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I declare that this thesis is my own work.

THE DISAPPLICATION OF NATIONAL LAWS BY ADMINISTRATIVE BODIES

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Contents

INTRODUCTION

Under EU law, administrative decision makers are to disapply national laws which are incompatible with EU law. This principle has comparatively recently received the attention of the Court of Justice in the case of *Minister for Justice and Equality v Workplace Relations Commission*[1] (hereafter referred to as "*WRC*" or "*the WRC case*"). The principle that national law must yield to EU law is well understood in the context of litigation before national courts with full original jurisdiction. However, this principle, and its implications, are perhaps less understood in the context of administrative decision makers which, by their very nature, have limited powers framed by jurisdictional rules found in national law.

While *WRC* was not the first case in which the Court of Justice found that the obligation to disapply national law extended to administrative tribunals,[2] *WRC* is significant in clarifying the extent of that obligation. In light of *WRC*, the obligation to disapply subsists even in circumstances where an administrative body has no power under national law to disapply national laws.[3] Thus, it appears that the obligation to disapply national laws cannot be defeated by Constitutional provisions of domestic law which reserve exclusively to Courts the power to quash or disapply domestic laws.[4] The real innovation found in the *WRC* decision is that national laws which purport to remove from a tribunal the power to disapply national laws

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[1] Case C-378/17, Judgment of the Grand Chamber dated 4th December 2018. See also High Court decision [2009] IEHC 72 and Supreme Court decision [2017] IESC 43. There is limited academic and professional commentary on this decision, but see Sarah Drake, "The principle of primacy and the duty of national bodies appointed to enforce EU law to disapply conflicting national law: *An Garda Síochána" Common Market Law Review* (2020) 57, pp 557–568. See also Louise O'Callaghan, "Allocation of Jurisdiction: The Irish Constitution and EU law at odds" (2019) ILT 37(10) p138. See also Marguerite Bolger and Katherine McVeigh, "Europe First?," Bar Review, 2019, (24)(4) p103-106.
[2] See for example *Costanzo SpA v Comune di Milano* C-103/88 and *CIF v Autorità Garante della Concorrenza e del Mercato* C-198/01.
[3] See for example, first, the decision of the CJEU C387/17 at para 36 which states that: "*any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law.*" Second, note the Supreme Court decision [2017] IESC 43 at para 5.15 which found that the WRC, as a matter of *national law,* has no *vires* to disapply national laws.
[4] See decision of the CJEU C-387/17 at para 51.

where required are among the very laws that a tribunal may be required under EU law to disapply. Put another way, even rules of national law which limit a tribunal's jurisdiction may have to be disapplied in order to allow domestic law to yield to EU law.

In *WRC*, the Court expressed the principle in the following terms.

" It follows from the principle of primacy of EU law… that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means."[5]

Hereafter, this shall be referred to as the "Principle." It is apparent from the foregoing that the Principle has a number of strands to it. First, the Principle derives from the primacy of EU law. Second, the Principle applies to "bodies" applying EU law. This term embraces courts and administrative tribunals.[6] Third, at its core the Principle requires that domestic laws which contravene EU law are disapplied. Fourth, the obligation to disapply such law may arise before the particular provision in domestic law has been struck down by a domestic court.

The *WRC* litigation gave rise to three written judgments and one Opinion, namely judgments of the Irish High and Supreme Courts, an Opinion of the Advocate General to the Court of Justice and a judgment of the Court of Justice.

Chapter One of the thesis analyses the *WRC* litigation and, in doing so, considers the issues arising before the Irish and European courts. Having done so, a number of themes are extracted from the *WRC* proceedings by reference to which it is proposed to analyse the Principle. In that regard, Chapter Two considers the Principle in light of Irish law on the respective powers of tribunals and courts in striking down or disapplying laws. As part of this analysis, a review of the position in Irish Constitutional law is undertaken. While it is clear that EU law is superior

[5] C-387/17 at para 50.
[6] See for example *Costanzo SpA v Comune di Milano* C-103/88 and *CIF v Autorità Garante della Concorrenza e del Mercato* C-198/01.

to Irish Constitutional law, this review demonstrates that Irish law exhibits a careful allocation of jurisdiction between Courts and administrative bodies. Whereas the *vires* of the latter is constrained by national law, the High Court is at large to disapply laws which contravene either constitutional or EU norms. This analysis concludes that the position of both the Irish High and Supreme Courts in the *WRC case* was accurate in the conclusion that the WRC is not empowered by national law to disapply domestic laws. Notwithstanding that the Irish Courts appeared to be correct in their ultimate conclusions, there are unsatisfactory elements to the Supreme Court's reasoning which are explored.

Chapter Three analyses the Principle in light of the question of a tribunal's jurisdiction. An analysis of the evolution of the Principle up to the *WRC* case is carried out. The Principle devolved from the case of *Amministrazione delle Finanze dello Stato v Simmenthal SpA*[7]. However, the evolution of the Principle is closely examined to ascertain whether it has expanded beyond its original province. In this regard, it is argued that the Principle as originally expressed in *Simmenthal* and the line of cases which followed was always contingent on the body in question acting within jurisdiction. It was clear in *WRC* that the tribunal manifestly had no jurisdiction to disapply national law.[8] However, the *WRC* decision now requires decision makers to disapply domestic statutes limiting the tribunal's jurisdiction. Therefore, jurisdictional rules have, in the wake of *WRC,* become a species of national law which are now themselves prone to disapplication.

On a related note, Chapter Four analyses the Principle in light of the doctrine of procedural autonomy. Procedural autonomy holds that, subject to two conditions, and where Union law does not provide detailed procedural rules, it is for Member States to determine the Courts and tribunals with responsibility for protecting Union rights.[9] The two conditions in question are that the procedure, whether judicial or administrative, for vindicating rights derived from Union law must be no less favourable than the procedure for vindicating comparable rights in national law; this is the principle of equivalence.[10] The second condition is that the procedure established by national procedural autonomy must not render the vindication of Union level

[7] C-106/77.
[8] See Supreme Court decision in *WRC* [2017] IESC 43 at para 5.15 and also High Court decision of Charleton J [2009] IEHC 72 at para 8.
[9] *Alassini v Telecom Italia SpA* C-317/08 and generally the Opinion of AG Wahl in *WRC.*
[10] *Ibid.*

rights excessively difficult; this is known as the principle of effectiveness.[11] It appears that the national rules the subject of the *WRC* case were compatible with both these principles of equivalence and effectiveness. In fact the referring Court found that the national provisions governing the jurisdiction of the WRC and the Courts respectively were consistent with equivalence and effectiveness.[12] Accordingly, and in the absence of Union law stipulating the entities with responsibility for protecting the rights at issue in *WRC*, the national rules of jurisdiction, which do not allow the WRC a power to disapply national laws, might have been saved under the principle of procedural autonomy.

