2000] 2 IR 321.

<sup>18</sup> *J & J Haire Company Ltd v Minister for Health* [2009] IEHC 562.

<sup>19</sup> See Rachael Walsh, 'Private Property Rights in the Irish Constitution' (PhD Thesis, Trinity College Dublin 2011) 136-141.

time-limited rent freeze under section 6, and modifies the rules surrounding notices of termination in one specific circumstance. In terms of the former, it establishes a scheme whereby tenants who qualify as ‘relevant persons’ under the Act can self-declare to the Residential Tenancies Board and to their landlord that they are within that category, and that as a consequence, there is a significant risk that their tenancy will be terminated by the landlord.<sup>20</sup> Upon doing so, they can avail of a rent freeze up to 10 January 2021. Rent increases that would otherwise take effect in that period cannot be applied, and no increase in rent is payable in respect of that period (i.e. rent increases applied post-10 January 2021 cannot be backdated to cover the new emergency period). The definition of relevant persons applies to tenants who are unable to pay their rent and are, or have been at any time between 9 March 2020 and 10 January 2021, in receipt of welfare supports from the State directed at the COVID-19 crisis, such as the temporary wage subsidy scheme, the pandemic unemployment payment, and rent supplement.<sup>21</sup> Notably, there is no provision under the Act for a further extension of the emergency period beyond 10 January 2021.

This legislative framework has been criticised as unduly complex, and certainly raises concerns about the onus it places on tenants to take proactive steps to trigger protections. The Residential Tenancies Board has sent information about the COVID-19 related changes to registered tenancies and it is to be hoped that this makes tenants aware of their obligations under the new scheme. However, it appears to have been designed to address some of the constitutional questions left open by *Blake* and *Private Residential Housing Bill* about the permissibility of rent freezes and restrictions on the recovery of possession of rented properties by landlords.

First, the freeze under the RTV Act 2020 involves a *deferral* of rent increases. It does not, like the scheme in *Blake*, suppress rents. Rent increases that would otherwise have been imposed

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<sup>20</sup> Residential Tenancies and Valuation Act 2020, s. 4.

<sup>21</sup> Various payments are specified in s. 4(6) (c), but a catch all is included in s. 4(6)(c)(iii): “any other payment out of public moneys provided for by or under statute, paid for the purpose of alleviating financial hardship resulting from the loss of employment occasioned by—  
(I) the spread, or risk of spread of, Covid-19, or  
(II) measures adopted by the State to prevent the spread of that disease.”

during the freeze will be triggered once the freeze is terminated. Rent remains payable for the duration of the freeze, although without any increases.

Second, the temporary nature of the rent freeze and the restrictions on evictions – up to 20 January 2021 – is significant. The open-ended nature of the restrictions imposed on landlords was a key factor in *Blake*. The lack of provision for extension in the RTV Act 2020 rules out any such concerns. The deferral of payment of rent increases involved in the current restrictions is also much shorter than the four-year phasing-in of market rents that troubled the Supreme Court in *Private Rented Dwellings*. Even at its current length, the total period of increased restrictions of rent increases and evictions since the Emergency Measures Act 2020 will be under a year.

Third, there is an attempt in the RTV Act 2020 at tailoring the freeze and eviction restrictions to circumstances where there is a need on the part of the tenant for such protections. This is done through the self-reporting requirement, which in turn is linked to receipt of COVID-related welfare support. This reflects a key concern raised in *Blake*, which was that there was a lack of tailoring to the relative needs of tenants and landlords. This led the Court to conclude that there was no social justice rationale for the rent control scheme. The self-reporting mechanism in the RTV Act 2020 responds to that concern and is bolstered by the fact that it is a criminal offence to make a false declaration of inability to pay to the Residential Tenancies Board.<sup>22</sup> In doing so, it targets the rent freeze at those who need it, without requiring cumbersome case-by-case analysis of the needs of tenants.

The RTV Act 2020 also ends the near-blanket ban on evictions seen during the original emergency period. Instead, the new Act modifies the rules around notices for termination where that notice cites non-payment of rent. The new Act stipulates that the notice period for non-payment of rent will be the later of 90 days from the serving of the notice of termination or the expiration of the emergency period.<sup>23</sup> Once such a notice is served, the tenant will have a period of 28 days to pay the outstanding rent and to avoid being evicted.

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<sup>22</sup>*Ibid* s. 4 (2).

<sup>23</sup> *Ibid* s 5.

The new period of 28 days is an extension to the 2004 Act's requirement of 14 days from receipt of notice. The Act also maintains the inability of gaining rights under Part 4 of the 2004 Act for those who cannot be evicted until after the emergency period, here meaning 10 January 2021.

The other change that the Act makes is that in section 13, it clarifies the termination dates for those notices of termination affected by the blanket ban. Such termination dates will now be the later of the unexpired notice plus the emergency period (assumed here to mean the emergency period per the Emergency Measures Act 2020 as extended) or 10 August 2020.

It is to be hoped that the continued payments under the COVID-19 welfare schemes will avoid an increase in the number of notices of termination where non-payment of rent is the reason. The Residential Tenancies Board, via their website, encourages landlords and tenants to attempt to make their own arrangements around rent arrears and the like which arise from the COVID-19 situation. Such arrangements have not been mandated or placed on a statutory footing but they may well be more practical and desirable for both landlords and tenants than relying on the statutory provisions. It would also be advisable for the Residential Tenancies Board to update its guidance on rent reviews to note that there is the possibility of tenants self-declaring under the 2020 Act. Although not a formal requirement of the extended rent freeze, prudent landlords would be advised to check with their tenants before undertaking a rent review. Such a move would also be a generous gesture of social solidarity.

It is perhaps disappointing that the RTV Act 2020 did not mandate some attempt to offer a negotiated payment plan to address rent arrears and instead stipulates that the full amount must be paid. This is particularly harsh for those tenants with a Part 4 tenancy and runs the risk of an increase in homelessness as the economic effects of COVID-19 start to be felt. Of course, there is nothing to stop landlord and tenants undertaking such payment plans themselves and this might actually be preferable to both parties.

So too is it disappointing that the Government did not consider a staged return to the forms of eviction allowed under the 2004 Act. While the changes to evictions on the basis of rent arrears are to be welcomed, it was open to the Government to prohibit all forms of no-fault

eviction until 10 January 2021. No-fault evictions are those evictions which do not result from any misbehaviour on the part of the tenant. They are allowed under the 2004 Act, typically when the landlord or one of the landlord's family needs the property, or because the landlord needs to undertake major renovations to the property.<sup>24</sup> Extending the prohibition on no-fault evictions until 10 January 2021 would respect the continued need to minimise movement until the virus is under control. Given its time-limited basis, such an extension would not be constitutionally problematic on the basis of the Supreme Court's previous decisions on the issue. At the very least, the government could revisit its decision against extending eviction bans to those areas under increased restrictions such as those under level 3 restriction and higher under the plan for living with COVID-19.<sup>25</sup>

The take-up of the protections afforded to tenants under the Residential Tenancies and Valuation Act 2020 has so far been limited. By early October 2020, only 159 renters had applied for protection under the scheme.<sup>26</sup>

## **The Future of Balancing Landlords' Rights and Tenants' Rights**

As disruptive as the COVID-19 pandemic has been, its policy successes should not be ignored. In the introduction, we noted that the emergency period has seen remarkable successes in terms of changes to Irish rental housing. While the reduction in rents and the increase in available rental properties may be partially attributable to the impossibility of using these properties as holiday rentals,<sup>27</sup> others are clearly linked with the Emergency Measures Act. In terms of the reduction in rents, evidence is emerging that rents are increasing again and that,

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<sup>24</sup> Residential Tenancies Act 2004, s 34.

<sup>25</sup> Daniel McConnell, 'Ban on evictions unlikely to be renewed as eight counties face more restrictions' *Breaking News.ie* (22 September 2020) <https://www.breakingnews.ie/ireland/ban-on-evictions-unlikely-to-be-renewed-as-eight-counties-face-more-restrictions-1018638.html>. See, Plan for living with COVID-19, [https://www.citizensinformation.ie/en/covid19/living\\_with\\_covid19\\_plan.html](https://www.citizensinformation.ie/en/covid19/living_with_covid19_plan.html).

<sup>26</sup> <https://www.independent.ie/irish-news/small-numbers-apply-for-rental-protections-to-help-safeguard-against-eviction-39587962.html>.

<sup>27</sup> McDermott (n 3) <https://www.thejournal.ie/airbnb-rental-market-simon-communities-survey-5083867-Apr2020/>



in some parts of Ireland, continued to rise even during lockdown.<sup>28</sup> However, in terms of the reduction of properties being used as holiday rentals, it is hoped that such gains will remain given that such rentals are now illegal except in a small number of circumstances. For those successes which are more directly tied to the Emergency Measures Act, there is reason to be concerned as Ireland begins to wind-down the emergency measures and replaces them with its strategy for living with COVID-19.

Prior to the COVID-19 pandemic, the Irish rental sector was in crisis with spiralling rents, a lack of supply, and increasing homelessness. As evidenced by the prohibition on holiday rentals, the government was beginning to take steps to target at least one of the perceived drivers of the rent crisis. While it will likely be several months, if not years, before tourism returns to pre-COVID-19 levels, the government should consider if its laws around holiday rentals are as effective as they could be. The swathe of properties appearing on the long-term rental market during lockdown suggests that compliance with the holiday rental laws pre-lockdown may have been less than anticipated.<sup>29</sup> Ireland might consider measures similar to that adopted by North American cities, such as San Francisco, which require holiday rental hosts to have a business registration number without which they cannot list their property on Airbnb.<sup>30</sup> Such measures require Airbnb's cooperation, which seems likely to be forthcoming given its founder's stated desire to work with communities to mitigate negative effects on housing markets.<sup>31</sup>

The Government should also consider whether the one-size fits all approach to regulating the private rental sector is fit for purpose. In its attempt to balance landlord's property rights with

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<sup>28</sup> Ronan Lyons, *Irish Housing Market Report – July 2020* (21 August 2020), <https://www.daft.ie/report/ronan-lyons-housingmarketjuly2020>; RTB, *Exploring the Impact of COVID-19 Pandemic on Rental Prices in Ireland from January to June 2020: Early Insights from a Monthly Rent Index* [https://www.rtb.ie/images/uploads/Comms%20and%20Research/RTB\\_Rent\\_Index\\_Series\\_Analysis\\_Exploring\\_the\\_Impact\\_of\\_the\\_COVID-19\\_Pandemic\\_Final.pdf](https://www.rtb.ie/images/uploads/Comms%20and%20Research/RTB_Rent_Index_Series_Analysis_Exploring_the_Impact_of_the_COVID-19_Pandemic_Final.pdf).

<sup>29</sup> Michelle Hennessy, 'Increase in available rental properties in Dublin 'likely related to collapse of tourism' *The Journal.ie* (20 March 2020) <https://www.thejournal.ie/rental-properties-coronavirus-5052953-Mar2020/>.

<sup>30</sup> These rules are detailed on Airbnb's own website see: <https://www.airbnb.ie/help/article/871/san-francisco--ca>.

<sup>31</sup> John Kilraine, 'Airbnb 'made mistakes and needs to change' says founder' *RTE News* (9 August 2020) <https://www.rte.ie/news/business/2020/0809/1158208-airbnb/>.

tenant's housing rights, the Residential Tenancies Act 2004 allows for various forms of no-fault eviction. The provisions on no-fault evictions tacitly assume that many landlords have one or two rental units and are operating on a relatively small scale.

While many landlords may only have one or two rental units, there are several Real Estate Investment Trusts ('REIT') operating as landlords in Ireland. These REITs can have several thousand residential units on the rental market.<sup>32</sup> So too are there properties which have been subdivided into multiple units. In Dublin, for example, some Georgian terraces have been sub-divided into multiple residential units. REITs and properties with upwards of three, sometimes even upwards of ten or twenty units, are not the sort of landlord envisioned by the 2004 Act. REITs and those landlords with more than three units (either in one building or across several) are not small-scale landlords and it is hard to justify their access to no-fault eviction. Amending the 2004 Act to remove no-fault evictions from those landlords with three or more residential units would arguably be both constitutional – in that, per the case law above, it takes into consideration the relative capacities of the affected landlords – and an important protection for tenants' housing rights where their landlord is a business rather than someone who might need the property themselves. Such a rule would also recognise that large landlords ought to have the capacity to renovate around sitting tenants, either by renovating one room at a time or by temporarily displacing affected tenants from one unit to another (for the same rent as the tenants' normal rent) as the tenant's normal property is renovated.

Perhaps the main issue with Ireland's residential tenancies' sector is that for a person seeking housing, their main options are owner-occupation or the private rental sector. Ireland's social housing is in short supply. Admittedly, the current Minister for Housing has indicated a willingness to buy properties to use as social housing.<sup>33</sup> As laudable as such a policy would be, local councils would be purchasing property at market-rate, thus competing with would-be owner-occupiers. In fact, it would arguably be a policy clash with the recent measures

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<sup>32</sup>'Ires Reit reports 30% increase in rental income' *RTE News* (7 August 2020), <https://www.rte.ie/news/business/2020/0807/1157834-ires-reit-reports-30-increase-in-rental-income/>.

<sup>33</sup> Christina Finn, 'State plans to buy up Airbnb properties, says Housing Minister' *The Journal.ie* (12 July 2020) <https://www.thejournal.ie/darragh-o-brien-housing-minister-5146915-Jul2020/>

designed to assist first-time buyers.<sup>34</sup> The assistance given to first-time buyers often drives up prices,<sup>35</sup> so if the Government does offer money for local authorities to buy, either new-build or second-hand homes for social housing, they are effectively wasting money. Given the financial cost of the COVID-19 crisis so far, it might be better that, instead of buying properties on the open market for use as social housing, the Government offers the money to local authorities to renovate and make available existing empty social housing units.<sup>36</sup>

## Recommendations

While publicising the new protections to tenants with respect to rent increases is to be welcomed, we also think that the Government should additionally ensure that all PUP recipients receive this information. (Admittedly some PUP recipients will be owners/mortgagors, so the Government could consider sending PUP recipients general debt advice as well, eg including information about Abhaile). Uptake of new tenant protections has been very low so far, so all potentially effective communication channels should be explored.

In the medium term, we recommend that the Government reviews the current statutory regime around holiday lettings. In particular, we recommend that the Government examines the measures adopted in North American cities, several of which adopted a regime whereby would-be hosts cannot even list their properties unless they comply with the regulations around holiday lettings.

In the longer-term, or perhaps sooner, we recommend that the Government considers limiting no-fault evictions to landlords with no more than three residential properties

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<sup>34</sup>Jack Horgan-Jones, 'Expansion of help-to-buy scheme will 'help thousands'' *The Irish Times* (23 July 2020) <https://www.irishtimes.com/news/ireland/irish-news/expansion-of-help-to-buy-scheme-tax-rebate-will-help-thousands-1.4312121>

<sup>35</sup> Dominic Coyle, 'Expanded help-to-buy scheme makes little sense and may fuel house price rises' *The Irish Times* (24 July 2020) <https://www.irishtimes.com/business/personal-finance/expanded-help-to-buy-scheme-makes-little-sense-and-may-fuel-house-price-rises-1.4312728>

<sup>36</sup>Sarah Burns, 'Council renovated one Sandycove home at cost of over €200,000' *The Irish Times* (25 February 2020) <https://www.irishtimes.com/news/social-affairs/council-renovated-one-sandycove-home-at-cost-of-over-200-000-1.3805933>

available for let or being let. That is, where the landlord is clearly running a property-rental business, they should not be allowed to use no-fault eviction. No fault eviction is a tool aimed to protect the interests of small-time landlords who may need the property for personal use.

## **Conclusion**

It is possible for the Government to address shortages in social housing, protect tenants in the private rental sector, and to encourage owner-occupation. How that can be done is beyond the scope of this short policy report. Suffice to say that it would require long-term investment rather than quick fixes. However, in terms of maintaining the gains made during the emergency period with respect to reducing homelessness, and ensuring affordable rents there are several measures the Government could consider in addition to the RTV Act 2020. For one, the Government could consider a temporary moratorium on no-fault evictions for *all* landlords until 10 January 2021, with more nuanced no-fault eviction rules (as outlined above) to come in after 10 January 2021. So too could the Government revisit the rules surrounding holiday rentals and seek to work with companies like Airbnb to ensure that any listed properties are legal. It could also consider introducing an obligation to demonstrate a good faith attempt to negotiate a solution to rent arrears as a prerequisite for eviction on grounds of non-payment of rent. A similar obligation in the mortgages arrears context was introduced through a code of conduct, but the Supreme Court held that lenders are required to establish observance of the relevant moratorium in order to secure an order for possession.

The legal precedents on rent control and eviction restrictions do not bar rights-restrictive measures. Rather, they indicate the need for interventions that are appropriately tailored to the relative means and needs of tenants and landlords, and that respond to a compelling social justice rationale for tenant protection. That rationale is readily identifiable in the current circumstances. The RTV Act 2020 furthered the process of designing more tailored tenant protections that began with the Residential Tenancies Act 2004's measures like rent pressure zones and enhanced security of tenure. We suggest that there is scope to go further within the existing constitutional parameters, even barring a referendum on housing.





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## **CHAPTER 2: BANKS AND MORTGAGES – LEGAL AND POLICY CHALLENGES IN THE CONTEXT OF COVID-19**

**Sarah Hamill and Rachael Walsh**

### **Introduction**

At least two significant risks are raised by the COVID-19 crisis and the resulting lockdown in the mortgages context: first, there are public health risks for both borrowers and the public at large if repossessions necessitate the movement of people that could spread COVID-19; second, borrowers who suffer economic hardship as a result of lockdown measures, for example due to unemployment or reduced business revenue, could suffer hardship through loss of commercial or residential properties. The latter risk in particular did not abate with the phased re-opening of the country.

In the rental context, the risk associated with movement was addressed as part of the emergency response in the Emergency Measures in the Public Interest (COVID-19) Act 2020; the second longer-term hardship risk was mitigated through the Residential Tenancies and Valuation Act 2020. To-date there has been no formal legal response to either form of hardship in the mortgages' context. The voluntary approach adopted to the mitigation of COVID-19 hardship in the mortgages' context, evident in the lack of legal regulation for instance to require payment breaks or to impose a moratorium on repossession proceedings, stands in marked contrast to the interventions in the rental market considered in the last chapter. While the government intervened to protect renters, it relied on the good-will of market operators to protect borrowers.

## COVID-19 Payment Breaks

The Banking and Payments Federation Ireland ('BPF') produced an FAQ document for those seeking payment breaks on personal loans or mortgages.<sup>37</sup> The document notes that its members agreed, in early March, to offer payment breaks of up to three months. It should be noted that some mortgage lenders offer the potential of payment breaks normally. That means borrowers can take several months, typically three, with no payments a few times during the term of the mortgage. As such the payment break offered by BPF members was in keeping with the pre-COVID-19 crisis practices of some lenders.

At the end of April 2020, the BPF members agreed the potential of extending the original three months by another three months. Thus there is the potential, for most borrowers, to avail of up to six months of a payment break. Payment breaks normally add to the cost of the mortgage because interest continues to accrue and so borrowers who avail of a break and then return to making payments will either have higher monthly repayments or a longer loan term.

Each of the main Irish mortgage lenders prepared information pages on their websites for worried customers. The level of information on the initial page varied. Here it is instructive to examine the approach of the major players towards personal customers with mortgages – Bank of Ireland ('BOI'), Allied Irish Banks ('AIB'), KBC, Ulster Bank, Permanent TSB, and EBS –to illustrate the variation in approaches. AIB, for example, noted that a complete break for up to six months was possible.<sup>38</sup> BOI appears to only offer three months initially, noting the deadline of 30 September 2020 to apply, and then the recipients would get a letter offering a further three months at the end of the first three.<sup>39</sup> KBC notes that the deadline of 30 September 2020 was imposed by the European Banking Authority. KBC also offers a delayed start to the payment break but notes that such delayed starts will have to be shorter payment breaks and all such breaks must end in March 2021.<sup>40</sup> Permanent TSB, like AIB, makes no mention of any deadline to apply on its information page but notes the possibility of a break for up to six months.<sup>41</sup> Ulster Bank's page, in contrast to the others, implies that only breaks of up to

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<sup>37</sup> Banking and Payments Federation Ireland, 'A Guide to the COVID-19 Payment Break' online: <https://www.bpfi.ie/wp-content/uploads/2020/06/BPFI-Guide-to-the-COVID-19-Payment-Break-Final.pdf>.

<sup>38</sup> <https://aib.ie/our-products/mortgages/flexible-payment-options>.

<sup>39</sup> <https://personalbanking.bankofireland.com/borrow/mortgages/mortgage-repayment-covid-19/>.

<sup>40</sup> <https://www.kbc.ie/covid-19>.

<sup>41</sup> <https://www.permanenttsb.ie/about-us/notices/2020/march/covid-19/>.

three months are available and makes no mention of a deadline to apply.<sup>42</sup> EBS also seems to offer only three months breaks but does note the deadline.<sup>43</sup>

The level of information provided on the information page should not, however, be taken as reflective of differences in policy. It may well be that all banks would offer the same flexibility over start dates as KBC but that flexibility would depend on personal circumstances. So too do the information pages differ in the alternatives they offer. A complete payment break is one option, but some banks note the option of switching to interest-only payments or to some other form of reduced payments.

In fact, applications for mortgage breaks across all of the institutions closed on 30 September, although the Governor of the Central Bank confirmed that such breaks could still be offered on a case-by-case basis.<sup>44</sup> Meeting with the Government, the BPFJ undertook that its members would engage constructively with borrowers in arrears on a tailored, rather than a system-wide basis.

What is important to note is that these payment breaks do not press pause on the normal operation of the mortgage. The mortgage subsists in the background and once repayments start again, they will likely either be higher or last longer. If the latter, some banks note that an extension to the mortgage term must be applied for. Of course, if the borrower remains in financial difficulties after the six-month payment break, then their credit rating may be affected. But an individual's credit rating will not be affected by taking one of the COVID-19 payment breaks.

The payment breaks are not an entirely selfless policy on the part of lenders. They have been and no doubt are useful pressure valves for customers suffering financial difficulty as a result of COVID-19. They protect a mortgagor's credit rating and they allow borrowers to stay in their own homes. Yet they are, perhaps, only a deferral of the financial pressure and they have the potential to add to the costs of the mortgage where they are availed of. The payment breaks protect the lenders' interests in the mortgage, that is getting the full value of the loan and interest. Controversy arose over the question of interest charges during COVID-19 payment breaks, with clarification from the European Banking Authority that interest charges could be waived without adversely affecting borrowers' credit ratings. There were suggestions that lenders in the Irish market had previously indicated that they were constrained by EBA regulations from waiving interest charges.<sup>45</sup> The Tánaiste Leo Varadkar

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<sup>42</sup> <https://digital.ulsterbank.ie/personal/help-and-support/coronavirus/mortgage-payments.html>.

<sup>43</sup> <https://www.ebs.ie/covid19/mortgagecustomers/covid-19-mortgage-payment-break>.

<sup>44</sup> See <https://www.rte.ie/news/business/2020/0928/1167865-minister-finance-bank-chiefs/>.