Thus, the first four chapters contain a detailed analysis of the *WRC* decisions and the issues arising in that case. These first four chapters highlight a significant qualification to the Principle on which the *WRC* case turned. The Principle is qualified insofar as a tribunal need only act within its jurisdiction which is of course set down by national law and protected by the doctrine of procedural autonomy. *WRC* holds that jurisdictional rules now may have to be disapplied by the tribunal itself. It further holds that the Court of Justice is competent to declare certain procedural arrangements to be incompatible with EU law, a task previously reserved to national courts. Now especially in an institution like the EU, which includes Member States from common law and civil law traditions with their distinct attitudes to court procedures, any topic moving the border between the competence of national and European law to establish jurisdiction, is bound to be complicated and far reaching. However, given the scope of this thesis, namely its focus on the *WRC* decision, I have not moved out into broader theoretical waters, but merely made the following selection of discreet practical issues requiring some consideration.

In that regard, the remaining chapters pivot to a prospective analysis whereby certain of the potential practical consequences arising from the Principle are analysed. Chapter Five considers the status of domestic limitation periods in light of the Principle. Chapter Six considers the implications of the Principle for the right to an effective remedy in EU law. Chapter Seven considers the status of ouster clauses in light of the Principle. Chapter Eight analyses the implications for the rules of evidence applied by tribunals. Penultimately, Chapter

[11] *Ibid.*
[12] [2017] IESC 43 at para 7.17.

Nine considers the relevance of the EU Charter of Fundamental Rights. Finally, Chapter Ten summarises the main findings of the analysis.

CHAPTER 1 THE WRC PROCEEDINGS

BACKGROUND

The applicants in *WRC* applied for entry as trainees of An Garda Síochána. At that time, they were aged between 36 and 48. Admission to trainee status at An Garda Síochána is regulated by statutory instrument.[13] The statutory instrument provided that the Commissioner could not admit a person as a trainee unless the person was aged between 18 and 35. Accordingly, as noted by the Supreme Court, the age requirements were established by national law and not by an administrative decision.[14] The disappointed applicants lodged a complaint with the Equality Tribunal (the predecessor to the Workplace Relations Commission; but references hereafter will be made to the "WRC" as this entity was in fact the party to the proceedings before the Irish and European courts).

The Minister for Justice and Equality argued before the WRC that the substance of the case sought the disapplication of national law, namely disapplication of the age requirements set down in statutory instrument. It was argued that, in consequence, the WRC had no jurisdiction to entertain the complaint. The WRC proposed to hear the substance of the complaint and to decide that jurisdictional question in tandem with its consideration of the substantive complaint, as distinct from determining jurisdiction as a preliminary point.[15] This was unsatisfactory to the Minister who contended that it was more appropriate to decide the question of jurisdiction as a preliminary point, as such a determination could be appealed to the High Court which would, it was argued, save time and expense.

Accordingly, the Minister applied for judicial review of the WRC on the basis it was *ultra vires* that body to embark on a procedure which might culminate in the disapplication of national law.[16]

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[13] Specifically, Regulation 5 of the Garda Síochána (Admissions and Appointments) Regulations 1988 (S.I. No. 164 of 1988), as amended by the Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2001 (S.I. No. 498 of 2001) and the Garda Síochána (Admission and Appointments) (Amendment) Regulations 2004 (S.I. No. 749 of 2004).

[14] [2017] IESC 43 at para 1.2.

[15] [2017] IESC 43 at para 3.2.

[16] See CJEU decision C-378/17 describing the procedural background to the case at para 15.

APPROACH ADOPTED BY IRISH COURTS

In the High Court[17] Charleton J found that the WRC had no power or obligation, either in domestic law or European law, to disapply national law.[18] Without delving into the principle of procedural autonomy in any detail, the High Court judgment refers to several passages[19] from the CJEU decision in *Impact v Minister for Agriculture*[20] which suggest that, subject to the principles of effectiveness and equivalence, it is for Member States to stipulate the respective Courts and tribunals with responsibility for vindicating Union protected rights. The Court was satisfied that the tribunal could not augment its own jurisdiction in order to disapply national law.[21]

The Supreme Court decision[22] is a more detailed judgment and culminated in a reference to the Court of Justice under Article 267 TFEU as to whether EU law required the WRC to disapply national law. As with the High Court decision, the Supreme Court found that the WRC had no jurisdiction in Irish law to disapply national laws.[23] This was the clear constitutional position in Irish law.[24] The Supreme Court considered whether there might be such a power as a matter of EU law.[25] While the Supreme Court was satisfied that the allocation of powers between the High Court (with full original jurisdiction and a power of judicial review) and the WRC (with a limited first instance adjudicatory role in discrimination claims) did not impair the Union requirements of equivalence and effectiveness,[26] it nonetheless referred the question whether the WRC was required to disapply national law in the case before it.

By way of comment, it is clear that both the Irish High court and Supreme Court were of the view that the WRC enjoyed no power in Irish law to disapply national laws. However, whereas the High Court was clear that there was no principle of European law which empowered the

[17] [2009] IEHC 72.
[18] [2009] IEHC 72 at para 8.
[19] [2009] IEHC 72 at para 7.
[20] C-286/06.
[21] [2009] IEHC 72 at para 8.
[22] [2017] IESC 43.
[23] [2017] IESC 43 at para 5.11.
[24] [2017] IESC 43 at para 5.12 and 5.15.
[25] [2017] IESC 43 commencing at para 6.1.
[26] [2017] IESC 43 at para 10.2.

WRC to disapply national law,[27] the Supreme Court entertained a doubt and referred that very question to the CJEU.[28]

THE QUESTION REFERRED

Under Article 267 TFEU, the Supreme Court referred the following question to the Court of Justice:

"Where

(a) A national body is established by law and has a general jurisdiction conferred on it to inter alia ensure enforcement of Union law in a particular area; and

(b) National law would require that such body not have jurisdiction in a limited category of case where an effective remedy would require the disapplication of national legislation on the basis of national or European law; and

(c) Appropriate national courts would have a jurisdiction to make any appropriate order disapplying national legislation which was required to ensure compliance with the measure of European law in question, would have jurisdiction to entertain cases in which such a remedy was necessary, would have jurisdiction in such cases to provide any remedy mandated by Union law and where the remedy provided in the courts has been assessed, in accordance with the jurisprudence of the Court of Justice, as complying with the principles of equivalence and effectiveness

Must the statutory body concerned nonetheless be taken to have a jurisdiction to entertain a complaint that national legislation was in breach of relevant Union law and, if upholding that complaint, disapply that legislation notwithstanding that national law would confer the jurisdiction in all cases, involving challenges to the validity of legislation on any ground or

[27] [2009] IEHC 72 at para 8.
[28] [2017] IESC 43 at para 10.3.

requiring the disapplication of legislation, on a court established under the Constitution rather than the body in question?"[29]

Usefully, the Court of Justice restated the question referred in the following terms:

"By its question, the referring court asks, in essence, whether EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law."[30]

APPROACH OF THE ADVOCATE GENERAL AND COURT OF JUSTICE

The Opinion of Advocate General Wahl and the judgment of the Court of Justice are in contrast both in terms of their respective conclusions and also with respect to the manner in which they approached the case.

Advocate General Wahl, who ultimately concluded that the WRC had no obligation in European Union law to disapply national law, interpreted the question before him as concerning *both* the question of procedural autonomy and the primacy of EU law.[31] The key aspect of AG Wahl's Opinion is that it is the function of national law to ascribe jurisdiction between courts and tribunals, subject to the principle of procedural autonomy. He opined that the primacy of EU law does *not* require a tribunal to shun its stated jurisdiction and take seisin of a matter outside its "substantive competence."[32]

By contrast, the Court of Justice concluded that the WRC *must* in fact disapply national measures which are contrary to Union law.[33] In doing so however, its decision is focussed

[29] C-378/17 at para 24.
[30] C-378/17 at para 31.
[31] Opinion of AG Wahl at paras 1 and 2.
[32] Opinion of AG Wahl at paras 89 to 91.
[33] C-378/17

almost exclusively on the principle of the primacy of EU law.[34] The doctrine of procedural autonomy receives relatively little attention.[35]

THEMES ARISING FOR FURTHER ANALYSIS

It is apparent from the domestic and European Courts' judgments that a number of principles arise which require further analysis. First, Irish law on the respective powers of tribunals and courts to disapply national laws are analysed. Second, jurisdiction as a facet of the Union law obligation to disapply national laws is considered. In this regard, the AG highlighted the fact that the requirement to disapply national law only arose when a court or tribunal was acting *within jurisdiction*. So, the question of a body's jurisdiction is relevant to the application of the Principle. Thirdly, and finally for this part of the thesis, the procedural autonomy of Member States is considered. In analysing this third theme, consideration of the concepts of equivalence and effectiveness, which are conditions precedent to the operation of the principle of procedural autonomy, is required.

[34] See for example C-378/17 at para 31 and the manner in which the Court puts the question before it.

[35] The principle of procedural autonomy is not referred to explicitly by the CJEU, although it does appear to be implicitly referred in para 34 of the decision. Critically however, the CJEU appears to engage in a substantive consideration of the principle of the primacy of EU law only, without teasing out its interaction with the doctrine of procedural autonomy. In that regard, see para 39: *"[i]t follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules."*

CHAPTER 2 IRISH LAW ON THE POWERS OF TRIBUNALS AND COURTS

In considering Irish law on the topic of the respective powers of tribunals and courts to disapply national law, the following framework is adopted. First, the approaches of the Irish High and Supreme Courts on the issues of (a) the powers of tribunals to disapply national law and (b) the powers of the High Court to do so, are considered. Thereafter, some conclusions on these respective powers are offered. Finally, an issue raised by the Supreme Court, namely the question whether there is any difference in quashing a law and simply disapplying it, is considered.

POWERS OF TRIBUNALS

Perhaps unsurprisingly, the Irish Courts in *WRC* ruled that the WRC had no *vires* to disapply national law as that function was reserved exclusively to the High Court. However, while the Irish Courts' ultimate conclusions are not startling, some parts of the judgments are worthy of further consideration.

The Constitution expressly envisages a *limited* role for administrative bodies in exercising powers of a judicial nature. In that regard, Article 37 of the Constitution provides:

"Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."

The High Court decision in *WRC* is relatively concise. The essence of the judgement of Charleton J in the High Court is that *WRC* was not permitted to disapply national law. He stated:

"The respondent does not have the authority to make a binding legal declaration of inconsistency or insufficiency on a comparison of European and national legislation. The High

Court has that power as this has been expressly reserved to it by Article 34 of the Constitution."[36]

The basis for that conclusion appears to flow from two propositions found in the judgment. First, the Judge noted that the age limit at issue was established by national legislation which bound the WRC.[37] Second, in the view of Charleton J, there was no principle of European Union law which allowed *"an administrative body or a court of limited jurisdiction to exceed its own authority in order to achieve a result, whereby it is of the view that European legislation has not been properly implemented at national level and that this situation is to be remedied by the re-ordering in ideal form of national legislation."*[38]

The inference which might be drawn from this aspect of his judgment is as follows. As domestic law established a jurisdictional limit on the WRC, and, as EU law does not require a tribunal to depart from its jurisdictional limits, it must follow that the domestic rules of jurisdiction must be applied. Put another way, it appears to be view of Charleton J. that, as EU law does not require administrative body to shed its jurisdictional limits, those limits remain applicable in the context of the dispute before it. The question as to whether in fact EU law *does* require an administrative body to stay within jurisdiction is explored in Chapter 3 (the stated aim of the present chapter is an expatiation of the principles of Irish law only).

The High Court did not engage in a particularly detailed analysis of the constitutional limitations on the powers of tribunals, save for the earlier comment that the WRC simply has no power to condemn national laws as that function is reserved exclusively by Article 34 to the High Court. While the specific sub provision of Article 34 was not spelled out by the High Court, it would appear that there are two relevant sub provisions.

First, Article 34.3.1 provides:

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[36] [2009] IEHC 72 at para 8.

[37] [2009] IEHC at para 8: *"The respondent is bound by the Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2004 fixing the upper age for admission to training as a member of An Garda Síochána at 35 years."*

[38] [2009] IEHC 72 at para 8.

"The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."

Second, Article 34.3.2° provides:

"Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court, the Court of Appeal or the Supreme Court."