<sup>45</sup> See <https://www.thejournal.ie/banks-interest-charges-covid-19-5144696-Jul2020/>.



denied that they made such claims to him, but he indicated to lenders that they should not profit through the imposition of interest charges during COVID-19 payment breaks.<sup>46</sup> However, that political request did not have a legal basis and it remains to be seen whether lenders will let interest charges accrue and, if so, who will pay for them. As much as mortgages are considered essential in owning one's own home, they are also, and this ought not to be forgotten, a financial product which lenders rely on for profit and income. A short-term break on repayments can preserve the lenders' income for the rest of the term but there is a point where the financially prudent decision for lenders is to repossess.

The lenders' information pages are not clear about whether those customers already in mortgage arrears could avail of a mortgage break. The Central Bank's FAQ suggests such customers contact their bank to discuss their options.<sup>47</sup>

## **Repossession Proceedings during the COVID-19 Crisis**

The Central Bank indicated that it 'expect[s] lenders to pause repossession action on all residential properties' but that those at risk of repossession should discuss it with their lender.<sup>48</sup> It would seem most banks did pause repossessions but without the figures from the Central Bank's quarterly analysis of mortgage arrears, it is hard to be certain. Based on the first quarter of 2020, 64 principal private dwellings were repossessed, some of which were voluntarily surrendered.<sup>49</sup> But such repossessions, presumably, pre-dated the lockdown period.

What is clearer is that lenders did continue with some existing repossession proceedings where necessary to protect the lender's position, e.g. due to the risk of a claim becoming statute-barred. However, even without such a response, the effective shut-down of the courts for all but urgent business would have had the same effect. For example, in May and early June 2020, a number of individual Circuit Courts announced that they would adjourn re-possession lists until September or October 2020.<sup>50</sup> In an interesting statement, Kerry Circuit Court stated that adjourning repossession

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<sup>46</sup> See <https://www.rte.ie/news/2020/0709/1152321-banks/>.

<sup>47</sup> <https://www.centralbank.ie/consumer-hub/covid-19/faq-for-consumers>

<sup>48</sup> <https://www.centralbank.ie/consumer-hub/covid-19/faq-for-consumers>

<sup>49</sup> <https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/residential-mortgage-arrears-and-repossession-statistics-march-2020.pdf?sfvrsn=4>.

<sup>50</sup> Dublin Circuit Court (10.05.20), Louth Circuit Court (18.05.20), Meath Circuit Court (19.05.20), Kildare Circuit Court (19.05.20), Wicklow Circuit Court (29.05.20), Castlebar Circuit Court (16.05.20), Roscommon Circuit Court (15.05.20), Leitrim Circuit Court (29.05.20), Tipperary Circuit Court (19.05.20), Kerry Circuit Court (09.06.20)

lists was “in keeping with Government moratorium (*sic*) on Re-possession Orders in response to the Covid 19 pandemic”.<sup>51</sup> In fact, as we have seen, no such government moratorium exists – any forbearance on the part of mortgagees is wholly voluntary.

However, the felt need for relief for borrowers from the effects of repossession during the COVID-19 crisis is reflected in some judicial decisions on pre-COVID-19 repossession proceedings that were issued close to the lockdown period. The lack of legal regulation led to some inconsistencies in approach from judges in hearing repossession proceedings. Simons J in two decisions referred specifically to the COVID-19 crisis as justification for a six-month stay on repossession orders. Strikingly, he did not confine this approach to residential cases. In *AIB plc v Fitzgerald*,<sup>52</sup> he granted such a stay in a commercial property repossession context, stating this was “longer than the usual three-month stay allowed in these types of cases, and this is intended to reflect the practical difficulties presented by the coronavirus pandemic.” There was a lessee in occupation of the relevant premises for 10 years and the stay would allow time for the lessee to find alternative accommodation. In *Start Mortgages DAC v McNairr*<sup>53</sup> Simons J imposed a six-month stay on possession order for residential premises and gave liberty to reapply for an extension if “the current emergency conditions in respect of the coronavirus disease pandemic” continued to apply at the end of the stay. In contrast in *KBC Bank Ireland Ltd v McCormack*,<sup>54</sup> Heslin J granted an order for repossession of a family home without any COVID-19 related stay. As such, one impact of the lack of COVID-19 legal regulation in relation to mortgages appears to have been inconsistent judicial approaches in relation to ‘hardship’ stays, and as a result, unequal treatment of borrowers. In addition, there has not been clarity or consistency on whether different approaches are warranted in respect of commercial and residential properties. Significantly, the post-economic crisis expansion in regulation of mortgages generally adopts a much more protective attitude towards borrowers in the context of residential properties.

## Potential Policy Responses to a COVID-19 Mortgage Arrears Crisis

Chapter 1 of this Report analyses the proactive legislative response to the risk of rent arrears difficulties arising out of the COVID-19 crisis. No such COVID-specific legislative response has been forthcoming in relation to mortgage arrears. This is despite the fact that the level of uptake of payment

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<sup>51</sup> <https://beta.courts.ie/news/kerry-circuit-court-practice-note-2-trinity-term-2020>

<sup>52</sup> [2019 No. 232 SP] (27 April 2020) [https://beta.courts.ie/viewer/pdf/6f4a3e9e-74f6-4a6e-9673-88cfd7af424/2020\\_IEHC\\_197.pdf/pdf#view=fitH](https://beta.courts.ie/viewer/pdf/6f4a3e9e-74f6-4a6e-9673-88cfd7af424/2020_IEHC_197.pdf/pdf#view=fitH)

<sup>53</sup> [2020] IEHC 140 (23 March 2020).

<sup>54</sup> [2020] IEHC 175 (25 March 2020).

breaks has been high. Central Bank data released in July 2020 showed that 158,659 payment breaks were approved for Irish borrowers by Irish retail banks, credit unions and credit servicing firms following the lockdown. An additional 68,574 payment breaks have also been given to non-Irish borrowers, mostly in the UK. 60% of the breaks were made to households and 40% to businesses.<sup>55</sup> By the end of September 2020, the number of payment breaks was down approximately 25% from the peak.<sup>56</sup> This level of uptake and extension of breaks raises the prospect of an arrears problem once breaks are terminated, which may be exacerbated by interest charges levied during the break period.

The Central Bank released its first-quarter data on mortgage arrears in late June 2020.<sup>57</sup> It noted an increase of over 2800 accounts in arrears for 'principal dwelling houses' but also that some of the new arrears had, probably due to COVID-19 payment breaks, returned to no arrears.<sup>58</sup> There was also a reduction in the number of long-term arrears.<sup>59</sup> A little over 8% of all private residential mortgages were in arrears at the end of March 2020.<sup>60</sup>

The potential of an arrears crisis and, indeed, concerns over a long-term impact on the economy are shaping how banks approach new and in-progress mortgage applications. AIB and its subsidiaries initially banned mortgage lending to those in receipt of the pandemic unemployment payment, but quickly reversed this decision following an article in *The Irish Times*.<sup>61</sup> Those on the wage subsidy or pandemic unemployment payment will face extra scrutiny should they apply for a mortgage, and particularly before the lender allows the borrower to draw down the mortgage.<sup>62</sup> Irish mortgage lenders are already under fairly stringent rules and the evidence suggests that they are voluntarily taking steps to further mitigate potential risk. The issue here is that the economic effects of COVID-19 could be relatively short-lived, it may be that life returns to 'normal' in the near-future; but there is a risk that the nationwide lockdown was not a one-off and, even if it was, there are doubts over whether

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<sup>55</sup> <https://www.rte.ie/news/business/2020/0709/1152300-central-bank-payment-breaks-data/> Robert Shortt 9 July 2020.

<sup>56</sup> See <https://www.rte.ie/news/business/2020/0928/1167865-minister-finance-bank-chiefs/>.

<sup>57</sup> Central Bank of Ireland, 'Residential Mortgage Arrears & Repossession Statistics: Q1 2020' online: <https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/residential-mortgage-arrears-and-repossession-statistics-march-2020.pdf?sfvrsn=4>.

<sup>58</sup> Ibid, 1.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid, 2.

<sup>61</sup> Jack Horgan-Jones, 'AIB U-turn on mortgage block for those on Covid wage subsidy' *The Irish Times* (1 July 2020), <https://www.irishtimes.com/business/financial-services/aib-u-turn-on-mortgage-block-for-those-on-covid-wage-subsidy-1.4293709>.

<sup>62</sup> Ibid.

some sectors, such as aviation, will recover quickly. Accordingly, those applicants who may have seemed low-risk, and every mortgage involves risk, in February 2020 may be out of work or on reduced income come December 2020. Or those applicants might be back to the same job and income level as in February 2020. It is simply too early to tell, and having been badly burned by the 2008 financial crisis, Irish banks and lenders are understandably being cautious.

The activity in terms of developing codes of conduct and support structures around mortgages arrears in the wake of the economic crisis may be one explanation for the lack of legislative activity in response to COVID-19 on this issue. The codes of conduct in respect of mortgage arrears are well-established in the regulatory landscape at this stage, and have been the subject of extensive litigation. However, the effect of that litigation is that most aspects of the codes are not judicially enforceable – courts will only intervene to ensure that the moratorium period prior to the initiation of repossession proceedings is observed. If the COVID-19 crisis leads to a significant new arrears crisis, non-observance of existing codes will not generally form a basis for refusing a repossession order.

In addition, businesses have been hard-hit in the COVID-19 crisis. The arrears regime primarily deals with residential premises, in particular, with mortgages in respect of principal private residences. This means that there is a gap in terms of protection for borrowers with mortgages on commercial premises who may be in arrears difficulties, for example as a result of shut-downs and alterations to business activities required as a response to COVID-19.

## **Changes to Codes of Practice and Other Potential Policy Interventions**

This raises the question of whether changes or additions to the existing codes of conduct should be contemplated. Those codes guide the mortgagor/mortgagee relationship rather than restricting the rights of mortgagees to avail of remedies in the courts. Similar guidance designed to facilitate the working out of arrears problems might be designed to cover commercial mortgages given the impact of COVID-19 on the operation of many businesses. It raises the further question of whether in the residential context, a more interventionist approach might be required, with more aspects of the code being made judicially enforceable, and whether through legislative change, or through judicial innovation in the implementation of the existing codes to inform the exercise of judicial discretion.

## **Recommendations**

We recommend that in the same way that a Code of Conduct for Mortgage Arrears exists for principal private residences, a code of conduct for mortgage arrears accruing in respect of commercial premises and in respect of non-primary principal residences should be introduced in the short term to assist in arrears management during and after the COVID-19 crisis.

We recommend that the manner in which COVID-19 related hardship can be taken into account by judges in repossession proceedings should be clarified in order to ensure consistency in treatment of defaulting mortgagees, for example in respect of the granting of possession orders and the placing of stays on the execution of such orders. Such clarification should cover, and where necessary distinguish between, both repossession proceedings arising during the current COVID-19 crisis in respect of arrears accrued prior to the crisis, and repossession proceedings involving COVID-19 related arrears.

## **Conclusion**

There is scope for some policy approaches by the courts and legislature to address COVID-19 issues that have been ventilated here. For example, section 7 of the Land and Conveyancing Law Reform (Amendment) Act 2019 obliges Irish courts to carry out a proportionality assessment of the interference with the right to respect for home prior to issuing a possession order. COVID-19 related hardship may well become a factor that is weighed in the balance in such proportionality review. Similarly, such hardship might influence the exercise of judicial discretion in relation to the adjournment of proceedings to facilitate the personal insolvency process under the Land and Conveyancing Law Reform Act 2013. Absent COVID-specific legislative intervention in relation to mortgage arrears, these existing statutory provisions provide a space through which COVID-arrears might be addressed.



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## **CHAPTER 3: COVID-19 IMPACT ON WORKFORCE AND EMPLOYMENT**

**Mark Bell, Alan Eustace, Desmond Ryan, and David Fennelly**

### **Introduction**

The pandemic has had a profound impact upon working life in Ireland. The most severe effects have been on the many workers who have lost their jobs or who have seen their income fall. For those still in employment, many experienced a change in the physical location where their work is performed, often being displaced into the private home.<sup>63</sup> It is now apparent that working from home will continue to be a significant feature of the labour market for the duration of the pandemic, and possibly beyond. At the same time, many workers continue to perform their duties in the normal place of employment, but they do so in a changed environment with elevated risks to their own health, as well as additional responsibilities to protect the health of their co-workers, customers and service-users. This chapter provides some initial reflections on the implications of these changes from an employment law perspective. Four themes are explored: (1) the impact on diversity and inclusion in the workplace; (2) employers' health and safety obligations in the context of COVID-19; (3) challenges presented by working from home; (4) adjudication of employment disputes in the context of COVID-19. This is not an exhaustive examination of the full range of employment

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<sup>63</sup> In the Labour Force Survey conducted in April 2020, 47% of respondents said that COVID-19 had had an effect on their employment situation. Of these, 34% of people had commenced working from home: CSO, 'Employment and Life Effects of COVID-19' (2020):

<https://www.cso.ie/en/releasesandpublications/er/elec19/employmentandlifeeffectsofcovid-19/>.

law issues that are prompted by the pandemic, but it offers some insight into the relevance of law in the midst of deep changes to the labour market.

## **Impact on Diversity and Inclusion in the Workplace**

It is becoming clear that certain groups face distinct challenges because of the pandemic and that these have the potential to aggravate pre-existing patterns of inequality and disadvantage.

Certain groups are at a higher risk of becoming seriously ill if they contract COVID-19. This includes people with some types of disability and those over the age of 60 (and especially those over the age of 70).<sup>64</sup> Evidence from other countries has also indicated an elevated risk for persons from ethnic minority communities and for men.<sup>65</sup> These heightened risks to health may impact on the labour market situation of such persons. The HSE advises that those at very high risk should continue to stay at home as much as possible.<sup>66</sup>

People with caring responsibilities may be encountering greater obstacles to continuing to work, whether at the workplace or from home. Childcare services, schooling, and support services for persons with disabilities have all been heavily disrupted in recent months. Many parents and carers relied on those services in order to combine working life and caring responsibilities. Given that caring continues to be performed disproportionately by women, then these difficulties are likely to impact on a greater number of women than men.

Working from home may be particularly difficult for those living in shared accommodation where private space is limited to one's bedroom. This may be a greater difficulty for young

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<sup>64</sup> <https://www2.hse.ie/conditions/coronavirus/people-at-higher-risk.html>.

<sup>65</sup> Public Health England, 'Beyond the Data: Understanding the Impact of COVID-19 on BAME Groups' (Public Health England 2020).  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/892376/COVID\\_stakeholder\\_engagement\\_synthesis\\_beyond\\_the\\_data.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892376/COVID_stakeholder_engagement_synthesis_beyond_the_data.pdf).

<sup>66</sup> <https://www2.hse.ie/conditions/coronavirus/cocooning.html>.

workers in shared rental accommodation. There is also emerging evidence that younger people may be experiencing greater difficulties with mental health during that pandemic.<sup>67</sup>

Migrant workers form a significant component of those working in certain industries where there have been significant clusters of COVID-19 infections, such as meat processing factories.<sup>68</sup> The adverse economic effects of the pandemic are likely to be accentuated for those in insecure forms of employment and those working in certain sectors, such as tourism, hospitality and entertainment. Data indicates that younger workers were amongst those most effected in the initial response to the pandemic. The CSO found that ‘younger persons have experienced the highest rates of loss of employment and temporary layoff, with 46% of 15-24 year olds being temporarily laid off and over a fifth (22%) experiencing loss of employment.’<sup>69</sup>

It will only be in time that a fuller picture will emerge of the labour market consequences of COVID-19. The emerging data illustrates the risk that COVID-19 will be detrimental to efforts to advance diversity and inclusion. Responding to these issues will entail the engagement of a range of legal and policy instruments, but it is possible to highlight briefly some existing provisions of Irish law that have a role to play.

## **The Public Sector Equality and Human Rights Duty**

Section 42 of the Irish Human Rights and Equality Commission Act 2014 provides:

A public body shall, in the performance of its functions, have regard to the need to—

(a) eliminate discrimination,

(b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and

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<sup>67</sup> Brian Hutton, ‘Millennials during Covid-19 pandemic: ‘God, my life is passing me by’’ (Dublin, 18 August 2020) <https://www.irishtimes.com/news/ireland/irish-news/millennials-during-covid-19-pandemic-god-my-life-is-passing-me-by-1.4332339>

<sup>68</sup> See further, Oireachtas Special Committee on COVID-19 Response, ‘COVID-19: the Situation in Meat Processing Plants’ (13 August 2020): [https://www.oireachtas.ie/en/debates/debate/special\\_committee\\_on\\_covid-19\\_response/2020-08-13/3/](https://www.oireachtas.ie/en/debates/debate/special_committee_on_covid-19_response/2020-08-13/3/).

<sup>69</sup> CSO (n63). See also, TASC, ‘Stories of the Pandemic: The experiences of Millennial and Generation Y workers in Ireland’ (TASC 2020): <https://www.tasc.ie/publications/stories-of-the-pandemic-the-experiences-of-millenn/>.



(c) protect the human rights of its members, staff and the persons to whom it provides services.

This duty applies to public bodies in their capacity as employers.<sup>70</sup> The Irish Human Rights and Equality Commission (‘IHREC’) has issued guidance for public bodies on the steps that they should take in order to comply with this statutory duty. In summary, bodies need to: *assess* the impacts of its functions on equality and human rights; *address* equality and human rights issues that arise from the assessment; *report* publicly on actions taken, which entails reviewing and monitoring progress. In the midst of an emergency, there is a risk that public bodies lose sight of this statutory duty. Yet given the evidence that the pandemic is impacting in different ways on specific groups in the workplace, then it is vital that public bodies include consideration of equality when making decisions about workers and the workplace in this period. Helpfully, IHREC has issued guidance on applying section 42 in the context of the pandemic.<sup>71</sup>

In addition, public bodies need to comply with the duties found in the Disability Act 2005. Section 47(1) states that “a public body shall (a) in so far as practicable take all reasonable measures to promote and support the employment by it of persons with disabilities”. As mentioned above, people with some types of disability are at a higher risk of becoming seriously ill if they contract COVID-19. Therefore, there may be a greater need for those persons to be supported to continue working from home, even if other workers are returning to the workplace. In this regard, it is important for public bodies to keep in mind the following guidance from IHREC:

“Remember that equality does not always mean treating everyone the same. Certain people or groups of people may be more at risk than others of experiencing discrimination or human rights violations. Ensuring equality of opportunity may mean catering for the specific needs of people or groups of people who experience disadvantages in society.”<sup>72</sup>

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<sup>70</sup> IHREC, ‘Implementing the Public Sector Equality and Human Rights Duty’ (IHREC 2019) 16: <https://www.ihrec.ie/our-work/public-sector-duty/>.

<sup>71</sup> IHREC, ‘COVID-19 and the Public Sector Equality and Human Rights Duty’ (IHREC 2020): <https://www.ihrec.ie/documents/guidance-note-covid-19-and-the-public-sector-equality-and-human-rights-duty/>.

<sup>72</sup> Ibid 17.

## The Employment Equality Acts 1998-2015

The Employment Equality Acts ('EEA') 1998-2015 prohibit discrimination on nine grounds: gender, civil status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community. While the EEA do not include an express duty to promote equality, employers that adopt policies and practices without regard to their impact upon specific groups of workers risk breaching the legislation. For example, given the economic situation, it is unfortunately the case that some employers may have recourse to compulsory redundancies. When deciding upon the criteria for selecting workers for redundancy, employers should ensure that these do not have an adverse effect on workers with protected characteristics. This was highlighted by the Court of Justice in *DW v Nobel Plastiques Iberica SA*.<sup>73</sup> In that case, the Court held that several of the criteria used by the employer to select workers for redundancy (such as rate of absenteeism) were liable to place disabled workers at a disadvantage and that this could constitute indirect discrimination on grounds of disability.<sup>74</sup> The Court highlighted the importance of examining whether the employer had taken appropriate measures to support disabled workers through the provision of reasonable accommodation. If the employer had not provided reasonable accommodation, then selection for redundancy would constitute indirect discrimination.<sup>75</sup>

The prohibition of indirect discrimination and the duty to provide reasonable accommodation for workers with disabilities need to be taken into account by employers when facing the challenges of managing the workforce during the pandemic.<sup>76</sup> Of particular salience in the present environment are policies and practices around flexible working. It is easy to anticipate difficulties where an employer wishes workers to resume activities in the workplace, but a worker encounters an obstacle to doing that because of a lack of adequate childcare or alternatively where the worker wants to continue working from home due to concerns about the risks to their health. There are no simple solutions to the competing interests that employers have to juggle, but when making decisions about who is permitted to continue

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<sup>73</sup> Case C-397/18 *DW v Nobel Plastiques Iberica SA* EU:C:2019:703.

<sup>74</sup> *Ibid* [59]-[60].

<sup>75</sup> *Ibid* [71].

<sup>76</sup> See further, Mark Bell, 'Accommodating Diversity When Returning to the Workplace' COVID-19 Law and Human Rights Observatory Blog (6 July 2020): <https://tcdlaw.blogspot.com/2020/07/accommodating-diversity-when-returning.html>.

working from home, duties arising from the EEA needed to be considered. Notably, in relation to workers with disabilities, the Supreme Court has clarified that the duty of reasonable accommodation for persons with disabilities extends to the redistribution of tasks amongst the workforce.<sup>77</sup> If a worker with a disability faces a higher risk from COVID-19 and wishes to continue working from home, then it would be relevant for the employer to examine whether this can be facilitated through a reorganisation of the tasks performed by that worker.

This short review has identified the different ways in which the pandemic may give rise to disadvantage in the labour market for social groups that are already vulnerable to discrimination and inequality. Above all, public bodies and employers need to be cognisant of the differential impacts of the pandemic and to build this into decision-making, both at the level of policy and in regard to the treatment of individuals.

## **Employers' Health and Safety Obligations in the Context of COVID-19**

COVID-19 throws up a myriad of legal issues relating to the safety, health and welfare of employees. A range of questions must now be considered as regards, for example, the well-being of employees returning to the employer's premises following the easing of restrictions, as well as similar, but distinct, concerns for employees working from home.<sup>78</sup>

Regardless of whether employees are working from home or not, employers owe a wide range of duties to their employees so as to ensure that their well-being, both physical and psychological, is protected in the course of their work. These duties have various different sources in employment law, including the incremental development of common law

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<sup>77</sup> *Nano Nagle School v Daly* [2019] IESC 63. See further, Desmond Ryan and Mark Bell, 'Disability, Reasonable Accommodation and the Employer's Obligations: *Nano Nagle School v Daly*' (2020) 83 *Modern Law Review* 1059.

<sup>78</sup> For further treatment of Alan Eustace, 'Protecting Workers' Rights during Covid-19 – a Remote Prospect?' COVID-19 Law and Human Rights Observatory Blog (12 June 2020), <https://tcclaw.blogspot.com/2020/06/protecting-workers-rights-during-covid.html> and Desmond Ryan, 'Safeguarding Employees' Health and Welfare: Is Employment Law "Working from Home?"', COVID-19 Law and Human Rights Observatory Blog (22 July 2020), <https://tcclaw.blogspot.com/2020/07/safeguarding-employees-welfare-during.html>.

jurisprudence by decided cases of the courts<sup>79</sup>, decisions of specialist employment law fora/tribunals, as well as specific pieces of legislation designed to protect employees and to ensure that their well-being is safeguarded. Human rights instruments also play a key role.

### **Common Law Sources of Protection for Employees' Well-being: implications for COVID-19**

Turning first to the common law, tort law and contract law are the core sources of protection for employees as regards their safety, health and welfare. Tort duties are imposed upon all employers, whereas specific contractual obligations are assumed, expressly or impliedly, by employers when they enter into contracts of employment with their employees. In practice, however, the distinction between tort and contract in this area can be elusive, since many of the key contractual duties likely to be of relevance here are implied duties such as, for example, the implied contractual duty on employers to act responsibly towards their employees and to provide them with a safe working environment. These effectively mirror and are largely coterminous with several tort law duties.<sup>80</sup> A particularly adaptable implied term in the contract of employment is the employer's implied mutual duty of trust and confidence,<sup>81</sup> a dynamic and flexible implied term that may well come to be engaged in COVID-19-related cases.

Briefly, under both tort and contract law orthodoxy, employers must ensure that their employees enjoy the provision of a safe place of work; the provision of proper equipment; and the provision of a safe system of work. At a minimum, these obligations require employers to give careful thought to the appropriateness of the facilities which employees are expected to use in the course of carrying out their work. Whilst it can be anticipated that courts will be reasonable in what they expect of employers, particularly in the short term, having regard to the unprecedented and unforeseen nature of the pandemic, the overriding

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<sup>79</sup> For detailed treatment in and Irish context, see Bryan McMahon and William Binchy, *Law of Torts* (4<sup>th</sup> edition, Bloomsbury Professional, 2013), chapter 18.

<sup>80</sup> On the specific relationship between negligence principles and the contract of employment see Desmond Ryan, "Bullying, Harassment and Stress at Work", chapter 8 in Ailbhe Murphy and Maeve Regan, *Employment Law* (2<sup>nd</sup> edition, Bloomsbury Professional, 2017), pp 235-236.

<sup>81</sup> For treatment of how this implied term has been developed in the Irish courts, see Desmond Ryan, *Redmond on Dismissal Law* (3<sup>rd</sup> edition, Bloomsbury Professional, 2017), pp 84-98. See also *Kearney v Byrne Wallace Wallace* [2019] IECA 206.

concern of the law of tort and in particular its reference to the employer's duty of care as "non-delegable"<sup>82</sup> suggests that the balance as between inconvenience to an employer and avoiding risk of injury to the employee will tilt heavily in favour of the latter.

Many negligence claims are likely to arise alleging failure by employers to take due care to protect employees and members of their households from being exposed to COVID-19,<sup>83</sup> but other dimensions of employee well-being must also be considered in this context. Isolation and loneliness are foreseeable consequences of COVID-19 for some individuals, particularly, but not exclusively, where they are working from home. Case law in recent years has stressed the importance of employees not feeling abandoned or isolated by their employers, particularly in circumstances where the employer is objectively on notice of concerns or difficulties in the workplace.<sup>84</sup> This and related case law should be considered carefully by employers, particularly in the context of managing complaints or concerns of which they are or ought to be aware. In this regard, employers should proactively consider their Employee Assistance Programmes or similar initiatives designed to provide confidential support to employees.

### **Statutory Protections for Employees in the Context of COVID-19**

In terms of statutory protections for employees which may have to be considered afresh in light of COVID-19, working time legislation must be carefully considered by employers to protect employees from burn-out and to ensure that appropriate work-life balance can be maintained. The right to disconnect will inevitably be the subject of much more detailed focus by courts and tribunals in the context of employees working from home. There have already been decided cases applying the statutory regime to protect employees from overwork, with the Organisation of Working Time Act 1997 being utilised as an instrument to emphasise the

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<sup>82</sup> For recent consideration of the nature of non-delegable duties, see the Supreme Court decision in *Morrissey v Health Service Executive* [2020] IESC 6.

<sup>83</sup> A relevant precedent in this regard – albeit in a different context – may be *Maguire v Harland and Wolff* [2005] EWCA Civ 1 (wife of employee developed mesothelioma following "familial" or secondary exposure due to husband's work clothing; majority of Court of Appeal overturned imposition of liability at first instance).

<sup>84</sup> See for example the decision of the Court of Appeal in *McCarthy v ISS Ireland Ltd (Trading as ISS Facility Services)* [2018] IECA 287.

importance of work life balance: see the 2018 decision of the Labour Court in *O'Hara v Kepak*<sup>85</sup> discussed elsewhere in this chapter.

Specific statutory protections for employees in this context can also be identified in the Safety, Health and Welfare at Work Act 2005, which imposes a wide range of duties on both employers and employees in this regard<sup>86</sup>, which have yet to be tested in the context of COVID-19.

## **Fundamental Rights Considerations and Employee Well-being**

Tellingly, many major human rights instruments include the concept of 'home' as being bound up with concepts of privacy and inviolability which posit a clear separation between one's work and one's home life. Under Article 8 of the European Convention on Human Rights, for example, express protection is given for respect to a person's "private life, home and correspondence". Article 7 of the Charter of Fundamental Rights of the European Union<sup>87</sup> is entitled "Respect for private and family life" and provides:

"Everyone has the right to respect for his or her private and family life, home and communications."

The clear thrust of these provisions is to enshrine into human rights law a protection for the sanctity of a person's home to enable them to develop their identity, dignity and personhood outside the workplace and in a manner that is separate from their identity as an economic actor.

Similarly, under the Irish Constitution there is express protection given for the inviolability of the dwelling under Article 40.5. The case law concerning that article emphasises the value of one's home life being separate from the public sphere that is typically be engaged by the carrying out of a person's occupation or livelihood.<sup>88</sup>

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<sup>85</sup> DWT 1820, Labour Court, 19 July 2018.

<sup>86</sup> Practical guidance on how employers and employees can adhere to these obligations in the WFH context, and answering many of the questions I have identified above, has recently been provided by the Health and Safety Authority and is available here: [https://www.hsa.ie/eng/topics/covid-19/covid-19\\_fags\\_for\\_employers\\_and\\_employees\\_in\\_relation\\_to\\_home-working\\_on\\_a\\_temporary\\_basis/](https://www.hsa.ie/eng/topics/covid-19/covid-19_fags_for_employers_and_employees_in_relation_to_home-working_on_a_temporary_basis/)

<sup>87</sup> 2007/C 303/01.

<sup>88</sup> See for example *Sullivan v Boylan* [2013] IEHC 104.

The observations above on different sources of law have sought to identify emerging questions about how existing legal frameworks may be applied or adapted to protect employees' safety, health and welfare in the context of COVID-19. It is hoped that these will provide useful starting points for stakeholders exploring these and related questions about safeguarding employee welfare during the pandemic.

## **Challenges Presented by Working from Home**

The Covid-19 pandemic has seen more people working from home than at any time since the Industrial Revolution killed off cottage industry – and remote working may well be here to stay. Both employers and employees have incentives to facilitate working from home; however, widespread remote working will bring many challenges for how labour law protects workers' rights.<sup>89</sup> This section will examine some of the major challenges and measures to address these.

### *Health and safety*

The first challenge relates to occupational health and safety. A later section will analyse in more detail the health and safety obligations of employers during the pandemic, but it is worth highlighting here that employers remain responsible for the safety of an employee's working conditions if they are working from home. Employers have duties under tort, contract and statutory law (in particular, the Safety, Health and Welfare at Work Act 2005) in respect of their employees' physical and mental health at work. Already the pandemic has exposed unexpected problems like kitchen chairs not being suitable for prolonged sitting at a computer; as the lockdown continues, more significant welfare problems are likely to be reported – including mental health problems from prolonged isolation or the stress of

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<sup>89</sup> For further discussion of some of the issues raised in this section, see Alan Eustace, 'Protecting Workers' Rights during Covid-19 – a Remote Prospect?' COVID-19 Law and Human Rights Observatory Blog (12 June 2020), <https://tcdlaw.blogspot.com/2020/06/protecting-workers-rights-during-covid.html> and Desmond Ryan, 'Safeguarding Employees' Health and Welfare: Is Employment Law "Working from Home?"', COVID-19 Law and Human Rights Observatory Blog (22 July 2020), <https://tcdlaw.blogspot.com/2020/07/safeguarding-employees-welfare-during.html>.

adjusting to new ways of working.<sup>90</sup> As will be discussed below, remote working also makes it possible to work longer hours, with an accompanying danger of increased occupational stress – one of the most significant health and safety problems in the modern workplace. It is important that employers are made aware of their potential liability for injuries suffered by remote workers whether because of unsuitable working environments or stress, and provide workers with any equipment or working arrangements necessary to alleviate these. There are some taxation measures available to workers and employers to help fund such provisions – these may need to be enhanced if remote working is to remain widespread.<sup>91</sup>

### *Working time*

The next challenge relates to working time. The Organisation of Working Time Act 1997<sup>92</sup> provides for a minimum rest period of 11 hours per day, plus at least one full day off per week, and a maximum average working week of 48 hours. Employers are obliged to keep records to demonstrate they have complied with these requirements in respect of any given worker. The Act defines both ‘working time’ and ‘outworkers’ in terms that capture employees who are working remotely, but there is no specific provision made for the monitoring and recording of working time of outworkers apart from the general obligations of employers under section 25.

Long before Covid-19, there was widespread concern that the ease of mobile digital communication was obliterating the distinction between ‘work’ and ‘home’. Employers may be held liable under the 1997 Act where they are aware that employees are working excessive hours from home – for example, where the company’s software keeps time logs, or emails are sent from work accounts.<sup>93</sup> In such circumstances, the employer is obliged to record this as time worked, and take steps to curtail the employee’s working time to bring it into line with the requirements of the 1997 Act.

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<sup>90</sup> See, for example, Laura Slattery, ‘Working from home: new costs, new stresses and little relief’, *The Irish Times*, 26 May 2020; Mark O’Connell, ‘If you injure yourself working from home, is your employer responsible?’ *The Irish Times*, 29 May 2020. See also *McCarthy v ISS Ireland Ltd* [2018] IECA 287.

<sup>91</sup> For more information, see <https://www.revenue.ie/en/tax-professionals/tm/income-tax-capital-gains-tax-corporation-tax/part-05/05-02-13.pdf>.

<sup>92</sup> See in particular sections 11, 13 and 25.

<sup>93</sup> See, for example, *O’Hara v Kepak Convenience Foods*, Labour Court (determination no DWT1820).



Unfortunately, logging hours actually worked is no panacea. We know from experience with the ‘gig economy’, that does not account for the time spent *waiting for work*, particularly for lower-ranked employees in large organisations whose work is generally not self-directed but assigned by superiors. An employee dependent on work being assigned to him by a superior may know to expect an email or a video-call at some time during the day, but not when, which affects how he spends his ‘free time’ in between. In *Matzak*, the CJEU held that in some circumstances, time spent waiting for work must be counted as ‘working time’,<sup>94</sup> but this is notoriously difficult to monitor. It will be even worse if higher-ranked employees themselves take advantage of remote working to put in flexible hours. Of course, it is easier if an employer simply operates on the premise that an employee is available to work at all times during normal business hours – but even before widespread remote working, it was not at all uncommon for managers in some industries to contact employees at all times of the day and night. In any event, it will be difficult to stop employees working extra hours if they want (or feel pressured) to, even if they have ‘clocked out’ at 5pm.

### *Enforcement*

The risks to health and safety and working time protections are compounded by the difficulty of enforcement. Both the occupational safety and working time regimes rely to a certain extent on inspections of workplaces. For example, under section 8 of the 1997 Act, inspectors appointed by the Minister have the power to ‘enter at all reasonable times any premises or place where he or she has reasonable grounds for supposing that any employee is employed in work’. However, sub-section (4) provides: ‘An inspector shall not, other than with the consent of the occupier, enter a private dwelling (other than a part of the dwelling used as a place of work) unless he or she has obtained a warrant from the District Court under subsection (7) authorising such entry.’<sup>95</sup> The public inspection system assumes that where people live and work on the same premises, there is a clear delineation between the two. While this might be more or less true for a workplace like a family farm or a shop with an apartment on the upper floor, it does not reflect the experience of the hundreds of thousands

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<sup>94</sup> C-518/15 *Matzak*, in particular [53] ff; see also Leszek Mitrus, ‘Potential implications of the *Matzak* judgment (quality of rest time, right to disconnect)’ (2019) 10(4) *European Labour Law Journal* 386, 394 ff.

<sup>95</sup> Safety, Health and Welfare at Work Act 2005, section 64 provides for a similar regime.

of people who, since the pandemic hit, have cobbled together ‘offices’ in the corner of their bedroom or at the kitchen table.

There is no easy solution for public enforcement: inspectors could begin visiting more private residences – which will require, at great public expense, more inspectors and more sittings of the District Court to obtain warrants. Alternatively, the Act could be amended to remove the requirement of a warrant, but that is likely to conflict with the constitutional protection of the dwelling. Inspectors could rely on employer records to verify that businesses are compliant with their obligations in respect of remote workers – but the above has already highlighted the difficulties with adequately recording remote working time, and if anything health and safety conditions of remote workers are even harder to record accurately. If the evidence necessary to convict employers of an offence under either regime is now to be found in the homes of workers rather than on a central business premises, we can surely expect enforcement to decline.

## **Recommendations**

One promising mechanism to protect the right to leisure time from encroachment by ‘always-on’ working is the ‘right to disconnect’ which has been recognised in several jurisdictions.<sup>96</sup> Under a law that came into force in 2017, French businesses with more than 50 employees have been obliged to enter negotiations with trade unions to restrict the use of after-hours email and other communications. Italy adopted a similar law in 2017, and Spain in 2018. The International Labour Organisation (‘ILO’) has called for more countries to follow suit.<sup>97</sup> If remote working is going to become more deeply entrenched in Ireland as a result of COVID-19, it may be time to draw on such experience in other jurisdictions and put in place regulations on working time giving effect to a legal right to disconnect.

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<sup>96</sup> For example, *Loi n° 2016-1088 du 8 août 2016 relative au travail* (France); *Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales* (Spain); *Legge 22 maggio 2017, n 81* (Italy). For further discussion see Paul M Secunda, ‘The Employee Right to Disconnect’ (2019) 9 *Notre Dame Journal of International and Comparative Law* 1; Frank Hendrickx, ‘From Digits to Robots: The Privacy-Autonomy Nexus in New Labor Law Machinery’ (2019) 40 *Comparative Labor Law & Policy Journal* 365; Matteo Avogaro, ‘Right to Disconnect: French and Italian Proposals for a Global Issue’ (2018) 4 *Law Journal of Social & Labour Relations* 110.

<sup>97</sup> *Working Anytime, Anywhere: The Effects on the World of Work* (ILO 2017).

One of the biggest health and safety issues associated with working from home is the increase in the level of occupational stress: this is particularly so where workers have to negotiate limited access to company resources, technological difficulties, and the burden of providing childcare all while trying to work. This tends to lead to higher levels of so-called ‘techno-stress’ and burnout. Therefore, the right to disconnect is as much a health and safety protective measure as it is concerned with protecting leisure time for its own sake.

As cases like *O’Hara v Kepak Convenience Foods* indicate, workers already enjoy the right in principle to refuse work after hours, where it would bring them beyond statutory or contractual limits on working hours or interrupt the 11-hour rest period to which workers are entitled. However, the ILO report and the experience of other jurisdictions suggests more targeted legislative action may be appropriate, particularly to help overcome the ‘always-on’ culture that might see employees pressured into working after-hours, with the associated negative effects on their health. In the absence of robust public enforcement mechanisms for labour law where employees are working from home, specific legislation on the right to disconnect would be of central importance.

## **Adjudication of Employment Disputes in the Context of COVID-19**

COVID-19 has not only affected the substantive law governing employment. It has also had a significant impact on the architecture for its enforcement. This contribution examines how the framework for the adjudication of employment and equality law disputes in Ireland has responded to the pandemic.

Since its establishment in 2015, the Workplace Relations Commission (‘WRC’) has served as the first instance forum for the determination of the vast majority of employment and equality complaints and disputes. Parties have a right of appeal in respect of a decision of a WRC adjudication officer, which, subject to certain exceptions,<sup>98</sup> lies to the Labour Court.<sup>99</sup> Any further appeal to the High Court is limited to a point of law.<sup>100</sup> According to its Annual

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<sup>98</sup> See, e.g., section 26, Equal Status Act 2000, which provides for an appeal to the Circuit Court.

<sup>99</sup> Workplace Relations Act 2015, section 44.

<sup>100</sup> Workplace Relations Act 2015, section 46.

Report, in the course of 2019, the WRC received 8,309 adjudication complaint files, held 5,000 adjudication hearings and issued 3,000 adjudication decisions.<sup>101</sup>

Following the restrictions on activity announced by the Government on 12 March 2020, the WRC cancelled adjudication hearings and face to face mediations.<sup>102</sup> The Labour Court also cancelled hearings around this time.<sup>103</sup> While the Irish courts have remained open throughout this period, activity has been significantly reduced and focused on urgent matters, particularly at the High Court and Circuit Court levels which deal with most employment disputes.<sup>104</sup> Thus, at a time of great turbulence in employment as a result of the pandemic, which saw “*the largest monthly increase in unemployment in the history of the State*”,<sup>105</sup> the pandemic significantly limited the activity of the State’s main fora for the resolution of employment law disputes.

Against this backdrop, the WRC published a *Consultation Paper on Remote Hearing and Written Submissions* and sought submissions from stakeholders and interested parties on dealing with adjudication complaints in the context of the COVID-19 restrictions. In this Consultation Paper, the WRC noted that, while adjudication hearings had been cancelled, it was still providing mediation of individual complaints and conciliation of collective disputes by telephone. The WRC then identified a number of measures which could allow it to continue to perform its functions in the context of the COVID-19 restrictions:

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<sup>101</sup> Workplace Relations Commission, Annual Report 2019, available online at [https://www.workplacelrelations.ie/en/publications\\_forms/corporate\\_matters/annual\\_reports\\_reviews/annual-report-2019.pdf](https://www.workplacelrelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2019.pdf).

<sup>102</sup> This measure initially applied until 29 March 2020 and was subsequently extended: see Workplace Relations Commission, *Covid-19 WRC Cancellations (12 March 2020)* and *COVID-19 Update - 24 March 2020*, available online at [https://www.workplacelrelations.ie/en/news-media/workplace\\_relations\\_notices/covid.html](https://www.workplacelrelations.ie/en/news-media/workplace_relations_notices/covid.html). During this period, parties could continue to submit adjudication complaints and the WRC Information & Customer Service Call Centre remained open: see Workplace Relations Commission, *COVID-19 Update - 18 March 2020*, available online at [https://www.workplacelrelations.ie/en/news-media/workplace\\_relations\\_notices/covid-19-update-18-march-2020.html](https://www.workplacelrelations.ie/en/news-media/workplace_relations_notices/covid-19-update-18-march-2020.html).

<sup>103</sup> <https://www.labourcourt.ie/en/useful-information/covid-19-updates/covid-19-update-17-april-2020.html>

<sup>104</sup> See Keena, “Court system could be changed for the better by pandemic”, *The Irish Times*, 27 August 2020.

<sup>105</sup> See Coates, Byrne, Brioscú, Corcoran, Cronin, Keenan and McIndoe-Calder, “The Initial Labour Market Impact of COVID-19” (2020) 4 *Economic Letters*, p. 4, available online at [www.centralbank.ie/publication/economic-letters](http://www.centralbank.ie/publication/economic-letters).

- (i) First, the WRC referred to section 47(1) of the Workplace Relations Act 2015 – as well as the analogous provisions of other statutes<sup>106</sup> – which provided a statutory basis for the disposal of complaints by way of written procedure.
- (ii) Secondly, the WRC stated that, subject to certain limitations,<sup>107</sup> it had the power to conduct hearings remotely by way of video-conference where this was necessary and appropriate.<sup>108</sup> However, the WRC considered that it would be prudent to proceed with remote hearings “*on a pilot basis, with the consent of the parties, only in relation to what might be deemed more “straightforward cases”*”.

In both cases, the WRC identified certain types of complaints which would be most suitable for disposal by way of written procedure or virtual hearing (for example, complaints relating to pay and hours of work, terms and conditions of employment) and also those which would be less suitable for adjudication in this manner (in particular, complaints under the Unfair Dismissals Acts, the Employment Equality Acts and the Protected Disclosures Act which frequently involve material disputes of fact and require oral evidence and cross-examination). In all cases, the WRC recalled its obligation to “*conduct the investigation process in accordance with fair procedures and constitutional justice*”.

The Consultation Paper shone a light on the very significant challenges that COVID-19 posed for the adjudication of employment and equality disputes, particularly in managing the move from traditional to alternative models of dispute resolution. Following the consultation process, in mid-June 2020, the WRC published a Service Delivery Matrix on the delivery of mediation and adjudication services during COVID-19. The WRC asked parties and their representatives “*to be positively disposed to complaints being adjudicated upon via both*

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<sup>106</sup> The WRC refers to section 8B of the Unfair Dismissals Act 1977, section 79(2A) of the Employment Equality Act 1998, and section 25(2A) of the Equal Status Act 2000.

<sup>107</sup> The Consultation Paper referred to the power under section 41(10) of the 2015 Act – and analogous provisions of other statutes – to compel the attendance of a witness.

<sup>108</sup> Whereas section 39(2)(b) of the 2015 Act permitted a mediation officer to convene a meeting or to “*employ such other means as he or she considers appropriate for the purpose of resolving the complaint or dispute*”, section 41 of the 2015 Act gave no express power to adjudication officers to conduct hearings virtually. However, the WRC considered that it enjoyed such a power based on “*common law implied powers to offer parties an effective remedy without undue delay under Irish and EU law, and the powers provided for in Section 41(5) of the WRA 2015 read together with Section 11(4) of the Act*”.

written proceedings and remote hearings”. The adjudication of complaints on this basis would be subject to the consent of the parties, at least during the initial pilot phase.<sup>109</sup> At the same time, the WRC announced that, in line with public health guidelines and the Government’s *Roadmap to Opening Society and Business*,<sup>110</sup> it would recommence limited face-to-face hearings in WRC premises from 20 July 2020, subject to appropriate public health protocols.<sup>111</sup>

For its part, the Labour Court began to conduct virtual hearings for the first time in June 2020, primarily in industrial relations cases.<sup>112</sup> On 21 July 2020, the Labour Court recommenced face-to-face hearings albeit on a limited basis and subject to appropriate public health protocols.<sup>113</sup> However, “by reason of the exceptional circumstances that have been put in place to ensure minimum presence at hearings”, the Labour Court announced that there was no physical capacity for persons not directly involved to attend its employment rights hearings which would be “private for the foreseeable future”.<sup>114</sup>

In this way, the WRC and the Labour Court sought to balance the limitations on its capacity to conduct face-to-face hearings with the need for fair and efficient determination of complaints. In circumstances where remote hearings were being trialled for the first time, and the 2015 Act did not confer an express power to conduct hearings on this basis, the WRC’s reliance on the consent of the parties to proceed by way of remote hearing is understandable.