By contrast to the relatively brief consideration of the issue of the jurisdiction of administrative bodies by the High Court, the issue of a tribunal's jurisdiction was considered in greater detail by the Supreme Court. In that regard, Clarke J. (as he was then) stated that *"the extent to which it would be permissible to confer on a statutory body, as a matter of domestic Irish constitutional law, the power to disapply legislation, must be extremely limited."*[39]

In light of the wording of Article 37 of the Constitution, which constrains tribunals to exercising "*limited*" powers in a civil context, Clarke J. expressed considerable doubt as to whether it would be possible to vest in a tribunal a power to disapply national law. In that regard, he noted: *"In my view a significant power to disapply duly enacted legislation could not be described as a limited power in the sense in which that term is used in Art. 37.1."*[40]

However, the basis on which Clarke J disposed of the issue whether the WRC had power to disapply national law was that the provisions of the primary legislation in question did not *expressly* give the WRC the power to so do. There are two particularly relevant passages here:

First, Clarke J stated: *"... if and to the extent that it be possible at all, a power to disapply national secondary legislation as a matter of national law could only be conferred on a statutory tribunal or other similar body if the statute concerned contained clear wording*

[39] [2017] IESC 43 at para 5.5.
[40] [2017] IESC 43 at 5.8.

conferring the jurisdiction in question… It does not seem to me that any such power could ever arise, as a matter of national law, by implication."[41]

The second relevant passage reads: *"… as a matter of national law, it cannot be said that there is anything even remotely resembling an express jurisdiction conferred on the Tribunal to set aside or disapply general measures of secondary legislation (that is measures other than registered employment agreements). This would suggest that the Tribunal could not provide any relief to the notice parties for the only means by which any relief could be given would be if the Tribunal did have a jurisdiction to disapply the Regulations."*[42]

Notwithstanding the fact that Clarke J. did row back on the proposition that it might be possible to confer a jurisdiction on a tribunal to disapply national law, the proposition that it is even *arguable* that a tribunal could be vested with such a power, is controversial and interesting, for two reasons.

First, it is without precedent in national law that a non-judicial public body could disapply national law.[43]

Second, the clear and unambiguous constitutional prohibition on a body other than the High Court questioning the validity of a law, as expressed in Article 34.3.2°, is not considered by the Supreme Court. Yet a plain reading of Article 34.3.2° indicates that it is a total bar to empowering a tribunal to disapply national law.

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[41] [2017] IESC 43 at 5.7.

[42] [2017] IESC 43 at 5.11.

[43] The Supreme Court in *WRC* referred to *Tormey v Ireland* [1985] IR 289 for the proposition that it is possible to vest some judicial powers in a tribunal. *Tormey* was in fact about whether it was constitutionally permissible to exclude an accused person from opting for a trial in the Central Criminal Court (i.e. the High Court), given that the High Court has full original jurisdiction under the Constitution. The reasons why the Supreme Court saved the statute in that case were twofold: first, an appeal would lie to the (then) Court of Criminal Appeal; second, the High Court retained powers of judicial review to prohibit trials from taking place in violation of the rights of accused persons in lower courts (page 297). *Tormey* however is no answer for the problem posed by Article 34.3.2° (providing exclusive competence to the High Court to question the validity of laws) as Article 34.3.2° did not arise in *Tormey.* This may, in some respects be a pedantic criticism, as the Supreme Court in *WRC* was clearly very doubtful as to whether it would be in fact permissible to dissolve the power to disapply national laws to a lower court or administrative body ([2017] IESC 43 at para 5.8).

The Supreme Court ultimately did not rule on the question whether (generally) it might be permissible in national law for a tribunal to disapply domestic laws. Rather the Supreme Court found that any attempt to devolve such power to an administrative body would have to be an *express* and not implied power. In the circumstances of the present case, there was no *express* power found in the Equal Status Act and consequently no statutory power in domestic law arose for constitutional scrutiny.

These points are collateral to the more significant point made by the Supreme Court where it found that the WRC has no power in national law to disapply domestic laws. Clarke J. summarised this position in national law as follows:

"It follows that, as a matter of fundamental Irish constitutional law, the proper interpretation of the jurisdiction of the Tribunal, on the one hand, and the High Court, on the other, is that the Tribunal does not have jurisdiction to deal with cases involving the disapplication of national legislation but the High Court, having that jurisdiction, also has an entitlement to implement, in the course of considering a case brought in which it is contended that there is a breach of Union employment equality rights which might require the disapplication of a measure of national legislation, a full power to provide for any remedy which would be available under the Employment Equality Acts."[44]

A number of cases have dealt with arguments that lower courts (here, an analogue for administrative tribunals) ought to disapply laws which were inconsistent with the Constitution.

In *Director of Public Prosecutions (Stratford) v O'Neill*[45] a case was stated by the District Court judge to the High Court. The questions stated included a question whether the District Court could entertain a challenge to the constitutionality of a statute. In that case, the accused was charged with larceny. Section 5(1) of the Summary Jurisdiction Over Children (Ireland) Act of 1884 (as amended) allowed the District Court to try minors summarily as distinct from on indictment, if the Court was satisfied with a number of matters, including "*the character and antecedents of the person charged.*" The District Court judge was concerned that, if at the preliminary stage in proceedings he embarked on an inquiry into the general character of the

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44 [2017] IESC 43 at para 5.15.
45 [1998] 2 IR 383.

accused, the Judge may be in a prejudiced position if the matter was tried before him. Smyth J. in the High Court ruled that it was permissible to "*disapply*" the law in question as being constitutionally repugnant. He stated:

"If, in appropriate proceedings the District Judge is faced with a conflict between a pre-1937 law and the Constitution, he is bound to give effect to the higher law, namely, the Constitution by 'dis-applying' the ordinary law. However, this does not mean that the accused could, as it were, institute the equivalent of declaratory proceedings in the District Court to challenge the validity of pre-1937 legislation, but rather where, as in this case, the Constitutional question arose incidentally in the course of ordinary proceedings, the District Judge has jurisdiction to pronounce on the question."

It is a notable aspect of that decision is that it pertained to a pre 1937 law. This was significant as "*there is no constitutional prohibition on any other court considering the consistency of a pre-1937 law with the Constitution.*"[46] Because laws enacted prior to 1937 were not passed under the Constitutional architecture established in 1937, they were not "laws" for the purpose of Article 34. Accordingly, it might be said that *O'Neill* did not involve Constitutional parameters to sufficiently deal with the question whether the lower courts (and by analogy tribunals) may disapply post-1937 laws.

In *DPP v MS*[47] the accused was charged with numerous sexual offences. Having earlier applied unsuccessfully for an order prohibiting the trial, the accused applied to the Circuit Court judge, at a pre-trial hearing, "*to quash the eleven counts*" on the basis that the statute under which he was prosecuted was repugnant to the Constitution. The statute in question was claimed to be unlawful as it stipulated higher sentences for males as distinct from females. This, it was claimed, violated *inter alia* the constitutional guarantee of equality before the law.