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<sup>109</sup> Workplace Relations Commission, *Mediation and Adjudication During Covid-19*, available online at [https://www.workplacerelations.ie/en/news-media/workplace\\_relations\\_notices/revise-matrix-for-dealing-with-complaints.pdf](https://www.workplacerelations.ie/en/news-media/workplace_relations_notices/revise-matrix-for-dealing-with-complaints.pdf).

<sup>110</sup> Department of the Taoiseach and Department of Health, *Roadmap to Opening Society and Business*, <https://www.gov.ie/en/news/58bc8b-taoiseach-announces-roadmap-for-reopening-society-and-business-and-u/>.

<sup>111</sup> In mid-July 2020, the WRC published guidance for visitors on the conduct of face-to-face hearings, available online at [https://www.workplacerelations.ie/en/news-media/workplace\\_relations\\_notices/face-to-face-hearings-guidance-note-16-july.pdf](https://www.workplacerelations.ie/en/news-media/workplace_relations_notices/face-to-face-hearings-guidance-note-16-july.pdf).

<sup>112</sup> Labour Court, *COVID-19 Update 18 May 2020*, available online at <https://www.labourcourt.ie/en/useful-information/covid-19-updates/covid-19-update-18-may-2020.html>.

<sup>113</sup> Labour Court, *Hearings in Lansdowne House COVID-19 Protocols* available online at <https://www.labourcourt.ie/en/useful-information/covid-19-updates/hearings-in-lansdowne-house-covid-19-protocols.html>.

<sup>114</sup> Section 44(7) of the Workplace Relations Act 2015 provides “[p]roceedings under this section shall be conducted in public unless the Labour Court, upon the application of a party to the appeal, determines that, due to the existence of special circumstances, the proceedings (or part thereof) should be conducted otherwise than in public”.

However, in view of the ongoing limitations on the number of face-to-face hearings, the WRC's capacity to adjudicate on complaints would be significantly constrained if it were dependent on the consent of the parties in every such case into the future. In view of the restrictions on the WRC's mediation and adjudication functions since March, the backlog of cases would continue to rise significantly, when timely recourse to the WRC may be needed more than ever.

Against this backdrop, on 6 August 2020, the Oireachtas enacted the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 which, among many other measures, provided an express statutory basis for the conduct of remote hearings by the courts and statutory bodies.<sup>115</sup> In particular, section 31 of the 2020 Act allows a "designated body"<sup>116</sup> to conduct a hearing provided for by statute by way of remote hearing.<sup>117</sup> The power to hold a hearing by way of remote hearing does not, however, apply where the designated body "of its own volition, or following the making of representations by a person concerned, is of the opinion that the application of the subsection to the hearing would be unfair to the person, or would otherwise be contrary to the interests of justice".<sup>118</sup> While no order has yet been made to designate the WRC or the Labour Court as a body for the purposes of this provision, assuming that these bodies are so designated in due course, this would put beyond any doubt their power to conduct adjudication by way of remote hearing.

As the pandemic has progressed, it has become clear that the transition from face-to-face to remote or alternative forms of meeting and hearing is not merely a short-term phenomenon. To date, the approach of the statutory bodies charged with adjudication of employment and

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<sup>115</sup> See especially Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, section 11 (remote hearing of civil proceedings) and section 26 (remote hearing of appeal proceedings – criminal). The relevant provisions of the Act were commenced on 21 August 2020: S.I. No. 306/2020 - Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (Commencement) Order 2020.

<sup>116</sup> Section 31(3) allows a Minister to designate, by order, a body for the purposes of section 31. As of 31 August 2020, no such orders had been made.

<sup>117</sup> Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, section 31(1). Section 31(5) provides that nothing in the section "shall be construed as operating to interfere with the power of a body under an enactment or rule of law to hold hearings before it by remote hearing". A remote hearing is defined as a hearing where the participants are not all in the one place, and one or more of the participants participate in the hearing by means of electronic communications technology: Section 31(6).

<sup>118</sup> Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, section 31(2).

equality disputes has been careful to limit remote hearings to those cases which involve relatively straightforward factual and legal issues, relying primarily on the consent of the parties and emphasising the importance of fair procedures. The importance of face-to-face hearings, particularly in cases involving a significant amount of oral evidence and material disputes of fact, has been recognised. At the same time, the right to a hearing within a reasonable time, as an essential element of access to justice in employment and equality matters, must be taken into account.<sup>119</sup> With a significant backlog as a result of the restrictions in place, and the possibility of an increased volume of complaints arising from the rise in unemployment and related issues, we are likely to witness increased recourse, of necessity, to remote hearings for employment and equality disputes in the coming months and years. As we do so, traditional ideas about the types of cases which are suitable for adjudication in this manner are likely to come under pressure and evolve, with an increased focus on how to ensure fair and effective hearing in the context of a remote hearing.<sup>120</sup>

## Recommendations

- There is a need for a comprehensive review of employment legislation to ensure that it can be applied effectively to those who perform most or all of their work remotely, both in terms of the substantive law and the process for the determination of disputes.
- Ireland is required to implement the EU Work-Life Balance Directive by 2 August 2022. This should be used as an opportunity to revise the legal framework on flexible working for all workers, taking into account the experience of widespread remote working since March 2020, and ensuring an effective right to disconnect for all workers.

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<sup>119</sup> Within the context of disputes falling within the scope of EU law, this is guaranteed under Article 47(2) of the Charter of Fundamental Rights of the European Union.

<sup>120</sup> For an interesting discussion of some of the tensions to which remote hearings give rise, see the decision of the Ontario Labour Relations Board in *Labourers' International Union of North America, Local 183 v. Innovative Civil Constructors Inc., Eiffage Innovative Canada Inc. and/or Eiffage Infrastructures Canada Inc., Hired Resources, and The Building Union of Canada*, Case No. 2788-17-U, available at [http://www.olrb.gov.on.ca/Decision/2788-17-U\\_June\\_22\\_2020.pdf](http://www.olrb.gov.on.ca/Decision/2788-17-U_June_22_2020.pdf).



- Employers must reflect on the scope of their duty of care to support their employees who are working remotely, with a particular emphasis on safeguarding employees' mental health.

## **Conclusion**

COVID-19 has severely impacted workers, including redundancies and changes in the workplace. In deciding on criteria for redundancy, it is important to keep in mind that some employees enjoy protected characteristics in both the private and public sectors. There are statutory duties on employers that guard against direct and indirect discrimination in managing the workforce; it is essential to not lose sight of them given that the pandemic is impacting specific groups in different ways. Other than prohibiting direct and indirect discrimination, there is a duty to provide reasonable accommodation for workers with disabilities.

With respect to the workforce, common law, statutory law, constitutional and human rights have provisions that may be applied or adapted to protect employees' safety, health and welfare in the context of COVID-19. Decisions made by employers and managing complaints would have to be made in the light of such provisions. Specifically, the phenomenon of remote working has brought about its own set of challenges. This includes occupational stress due to the possible encroachment of the right to leisure time by an 'always on' culture while working from home. Limited access to company resources, technological difficulties and the burden of providing childcare all point to health and safety issues that need to be addressed. Drawing on the right in principle to refuse work after hours in Irish jurisprudence, and legal developments on a right to leisure in other jurisdictions, a right to disconnect could be identified. Having said that, provisions on working time could be specifically fleshed out in pointed legislation.

Substantive provisions, however, would have little teeth without an effective process for enforcement and adjudication of disputes. Given limitations on the number of face-to-face hearings and restrictions on the WRC's mediation and adjudication functions, there needs to

be clarity on recognising the WRC and the Labour Court as a “designated body” to conduct a hearing provided for by statute by way of remote hearing.





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## **CHAPTER 4: THE SOCIAL PROTECTION RESPONSE TO COVID-19**

**Mel Cousins**

### **Introduction**

The Irish social protection response to COVID-19 has consisted of two main actions:

- 1) The COVID-19 Pandemic Unemployment Payment (PUP); and
- 2) Illness Benefit (IB) for COVID-19 absences.

These are administered by the Department of Social Protection. These are examined in this chapter. There is also an Employment Wage Subsidy Scheme (replacing the Temporary COVID-19 Wage Subsidy Scheme from 1 September 2020) operated by the Revenue which is not discussed in detail here.

The social policy, and indeed, economic significance of the social protection response to the COVID crisis cannot be overstated and the Department of Social Protection deserves considerable credit for both the policy response to such an urgent crisis and the ability to implement it in practice. Government departments need to recognise the importance of the rule of law and transparency in the implementation of social services and the use of data and ensure that these are complied with in practice. Given the ongoing pandemic and the deeply divided Oireachtas, it will be difficult to chart a consistent path out of such supports so as to return to a 'normal' labour market.

## The Pandemic Unemployment Payment

The COVID-19 Pandemic Unemployment Payment ('PUP') is a weekly payment to employees and the self-employed who lost their job on (or after) 13 March 2020 due to the COVID-19 pandemic. It was initially in place until August 2020 but was subsequently extended to April 2021. However, it is intended that new applications for PUP will not be accepted after the end of 2020.

It originally operated on an administrative basis (although see below) but has now been put on a statutory basis in the Social Welfare (COVID-19) (Amendment) Act 2020 (signed into law on 5 August 2020) which amended the Social Welfare (Consolidation) Act 2005. The Act provides that for Regulations to set out the details of some aspects of the PUP but these have not been adopted or are not available at the time of writing.

A person is eligible for PUP if he or she

- has attained the age of 18 years and has not attained pensionable age (currently 66),
- on or after 13 March 2020, the person was an employed or self-employed contributor in the week immediately before she ceased to earn an income from the employment concerned and lost her employment as a direct consequence of COVID-19 (including the adverse effects of COVID-19 on the business of her employer or self-employment and the adverse effects of measures required to be taken by her or her employer in order to comply with, or as a consequence of, Government policy to prevent, limit, minimise or slow the spread of infection of COVID-19),
- satisfies the contribution conditions which are that she have at least one paid contribution in the 4 weeks immediately before claiming the PUP or is a self-employed contributor,
- is capable of work, and
- is genuinely seeking, but is unable to obtain, employment suitable for her having regard to her age, physique, education, normal occupation, place of residence and family circumstances (however, unlike the standard jobseekers' payments there is no requirement that a person be 'available' for work).

A person must not be an employed contributor whose employer is, or was, in receipt of the temporary wage subsidy and must not be engaged in insurable employment.

The legislation states that, in the case of an employed contributor, a person is not considered to have lost employment (for the purposes of the PUP) if she (a) has lost the employment concerned through her own misconduct or has voluntarily left employment, (b) refuses an offer to return to the employment concerned, (c) has refused an offer of suitable employment, (d) has failed or neglected to avail of any reasonable opportunity of obtaining suitable employment, or (e) has failed or neglected to avail of any offer of support from, or proposed by, the Minister to enable to improve her prospects of obtaining employment.

Given the enormous volume of cases and the changing labour market (as specific sectors are opened up and closed down again), it is not clear that the Department of Social Protection has been able to enforce these conditionality rules in relation to seeking employment in any co-ordinated manner to date.

It is specified that a cross-border worker who works in Northern Ireland but who lives in the Republic of Ireland can claim PUP but that such a worker who lives in Northern Ireland but works in the Republic cannot.<sup>121</sup> This is in line with EU rules for such ‘frontier’ workers (under EU Regulation 883/2004) who, contrary to the usual rules, claim unemployment benefits in their state of *residence*. However, this would not seem to apply to a person who lives in Northern Ireland (or indeed another EU country) and works (and is insured) in the Republic but returns home less than once a week. Such person should arguably be entitled to the PUP under EU law.

It has been confirmed that people in direct provision can also access PUP. It appears that the Department of Social Protection had previously decided that no payment should be made to such persons although the legal basis for this refusal was, at best, unclear.<sup>122</sup>

As noted above, it appears that the PUP was originally operated on an administrative basis. However, the 2020 Social Protection Act refers to the pre-statutory PUP as having been made

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<sup>121</sup> A cross border or frontier worker is defined as any employed or self-employed person who works in one jurisdiction and lives in another to which he or she returns as a rule daily or at least once a week.

<sup>122</sup> Liam Thornton, *Challenging the Unlawful Exclusion of Asylum Seekers from Pandemic Unemployment Payment*, available at: <https://liamthornton.ie/2020/06/04/challenging-the-unlawful-exclusion-of-asylum-seekers-from-pandemic-unemployment-payment/>

under section 202 of the Social Welfare (Consolidation) Act 2005. This allows for the payment of supplementary welfare allowance in an urgent case. It is not clear that section 202 provided an appropriate legal basis for the payment of PUP.

Given the need to put in place a payment urgently, it was not possible to introduce a payment graduated according to previous earnings and a standard payment of €350 per week was initially made to all claimants. This had the result that some people whose income was less than this from employment were in receipt of a social welfare payment higher than their pay. From Phase 3 of the Roadmap, a two-level payment structure was introduced to link the PUP to prior earnings (from 7 July). About 27% of PUP recipients were in receipt of gross earnings of less than €200 per week (mainly, it appears due to part-time work). For these claimants, the PUP rate was €203 per week, the basic rate of payment of the Jobseeker's Benefit scheme. For all other claimants, the rate remained at €350.

Slightly more than half of those of the lower payment are women (53%). It is interesting to note that the introduction of the lower rate has not led to a more rapid fall in the numbers on the lower payment though, of course, more detailed analysis would be required to assess if the change had an impact taking account of the different characteristics of those on the different rates (gender, sector of employment, etc.).

Further changes were introduced in September 2020 with further phasing back planned for 2021. From 17 September 2020 until 31 January 2021 the Pandemic Unemployment Payment will be paid at 3 rates.

- People who earned less than €200 per week will continue to receive a PUP of €203 per week
- People who earned between €200 and €300 per week will see the rate reduced to €250 per week
- People who earned over €300 per week will receive €300 per week.

From 1 February 2021, the plan is to align the two lower rates at the standard jobseeker rate of €203, with the higher rate reduced to €250 per week. The intention seems to be to transition any remaining claimants in April 2021 onto the standard jobseeker payments (assuming they meet the qualifying conditions).

## Illness benefit (COVID-19)

Illness benefit (COVID-19) is a payment for employed and self-employed persons who are advised to self-isolate by a doctor or the HSE or have been diagnosed with COVID-19 (Coronavirus). Unlike standard illness benefit ('IB') (which only applies to insured employees), it also applies to the self-employed. The personal rate for this payment is €350 per week, as compared with the normal Illness Benefit rate of €203.

To receive the enhanced payment, one must be:

- self-isolating on the instruction of a doctor or the Health Services Executive (HSE) or diagnosed with COVID-19 (Coronavirus), and
- be absent from work and confined to your home or a medical facility

The legal basis for the payment is the Social Welfare (Consolidation) Act 2005 as amended by the [Health \(Preservation and Protection and other Emergency Measures in the Public Interest\) Act 2020 Act](#). Relatively little of the detail of the payment is set out in the Act and much is left to implementing regulations to be adopted by the Minister for Social Protection.<sup>123</sup> In legal terms, IB (COVID 19) is simply a form of illness benefit and it would appear that the general rules in relation to illness benefit should apply to it, subject of course to the specific provisions set out in the 2020 Health Act and the Regulations.

The 2020 Health Act (as regards social protection) initially was in effect until 20 May 2020 but this may be extended by the Government and has been extended until April 2021.

A person is entitled to IB (COVID) if she is

incapable of work, or is deemed to be incapable of work, by virtue of—

(a) being certified in the prescribed manner by a registered medical practitioner as being a person—

(i) who is diagnosed with COVID-19, or

(ii) who is a probable source of infection of COVID-19,

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<sup>123</sup> [SI 97 of 2020](#).



(b) having been notified, in the prescribed manner, by a medical officer of health or such other person as may be prescribed, that he or she is a probable source of infection of COVID-19,

(c) being deemed to be a probable source of infection of COVID-19, or

(d) being a person in respect of whom an order under section 38A(1) of the Health Act 1947 is in force (This provides for the detention and isolation of persons in certain circumstances in relation to limiting the spread of COVID-19).

Thus, a person need not be actually incapable of work but can, as in the case of standard IB, be deemed to be incapable of work in certain circumstances. The Regulations provide that that a person who is not incapable of work shall be deemed to be incapable of work by reason of a specified infectious disease by virtue of (a) being certified by a doctor as being a person who is a probable source of infection of COVID-19, (b) having been notified by a medical officer of health that he or she is a probable source of infection of COVID-19, or (c) being a person in respect of whom an order under section 38A(1) of the Health Act 1947 [concerning the detention or isolation of a person necessary to prevent the spread of COVID-19] is in force.

One potential issue is that while the Department of Social Protection website states that a person 'self-isolating on the instruction of a doctor or the HSE' will be entitled to payment, the Act and Regulations state that a person must be a *probable* source of infection. While self-isolating persons are presumably a *possible* source of infection, it is difficult to see that they could be classified as a *probable* source in many cases. Amendments to include 'possible or probable' in the section were ruled out of order during the passage of the Bill, presumably as a theoretical charge on the Exchequer. This issue could perhaps have been avoided had the wording of the current Regulations been used.

Article 20 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations, 2007 provides that a person is deemed to be incapable when s/he is under medical care for a disease or disablement and when it is certified by a doctor that because of the disease or disablement he or she should not work and he or she does not work. Arguably, a person self-isolating on the instructions of a doctor could be considered to be *under medical care* and thus be deemed to be incapable. However, it seems very unlikely that the award of IB to persons who are only possibly infectious will be challenged.

Regulations provide that a person is not entitled to benefit in respect of any day of incapacity for work, if he or she is entitled to full wages, salary, or paid sick leave and is entitled to a reduced rate or reductions in the rate of illness benefit in respect of any day of incapacity for work, if he or she is entitled to reduced wages, salary, or paid sick leave, for those same days, which is less than the rate of illness benefit to which he or she would otherwise be entitled. The normal requirement of six waiting days before a person becomes entitled to IB does not apply in this case.

The Act provides that the Minister may introduce regulations to amend the PRSI contribution conditions which must be satisfied to qualify for IB claims arising from COVID-19. The Regulations now provide that where a person is entitled to benefit if, immediately before claiming illness benefit, she

(a) is an employed contributor who (i) has qualifying contributions in respect of not less than 1 contribution week in the 4 weeks immediately before claiming illness benefit, and (ii) has not engaged in employment since the date of her claim for illness benefit,

or

(b) is a self-employed contributor, or has verified that she was self-employed immediately before claiming illness benefit by making a declaration that she (i) was engaged in self-employment immediately before claiming illness benefit, (ii) has not engaged in self-employment since the date of her claim, and (iii) will have reckonable income in the current contribution year and will be liable for the payment of a self-employment contribution.

The Act allows the Minister to vary, by regulation, the rate of IB payment to a claimant who meets the qualifying requirements for IB arising from COVID-19. This was originally intended to be €305 per week but was subsequently increased to €350 i.e. €147 more than the standard personal rate.

Section 6 of the 2020 Health Act gives the Minister sweeping powers to make regulations ‘for the purposes of giving full effect to the relevant provisions’. In particular, it states that

such regulations may, in particular, but without prejudice to the generality of the foregoing, provide for all or any of the following:

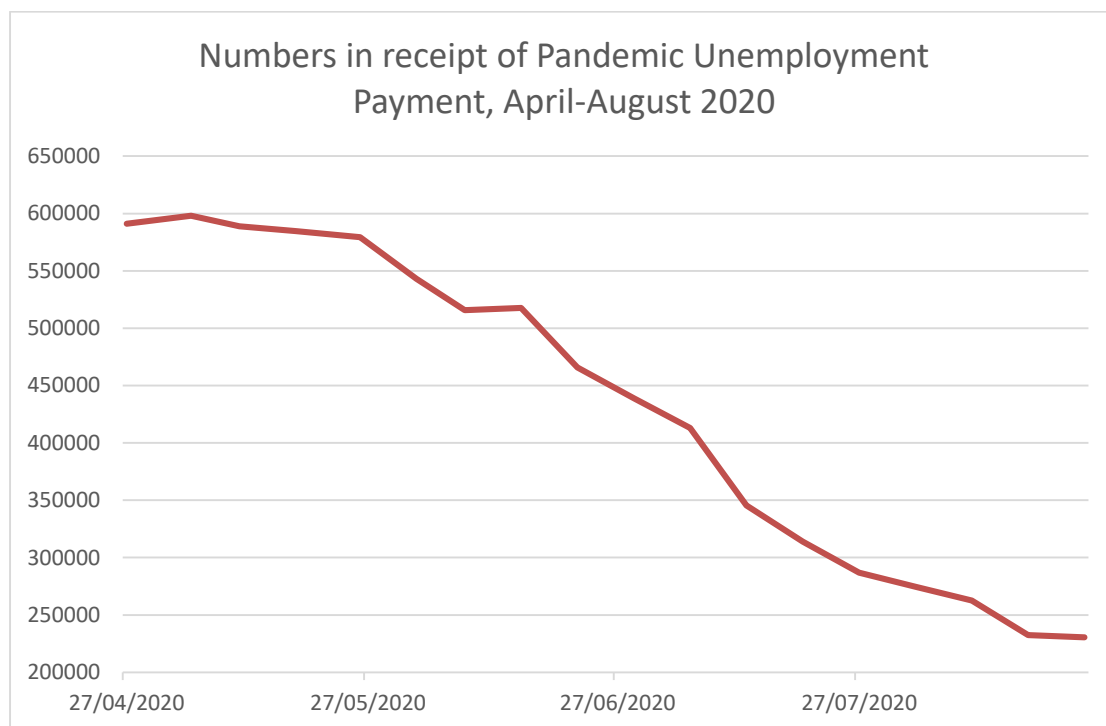
- (a) the matters referred to as prescribed by the relevant provisions;
- (b) the procedure by which, and manner in which, a person is certified to be a relevant person;
- (c) notwithstanding the generality of paragraph (b), the procedure by which, and manner in which, a person is deemed to be a probable source of infection of COVID-19;
- (d) the requirements in relation to which, and the manner in which, a relevant person shall notify the Minister of the circumstances of his or her incapacity, or deemed incapacity, for work;
- (e) additional conditions for entitlement of a relevant person to illness benefit;
- (f) such additional, incidental, consequential or supplemental matters as the Minister considers necessary or expedient for the purposes of giving effect to the relevant provisions.

In an attempt to protect these powers from accusations of allowing the Minister to legislate, section 40A(2) (as inserted) does set out several general policies and principles to which the Minister should have regard, including 'the nature and potential impact of COVID-19 on individuals, society and the State'. While there might, in theory, be some issues concerning the delegation of legislative powers to the Minister (in the light of art 15.2 of the Irish Constitution), it seems unlikely that any challenge will be made to the legislation and, even if it was, one might expect that the courts would adopt a flexible approach given the context (which is specifically emphasised in the preamble to the Act).

## **Trends in Claims**

There has been a steady fall in PUP from a peak of almost 600,000 in early May 2020 to 230,400 in late August (almost half of recipients are women (48%)) (data are as of 24 August 2020). This represents a 61% drop from the peak in early May 2020. This is in addition to an estimated 370,000 employees are currently being supported by the Temporary Wage Subsidy Scheme.