Keane C.J. ruled that the decision in *O'Neill* was *"not necessarily correct."*[48] He stated that the lower courts have no power to consider the constitutionality of *any* statute, whether pre- or

[46] *Ibid* at page 389.
[47] [2003] 1 IR 606.
[48] *Ibid* at page 619.

post- 1937. In referring to earlier case law where it was observed that lower courts had a duty to respect Constitutional right, Keane C.J. stated:

"Those observations are, in my view, perfectly consistent with the District Court or the Circuit Court having no power to determine issues as to the constitutional validity of legislation or rules of the common law, whether dating from before or after the enactment of the Constitution. Unless and until the legislation in question is found to be constitutionally invalid by the High Court or this court, the trial judge discharges his or her constitutional duty by upholding it and applying it to the facts of the case before him or her. There is ample machinery available to the litigant who is advised that any particular law is arguably unconstitutional to institute appropriate proceedings to have that issue resolved in the superior courts."[49]

While *MS* also related to pre-1937 legislation, the above dicta of Keane C.J. expressly embraces both pre and post 1937 legislation. If one accepts that *MS* is correctly decided and one also accepts that the constitutional prohibition on the District and Circuit Courts disapplying law extends, as a matter of logic, to administrative tribunals, then one is compelled to the conclusion that Article 34.3.2° entirely bars tribunals from disapplying national law.

POWERS OF THE HIGH COURT

Having considered the manner in which the Irish Courts considered the issue of the constitutional limitations on a tribunal's jurisdiction, consideration is now given to the High Court's jurisdiction.

As noted earlier, Charleton J. referred to the fact that the High Court is vested with jurisdiction under Article 34 to make the relevant declarations in the event on an inconsistency between domestic and European law.[50] Arising from the earlier analysis, it is thought that Charleton J. finds this specifically in either or both of Article 34.3.1 or Article 34.32.

The powers of the High Court were also considered by the Supreme Court in *WRC*. The Supreme Court appeared to find that the power of the High Court to quash legislation was

[49] *Ibid* at page 620.
[50] [2009] IEHC 72 at para 8.

found in Article 34.3.1.° In that regard, Clarke J refenced the full original jurisdiction clause in Article 34 and then stated:

"As the authors of Kelly, The Irish Constitution , (4th ed, Butterworths 2003 at para. 6.2.04) point out, that provision has consistently been held to establish that the High Court has full jurisdiction to afford a remedy where a right is breached even though no action, or other remedy, appropriate to the assertion of the right concerned is immediately obvious. Therefore, if a breach of a right is established and if there is no other obvious court or tribunal which has jurisdiction to enforce the right concerned by an appropriate remedy, then the High Court has, directly derived from the Constitution, an entitlement to take whatever action may be necessary. It is clear, as a matter of Irish constitutional law, that this encompasses obligations under European Union law. Given that European Union law is incorporated into Irish law by the Constitution itself, it follows that the High Court has full jurisdiction to grant any remedy, not otherwise and elsewhere available, which may be necessary to ensure that rights conferred under European Union law are vindicated."[51]

It is worth pointing out, although it is perhaps a hyper-pedantic point, that the above passage by the Supreme Court is incorrect where it states "*European Union law is incorporated into Irish law by the Constitution itself."* No such "*incorporation*" is in fact achieved by the Constitution. Rather, Ireland in fact incorporates EU law by virtue of section 2(1) of the European Communities Act 1972 (as amended). Accordingly, the incorporation of EU law in Ireland is primarily by way of statute, coupled with a negative constitutional clause disarming constitutional provisions in the case of acts necessitated by EU membership.[52] It is only in the event of a conflict between both systems that the Constitution and Irish law yields to the supremacy of EU law. This is in fact evidenced by the fact that both the Irish High and Supreme Court had to consider whether there was a power to disapply law, deriving *either* from national law or Union law.

Leaving aside that pedantic quibble, it is notable that the Supreme Court found the power to grant a declaration as to incompatibility specifically in Article 34.3.1° and not elsewhere.

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[51] [2017] IESC 43 at para 5.4.

[52] See also Kelly: The Irish Constitution 5th ed at paras 5.3.104 to 5.3.109 for fuller discussion.

In this regard, it is questionable whether the passage cited by Clarke J from *JM Kelly: The Irish Constitution* is in fact authority for the proposition for which it was relied upon. Clearly the passage referred to speaks of the High Court's wide jurisdiction to vindicate *rights.* However, the circumstances in which the High Court might be called upon to disapply national law may extend beyond cases involving actionable rights. In such cases, where EU law must prevail over a national law in a case which does not involve actionable rights, the Court's jurisdiction to disapply national law cannot be rationalised by reference to its powers to remedy breaches of rights.

It must be noted that nowhere in the Constitution is there any provision which expressly provides that the High Court may quash a law for inconsistency with EU law. Accordingly, the power of the High Court to so quash must be inferred. One basis to do so is by reference to Article 34.3.1°, as invoked by the Supreme Court.

Another such source might by Article 34.3.2° which, as quoted earlier, states:

"Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court, the Court of Appeal or the Supreme Court."

If one envisages, for a moment, the Irish Constitution *without* this express judicial review clause found in Article 34.3.2° it would be questionable whether the Irish courts would have any power to quash legislation enacted by an elected legislature. This provision clearly arms the judicial branch with the power to quash legislation. Secondly, the actual wording of Article 34.3.2° is important; it does *not* expressly state that the courts may only quash on the basis of unconstitutionality. The question which the Court may raise is the "*validity*" of any particular law "*having regard to*" the Constitution. Thus, the wording of Article 34.3.2 is loose enough that it may stretch to include review for illegality beyond repugnancy to the Constitution itself and perhaps it may stretch to embrace a power to condemn a law for incompatibility with EU law.

It is obvious that the drafters in 1937 did not envisage a scenario whereby any court would be called upon to impugn duly enacted legislation on the basis that it was contrary to European law. However, it cannot be ruled out that the Framers may have considered the possibility that the Irish State may, at some later date, join some form of federal system whereby laws passed by the national parliament may be subject to compliance with a higher legal norm.

Thus, the text of Article 34.3.2° might be said to be capable of breathing to embrace judicial review for compatibility with European law and this might have been the more natural place to find that very power.

In any event, regardless of the source of the power, it is clear that the High Court is empowered with a jurisdiction to quash legislation for illegality under EU law.[53]

The Supreme Court also considered the role of the High Court in relation to the statute in question. The "ordinary" position is that the High Court would not intervene, at first instance (as opposed to on appeal on a point of law or an application for judicial review), in a case which the WRC was empowered to hear and adjudicate upon. Clarke J. confirmed stated that in the following terms:

"While it would, ordinarily, be the case that the High Court could not embark on a hearing dealing with an ordinary employment equality case (for the jurisdiction in that regard is, ordinarily, conferred on the Tribunal), in circumstances where the complaint, if it is to be upheld and if the rights of the persons making the complaint are to be vindicated, would require the disapplication of a measure of national legislation, then it would be necessary to disapply any rules of national law which stood in the way of the High Court exercising the full powers which would ordinarily be enjoyed by the Tribunal in order that the Union law rights of the complainant concerned be fully vindicated."[54]

In a similar passage, the Court notes:

[53] Per Clarke J. supra: "… *the High Court has full jurisdiction to grant any remedy, not otherwise and elsewhere available, which may be necessary to ensure that rights conferred under European Union law are vindicated."*

[54] [2017] IESC 43 at para 5.13.

"While this latter position would not normally pertain in the context of a purely domestic legal situation, it is necessitated by the requirement to ensure that Union law rights are vindicated and represents the appropriate national solution to the problem caused by the Tribunal not having a jurisdiction to disapply legislation."[55]

It appears that Clarke J. is stating that the High Court would ordinarily not involve itself in a first instance adjudicative role in a dispute to which exclusive powers of first instance adjudication were granted by statute to an administrative body. As the Equal Status Acts take the first instance adjudication of employment-related discrimination disputes "out" of the Courts and into the exclusive remit of the WRC, subject to an appeal or judicial review, the High Court would not ordinarily involve itself in a first instance adjudicatory role.

Accordingly, the statutory scheme provided in the Equal Status Acts, which would suggest that the High Court is excluded from a first instance adjudicatory role, is no more than a rule of national law which could equally be disapplied (in order to give the High Court a first instance role of adjudication) if that is what EU law required.[56]

This is highly significant as, to the extent that the High Court's first instance adjudicatory role is curtailed or obliterated by the Equal Status Acts, this is simply a provision of national law which itself can be disapplied by the High Court to remove any perceived bar on the High Court hearing the claim at first instance. This is one of "*two potential solutions to the problem of disapplication*"[57], the other, of course, being that the WRC disapplies substantive provisions of national law.[58]

The significance of this "*potential solution*", whereby the High Court disapplies any law limiting its jurisdiction to hear the case for the purposes of disapplying statutory instruments which are repugnant to EU law, is that it is preferable from a national law stance.[59] Conversely,

[55] [2017] IESC 43 at para 5.15.
[56] [2017] IESC 43 at para 5.13.
[57] [2017] IESC 43 at para 5.13.
[58] [2017] IESC 43 at para 5.13.
[59] See [2017] IESC 43 at para 5.14 whereby Clarke J described it as in *"full conformity with the Irish constitutional legal order for it derives from the constitutional power of the High Court to deal with all matters of law and fact and requires the disapplication of any aspect of statute law which might stand in the way of the High Court being able fully to vindicate the rights asserted."*

the second potential solution, whereby the WRC arrogates to itself a power to disapply domestic regulations, is offensive to the Irish Constitutional structure.[60] Put another way, the former solution (i.e. the disapplication of statutory rules vesting the WRC with an exclusive first instance adjudicatory role) is contrary only to the relevant statute, namely the Equal Status Acts. However, the latter approach (involving the disapplication of duly promulgated laws, including statutory instruments) is contrary to *both* legislation (as the Equal Status Acts vest no express power to disapply national laws in the WRC) and, more importantly, the Constitution. Thus, the first solution is less violent to the domestic legal system.

A further issue concerning domestic rules of jurisdiction arises. In circumstances where an ambiguity is present in a statute which confers jurisdiction on a tribunal, there is a clear line of authority for the proposition that the statute ought, where possible, to be interpreted in consonance with EU law.[61] The question of the provisions of EU law are, in that teleological manner, relevant to the question of jurisdiction in domestic law. This is evident in the High Court judgment in *WRC* where Charleton J. reiterated a well known principle in domestic law, that, while a body must, where possible, interpret national law consistent with corresponding EU law, it does *not* have a power to interfere with the former. In that regard, Charleton J stated:

"In circumstances where an ambiguity arises, both this Court and any administrative body, including the respondent, is obliged to construe national legislation in the light of the obligation under European law in which it had its origin. That obligation, however, does not (sic) extent to re-writing the legislation; to implying into it a provision which is not there; or to doing violence to its express language."[62]

This interpretative obligation was referred to in *Marleasing v La Commercial Internacional de Alimentacion SA*[63] where it was held that a national court hearing a dispute pertaining to an EU

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[60] See [2017] IESC 43 at para 5.14: *"The alternative solution of extending a power, which would not otherwise arise, to the Tribunal to disapply national legislation is wholly contrary to the national legal order and, certainly as a matter of national law, would not represent an appropriate solution to the problem."*
[61] See for example *Impact v Minister for Food* C268/06 at para 54.
[62] [2009] IEHC 72 at para 7.
[63] C106/89.

Directive must interpret its national law in light of the wording and purpose of the Directive.[64] The limitations on that requirement were described by Murray CJ in *Minister for Justice v Altaravictius*[65] who stated it did not require a national court to interpret domestic law "*contra legem.*"[66]

This interpretive duty is clearly a helpful principle, but only insofar as it can in fact be applied in a relevant case. It is most helpful as it contemplates a middle ground between EU law and national law whereby they are interpreted harmoniously, where possible. This is of course less juridically destructive than the relatively stark act of disapplying national laws.

The real limitation arising from the duty to interpret domestic laws in harmony with EU law is simply that it is not always possible to so do.

CONCLUSION ON RESPECTIVE POWERS OF TRIBUNALS AND COURTS

It is uncontroversial that the High Court can quash or otherwise condemn laws for violation of EU law, however the precise source of that power is a little unclear. It appears clear that the Constitution stops short of expressly giving the Court such a power.

There might be a political dimension to this. Perhaps an express amendment to the Constitution granting the High Court the power of judicial review for breach of EU law would have been unpalatable. Such a proposed amendment would, in the usual way with referenda, come under public scrutiny. Perhaps an express power of that nature would have proved too controversial and may have been viewed as a radical power. The defeat of such an amendment would be

[64] The relevant passage reads, at para 13: "*The answer to the question submitted must therefore be that a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive .*"

[65] [2006] 3 IR 148.

[66] *Ibid* at page 156. See also *Impact v Minister for Agriculture and Food* C268/06 whereby the CJEU held that national courts are not required to interpret domestic laws *contra legem;* in that case the approach of the national courts in abiding by the Irish statutory rule against retrospective application of legislation meant that legislation belatedly transposing the provisions of a directive into national law did not have retrospective effect (see in particular paras 103 and 104).

catastrophic from the perspective of Irish-EU relations and would create a crisis whereby the Constitution would prohibit a certain course required by EU law. It might be thought that the omission of such an express and awesome power was desirable to ensure passage of the respective amendments to Article 29.