In addition, there are 1,011 people receiving a COVID-19 related Illness Benefit payment from the Department. These payments are in addition to the 244,600 people who were on the Live Register and mainly receiving the standard jobseekers' benefit and allowance. Most are not *directly* related to COVID-19 though the Live Register includes a small number of applicants for the PUP who have been advised to apply for jobseekers benefits if they have dependants (and would, therefore, receive a higher rate of payment). However, the Live Register figure is currently showing a significant increase which would suggest that the pandemic may be having an indirect impact on the labour market with jobs not being created due to the crisis.



The sector with the highest number of people in receipt of the PUP is now accommodation and food service activities (21% of the total), followed by the wholesale and retail trade (14%) and administrative and support service activities (10%). The impact of the reopening of the economy can be seen in areas such as construction. Since the peak on 5 May 2020, the number of recipients from the construction sector has dropped by 78%, manufacturing by 67% and wholesale and retail trade by 64%.

## Controls on Payment

The introduction of new payment schemes on such a massive basis was obviously a major challenge for the Department of Social Protection. One of the key issues has been to put in place control measures to ensure that, insofar as possible, payments are only made to those who are entitled to receive supports. According to the Department's website, these measures have included:

- Integrity checks made against records already held by DEPARTMENT OF SOCIAL PROTECTION including Public Service Information data and cross checks with payments on other schemes. These help to verify if a person is who they claim to be and that they are entitled to claim payment
- A reconciliation process between the Department's payment file and Revenue's payment file for the COVID-19 Temporary Wage Subsidy Scheme to avoid duplicate payments
- A prior employment status check by comparing all claims for PUP against prior earnings and employment records from Revenue data
- Departmental contact with recipients to ensure that they continue to satisfy the eligibility criteria of the COVID-19 Pandemic Unemployment Payment
- Data analytics, and
- The Department's inspection staff participating with Garda and Customs staff, in security checks on major transport routes and transport hubs.

One area where issues have arisen has been in relation to checks at airports to ensure that payments are not being made where persons have left the country and would not be entitled to benefit. In principle, of course, such measures are perfectly legitimate though issues have arisen about the basis on which the Department obtains information as to their departure.

This appears to be from social welfare inspectors questioning people in Dublin airport and other ports. The basis for this is section 250(16B) of the Social Welfare (Consolidation) Act 2005 but, as several commentators have noted, this requires the inspector to have "reasonable grounds to believe that there has been a contravention of this Act". This would seem to rule out a general 'stop and question' of persons travelling through Dublin airport. However, given that about 2,500 cases have been identified, the Department might argue

that it has reasonable grounds to believe that particular flights will include people who are contravening the Act. Whether this would stand up in court may be more debateable. The Data Protection Commissioner has now expressed “serious doubts” over the lawfulness of the collection of personal data in this manner.

## **Holiday Payments**

One area, linked to the issue of data collection in airports, where controversy arose was in relation to payment of PUP (and indeed other jobseekers payments) to persons who went on holidays abroad. It appears that, sometime in June 2020, a decision was made to change the existing rules under which jobseekers were allowed to take 2 weeks holidays abroad. This was set out in Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 in the case of jobseeker’s benefit and on an administrative basis in the case of jobseeker’s allowance. Whether this was an internal decision or linked to broader government policy to discourage travel (e.g. rules in relation to payment of public servants) is unclear. While one can agree or disagree with it, this was a perfectly legitimate decision, but one which required a change in the existing rules.

On 30 June 200, as FLAC (Free Legal Advice Centres) has shown, the Department issued a circular on the issue which purported to suspend travel abroad and to say that people who returned from such travel could not be considered to be genuinely seeking work during the period of two weeks self-isolation.<sup>124</sup> There were several problems with this. First, the circular purported to ‘suspend’ the provisions of SI 142 of 2017. Of course, a circular cannot amend a Ministerial Regulation. In addition, the question of whether somebody is genuinely seeking work is a question of fact. Given the possibility of on-line job search, applications and interviews, it is perfectly possible for a person to be genuinely seeking work even if self-isolating so the circular appeared to attempt to unlawfully fetter the discretion of deciding officers. In addition, there was initially no ‘genuinely seeking work’ requirement for PUP

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<sup>124</sup> Free Legal Aid Centre, Note on ‘Departmental Circular No. 35/20 and entitlement to certain Social Welfare Payments while abroad’, available at: <https://www.flac.ie/publications/flac-note-re-circular-35-20/>.

though one was introduced sometime in July. At best one could describe this change as lacking transparency.

On 10 July 2020, Minister Humphreys amended the Regulations.<sup>125</sup> She could have ruled out all travel abroad but did not do so. Instead the Regulations provided that jobseeker's benefit would only be payable where the claimant is on holidays in accordance with "the COVID-19 General Travel Advisory in operation by the Department of Foreign Affairs". At that time, DFA was advising against all non-essential travel abroad but this, of course, changed with the introduction of the Green List allowing travel to a limited number of countries.

Again, with some lack of transparency as to when it happened, the rules of the PUP were changed to provide that 'Holiday entitlements rules are the same as those for Jobseeker's Payments'. This meant that people on PUP could also go abroad to Green List countries. However, the Department appeared to interpret its own rules (incorrectly) as meaning that no travel abroad was possible.

When the issue broke in the media, the Government and Department obfuscated for a number of days failing to explain what it was doing, why or what the legal basis was. It introduced legislation to put PUP on a statutory basis which is a welcome measure. In the course of Oireachtas debates, the Minister now claimed that PUP was a supplementary welfare allowance payment under section 202 of the Social Welfare Acts which allows payments in urgent cases.

Ultimately, in what was portrayed as a U-turn, the Minister for Social Protection announced that recipients of jobseekers payments and PUP will be entitled to take holidays abroad in Green List countries (for up to 2 weeks) and retain their payment. Claims which were disallowed (apparently only 85 people) will be contacted. However, at the time of writing, no relevant regulations have been adopted (or, if they have they are not publicly available) and it would appear that, contrary to what the Minister said, there is no legal basis for paying PUP to people abroad on holidays even in Green List countries.

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<sup>125</sup> Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 9) (Absence from the State) Regulations 2020.

## Conclusion

The social policy, and indeed, economic significance of the social protection response to the COVID crisis cannot be overstated. The PUP provided support to up to 600,000 people at its peak and continues to provide essential support to a very large proportion of the population while the economy slowly recovers. After many decades of debate about social welfare rates, a payment was introduced at a much higher rate than the standard social welfare payments with very little discussion or opposition. The scheme was put in place with amazing speed and any issues which have arisen can be seen as rather minor in the overall scheme of things.

The Department of Social Protection deserves considerable credit for both the policy response to such an urgent crisis and the ability to implement it in practice. Of course, this was only possible due to the comprehensive IT infrastructure of the Department, the existence of personal identifiers (PPSN), and the ability to data match (particularly with Revenue data) so as to obtain information about earnings and to control claims.

However, there remain almost 600,000 people receiving support either through the social protection system or the tax subsidy (not including those on 'standard' social welfare payments) and given the sluggish labour market and the deeply divided Oireachtas, introducing the payments may well prove to be the easy part. In addition, the issues which have arisen do highlight the need for Government departments to appreciate the importance of the rule of law and transparency in the implementation of social services and the use of data.







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## **CHAPTER 5: BUSINESS INTERRUPTION AND INSURANCE LAW AND POLICY IN THE COVID-19 ERA**

**Deirdre Ahern**

### **Introduction**

The COVID-19 pandemic has led to massive business disruption and business closures as a consequence of collective efforts to contain the spread of the disease. Affected businesses suffered a very significant decline in business and lost profits as a consequence. When they looked to their insurers to make a claim for the economic impact of business interruption, many businesses found that insurance companies resisted their claim. This chapter of the report explores the implications of COVID-19 related business interruption for insurance and identifies policy recommendations for the insurance industry. In carrying out this analysis it is necessary to bear in mind that the individual wording of each insurance policy is important to its construction. Consequently, across the board generalisations on the interpretation of insurance policies are more difficult to draw. Indeed, the importance of not generalising is a core argument adopted by insurance companies against both class actions and blanket policy statements being made on COVID-19 loss cover. That being said, it is instructive to observe how the State and the Central Bank have sought to push insurance companies to adopt preferred policy positions in relation to business interruption claims predicated on perceived fairness obligations to insured parties. This shows a move away from simply regarding insurance contracts as largely matters of private agreement between the parties and highlights broader public policy concerns around the nature of insurance and the implications of the imbalance of power between insurers and policy-holders that have been brought to the fore in the context of COVID-19 disruption to businesses.

## Background

Insurance has a crucial role to play in minimising the risks involved in doing business by transferring risk from loss as a consequence of a covered event occurring to the insurer. This is done in return for the payment of a premium. As such, insurance is a critical enabler of commercial life. Insurance is usually offered on take it or leave it terms – the contracts are standard form contracts formulated by insurance companies rather than being individually negotiated by the parties. Insurance contracts are contracts *uberrimae fidei* (of utmost good faith). This means that the parties owe each other a duty to disclose all material facts and the insured must not make fraudulent claims. That said, there has been recognition by the Irish High Court in the landmark case of *Manor Park Home Builders Ltd v AIG Europe (Ireland) Ltd*<sup>126</sup> that it is not only insured parties who are subject to good faith obligations—these are balanced by reciprocal duties of good faith on insurance companies. Arguably that reciprocal duty of good faith recognised contemplates acting in a professional manner and extends to not unfairly denying to pay out on an otherwise valid claim. This has obvious implications for insurance law and practice in the context of COVID-19.

With business restrictions and closures being government-mandated in mid-March 2020 and again in October 2020, many businesses suffering the adverse financial consequences of forced closure or restricted operation have been keen to make insurance claims. Doing so successfully depends on (i) interpretation of the wording of the insurance policy and (ii) the stance adopted by the insurer.

## Insurance Cover and Claims

When it comes to making a claim for COVID-19-related losses much turns on the wording of a policy in relation to its scope to encompass COVID-19 consequential loss related to business interruption (most obviously, lost profits). If an insurance claim is made, it is up to insured party to establish that the claim falls within a risk that is insured against – to show that it is ‘within cover.’ By contrast, it is up to an insurer to show that any exclusion clause applies.

A business interruption policy is designed to place a firm in the same trading position they would have been in had turnover not been displaced by the business interruption event. Fixing the amount and duration of cover is a complex task - it is difficult when taking out such insurance to have a crystal ball.

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<sup>126</sup> *Manor Park Home Builders Ltd v AIG Europe (Ireland) Ltd* [2009] 1 ILRM 190. See further D. Ahern, “The Formation of Insurance Contracts and the Duty of Insurers” (2009) 16(4) Commercial Law Practitioner 84.

The firm taking out must choose what length of a period it would run for (often 12 months is the industry maximum) and what projected gross profit level it would protect.

Insurance contracts are interpreted objectively using the yardstick of how would a reasonable person, with access to the same relevant background that would have been available to the parties at the time the policy was entered into, understand the meaning.<sup>127</sup> For present purposes, it can be said that policies may be classed as (i) positive (ii) potentially open, or (iii) negative in relation to its scope to encompass COVID-19 consequential loss related to business interruption (most obviously lost profits) in terms of cover and causation. A positive policy will expressly cover business interruption and perhaps even refer to a pandemic. Indeed, some policy wordings were tailored to do so in the wake of the SARS virus outbreak. A potentially open policy has wording that may be possible to interpret to cover COVID-19 related business interruption. The crux for insurance covering interruption from property damage is that no physical damage to property has occurred (which is the usual cause of business interruption) eg when a fire has taken place. Here the interruption is a result of following government advice in relation to trading while COVID-19, an infectious disease, circulates. A negative policy is one classed as having no scope for covering business interruption.

## **Issues for Positive Insurance Policies that Cover Notifiable Disease**

Some policies have wording that covers business interruption in the context of (i) restrictions caused by a notifiable disease being present within a certain radius of the insured premises and/or (ii) restrictions caused by government or public authority imposed restrictions on access to insured premises. This presents a causation issue. Focusing on policies with positive scope to cover COVID-related business interruption, a significant point of contention is whether government restrictions constitute events allowing business to claim for consequential loss under their insurance policies for business interruption. It must be shown that the occurrence of an event which is insured against was the proximate i.e. immediate cause of the business interruption. This may require analysis of whether a business's losses were in response to a government directive to close or restrict business operation. The onus falls on the business to establish this. The causation issue is eased by the germane pronouncements of the Department of Finance and the Central Bank discussed below.

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<sup>127</sup> *Analog Devices BV v Zurich Insurance Co.* [2005] 2 ILRM 131.

Test cases taken by several pubs are being litigated in the Irish High Court before Mr Justice McDonald.<sup>128</sup> At the centre of these cases is a claim for consequential losses and an allegation that FBD is in breach of contract in refusing their claims. They claim that there an insured risk has arisen as there is an express right to be indemnified in the policy if their premises are closed by order of a local or governmental authority or of there are “outbreaks of contagious or infectious disease on the premises or within 25 miles”. By contrast, the insurer contends that the closures were not within the scope of this clause as the closures were as a result of national measures taken. To some this represents a rather opportunistic argument by the insurer that is unfair to business policyholders.

## **Issues for Negative Insurance Policies that do not Cover Business Interruption**

Negative policies do not contain wording that is sufficiently malleable to encapsulate losses sustained due to business interruption from COVID-19. A good example of this is provided by *Social Life Magazine, Inc. v Sentinel Insurance Co Ltd*. In this case the US District Court for the Southern District of New York refused a publisher’s application for a preliminary injunction compelling its insurer to pay out under an insurance policy. The plaintiff company, which was in the business of producing a magazine, argued that its COVID-19-induced financial predicament meant it would be unable to print its next issue without a quick pay out and it therefore sought to claim for lost income. The insurer argued that the spread of novel coronavirus did not cause any “direct physical loss or damage” as required for coverage under the policy. The Court refused the application because there was no direct physical loss or damage. Judge Caproni said of the virus, “[i]t damages lungs. It doesn’t damage printing presses”. She went on to say:

“I feel bad for every small business that is having difficulties during this period of time. But New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. You get an A for effort, you get a gold star for creativity, but this is just not what’s covered under these insurance policies.”<sup>129</sup>

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<sup>128</sup> Actions against FBD Insurance have been taken by Aberken, trading as Sinnott’s Bar, Hyper Trust Ltd, trading as the Leopardstown Inn, Inn on Hibernian Way Ltd trading as Lemon & Duke, and Leinster Overview Concepts Ltd trading as Sean’s Bar.

<sup>129</sup>G. Souter, “Publisher Appeals COVID-19 Ruling Denying Coverage” May 19, 2020 <https://www.businessinsurance.com/article/20200519/NEWS06/912334634/Publisher-appeals-COVID-19-ruling-denying-coverage-coronavirus#>.

Policies that fall within the negative category do not create public policy concerns. It is clear, however, that at renewal stage affected businesses will likely to be looking to ensure that more robust business interruption cover is in place. One unfair phenomenon witnessed in Ireland is where an insurer has lured businesses to switch insurer by telling them they will be covered for COVID-related business disruption and have afterwards changed the terms by withdrawing cover.<sup>130</sup> Clearly this type of misselling should be regarded as sharp practice.

## Issues for Potentially Open Insurance Policies

### *Requirement that Business Interruption Clause Mentions Infectious Diseases?*

Lawyers around the world are carefully parsing the fine print of such policies and it seems only a matter of time before the insurance industry view that COVID-19 claims are excluded from generally worded business interruption insurance policies is legally ruled upon. Insurers are maintaining that a pandemic is an event that is excluded from general cover unless insured parties have a policy that specifically covers infectious diseases. A counter-argument that could be advanced is that unless there is a specific exclusion in the policy for viruses, then they ought to be covered.

Another issue that has come up around the world is whether insurers are entitled to refuse claims where business closure has taken place in the context of COVID-19 on foot of advice rather than on foot of a mandatory Government direction or regulation.<sup>131</sup> In Ireland, the Minister for Finance and the Central Bank of Ireland pushed the insurance industry to agree that both mandatory direction and governmental advice in relation to business interruption should be treated equally. This issue is being litigated around the globe and some courts have adopted a flexible approach. For example, on 22 May 2020 the Paris Commercial Court ruled that Axa SA was required to pay out on a restaurant's claim for corona-virus related revenue losses due to an administrative decision to close the business.<sup>132</sup> The Regional Court of Mannheim was willing in principle to allow cover under business interruption

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<sup>130</sup> This was alleged to have occurred in relation to FBD insurance and the Lemon & Duke pub. A. O'Faolain, "Somewhat unfair' of FBD to tell pub it was covered for Covid-19 losses, court hears" *The Irish Times* 15 October 2020.

<sup>131</sup> The issue of the difference between advice and mandatory law is discussed in the COVID-19 Observatory's blog by Oran Doyle in O. Doyle, "Quarantine after International Travel: Legal Obligations, Public Health Advice, Pervasive Confusion" <https://tcdlaw.blogspot.com/2020/07/quarantine-after-international-travel.html>

<sup>132</sup> <https://www.reuters.com/article/us-health-coronavirus-insurance-axa/insurer-axa-must-pay-restaurants-COVID-19-losses-french-court-rules-idUSKBN22Y2LR>; <https://in.reuters.com/article/health-coronavirus-axa/corrected-update-2-french-restaurant-ruling-puts-coronavirus-claims-on-global-menu-idINL8N2D8120>.

insurance even where a hotel business closure was voluntarily undertaken due to the indirect financial effects of COVID-19. This was so, even though the insurance policy covered instances where the competent authority closes the insured business due to notifiable diseases or pathogens. The Court ruled that the hotel operator had a claim, because although no official order had been issued, the general rulings issued to combat the COVID-19 pandemic (such as restrictions on travel) acted de-facto like an official closure order. The Regional Court of Mannheim took the view that the insurance policy must be interpreted to provide cover for the indirect effect of official decisions.<sup>133</sup> This type of judicial approach opens the door to recovery for knock-on voluntary closure.

It is worth stressing that although relevant judicial pronouncements across the globe are of interest, the question of whether COVID-19-related events are within cover turns on the specific wording of the individual policy and the approach taken by the courts in the jurisdiction where the matter is litigated.

The question is, if there is an ambiguity in the policy, should it be resolved in the business's favour or the insurer's favour? Where there is ambiguity in the terms of an insurance policy concerning its application to business interruption, such doubt should be resolved in favour of the insured, as the weaker party, and against the insurer, as the stronger party. This is the essence of the rule of interpretation known as the *contra proferentem* rule. In interpreting insurance policies, a rule of thumb applied by the Irish courts is that where there is an ambiguity, any doubt is resolved in favour of the insured party. This reflects the fact that businesses, not insurance companies, are the party with the weaker bargaining power when taking out insurance. Applying the *contra proferentem* rule to insurance policies is in line with the Supreme Court's opinion in *Analog Devices BV v Zurich Insurance Co*<sup>134</sup> where it was applied to the interpretation of ambiguity in an exclusion clause. This precept of resolving interpretative doubt in the language of a policy in an insured party's favour holds out the prospect of a COVID-19 claim under a general business interruption policy being upheld as valid.

The Minister for Finance and the Central Bank of Ireland ('CBI') have emphasised that they would like this approach to be taken by insurers regarding business interruption insurance in the context of COVID-19. In other words, the benefit of the doubt would be given to businesses, thus allowing insurance claims to be made. However, English authorities point up that that the *contra proferentem*

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<sup>133</sup> However, for procedural reasons, the Court did not grant the plaintiff the interlocutory injunction sought.

<sup>134</sup> [2005] 2 ILRM 131.

rule should only come into play where there is an ambiguity, it should not be a starting point.<sup>135</sup> This is an important point. If a policy clearly falls into the negative category as regards recovery for business interruption for Covid-related loss of revenue, it should not be artificially shoe-horned into a 'benefit of the doubt' situation.

Where there is a doubt as to whether the wording of an insurance policy covering business interruption covers COVID-19, we recommend that such doubt should be resolved by courts and thus insurance companies in favour of the policy covering it. To do is consistent with the established *contra proferentem* rule.

## **Governmental and Regulatory Pressure on Insurers to Act Fairly**

Many businesses coping with reduced trading volumes and involuntary business cessation felt hard done by when faced with the intransigence of insurance companies. Since the pandemic forced major disruption to business life, popular, governmental and regulatory pressure has been exerted upon insurance companies to act fairly including in relation to business interruption claims.<sup>136</sup> This notion of 'fair play' leverages a central public policy concern with equity as a societal value. The value of fairness is a given but it perhaps becomes more starkly evident in a time of crisis than in buoyant economic times.

The Insurance Supervision Directorate of the CBI has prudential supervisory oversight of insurance companies in Ireland and issues standards, policy and guidance for the industry. The CBI as a supervisory authority is using its statutory information-gathering powers to study business interruption insurance models and market impact. This information-gathering exercise will allow a birds-eye view to emerge of how insurers are treating such claims and, where applicable, the basis on which they are being resisted. Leveraging fairness concerns, the CBI has been weighing up whether to bring a test case in the courts. Bringing a test case would be designed to resolve intractable differences of opinion between insurers and businesses concerning whether COVID-19 related losses ought to be considered within cover. If the CBI did bring a test case, it would be following in the footsteps of the

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<sup>135</sup> *Impact Funding Solutions Ltd (Respondent) v AIG Europe Insurance Ltd (formerly known as Chartis Insurance (UK))* [2016] UKSC 57, [2017] AC 73, *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm); [2018] Lloyd's Rep IR 83, at [65].

<sup>136</sup> A similar fairness focus was also trained on consumer insurance sectors. Popular pressure exerted on insurers as a consequence of an inevitable decrease in claims due to restricted movements by consumers during the pandemic, led to consumers obtaining rebates on their health insurance and motor insurance.



UK's Financial Conduct Authority ('FCA'). The FCA case was initiated in June 2020 against eight insurance companies who refused to pay out business interruption claims based on a disputed understanding of the policy wording. Notably, the FCA is not wedded to an understanding that COVID-19 losses ought to be covered in all cases. In fact, in April 2020, the FCA wrote to insurers indicating that most business interruption policies probably do not provide such cover. It has focused not on the negative category of cases, nor on the positive category, but on the intermediate, category of 'potentially open' cases. For instance, the FCA disputes the rationale provided by some insurers in claiming that losses are not covered, such as where insurers have contended that government advice does not constitute "public authority action".

In August 2020 the CBI published a supervisory framework for business interruption insurance ('Supervisory Framework').<sup>137</sup> In doing so it recognised that certainty is central to commerce and that market uncertainty leads to litigation. The Supervisory Framework reiterates the view that where interpretation of a clause is unclear, the interpretation that is most favourable to the customer should prevail.<sup>138</sup> This enshrines the *contra proferentem* rule discussed above.

Significantly, in the Supervisory Framework the CBI (as the Minister for Finance had earlier done) directed the insurance companies it supervises to treat business closures as a result of the Government communication in March 2020 as occurring on an equivalent basis to an order/direction or mandate when determining whether there is cover.<sup>139</sup> A court may form a different view than that put forward by the CBI. A court's view in a given case would trump the CBI's indicative approach. On 15 September 2020, the English High Court ruled in favour of many of the policy arguments presented by the FCA in the test case, *Financial Conduct Authority v Arch*. This was a complex case with many nuanced findings. It is interesting however that UK government advice in March was characterised as just that – advice – and not as mandatory and requiring action. This has implications depending on whether an insurance policy covers closure on official advice or only more mandatory acts.