In any event, while the Irish Courts' decisions raise important propositions which have been analysed, the Constitutional position is that the High Court may disapply national laws, but the WRC may not.

DISTINGUISHING JUDICIAL REVIEW AND DISAPPLICATION OF LAWS

The question whether there is much difference between the power of judicial review (by which it is meant in this context, the quashing of a law) and the mere disapplication of the law is worthy of consideration.

At a conceptual level, there is a difference between striking down legislation (for present purposes this includes statutory instruments) and merely disapplying it. In the case of the former, the legislation is struck down. In the latter case, the legislation is merely not applied to a specific dispute but it retains its vitality and it remains open to (possible) future application. So, the issue of what a decision maker "does" concerning a suspicious statute is important, conceptually.

The Supreme Court in *WRC* addressed this question. Clarke J. noted that "*in practice*" the two concepts when applied to the facts of the *WRC case* would not result in a real difference.[67] Because the regulations applied exclusively to applicants to join An Garda Síochána, should it be determined that they must be disapplied in the present case, then the Regulations, *"although perhaps in a highly theoretical sense still extant, would be legally null and of no effect. It would require to be disapplied in every case."*[68]

[67] [2017] IESC 43 at para 5.3. See also comments at para 5.2 *"The term 'disapply' is normally used to refer to the circumstances where a measure, although continuing to have general validity, is required not to be applied in the particular circumstances of an individual case because its disapplication is necessary to ensure the vindication of rights guaranteed by European Union law."*
[68] [2017] IESC 43 at para 5.3.

Notwithstanding the fact that the Court averted to this potential distinction (namely that a merely disapplied law which has not been quashed could be revived in a later case), it was found that, in the context of the powers of courts and tribunals, there is no "real distinction" between the two concepts. Clarke J stated:

"In the context of the distinction between the constitutional power of the higher courts and the limited role of statutory bodies, it does not seem to me that, as a matter of national law, any real distinction can be drawn between a power to set aside legislation, on the one hand, or a power to disapply it, on the other. In substance, both measures have the potential to entitle a body with appropriate jurisdiction to ignore a measure of national law. Obviously the effect of a measure being set aside may be greater in that it will not be valid for any purposes whereas a disapplication may in practice render a measure inapplicable in only some circumstances. However, both involve a relevant court or body not applying what would otherwise be the law which it is obliged under the Constitution to enforce. As a matter of national law such a decision is one which, at a minimum, can be said to be principally and primarily conferred on the courts established under the Constitution."

Thus, the two concepts are different in principle, as the disapplied laws remain alive. However, on the facts of *WRC,* the disapplication of the age limit effectively quashed it since the context on which age limit would arise is always the recruitment of members of An Garda Síochána.

Article 34.3.2°, which prohibits any entity other than the High Court from purporting to *"question of the validity of any law,"* was not expressly considered by the Supreme Court.

In light of this provision, it is suggested that the Supreme Court may have embarked on a redundant exercise of considering the differences between the judicial review and disapplying a law. Article 34.3.2° plainly renders impermissible any attempt to disapply apply laws by any entity, save for the High Court. The phrase *"question of the validity of any law"* is clear. Within the ordinary and plain meaning of those words, the disapplication of a provision of law, whether primary or secondary legislation, connotes the "questioning" the validity of a law.

Consequently, disapplying a domestic legal instrument is as much offensive to Article 34.3.2° as a tribunal or lower court purporting to strike down a law.[69]

These points may be considered pedantic in nature, given that the Supreme Court ultimately found that there was no power to disapply national law. However, the failure by the Supreme Court to recognise that both quashing and refusing to apply a law might amount to the same thing for the purposes of Article 34.3.2°, is notable.

Notably, Drake suggests that the Irish Supreme Court misunderstood the nature of the obligation to disapply national laws. She states:

"The crux of the problem in this case stemmed from an understanding on the part of the Irish judiciary that the obligation to disapply national law that conflicts with EU law equates to the authority to rule on the (constitutional) validity of national legislation. It is only the High Court, which can have this authority under the Irish Constitution with appeal on the law only to the Court of Appeal and the Supreme Court. A body such as the WRC cannot be granted this power, not just because the WRC has not been conferred this power by statute, but also because it would be contrary to the Irish Constitution. While Article 37 of the Constitution permits such a power to be expressly granted in 'limited circumstances', the Supreme Court did not consider that was the case here."[70]

Later, she makes the point that the disapplication of laws *"... should not be confused with the authority to invalidate national law, a matter which may be confined to the ordinary courts."*[71]

This might be a slightly unmerited criticism of the Supreme Court decision for the following reason. It appears from my earlier analysis that an expatiation of the distinction between powers of review and disapplication of laws are redundant in the Irish context. It is suggested that

[69] See *MS* per Keane J *supra*: District and Circuit Court judges have a constitutional duty pertaining to domestic law, which is discharged by "*upholding it and applying it."*
[70] Sarah Drake, "The principle of primacy and the duty of national bodies appointed to enforce EU law to disapply conflicting national law: *An Garda Síochána" Common Market Law Review* (2020) 57, pp 557–568 at p565.
[71] Sarah Drake, "The principle of primacy and the duty of national bodies appointed to enforce EU law to disapply conflicting national law: *An Garda Síochána" Common Market Law Review* (2020) 57, pp 557–568 at p566.

under Irish law, both the power to disapply laws and the power to rule on the constitutional validity of legislation may only be exercised by the High Court, since according to Article 34.3.2°, that is the only institution which may "*question the validity*" of any laws.

Prior to leaving this topic on the distinction, if any, between setting aside and merely disapplying national law it is worth drawing attention to two relevant approaches found in civil law jurisdictions.

For example, in Italy, the separation of powers under the Italian Constitution have been interpreted to the effect that the revocation or modification of an administrative act (analogous to *certiorari*) was impermissible as it constituted the exercise by an administrative judge of executive powers. Consequently, a practice developed whereby the administrative judge would simply not apply it.[72]

Another civil law approach, as found in French law, is a doctrine of flagrant irregularity which empowers the Civil Courts (as distinct from the administrative courts) to, rather than annulling the decision, simply declare that the decision was simply non-existent"[73]

These civil law approaches suggest that there might be some academic merit in the argument that there is a difference in disapplication and judicial review.

However, there is no merit in discussing the difference between disapplication and judicial review, in the context of the Irish Constitution, as Article 34.3.2 holds that tribunals may not "question the validity of" any law.