As discussed earlier, test cases are being taken against FBD Insurance plc by a number of companies operating pubs and bars. These cases represent the tip of the iceberg as some 1,100 Irish pubs and

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<sup>137</sup> Central Bank of Ireland, *COVID-19 and Business Interruption Insurance Supervisory Framework* 5 August 2020 <https://www.centralbank.ie/docs/default-source/consumer-hub-library/COVID-19/COVID-19---business-interruption-insurance---supervisory-framework.pdf>.

<sup>138</sup> Para. 11.

<sup>139</sup> Para. 7.

bars are estimated to be affected by the stance taken by FBD Insurance plc to refuse to admit cover. The outcome will also be closely watched by other businesses and the insurance sector. Where a test case on business interruption and insurance cover is taken by a business, the CBI recommends that costs not be sought against a losing plaintiff, recognising that they are effectively doing a public service in seeking efficient clarification of the law. A further requirement in the Supervisory Framework is that beneficial outcomes achieved should be applied more widely across the customer base and not limited to the business that has successfully brought a case. These interventions are interesting policy extensions, and bring in a concept that could usefully be given more widespread policy consideration.<sup>140</sup> These interventions see a significant rebalancing of the traditional power dynamic in insurance companies which is very heavily weighted in favour of insurers.

## Recommendations

### *Policy Wording*

When promoting business interruption policies, it is recommended that insurers and brokers should be clear on the scope of what risks are excluded. Clarity on cover is also pertinent at renewal stage. Insurance companies will no doubt be looking at tightening the wording of their policies to leave no scope for a COVID-19 style pandemic claim for both new policies and policies being renewed. Given the lack of competition in some insurance markets<sup>141</sup> and the imbalance of power in obtaining insurance cover, there is a need to review and reform insurance law for all business consumers in a manner similar to that effected by the Consumer Insurance Contracts Act 2019.<sup>142</sup>

### *A State-backed Insurance Fund for Pandemics*

A beneficial intervention would be for the State to set up a pooled insurance fund to cover pandemic risks. In the UK, the government is examining whether inspiration can be drawn from the Pool Re model. Pool Re is a state-guaranteed insurer covering businesses against losses caused by large-scale

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<sup>140</sup> Ireland lacks a class action/test case framework and generally operates on a loser pays approach. See further Law Reform Commission, *Report on Multi-Party Litigation* (LRC 76-2005).

<sup>141</sup> Evidence of price collusion practices has been found in motor insurance in Ireland: 'CCPC Find Alleged Anti-Competitive Co-operation' Among Insurance Firms' RTE 17 September 2020 <https://www.rte.ie/news/business/2020/0917/1165780-ccpc-finds-alleged-anti-competitive-co-operation/>.

<sup>142</sup> Its scope is restricted to businesses with an annual turnover of up to €3 million. This legislation followed on the work of the Law Reform Commission in the area and reforms undertaken in other jurisdictions including the UK: Law Reform Commission, *Report on Consumer Insurance Contracts* (LRC 113-2015) <http://www.lawreform.ie/fileupload/Reports/r113.pdf>.

terrorist attacks. The insurer was established in the early 1990s in response to extensive property damage sustained by businesses in a series of large bomb attacks by the Provisional IRA. Consequently there have been calls to use Pool Re as a model for a ‘Pandemic Re’ — creating a state-backed insurance company that would function to provide insurance cover to businesses against losses from a pandemic.<sup>143</sup>

## Conclusion

In the court of public opinion, considerable sympathy is felt for businesses, particularly for SMEs,<sup>144</sup> struggling to survive. Insurance law, dating from the Victorian era has always been heavily weighted in favour of insurers although there have been some judicial and legislative attempts in the latter part of the twentieth century and twenty-first century to ensure that business consumers and end user consumers are not unfairly treated.<sup>145</sup> The COVID-19 crisis has laid bare the essentially one-sided nature of insurance and insurance law and provoked comment as to how fair this is for insured parties. Currently we await the outcomes of test cases on business interruption insurance in Ireland. However, the manner in which the CBI has closely followed and made its views known to the insurance industry indicates the current policy direction that should be followed. If the insurance industry agrees to follow the CBI line, this will help to determine some of the key issues and to avoid a multiplicity of litigation. In particular, ambiguities of interpretation should be resolved in the insured party’s favour. The question of whether a ring-fenced fund, backed by the State needs to be set up to cover pandemics is a bigger policy issue, but one worth considering for the long-term to avoid disputes on cover and ensure economic support for businesses.

More generally, this examination of interpretation issues also highlights a need for deeper reflection on fairness within the insurer-insured relationship dynamic. In this regard, it is important that we do not leave some business consumers out in the cold through only driving making legislative changes for end user consumers and SMEs (who were the beneficiaries of the much-needed overhaul of insurance law in the Consumer Insurance Contracts Act 2019).

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<sup>143</sup> O. Ralph, UK Reviews State-backed Terror Insurer as Pressure Grows for Pandemic Cover” *Financial Times* September 3, 2020 <https://www.ft.com/content/b9fba238-3930-4691-8332-0bc1e690882c>.

<sup>144</sup> SMEs are small to medium sized enterprises.

<sup>145</sup> See, in particular the Consumer Insurance Contracts Act 2019.



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## **CHAPTER 6: CORPORATE GOVERNANCE, CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE CULTURE**

**Blanaid Clarke**

### **Introduction**

This chapter focuses on three corporate governance issues which have been the subject of increased scrutiny in the wake of the COVID-19 Pandemic (“the Pandemic”).<sup>146</sup> The first involves an exploration of the purpose of companies. Faced with a combined health and economic crisis giving rise to a global recession of a scale unseen since the Great Depression, companies are being asked to reflect on their values and to reconnect with society. In re-examining their values and purpose, they are forced to confront one of the fundamental corporate governance questions - in whose interests should companies act? The second issue described in this chapter is shareholder democracy. This involves a consideration of shareholders’ powers to exercise their rights and to influence the direction of the company. Health considerations have significantly reduced the ability of companies to organise shareholders’ meetings, the main means by which shareholders are afforded an opportunity to influence key decisions. The third issue considered in this chapter flows from the previous two. It explores the extent to which stakeholder governance has come to the fore in recent times. Finally, the chapter concludes by examining the extent to which the Pandemic offers opportunities and creates impediments to a future vision of corporate law which benefits all stakeholders rather than an elite few.

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<sup>146</sup> Some of the topics set out in this chapter were explored in Blanaid Clarke, ‘Corporate Social Responsibility in a Time of Crisis’ COVID-19 Law and Human Rights Blog (17 June 2020) <https://tcdlaw.blogspot.com/2020/06/corporate-social-responsibility-in-time.html>.

## Purpose and Values

The shareholder primacy norm which advocates that companies operate in the interests of shareholders is generally attributed to Milton Friedman who fifty years ago described “the social responsibility of business” as being to increase its profits.<sup>147</sup> A broader stakeholder theory by contrast has suggested that companies should be operated in the interests of a wider group of stakeholders including employees, customers, suppliers, local communities and society at large. Colin Mayer proposes an attractive and appealing alternative to the Friedman doctrine requiring companies to commit to a corporate purpose beyond profit or in addition to profit.<sup>148</sup> That distinction is important. He and his colleagues in the British Academy’s *Future of the Corporation* project suggest that companies should be required to define and deliver on their corporate purposes. They are not alone of course in expressing this view. Jaap Winter opined recently that:

“If corporations want to reconnect with society, they will have to be explicit about their ultimate objective, what value they will add to society. Generating shareholder value should not be the objective of this process, but a consequence.”<sup>149</sup>

Even before the Pandemic, a change in the rhetoric of business leaders was discernible. Some commentators have attributed this to a recognition of political dysfunction stemming from both the Global Financial Crisis and governmental failures to address societal issues such as climate change, poverty and inequality.<sup>150</sup> In 2019, the Business Roundtable, an association of CEOs of the largest US companies, published a statement committing to “lead their companies to the benefit of all stakeholders.”<sup>151</sup> In January 2020, Larry Fink, CEO of BlackRock Inc., the world’s largest asset manager, drew the obvious connection between social responsibility and shareholder return explaining that “a company cannot achieve long-term profits without embracing purpose and considering the needs of

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<sup>147</sup> Milton Friedman, The Social Responsibility of Business is to Increase its Profits, *New York Times*, 13 September 1970.

<sup>148</sup> Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (2018, OUP).

<sup>149</sup> Jaap Winter “Dehumanisation of the Large Corporation” (2020). Available at <https://ssrn.com/abstract=3517492> or <http://dx.doi.org/10.2139/ssrn.3517492>.

<sup>150</sup> Edward Rock “For Whom is the Corporation Managed in 2020?: The Debate Over Corporate Purpose” (2020). Available at <https://ssrn.com/abstract=3589951>.

<sup>151</sup> Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019). Available at <https://opportunity.businessroundtable.org/wp-content/uploads/2019/12/BRT-Statement-onthe-Purpose-of-a-Corporation-with-Signatures.pdf>.

a broad range of stakeholders.”<sup>152</sup> Some commentators have criticised such an expression of support as cynical and some have argued that, in promising more than it delivers, it might reduce demand for “meaningful legal and regulatory reforms that could effectively protect stakeholders”.<sup>153</sup> The *Davos Manifesto 2020* launched in January 2020 at the World Economic Forum promised “a better kind of capitalism”. This set of ethical principles described the purpose of a company as being “to engage all its stakeholders in shared and sustained value creation.” Companies, especially multinationals, were asked to take responsibility to work with governments and civil society to address big global challenges.

The key question then is who determines the purpose and values in any given company? The *UK Corporate Governance Code*, which applies to Irish and UK listed companies highlights the key role of the board in setting the “tone from the top”. It asks boards to identify their companies “purpose, values and strategy”. The board’s most important role though is in ensuring that these values are: aligned to the culture; embedded; and continually reinforced. Indeed in its recent Consultation Paper, the EU Commission asked whether for regulated financial services entities, part of the assessment of a director’s competence should be his or her ability to define and articulate their institution’s desired values.<sup>154</sup> Such a step would certainly emphasise the importance of these values and could even form a useful addition to the *Corporate Governance Code* itself.

A key determinant in the success of a purpose statement seeking to reconnect with stakeholders, will be its clarity and precision. Such attributes are essential if the statement is to guide management and employees in navigating the most challenging areas of behaviour or decision-making – “the grey zones in which adherence to conduct and values principles is a matter of judgment and not of clear-cut legal requirements”<sup>155</sup>. As the Pandemic forces more of us to work at home, this clarity will be more important than ever. Employees may not be exposed to obvious controls and the absence of on-site monitoring processes means that a clear understanding of their employer’s purpose and values provides invaluable support in driving them to do the right thing. A clear exposition of purpose and

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<sup>152</sup> Larry Fink “A Fundamental Reshaping of Finance” 14 January 2020. Available at <https://www.blackrock.com/hk/en/larry-fink-ceo-letter>.

<sup>153</sup> Lucian Bebchuk and Roberto Tallarita “The Illusory Promise of Stakeholder Governance” (2020) Forthcoming, *Cornell Law Review*, December 2020, Available at SSRN: <https://ssrn.com/abstract=3544978> p.16.

<sup>154</sup> European Commission, Public Consultation Document *Implementing the Final Basel III Reforms in the EU* (2019).

<sup>155</sup> G30 Banking Conduct and Culture Report: Banking Conduct and Culture: A Permanent Mindset Change (2018) [https://group30.org/images/uploads/publications/G30\\_Culture2018\\_FNL3lo-compressed.pdf](https://group30.org/images/uploads/publications/G30_Culture2018_FNL3lo-compressed.pdf).

values will also allow investors to determine which companies' shares to buy and allow management to determine which stakeholders to engage and support.

One word of caution though, in addition to "talking the talk", it will be important to determine whether companies actually adhere to these value statements. For this reason, progress in achieving their stated purposes and adhering to their values must be measured and disclosed. In non-regulated industries, a concern would be that market forces may not be sufficient to ensure follow-through.

## Shareholder Democracy

Although boards and senior managers are largely in charge of governing companies, shareholders have legal entitlements to participate in key decisions and to exercise their influence through attending and voting at shareholders' meetings. Clearly the social distancing rules, travel restrictions and work from home guidance has made holding shareholders' meetings during the Pandemic particularly challenging. In May 2020, the OECD published the results of a survey of 37 jurisdictions' corporate governance related responses to the Pandemic.<sup>156</sup> It included a review of the conduct of annual general meetings ("AGMs") and extraordinary general meetings ("EGMs") and revealed that one of the most common solutions among respondents, adopted in the UK and the Netherlands for example, was to extend the deadline for companies to call the AGM. It was also relatively common for public authorities to temporarily allow all companies to hold shareholders meetings though remote participation. This applied even in cases where the law previously required that the companies' constitutions should have authorised such participation. Indeed, the OECD found that some jurisdictions such as Germany took the opportunity to clarify or even advance regulation in this area. Ireland did not have the same ability to react as most other jurisdictions. A caretaker Government from the end of March 2020 was unable to introduce new primary legislation. It did publish the *COVID-19 Workplace Protection and Improvement Guide (M 2020)*, with which all companies were asked to comply. This required the implementation of physical distancing measures but noted helpfully that they could be achieved inter alia by "the use of technology for video/virtual meetings" and "limiting the number of meetings including length and proximity of gathering of employees/others". Although completely virtual meetings were not allowed under the Companies Act 2014, the Act facilitated shareholders participating via technology once the shareholders necessary to satisfy the quorum were

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<sup>156</sup> OECD, *National corporate governance related initiatives during the COVID-19 crisis* (May 2020). Available at <http://www.oecd.org/corporate/National-corporate-governance-related-initiatives-during-the-COVID-19-crisis.htm>.

"present in person or by proxy". Section 176(4) of the 2014 Act allows shareholders' meetings to be held in two or more venues at the same time "using any technology that provides members, as a whole, with a reasonable opportunity to participate".

The courts also stepped in where necessary to provide additional flexibility. In the case of *Xtrackers (IE) PLC v Companies Act 2014*, Mr Justice Barniville gave directions concerning the holding of a scheme meeting and EGM on the basis that he was satisfied that it was neither practicable, nor desirable, for the meetings to be held in the customary manner or in accordance with the company's constitution. He permitted the meetings to be held remotely, where necessary, by live teleconference. He also directed that a new scheme meeting be conducted in as briefly a manner as was reasonably practicable with as limited a number of attendees as possible. Yet this was far from ideal. In April 2020, a shareholder sought an injunction to prevent Grafton Group from holding a closed AGM pending a full hearing arguing inter alia that restrictions concerning leaving the house do not amend provisions of the Companies Acts relating to AGMs. The company had asked shareholders not to attend and to send their proxies to the Chairman. The applicant's counsel argued that the format of the meeting, to be conducted by four "company insiders", was "a bit Stalinesque" and a "parody" of the rights of members of companies.<sup>157</sup> On the balance of convenience and emphasising the lack of shareholder support for the applicant's position, the use of proxies by a majority of shareholders and market uncertainty in the event of a delay, the injunction was refused although the High Court acknowledged that a serious question arose.

Following the formation of a new Government, and with the benefit of extensive engagement with the Company Law Review Group, in early August, the Companies (Miscellaneous Provisions) (COVID-19) Act 2020 was introduced making temporary amendments to the Companies Act 2014.<sup>158</sup> The amendments apply for an interim period until 31 December 2020 although there is provision for a further extension by the Government, subject to annulment by either House of the Oireachtas. The amendments ensure that companies can hold shareholders' meetings by means of "electronic communications technology" which term is defined as "technology that enables real time transmission and real time two-way audio-visual or audio communication enabling attendees as a

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<sup>157</sup> M Carolan "Former Grafton Group chairman challenges 'closed' AGM plan" *Irish Times* 24 April 2020 and "High Court refuses to stop Grafton Group holding 'closed' AGM" *Irish Times* 28 April 2020.

<sup>158</sup> See further Deirdre Ahern, 'The Advent of a COVID-19 Legal Regime for Virtual AGMs: A New Vista of Technological Corporate Accountability to Shareholders' TCD COVID-19 Law and Human Rights Blog (13 August 2020) <https://tcdlaw.blogspot.com/2020/08/the-advent-of-covid-19-legal-regime-for.html>.



whole with a reasonable opportunity to participate in the meeting using such technology from a remote location”<sup>159</sup>. A new section 174A was inserted into the 2014 Act providing for general meetings during the interim period and applying notwithstanding anything in a company’s constitution.<sup>160</sup>

Companies may now postpone AGMs until 31 December 2020. Section 174A(5) states clearly that a company need not hold a general meeting at a physical venue but may conduct the meeting wholly or partly by the use of electronic communications technology “as long as all attendees have a reasonable opportunity to participate in the meeting in accordance with this section”. It can do this by “providing or facilitating the use of electronic communications technology, including a mechanism for casting votes by a member, whether before or during the meeting”.<sup>161</sup> It is clear that this should not require the shareholder or their proxy to be physically present.<sup>162</sup> To ensure the widest possible participation, section 174A(7) provides that only restrictions which are necessary to ensure the identification of attendees and the security of the electronic communications technology are permitted and those restrictions should be “proportionate to the achievement of those objectives”.

In order to provide for genuine participation, section 174A(9)(c) provides that the technology must allow the attendee to hear what is said by the chairperson of the meeting and any person introduced by the chairperson, and to submit questions and comments to the chairperson to the extent that an attendee is normally entitled to do so under the company’s constitution. Many of the concerns around virtual meetings related to data protection, fraud and certainty. Section 174A(9)(a) expressly obliges companies to ensure “as far as practicable that the technology used “(i) provides for the security of any electronic communications by the attendee, (ii) minimises the risk of data corruption and unauthorised access, and (iii) provides certainty as to the source of the electronic Communications”. Another major concern was that a failure or disruption of technology during a meeting which prevented shareholders participating would cast doubt on the validity of any decisions taken at the meeting. Section 174A(9)(b) requires companies to ensure as far as practicable that any such failure or disruption is remedied as soon as practicable. More importantly though, section 174A(10) provides that “any temporary failure or disruption of electronic communications technology shall not invalidate the general meeting or any proceedings relating to the meeting”. The company is also exempted from liability for any such failing or disruption unless attributable to their own wilful actions.

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<sup>159</sup> Section 174A(14) of the Companies Act 2014.

<sup>160</sup> Section 6 of the Companies (Miscellaneous Provisions) (COVID-19) Act 2020.

<sup>161</sup> Section 174A(6)(a) of the Companies Act 2014.

<sup>162</sup> Section 174A(6)(b) of the Companies Act 2014.

Directors are given wide discretion under section 174A(12), if they consider it necessary, to reschedule, relocate or reorganise the meeting in order to comply with health guidelines. In order to imbue as much flexibility as possible into the process, the Minister for Jobs, Enterprise and Innovation is also given additional powers to make regulations in relation to the operation of general meetings held by way of electronic communications.<sup>163</sup> Finally, the Companies (Miscellaneous Provisions) (COVID-19) Act 2020 includes specific requirements in relation to the form of notices of electronic general meetings, the inclusion of person participating electronically in the quorum and the conduct of voting at such meetings. The effect of these statutory changes overall is to facilitate shareholder engagement during the Pandemic and to ensure that shareholders are not deprived of their entitlement to influence decision making. In Ireland, as a matter of public policy in order to provide shareholder democracy for the long-term, we recommend that hybrid meetings should be facilitated and encouraged, allowing shareholders the option of attending in person or virtually. In such cases, the full range of technology should be available to allow shareholders joining remotely to be in the same position to participate and ask questions as those present. In the U.S., evidence suggests that as a result of the Pandemic, companies have held a record number of virtual meetings, 1,500 this year as compared to only about 300 in 2019.<sup>164</sup> Shareholder participation has increased and shareholders with dispersed portfolios were able to “attend” more meetings than before and at reduced cost. In the UK, a study of AGMs of FTSE 350 companies during the first half of 2020 found that 80.7% listed companies held closed meetings with only one or two shareholders present (usually the company secretary and the chair) requiring voting in advance via proxy and the majority.<sup>165</sup> Approximately 81.6% of companies with closed meetings made some arrangements to allow for shareholder Q&As with the board. Of the companies that held open meetings, 60% were facilitated through webinar or audiocast with live voting capabilities. In Ireland, it seems that many companies opted for the closed meeting but it is hoped that in the future as confidence grows amongst companies and their investors, a blended approach might be introduced. This would take the form of a hybrid meeting allowing shareholders the option of attending in person or virtually. In such cases, the full range of technology should be available to allow shareholders joining remotely to be in the same position to participate and ask questions as those present.

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<sup>163</sup> Section 174A(13) of the Companies Act 2014.

<sup>164</sup> Betty Moy Huber, Joseph Hall and Paula Simpkins “Top 10 Key Trends at 2020 Proxy Mid-Season” (June 8, 2020). Available at <https://corpgov.law.harvard.edu/2020/06/08/top-10-key-trends-at-2020-proxy-mid-season/>.

<sup>165</sup> Financial Reporting Council, “AGMs - An Opportunity For Change” (2020). Available at <https://www.frc.org.uk/getattachment/48c4ee08-b7be-4b7c-8f19-bcaf3d44e441/Corporate-Governance-AGM.pdf>.

## Stakeholder Governance

As might be expected, some companies have behaved better than others during the Pandemic. The *Financial Times* took to publishing a list of “business saints and sinners”. The latter includes Sports Direct who initially sought to keep stores open by categorising them as “essential” and Amazon who dismissed whistleblowers who had raised concerns about the safety of warehouse employees’ and COVID-19 risks. Particular attention is being paid to the manner in which companies utilise their capital when their very viability is under threat and employees are losing their jobs. Share repurchases, dividends and pay increases have become controversial. Total shareholder pay-outs were reported to have fallen by about a fifth globally, to \$382.2bn in the second quarter of 2020.<sup>166</sup> In addition to media and market opprobrium, regulators stepped in in some sectors – the European Central Bank for example prohibited banks from paying dividends. Many governments prohibited the payment of bonuses or dividends to companies receiving State support.

In Ireland, many listed companies took the decision not to pay dividends (eg Applegreen and Kingspan) or to suspend share buyback programmes (eg Cairn Homes and Ryanair). The Companies (Miscellaneous Provisions) (COVID-19) Act 2020 made it easier for planned dividend programmes to be delayed or amended. It amends the 2014 Act providing that directors who have recommended that the declaration of a specific dividend be adopted by resolution at a general meeting, may withdraw or amend that resolution where they consider that “such action is needed because of the actual or perceived consequences of COVID-19 on the affairs of the company”.<sup>167</sup> The circumstances in which this power may be exercised is limited as it can be exercised only where unanimous written shareholder consent is obtained and at least three days’ notice is given to shareholders before the general meeting. CRH was one of the only Irish listed companies to declare a dividend in the first half of the year. It did so however in the context of announcing a 25% cut in management salaries and board fees and the announcement of temporary lay-offs of 12,000 employees across its global workforce. It was reported that employees in a UK unit that had been furloughed were being paid in part by a UK Government job retention scheme and that staff in Ireland may also have benefited from the Irish Government’s temporary wage subsidy scheme.<sup>168</sup> Although, it paid a dividend in September

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<sup>166</sup> Janus Henderson Global Dividend Index.

<sup>167</sup> Section 186A of the Companies Act 2014.

<sup>168</sup> Joe Brennan “CRH boss itches for return to construction as prudence pays off” *The Irish Times* 24 April 2020.

2020, it paused the Group's share buyback programme until further notice.<sup>169</sup> This case provides some insight into the difficulty of balancing competing interests during the Pandemic, particularly in a stock held by pension funds, charities and other investors who depend on dividends as a source of steady income.

Share buybacks are often criticised as causing under-investment in companies and damaging short term behaviour. However, they can promote liquidity and add long-term value in the right circumstances. As with the payment of dividends thus, a one size fits all approach should not be adopted and these corporate actions should be judged in their context.

Looking at the actions of Irish companies through the prism of stakeholder governance, it is useful to categorise actions into three:

The first category of actions might be best described as "social activism". This would include the donation of €2.4m by AIB to Trinity College Dublin's COVID-19 immunology research efforts. This was a significant and commendable contribution. While consistent with the stated values of AIB, this action fell outside its core business operations which did not change. In this way, these actions are distinguishable from the other two categories of actions.

When examining the measures taken by companies as part of their business operations, we can identify a second category of actions which benefit both shareholders and a wider group of stakeholders. These actions would not be inconsistent with the shareholder primacy norm. They would include actions which may not increase profits but which lead to reputational gain or increase stakeholder loyalty or well-being. An example would be the high profile transport of vital supplies of PPE by Aer Lingus from China, reportedly "the largest cargo operation by air in the history of the State".<sup>170</sup> Actions such as these are in keeping with the enlightened shareholder value norm envisaged by Fink and involve companies promoting the wellbeing of both investors and stakeholders. It is not thus a question of philanthropy but of commercial business sense.

The third category of actions involve those taken as part of a company's business operations to protect stakeholders for the sake of stakeholders' relevant interests in response to what Parkinson described

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<sup>169</sup> CRH, 2020 Interim Results Press Release (August 2020). Available at <https://www.crh.com/media/3245/crh-2020-interim-results-announcement.pdf>.

<sup>170</sup> Gordon Deegan "Aer Lingus to receive almost €30m for collecting PPE from China" *The Irish Times* 29 July 2020.

as “a supposed moral imperative that may conflict with profit maximisation”.<sup>171</sup> These actions involve “uncompensatable costs” which do not improve shareholders’ returns. Many of the small companies that repurposed their existing production lines to make PPE free of charge for local hospitals and nursing homes would be an example. In such cases, the companies fundamentally changed the way they did their business. Although such actions resulted in a positive reputational impact in a way actions in the previous categories also might, this was not the purpose of the action and it did not equate to the cost involved. Companies acted in this way because they took the decision that this was the right thing to do and consistent with their corporate purpose. It should be noted that if such an alternative moral imperative exists in the case of public listed companies, it should to be identified at the outset and publicised in order to allow investors commit to it in advance and to allow managers make business decisions informed by such a purpose.

There have been calls for governmental support to large companies to be given in return for promises to broaden their corporate purpose and to consider broader stakeholder interests outside profit maximisation. One can see elements of this in two of the supports made available by the Irish Government. Firstly, a condition of the temporary *COVID-19 Wage Subsidy Scheme* was that companies retain their employees on the payroll. Secondly, the State’s €2 billion *Pandemic Stabilisation and Recovery Fund* aimed at medium and large enterprises constitutes a sub-portfolio within the Ireland Strategic Investment Fund. It applies the latter’s *Responsible Investment Policies* which integrates a wide range of Environmental, Social and Governance (ESG) factors into its investment decisions across the whole of the Fund and commits to being a responsible investor as stewards of public assets.

## Recommendations

We recommend that listed companies and public interest companies should publish a purpose statement as a means of guiding management and employees in navigating challenging areas of behaviour or decision-making and as a mean of providing investors with sufficient information to guide their investment choices. Companies must also embed this purpose within their corporate strategies. In evaluating a company's purpose, a distinction should be drawn between enlightened shareholder value and a broader, more altruistic version of stakeholderism. The impact of this distinction on stakeholders is important and merits further exploration.

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<sup>171</sup> John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford University Press, 1995).

In Ireland, in order to provide shareholder democracy, hybrid meetings should be encouraged and facilitated, allowing shareholders the option of attending in person or virtually. In such cases, the full range of technology should be available to allow shareholders joining remotely to be in the same position to participate and ask questions as those present.

Share buy-backs are often criticised as causing under-investment in companies and damaging short term behaviour. However, they can promote liquidity and add long-term value in the right circumstances. As with the payment of dividends thus, a one size fits all approach should not be adopted and these corporate actions should be judged in their context.

## **Conclusion**

It was heartening to see many companies stepping up to the mark in the early months of the Pandemic - taking responsibility beyond their own immediate financial successes and living the values in a real and demonstrable manner. This is important because there are significant societal global challenges which will require the co-operation of corporate players, governments and civil society. Joseph Stiglitz in late 2019 identified three existential crises facing the world: a climate crisis, an inequality crisis and a crisis in democracy<sup>172</sup> and all three remain and indeed have been exacerbated by the Pandemic.

As many commentators and activists have noted, the Pandemic could present an opportunity to rebuild our economies and to make better choices in so doing. It is noteworthy that there has been a marked difference in the debate surrounding the decisions which needed to be made in the Pandemic from previous debates on climate change where scientists have been ignored or discredited. We saw a reliance and trust in science informing action from governments and society to solve a global emergency. Clearly, there will be challenges along the way. There is a possibility that scientists will once again fall into disrepute – there are signs in a number of countries already of politicians seeking to shift the blame onto scientists for their own inadequate or untimely responses. We are also witnessing increasing demands from some sectors of the community to get the economy moving as quickly as possible and without the costs or burdens perceived to flow from environmental regulation. A related concern thus might be that social responsibility will overshadow environmental

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<sup>172</sup> Joseph Stiglitz “It's time to retire metrics like GDP. They don't measure everything that matters” *The Guardian* 24 November 2019.

responsibility in the immediate aftermath of the Pandemic. The necessary current focus on the “S” component of ESG may divert attention from the “E” component. This would be unfortunate as all elements of ESG are equally important in the long run.

As the Pandemic continues and the recession deepens, companies will be put under more strain and the task of adhering to their values and pledging to a corporate purpose not just beyond profit maximisation but perhaps even beyond corporate survival will be onerous. It is in these circumstances that we will see the truth behind their public statements, the level of their commitment and the depth of their resolve.



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## **CHAPTER 7: COVID-19, FINANCIAL STABILITY AND ECONOMIC GROWTH: EUROPEAN UNION DEVELOPMENTS**

**Alexandros Seretakis**

### **Introduction**

Even before the outbreak of COVID-19, numerous international organisations, including the International Monetary Fund (“IMF”) and leading economists, were warning of a forthcoming crisis in the world economy. The world economy was already vulnerable to the trade war between China and the US and high private debt levels. The pandemic, which started as a pure health crisis, has morphed into the most serious economic crisis since World War 2. Governments around the world have imposed severe lockdowns with economic activity grinding to a halt. The COVID-19 pandemic has plunged the Eurozone into a severe recession with Eurozone Gross Domestic Product (‘GDP’) declining 12.1% between the first and second quarter of 2020. This chapter examines the financial stability public policy implications for the EU, which will in turn have an impact on Ireland as a Eurozone Member State.

### **Economic Impact of COVID-19 in the Eurozone**

The recession has resulted in an exponential increase in unemployment in numerous Eurozone countries. For instance, the unemployment rate in Ireland surged from around 5 per cent before the start of the pandemic to 16.7% in July. What is more, the actions taken by governments to support businesses and households have resulted in soaring government deficits and debt levels. The European Central Bank (“ECB”) has warned that average Eurozone budget deficits will increase to 8% of GDP in 2020 while aggregate government debt will surpass 100% of GDP. In particular, Ireland’s budget deficit is expected to hit €30 billion, equivalent to around 10% of GDP or around 15% of modified gross national income, while its debt reached €237 billion in the first quarter of the year.



In contrast to the financial crisis and the sovereign debt crisis, the COVID-19 pandemic is a crisis engulfing the real economy. The lockdown measures have resulted in both a supply and a demand shock to the economy. For instance, the closure of factories and retail shops, which can be seen as a supply shock, has led to a surge in unemployment. The increase in unemployment has dented consumer income and spending power, a demand shock. The crisis has not yet spread to the financial system or sovereigns. The decisive actions of the European Central Bank boosted liquidity, stabilised financial markets and prevented a surge in borrowing costs.

Even before the onset of the pandemic, the accommodative monetary policy stance of the ECB ensured an ample supply of liquidity in the financial system. In September 2019, the ECB announced the resumption of its asset purchase program at a monthly pace of €20 billion and a further cut in its deposit facility rate. As a result, the Eurozone financial system entered the pandemic with significant support by the European Central Bank. Nevertheless, the onset of the pandemic and the lockdowns imposed by European countries saw a sharp rise in Eurozone bond yield, most notably Italian bond yields and renewed investor fears regarding the creditworthiness of Eurozone governments. Furthermore, the lockdown measures and the sharp fall in consumer spending threatened firms and in particular small and medium-sized firms, with liquidity squeeze and bankruptcy.

In response to these developments, the ECB was forced to take drastic measures. On 18 March 2020 the ECB announced the launch of the so-called Pandemic Emergency Purchase Programme. The programme involved the purchase of private and public sector securities with the overall amount of purchases reaching €750 billion. In June 2020, the ECB decided to increase the amount of asset purchases under the Pandemic Emergency Purchase Programme by €600 billion to €1,350 billion. The launch of the programme contributed to the sharp decrease of government bond yields and has prevented a repeat of the sovereign debt crisis. Furthermore, the decrease in borrowing costs, has allowed Eurozone government to finance their stimulus packages aimed at supporting the economy and the expenses associated with managing the pandemic. For instance, Ireland's public debt agency has been tasked with raising €20-24 billion debt in the markets in order to finance the costs of the pandemic. Ireland was able to issue a 10-year bond at a yield of just 0.285%. Other Eurozone government saw their bond yield dropping significantly with Italian bond yields standing currently at 1% and Greek bond yield standing at 1.10%.

Furthermore, the ECB adopted a series of measures, which seek to stabilise the banking sector and support its lending activities to firms and in particular small and medium-sized enterprises, which constitute the backbone of the Eurozone economy. The ECB made available at very low rates up to €3 trillion of liquidity to credit institutions through its refinancing operations. Moreover, it eased the conditions for its targeted long-term refinancing operations, which aim at supporting bank lending to the real economy and especially small and medium-sized companies. What is more, the ECB, acting in its bank supervisory capacity, temporarily relaxed bank capital and liquidity requirements freeing up an estimated €120 billion of capital, which banks can deploy to finance the real economy. In addition, the ECB issued a recommendation to banks to halt the payment of dividends and share buy-backs until January 2021. This measure aims at bolstering the loss-absorbing capacity of banks and promoting lending to the economy.

## **Severe Impact on the Real Economy**

The measures adopted by the ECB seek to safeguard the stability of the financial system. Nevertheless, the COVID-19 pandemic and the concomitant recession are having a severe impact on the real economy in all European Union Member States. European Union countries have introduced their own national stimulus packages to shield their economies from the negative consequences of the recession. State aid rules, which prohibit governments from supporting struggling firms and fiscal rules enshrined in the Stability and Growth Pact, which prohibit governments from running deficits beyond 3% of GDP.

Nevertheless, numerous countries, especially the ones hit by the Eurozone debt crisis, lack the fiscal space to finance both the expenditure associated with managing the health costs of the pandemic and the stimulus packages aimed at revitalising their economies. Furthermore, the suspension of the prohibition against state aid, a cardinal rule of the European Union, creates an uneven playing field. Firms located in stronger Member States are able to obtain support from their government, while firms located in weaker Member States cannot count on such support. Consequently, the latter firms are at a significant disadvantage compared to the former ones. An example is the bailout of Lufthansa. Lufthansa, Germany's largest airline was forced to resort to a 9 billion euro bailout by the German government, which in turn received a 20 per cent stake in the airline. The bailout puts other airlines, which are located in Member States, which lack the fiscal space to support their airlines, such as Greek, Irish, Italian airlines at a significant disadvantage.

What is more, a prolonged recession in individual countries and/or an uneven recovery from the pandemic would put a severe strain on the functioning of the internal market and would hit the export- oriented economies of numerous countries. For instance, a prolonged recession in Greece, Italy and Spain would significantly affect the German and Dutch economies, which depend on exports to other European Union countries. Moreover, a fall in GDP would lift the debt levels of Eurozone countries even higher.

## **Work Towards a Recovery Package**

In April 2020 the Eurogroup, the body composed of Euro-area finance ministers, agreed on a package amounting to €540 billion, which seeks to support workers, businesses and sovereigns. The package consists of three credit lines available to euro-area Member States, an emergency support package by the European Investment Bank up to €200 billion and the SURE initiative by the European Commission, which supports national short-time work schemes. As far as the credit lines offered to Euro-area Member States are concerned, they will be extended by the European Stability Mechanism and the funds can only be used to fund the healthcare related costs of the pandemic. Each Member State may borrow up to 2% of GDP. It should be noted that no Member State has made use of this facility. A reason behind this is the negative stigma associated with borrowing from the European Stability Mechanism. The European Stability Mechanism was created during the sovereign debt crisis, in order to fund sovereigns in distress subject to string conditions. Thus, financial markets might perceive tapping the European Stability Mechanism credit lines as evidence of financial distress.

In addition, the severity of the crisis and the devastating effects on the European economy, led Germany and France to propose, in May 2020, the establishment of a €500 billion recovery fund. Most importantly, according to their proposal the European Commission would raise the funds on the financial markets and distribute it to governments as grants. The European Commission put forward its proposal for the creation of a new recovery instrument, the so-called Next Generation EU fund. The goal of Next Generation EU is to support economic recovery and promote digitalization and the transition to the green economy. According to the proposals, Next Generation EU would have a firepower of €750 billion, which will be raised by the European Commission on financial markets. The fund would comprise of a new recovery and resilience facility of €560 billion and various other instruments, which would aim at supporting health care systems and accelerating the transition towards climate neutrality and the digital economy. The recovery and resilience facility was the most important part of the Commission's proposal. The facility would allow Member States to access €310

billion in grants and €250 billion in loans. The funds would support investments and reforms, including with respect to the digital and green transitions.

The Commission's proposal was heavily criticised by a handful of countries, termed frugal by four, including the Netherlands, Finland, Denmark and Sweden. The four countries, which are net contributors to the EU budget and enjoy stellar credit ratings, opposed the size of the fund and the grants element of the Commission's proposal. The frugal four advocated for a smaller fund and were in favor of loans instead of grants to governments. Moreover, the 'frugal four' argued that the loans should be subject to strict conditions and monitoring with loan recipients having to carry structural reforms, which would make their economies more competitive. The frugal four's opposition drew heavy criticism from other European countries, which supported the Commission's original proposal. In particular, the insistence of the frugal four to loans instead of grants and to subject loan recipient to strict conditions drew heavy criticism. Extending loans to already indebted countries would only increase their debt burden and raise their debt ratio. What is more, conditionality and structural reforms are still associated in many countries with austerity and the unpopular rescue packages during the Eurozone debt crisis. In addition, unlike the Eurozone debt crisis, the current recession is caused by an unprecedented health crisis and not economic mismanagement.

## **The Agreed Recovery Package: Next Generation EU**

After intense negotiations, European Union leaders were able to agree on the final form of the recovery package in July 2020. The size of the recovery package remains at €750 billion and will be composed of €390 billion in grants and €360 billion in loans. Countries which are willing to access the funds will have to present plans focused on improving their economies and promoting the green and digital transition. Disbursement of funds will be subject to targets and milestones and will have to win the approval of a qualified majority of European Union governments. The distribution of funds is also tied to respect for the rule of law. The European Commission will borrow the funds on the financial markets and the Commission will repay the borrowings in part by introducing new taxes, such as a tax on non-recycled plastics.

Despite the initial enthusiasm with regards to the adoption of the package, the agreed recovery package suffers from several flaws and is unlikely to be a game changer with respect to the recovery of the European economy and its transition to the green and digital age. The grants component of the package is extremely low representing only 2.8% of the European Union's collective GDP.

Furthermore, the funds will not be available immediately. The funds will be allocated from 2021 onwards and the allotment will last for three years. Furthermore, the rule of law conditions included in the final compromise are vague and it remains to be seen whether they will be effective in practice. Numerous proponents of the package claimed that its adoption represented Europe's Hamilton moment with the package representing the first step towards a fiscal union. Nevertheless, the European Council has made it clear that the package is an exceptional response to temporary but extreme circumstances, a view shared by numerous countries, including the frugal four, which remain opposed to any form of fiscal union.

## **Conclusion**

The extent to which Ireland will avail of the recovery package and credit lines offered by the EU remains to be seen. In the context of the EU project, overall Next Generation EU represents a welcome development and will provide a cushion against the recession. However, its small size, exceptional nature and limited duration make it unlikely that it will lead to a meaningful transformation of the European economy. A transformation of the European economy towards a green and digital model would have to involve a much larger and long-term investment programme. Mimicking the model of Next Generation EU, the investment programme could be financed by the issuance of debt at the EU level, which would then be channelled to projects across the EU. Only a sizeable and long-term investment programme could make Europe a champion in sustainability and digitalisation. Furthermore, it would also pave the way for the creation of a fiscal union, which is considered one of the missing elements of deeper European integration.



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## **CHAPTER 8: THE ROLE OF RIGHTS IN ADDRESSING SOCIO-ECONOMIC CONCERNS IN THE WAKE OF COVID-19**

**Suryapratim Roy**

### **Introduction**

Ireland has adopted robust fiscal and macro-financial policies in the wake of COVID-19, and comparable with other states in the EU.<sup>173</sup> There have been several Guidance Documents issued by the NPHET issued to cater to vulnerable groups, with specific documents issued on Travellers, the Roma community, the homeless and direct provision services.<sup>174</sup> There have been specific policy measures taken on social welfare, housing, business protection, disability and employment.<sup>175</sup> Several compelling socio-economic concerns have been left to voluntary action as we have seen in some instances in this report. The question that is the focus of this chapter is the role of rights in deciding whether to adopt specific policies, the nature of policies adopted, and whether they can be enforceable by citizens of and residents in Ireland.

### **Methods of Addressing COVID-19 Socio-Economic Concerns**

In the contributions to this Report, we have seen four ways on addressing socio-economic concerns (i) Voluntary activities in the private sector, and self-regulation, (ii) Rights under

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<sup>173</sup> For a summary of policy measures adopted in different states, see the International Monetary Fund Policy Tracker available at <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>.

<sup>174</sup> Available at: <https://www.hpsc.ie/a-z/respiratory/coronavirus/novelcoronavirus/guidance/vulnerablegroupsguidance/>.

<sup>175</sup> Specific policies are discussed in dedicated chapters of this report. The Observatory maintains a compilation of regulations adopted in Ireland available at <https://www.tcd.ie/law/tricon/covidobservatory/resources/index.php>.

existing legislation and common law rights, (iii) Specific policies to deal with socio-economic concerns, and (iv) Statutory rights as a result of specific policies.

### *Voluntary activities in the private sector, and self-regulation*

As shown by Sarah Hamill and Rachael Walsh, mortgage payments operate in the domain of voluntary activities (Chapter 2). In Blanaid Clarke's contribution (Chapter 6), corporate governance operates in the realm of self-regulation of firms and shareholder rights. Deirdre Ahern (Chapter 5) highlights pressure exerted by the State on the insurance sector to voluntarily adhere to perceived fairness considerations in adjudicating on the validity of claims for COVID-19 related business interruption. There is a sense that self-regulation of the sector has proved insufficient.

### *Rights under existing legislation and common law rights*

In some cases, COVID-19 contingencies appear to be covered in existing legislation; in Mark Bell, Desmond Ryan, Alan Eustace and David Fennelly's contribution (Chapter 3), Irish Human Rights and Equality Commission Act 2014 and Employment Equality Acts 1998 – 2015 are highlighted as providing statutory rights against discrimination at the workplace in the public and private sectors. Chapter 3 also points to prohibitions on penalising workers under the Organisation of Working Time Act 1997 and highlights protections of employee well-being under the Safety, Health and Welfare at Work Act 2005. It is also essential to mention that COVID-19 should not dilute these rights unless there are good reasons. This is why the issue of access to justice is crucial, as pointed out in relation to labour courts. This chapter also points to the existence of common law duties on employers to ensure employee well-being

### *Specific policies to deal with socio-economic concerns*

The most prevalent form of addressing socio-economic concerns is by way of specific policies. This is true for new rules around rent freeze and evictions as provided for in the Residential Tenancies and Valuation Act 2020 as analysed in Chapter 4. Mel Cousins documents the social welfare response in the form of the Irish Unemployment Payment and the Payment Illness Benefit. At the EU level, Alexandros Seretakos points to finance policies (Chapter 7).

### *Statutory rights as a result of specific policies*

Some policies instil statutory rights. Take for instance the duty of landlords not to evict tenants instils rights on tenants to approach the Residential Tenancies Board in the event the new rules are violated. This is also clear from amendments to existing legislation such as the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 was introduced making temporary amendments to the 2014 Act. While the amendment appears to be a change to facilitate online meetings, as Blanaid Clarke points out in Chapter 6, it also has the potential to vindicate shareholders rights to effective participation.

With respect to the four ways of dealing with socio-economic concerns, there is scope for policy reform, sometimes by way of explicit rights, or using rights to develop and interpret policy. Chapter 3 points to workplace concerns that COVID-19 has brought about such as occupational stress due to an 'always on' culture that working from home entails. This could be addressed by a constructive reading of existing legislation by recognising rights at the workplace to be extended to people working from home. This would also include the obligations of employers to provide necessary supports. The voluntary approach on mortgages require policy clarity with respect to non-interference with the credit rating of consumers if they opt for a COVID-19 payment break. Hamill and Walsh also point to the need for statutory rights that guard against repossession when they share the compelling anecdote that some courts have assumed there is such a moratorium in place, even in the absence of explicit statutory provisions.

On the issue of rent freezes and evictions considered in Chapter 1, there appears to be discrimination against commercial tenants that warrants policy change. Further, while Walsh and Hamill point discuss the role of constitutional rights in shaping legislation on rent freezes and a temporary ban on evictions, they point to the missing role of human rights in issues of economic hardship. Highlighting the prevalence of human rights and constitutional rights, Chapter 3 points to the role of the right to private and family life (Article 8 of the European Convention of Human Rights), respect for private and family life (Article 7 of the Charter of Fundamental Rights of the European Union) and inviolability of the dwelling (Article 40.5 of the Irish Constitution) in informing a claim to the sanctity of the home. Accordingly, one's home life has value outside the use of the home as a workplace.



What we see from the above is that specific socio-economic concerns in the wake of COVID-19 have been approached in different ways. Each issue requires an assessment of reliance and fairness of voluntary measures, existing statutory and common law rights, new rights under policies, policies that do not entail rights as such, and the role of constitutional and human rights in both informing and dealing with concerns that have been identified. In the following sections, I will address three issues underlying the role of human and constitutional rights in addressing socio-economic concerns arising from COVID-19: (i) Justiciability of socio-economic concerns, (ii) Rights-discourse in shaping executive and legislative choices, and (iii) Horizontal application of rights.

### **Justiciability of COVID-19 Socio-economic Concerns**

In legal systems across the world including Ireland, the United Nations (UN), the European Union (EU) and the Council of Europe, there is recognition of social and economic rights. Directive principle of state policy found in the Irish constitution point to the role of socio-economic concerns. Human rights that engage with socio-economic issues are laid out in the EU Charter of Fundamental Rights (CFR), European Pillar of Social Rights, European Social Charter, European Convention on Human Rights (ECHR) and UN human rights treaties, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR). Many of the socio-economic rights accorded under the Irish constitution are ‘unenumerated’ personal rights, which are primarily read into and identified under Article 40.3.1° of the Constitution.<sup>176</sup> Court-identified, unenumerated (i.e. unwritten) socio-economic rights under Article 40.3.1° include various rights of the child,<sup>177</sup> the right to bodily integrity<sup>178</sup> including

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<sup>176</sup> This provision states that: ‘[t]he State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen’.

<sup>177</sup> A separate section on children has been inserted as Article 42A of the Constitution following the Thirty-First Amendment in 2012. Prior to that, there has been a long legal history of children’s welfare drawing on socio-economic and unenumerated rights. For a discussion, see Alan P. Brady, ‘Children’s Constitutional Rights: Past, Present and Yet to Come’ *Catherine McGuinness Fellowship Seminar: Children and Article 42A of the Irish Constitution*, 6 December 2018. Available at: [https://www.childrensrights.ie/sites/default/files/submissions\\_reports/files/Alan%20DP%20Brady%20-%20Childrens%20Constitutional%20Rights%20-%206%20Dec%202018.pdf](https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Alan%20DP%20Brady%20-%20Childrens%20Constitutional%20Rights%20-%206%20Dec%202018.pdf).

<sup>178</sup> *Ryan v Attorney General* [1965] IR 294.

the right not to have health endangered by the State,<sup>179</sup> the right to work or to earn a livelihood, and a right to a clean environment.<sup>180</sup>

Notwithstanding the recognition of such rights, the EU legal system in giving effect to the CFR, the European Court of Human Rights (ECtHR) and the Irish judiciary have been reticent in recognising a duty on states to devote resources to achieve certain socio-economic ends, such as providing housing for all.<sup>181</sup> Article 2 (1) of the ICESCR as well allows states to 'progressively realise' socio-economic rights; thereby allowing states to make judgments on distribution of resources. The legal doctrine that allows states a wide amplitude in making resource-based judgements in realising socio-economic rights is the doctrine of 'margin of appreciation'. Obligations associated with a right is clearly articulated in jurisprudence associated with the right to private and family life, home and correspondence (Article 8 ECHR) where there are positive obligations on states to ensure environmental protections, meaningful rights to and at work, health of prisoners, enjoyment of family life by foreigners, among others.<sup>182</sup> The mechanisms by which such obligations are fulfilled is left to legislative and executive 'margin of appreciation' in states. Similarly, courts in Ireland have been hesitant in interfering with legislative and executive decisions involving allocation of resources. This is both with respect to justiciability and review of such decisions. The Supreme Court has expressed that the role of courts is limited to commutative and not distributive justice.<sup>183</sup> The non-justiciability of questions regarding finances or resources (including the fairness of such allocation), and a segregation of commutative and distributive justice has been critiqued by scholars,<sup>184</sup> as well as in the Constitutional Convention Report.<sup>185</sup> Even when socio-economic concerns are

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<sup>179</sup> *The State (C) v Frawley* [1976] IR 365.

<sup>180</sup> *Merriman v Fingal County Council* [2017] IEHC 695.

<sup>181</sup> *Chapman v UK* [2001] 33 EHRR 399.

<sup>182</sup> An updated ECtHR guidance document on Article 8 shows the prevalence of positive obligations: [https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf).

<sup>183</sup> *MacMathuna v Attorney General* [1995] 1 IR 484 relying on *O'Reilly v Limerick* [1989] ILRM 181.

<sup>184</sup> Mark de Blacam, 'Children, Constitutional Rights and the Separation of Powers' (2002) *Irish Jurist* 113; Gerry Whyte, 'Judicial Capacity to Enforce Socio-Economic Rights' (2014) 37 *Dublin University Law Journal* 203; Colm O'Connell, 'Zones of Constitutionalisation and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order' (2014) 37 *Dublin University Law Journal* 173.

<sup>185</sup> Eighth Report of the Convention on the Constitution: Economic, Social and Cultural (ESC) Rights (March 2014).

rendered justiciable, rights-based claims rarely succeed in challenging executive and legislative decisions.<sup>186</sup> Here Ireland is far more eager to read rights under the ECHR restrictively, and discretion given to executive and legislative bodies expansively than, say, the Netherlands.

Following from the above, there would be a limited role for socio-economic rights-based claims in shaping government response to COVID-19. The conventional view has been that socio-economic rights operate in the realm of aspiration, rather than positive duties on states. This is contrasted against civil and political rights that confer duties of restraint on states. This rigid distinction between civil and political rights on one hand and socio-economic rights on the other has come under increasing strain in developing human rights case law, with the House of Lords in the UK characterising it as ‘a false dichotomy’.<sup>187</sup> Irrespective of how a right is categorised, there is a cluster of obligations<sup>188</sup> on states that accompanies rights. For instance, a civil and political right such as the right to a fair trial entails a corresponding obligation to provide a functioning court system, and removing hurdles in access to justice. The discussion on *Adjudication of Employment Disputes* in Chapter 3 notes the importance of access to justice in times of COVID-19. There is currently an application for a preliminary ruling filed by an Italian magistrate pending before the European Court of Justice (CJEU) contesting suspensions on civil, criminal and administrative courts.<sup>189</sup> Improving access to justice may well have an impact on state expenditure, as is borne out in previous cases before Irish courts.<sup>190</sup>

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<sup>186</sup> Though *Merriman* recognised a right to environment, the challenge against the environmental harm of a planning decision. Recently, the Supreme Court of Ireland quashed Ireland’s climate mitigation plan, but did not do so to vindicate environmental rights or socio-economic rights under the ECHR. *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49.

<sup>187</sup> *R. (Adam, Limbuela and Tesema) v Secretary of State for the Home Department* [2005] UKHL 66.

<sup>188</sup> Sandra Fredman, *Human Rights Transformed: Positive rights and positive duties* (OUP 2008).

<sup>189</sup> The dilution of access to justice potentially infringes several rights found in the CFR, including the right to fair trial and effective remedy (Art 47 CFR), the right to liberty and security (Article 6) for pending cases. Pending Case C-220/20: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=CE422F54B6387F78E9FAA9E1F7330AD2?text=&docid=230245&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8203335>.

<sup>190</sup> In *O’Donoghue v Legal Aid Board* [2004] IEHC 413, shortening waiting lists for civil aid applications entailed mobilization of additional state resources.

One way to appreciate the justiciability of socio-economic concerns is recognising the distinction between allocative decision-making and fulfilment of obligations that have an allocative impact on state expenditure.<sup>191</sup> This leads to a clearer subset of nonjusticiable policy issues, as all public decisions entail an impact on the state's resources. It may point to the limited role of rights, or claims based on socio-economic concerns in budgetary and budget-like decisions. In Alexandros Seretakís' contribution (Chapter 7) on financial stability, questions on state aid rules and exemptions, and decisions on Irish borrowing would not benefit from rights-based claims.<sup>192</sup> At the same time, such a distinction will also lead to requiring state action where there is a breach of positive obligations on the state in protecting the right to life, or right to private and family life. Several contributions in the Trinity Law and Human Rights Observatory point out that legislative and administrative measures taken in response to COVID-19 may amount to governmental overreach.<sup>193</sup> There is a converse problem noticed in some countries – that of governmental 'underreach'. This arises where measures taken in response to COVID-19 either to combat the virus or its effect on society – are insufficient.<sup>194</sup> Positive obligations on the state to enforce the right to health under CFR, ECHR or an unenumerated constitutional right, for instance, may help overcome 'underreaching' policies. It may also provide the tools to require the government to take necessary steps to fulfil the right to education. In fact, it appears that the need to vindicate the right to education informs decisions to restrict other activities when there is a high number of cases.<sup>195</sup>

The other way in which positive duties of the state to address socio-economic concerns has been manifested is by way of equality provisions, and specifically the right against non-discrimination. This is evident in the discussion in Chapter 3 on the impact of COVID-19 on diversity and inclusion in the workplace. Protections for the disabled in relation to redundancy

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<sup>191</sup> Jeff King, 'The Justiciability of Resource Allocation' (2007) 70 *Modern Law Review* 197.

<sup>192</sup> This is different from the effects of austerity decisions, and dilution of public services. These may bring socio-economic claims into play.

<sup>193</sup> See contributions at <https://tcdlaw.blogspot.com/>.

<sup>194</sup> Kim Lane Scheppele, 'Executive Underreach, in Pandemics or Otherwise' *American Journal of International Law* (forthcoming).

<sup>195</sup> <https://www.independent.ie/world-news/coronavirus/the-five-level-living-with-covid-plan-aimed-at-keeping-schools-open-in-all-phases-39526234.html>.

and rights at the workplace appear to be ensured in the existing statutory framework; discretionary language is tempered by protections against implied discrimination. The social security measures adopted – as discussed by Mel Cousins (Chapter 4) – appear to be non-discriminatory. Both the Pandemic Unemployment Payment and the Illness Benefit appear to be available to all working residents, regardless of their nationality or whether they are in direct provision. Cousins also explains that there does not seem to be issues of discrimination in sanctioning holiday-goers by ceasing unemployment payments. Hamill and Walsh (Chapter 2) suggest commercial borrowers may be disadvantaged compared to residential borrowers as they too may suffer economic hardship, but residential and commercial tenants may be classified as separate classes of consumers, and there may not be a tenable legal claim of discrimination. Thus, overall, there appears to be no evident concerns around discrimination in Ireland’s treatment of COVID-19. Having said that, there is certainly scope for analysis of structural inequality concerns in vulnerability towards catching the disease, accessing treatment, and the impacts of COVID-19.<sup>196</sup>

## **Rights-discourse Shapes Executive and Legislative Choices**

As discussed in Chapter 3, the Irish Human Rights and Equality Commission requires public bodies to assess the impacts of its functions on equality and human rights. This would apply to public bodies in making COVID-19 policies. This is true even for decision on the distribution of resources - the difficulty of justiciability of budgetary decisions discussed in the earlier section are without prejudice to the progressive realisation of allowing socio-economic concerns in informs budgetary concerns.<sup>197</sup> Chapter 4 focuses on regulatory decisions on

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<sup>196</sup> For the application of vulnerability theory in assessing claims of equality and non-discrimination, see Martha A. Fineman ‘Vulnerability and Social Justice’ (2019) 53 *Valparaiso University Law Review* 341. On the distinction between equality and non-discrimination in relation to the right to health, see Gillian MacNaughton, ‘Untangling Equality and Non-Discrimination to Promote the Right to Health Care For All’ (2009) *Health and Human Rights Journal*; available at: <https://www.hhrjournal.org/2013/08/untangling-equality-and-non-discrimination-to-promote-the-right-to-health-care-for-all/>.

<sup>197</sup> There is scope to monitor the way government decisions on resources are made. As the IHREC pointed out, there is scope for the progressive realisation of the ICESCR in conducting social impact assessments of budgetary decisions: ‘budgetary governance process requires transparent and reasonable justification, examination of alternatives, genuine participation, a focus on discrimination, and on-going commitment to the sustained impact and realisation of rights and independent review

social welfare in the wake of COVID-19, and there seems to be limited applicability of rights. However, the progressive realisation of socio-economic rights would warrant ensuring budgetary decisions are transparent (a concern highlighted by Cousins in relation to sanctions on ‘holiday payments’ and collection of personal data for the implementation of social services).

More specifically, given potential infringement of rights, it is incumbent on public bodies to make decisions to avoid such infringement. The shorthand tool for such avoidance is the proportionality principle as laid out by the Supreme Court in *Meadows v Minister for Justice, Equality and Law Reform*.<sup>198</sup> The principle is conventionally looked at as a standard of review of regulatory decisions, which is more detailed and nuanced rather than its predecessors – the irrationality and unreasonableness standards. It needs to be stressed that the principle is more than just a standard of judicial review and is not limited to justiciable claims; rather, it is a legal standard of regulatory decision-making where rights are involved. The impact of proportionality in legislative and executive decisions in the European legal order is an obligation to give reasons: ‘in enforcing ends-means tests, courts push lawmakers and administrators into a judicial mode, requiring them to reason as the judge will, that is, to consider the proportionality of their own activities.’<sup>199</sup>

It is a matter of some debate as to whether the *Meadows* jurisprudence requires judges to apply a detailed proportionality test in assessing administrative action, or whether a simpler irrationality test – that provides greater discretion to ministers – is applied to see whether the proportionality test has been applied by policymakers. What seems incontrovertible is that the proportionality principle should guide all policy decisions. As Brady notes, the ‘findings [of *Meadows*] clearly have implications for any administrative decision which

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mechanisms.’ Irish Human Rights and Equality Commission, *Ireland and the International Covenant on Economic, Social and Cultural Rights* (2015), p. 12, 36. Available at: [https://www.ihrec.ie/download/pdf/ihrec\\_report\\_ireland\\_and\\_the\\_international\\_covenant\\_on\\_economic\\_social\\_and\\_cultural\\_rights.pdf](https://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf).

<sup>198</sup> [2010] 2 IR 701.

<sup>199</sup> Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004), p. 11.

intrudes upon fundamental rights.<sup>200</sup> Though there is also debate on what the proportionality standard entails, it involves assessing the legitimacy, suitability and necessity of any policy when there is a question of rights involved. Given the plethora of socio-economic rights recognised under the Irish constitution, and in keeping with European law, discretion exercised in relation to policy decisions would have to be tempered by a proportionality test. It may not be evident how proportionality assessments work in relation to socio-economic concerns; readers would be familiar with the utility of proportionality in assessing the legitimacy, suitability and necessity of policy interventions against some freedom or right that such interventions potentially infringe. There has, however, been a transformation in the way proportionality has been applied in the European legal order – there is no longer a concentration on infringement of a freedom or a right, but a balancing of competing rights and interests in legal decision-making, necessarily involving fact-based inquiry. When respect to socio-economic rights, such rights are inevitably open-ended, and inevitably require balancing of conflicting interests in delineating the content of the right at stake.<sup>201</sup> Some examples may help illustrate this point, and highlight its relevance for COVID-19.

The Constitutional Court of Latvia concluded that even in times of rapid economic recession, the rights of pension recipients to social benefits should not be infringed. Applying proportionality, the court reasoned that the regulator had not carried out ‘well-weighted analysis neither regarding the consequences of the adoption of the impugned provisions, nor regarding other, less restrictive means for the attainment of the legitimate end.’<sup>202</sup> Again, lawsuits in Greece challenged wage and benefit cuts that flowed from the terms of the EU-IMF bailout mechanism. The state rapporteurs applied a proportionality analysis to articulate its aims (not only to cut expenses but to augment state revenues), and necessity of such cuts.<sup>203</sup> A similar policy adopted in Hungary on a bailout package was struck down on grounds

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<sup>200</sup> Alan Brady, ‘Meadows and proportionality in judicial review – Where are we now?’, Bar Council CPD – Judicial Review Update. Available at: <https://www.lawlibrary.ie/News/CPD-JR-Update-Alan-DP-Brady-27-Feb-2017.aspx>.

<sup>201</sup> Xenophon Contiades and Alkmene Fotiadou, ‘Social rights in the age of proportionality: Global economic crisis and constitutional litigation’ (2012) 10 *International Journal of Constitutional Law* 660, 669.

<sup>202</sup> *Ibid* at 676 – 677.

<sup>203</sup> *Ibid* at 682.

of proportionality due to its sudden adoption, without assessment of its impacts.<sup>204</sup> Thus, proportionality would be useful not only in assessing the appropriateness of regulations such as those requiring mandatory face coverings and compulsory vaccinations, but also arrest hasty regulatory decisions by adopting a consequentialist analysis, as well as assess the impact of COVID-19 policies on existing social benefits and conditions that allow one to function as an economic actor.

### **Potential for Horizontal Application of Rights**

As this Report bears out, COVID-19 has substantially affected activities in the private domain, and reliance is placed on self-regulation. There is potential for recourse to private law, and areas of law that deal with interpersonal relations such as labour law. As brought out in the discussion on employment in Chapter 3, such relations are informed by statutory and common law rights. Having said that, there is one dimension of public law with respect to private relations that merits mention: the horizontal application of fundamental and constitutional rights. The doctrine of horizontality refers to the application of rights to private relationships ie rather than against the State. Such application could be direct where non-conformity with rights in private relationships such as employer-employee relationships constitutes a cause of action, or indirect where courts interpret private law in compliance with rights.

Rights could be found expressly or impliedly in the constitution, or in the European legal order including the EU legal framework and the ECHR. The implementation of EU directives has been by way of statutes and interpretation of common law, and claims for damages may be filed by private parties for breach of EU law in Irish courts (or *Francovich* claims).<sup>205</sup> EU treaties have been interpreted by the CJEU to have a horizontal direct effect,<sup>206</sup> while the Court has

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<sup>204</sup> *Ibid* at 677.

<sup>205</sup> Case C-6/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5375.

<sup>206</sup> Case 43/75, *Defrenne v. Sabena* (No 2) [1976] ECR 455; Case C-438/05, *The international Transport Workers' Federation & The Finnish Seamen's Union v. Viking Line. ABP & Oü Viking Line Eesti* [2007] ECR I-10779. For a collection of essays on how EU fundamental rights have been employed to shape private relations in the light of progressive goals, see Dorota



rejected the horizontal application of directives<sup>207</sup> (due to their specific method of implementation, and the principles of subsidiarity and legal certainty).<sup>208</sup> While the recently instituted European Pillar of Social Rights has initiated specific directives, the CFR is amenable to direct horizontal effect to the extent such rights are not found in specific legislation. The non-applicability of the horizontality rule in cases where there is specific legislation has been subject to criticism,<sup>209</sup> given that narrower scope of directives and inadequate implementation might foreclose the applicability of fundamental norms to interpersonal relationships. With respect to the ECHR, there has been a steady development of the jurisprudence on both direct and indirect horizontal application,<sup>210</sup> primarily with respect to employment relationships. However, the impact of such jurisprudence on the legal treatment of private relationships has not been as robust.

Irish constitutional jurisprudence has recognised the direct horizontal effect of constitutional rights in interpersonal relationships in *Meskeil v CIE*<sup>211</sup> and *Glover v BLN Ltd.*<sup>212</sup> However, courts have been reluctant in applying constitutional rights directly in private relationships; it is when the scope of common law rights is 'plainly inadequate' or 'basically ineffective' that constitutional rights are invoked.<sup>213</sup> The direct horizontal approach may therefore lead to contracting rather expanding the scope of common law or statutory rights, as courts may seek to interpret such rights restrictively to carve out the adequacy of existing private law

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Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing Oxford 2013).

<sup>207</sup> With respect to EU secondary law, the CJEU has clarified that 'mere adverse repercussions on the rights of third parties' are permissible when a private party invokes provisions of a directive against a member state.' Case C-201/02 *The Queen on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723.

<sup>208</sup> Case 152/84 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority* (Teaching) [1986] ECR 723, Case C-91/92 *Paola Faccini Dori v. Recreb Srl* [1994] ECR I-3325.

<sup>209</sup> Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 *European Law Journal* 657.

<sup>210</sup> Olha Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights' (2006) 13 *Maastricht Journal of European and Comparative Law* 195.

<sup>211</sup> [1973] IR 121.

<sup>212</sup> [1973] IR 388.

<sup>213</sup> *Hanrahan v Merck, Sharp and Dohme (Ireland) Ltd* [1988] ILRM 629.

remedies.<sup>214</sup> Unlike other jurisdictions, such an approach may lead to difficulties in indirect horizontal application of rights, though the same may be warranted.

The possibility of direct and indirect discrimination in selecting workers for compulsory redundancies due to COVID-19 was analysed by in Chapter 3. An additional concern would be swift and unilateral decisions to make workers redundant, especially those employed on open-ended and temporary contracts. Some of these concerns are met by the fact that the Unfair Dismissals Acts 1977-2005 apply to most contracts, including temporary contracts under the Employment Agency Act. Having said that, for the open-ended and short-term contracts falling under the cracks, there appears to be hardly any protection as the duty to inform and consult workers in good time before redundancy under the CFR<sup>215</sup> is foreclosed by Directive 2002/14, which establishes a general framework for informing and consulting employees within the EU. If a French case before the CJEU on the absence of such protections to employees working under certain types of contracts is of any indication, the CFR does not provide a right specific enough to be invoked in a dispute between private parties.<sup>216</sup> Concerns raised in Chapter 3– of occupational health and safety and protecting one’s private life independent of one’s role as an economic actor in employer-employee relations respectively – may be inspired by Article 8 ECHR discussed earlier in relation to positive obligations. If occupational stress causes damage to an employee’s health, personal and family relationships, then Article 8 may have an indirect horizontal effect.

## Conclusion

This public policy report of the School of Law, Trinity College Dublin’s COVID-19 Legal Observatory has focused on reflections on how public policy can provide support to underpin individuals, communities,

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<sup>214</sup> In relation to tort law, Binchy observes that that rather than inquiring whether a tort is harmonious with constitutional values, courts are inclined to take a minimalist approach is assessing whether a tort is ineffective in protecting a constitutional right. William Binchy, ‘*Meskill*, the Constitution and Tort Law’ (2011) 33 *Dublin University Law Journal* 339, 346-347.

<sup>215</sup> Article 27 CFR provides that ‘workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.’

<sup>216</sup> Case C-176/12, *Association de Médiation Sociale v. Hichem Laboubi* EU:C:2014:2.

businesses and the economy in Ireland against the contextual backdrop of COVID-19. In this chapter, it was suggested that the regulatory response to COVID-19 on socio-economic issues could be analysed by examining the degree of self-regulation, existing rights that bear on issues, specific regulation, and rights that are created by specific legislation. Rights have different sources – human rights and fundamental rights are derived from the EU legal order, ECHR and the Irish constitution; in addition, statutory and common law rights have bearing on everyday engagement. The role of statutory and common law rights, and the reliance on self-regulation in dealing with socio-economic issues is evident from the various contributions to this Report. This chapter has sought to contribute to this discussion by highlighting three aspects of human and constitutional rights in addressing socio-economic concerns arising from COVID-19: whether and to what extent socio-economic concerns are justiciable, how rights-discourse shape executive and legislative choices, and the horizontal application of rights to private relationships. The primary findings from analysing these aspects is that there is potential (though limited) for requiring the government to meet its positive obligations to secure socio-economic rights, proportionality serves as a tool of shaping policy decisions, and indirect horizontal application of rights may speak to concerns raised in different contributions to this Report.



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