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[72] See "Constitutional Law in Italy" Onida, Balboni et al (Kluwer 2013) page 320. See also "*The Simmenthal Revolution Revisited: What Role for Constitutional Courts*" (Darinka Piqani) writing in "*National Courts and EU Law: New Issues, Theories and Methods*," de Witte, Mayoral et al (Elgar 2016) at page 34 who states that *"... disapplication of conflicting national law can be done without a decision of unconstitutionality by constitutional courts or an annulment by parliament."*

[73] Brown and Bell, French Administrative Law (5th edition) page 139: *"... it indicates some irregularity on the part of the administration which is so flagrant and gross that it cannot be regarded as an administrative act at all but is treated as if it were the act of a private body, thereby losing the privilege of being adjudicated upon only by the administrative court and falling in the cognizance of the ordinary courts."*

<u>CHAPTER 3 JURISDICTION AS A FACET OF THE PRINCIPLE</u>

Having considered the issue of the powers of administrative bodies in Irish law to disapply laws, the analysis now turns to the various aspects of European law which bear on the power and requirement to disapply national laws as necessary. In this regard, the question of "jurisdiction" arises. EU law (usually) does not legislate for the entities which ought to have power to deal with certain disputes and award certain reliefs. Thus, normally, jurisdiction is established by national law. Yet, the issue of jurisdiction is relevant to the manner in which the Principle is to be exercised. A line of caselaw from the CJEU suggests that the Principle ought only to be exercised by a judicial body or tribunal acting within its jurisdiction.

SIMMENTHAL AND LATER CASE LAW

A line of case law commencing with *Amministrazione delle Finanze dello Stato v Simmenthal SpA*[74] gave rise to the Principle. Originally, the obligation to disapply national law was stated to rest with domestic courts.[75]

In *Simmenthal* an Italian magistrate referred a question to the CJEU concerning whether he was required to disapply a national law which was contrary to EU law. The Court handed down the following principle:

"It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.

Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary

[74] C106/77.

[75] Darinka Piqani, "*The Simmenthal Revolution Revisited: What Role for Constitutional Courts*" in de Witte, Mayoral et al (eds) *National Courts and EU Law: New Issues, Theories and Methods* (Elgar 2016) which deals with the ramifications of the *Simmenthal* case on courts, as opposed to administrative entities.

at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law."[76]

It is notable that, when stated in these terms, the obligation to disapply national laws rests on courts only,[77] although, as shown subsequently, this obligation extended to include administrative bodies. Importantly, as can be seen from the above statement of principle, the obligation arises only where the court has jurisdiction.

In *Costanzo SpA v Comune di Milano*[78] the plaintiff in the domestic proceedings was eliminated from a public works contract competition by virtue of national rules which were claimed to be contrary to the relevant Directive. Numerous questions were referred to the CJEU. Of importance in the present context was the question whether "*administrative authorities*" were under the same duty as national courts to disapply national laws contravening Union laws. The Court of Justice answered the question affirmatively and ruled:

"… administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of [Union law] and to refrain from applying provisions of national law which conflict with them."[79]

Here, it is appropriate to note that *Costanzo* extends the "same obligation" as lies with national Courts (as espoused in *Simmenthal*) to administrative entities. It is submitted that this means that the requirement to act within jurisdiction is also a feature of the obligation placed on national administrative authorities as both cases concern the "same obligation".[80]

[76] *Simmenthal* at paras 21 and 22.
[77] See *Piqani* (supra) at page 27 *"Under Simmenthal, ordinary courts are fully in charge of applying EU law, meaning any constitutional rule or practice, regardless of whether it follows from choices of national constitutional design or deeply rooted legal traditions will be precluded by EU law in case it potentially impairs the full application and effectiveness of EU law."*
[78] C103/88.
[79] *Costanzo* at para 33.
[80] See, by way of analogy only, *Impact v Minister for Agriculture and Food* C268/06 at para 101 where it was held that the interpretative duty on national courts only extends as far as their jurisdiction goes (emphasis added): *"The principle that national law must be interpreted in conformity with Community law none the less requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by*

CIF v Autorità Garante della Concorrenza e del Mercato[81] involved *inter alia* the question whether the Italian competition authority was required to disapply provisions of national law which shielded otherwise anti-competitive behaviour proscribed by the Treaty. In essence the national law impugned in that case *required* all entities involved in the manufacture and sale of matches to join the *CIF* consortium. The national legislation required those entities to act in a manner that was anti-competitive and contrary to Union Treaty articles on competition law. The domestic Competition Authority applied the following approach: first, it found that the anti-competitive behaviour was shielded by the provisions of national law; second, that those legislative provisions had to be disapplied as they were contrary to EU law and third, as a result of that disapplication, the shield was dropped.[82] The Court of Justice ruled, citing *Costanzo,* that:

"The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities… which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied."[83]

CIF, while not referring explicitly to the requirement to remain "within jurisdiction", cites *Costanzo* which, as argued above, imported the requirement to act within jurisdiction when considering the obligation to disapply national laws.

JURISDICTION CONSIDERED IN THE WRC CASE

There is somewhat of an inconsistency in the CJEU's decision in *WRC*. One the one hand the obligation to act within jurisdiction remains. Yet, jurisdictional rules are among those national rules which may have to be disapplied by national tribunals.[84]

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domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it."

[81] C198/01.

[82] *CIF* at para 22.

[83] *CIF* at para 49.

[84] See *WRC* at para 50 which states that bodies acting "*within the exercise of their respective powers*" may have to disapply national law. But see also para 52 which provides that jurisdictional rules may have to be disapplied.

High Court

As far as European Law is concerned, the High Court entertained no doubt as to the duty to disapply national laws. Simply put, Charleton J. expressed the view that European law does not empower an administrative body (or indeed a Court) to exceed its own *vires*. In that regard, Charleton J. stated (emphasis added).

"There is no principle of <u>European law</u> which allows an administrative body or a court of limited jurisdiction to exceed its own authority in order to achieve a result, whereby it is of the view that European legislation has not been properly implemented at national level and that this situation is to be remedied by the re-ordering in ideal form of national legislation. The limit of jurisdiction is of primary importance to the exercise of authority, whether the court be one established as an administrative body, or is one of the courts under the Constitution. In the event that a view emerges that national legislation has not properly implemented European legislation, this is no more than an opinion. <u>The respondent does not have the authority to make a binding legal declaration of inconsistency or insufficiency on a comparison of European and national legislation. The High Court has that power</u> as this has been expressly reserved to it by Article 34 of the Constitution."[85]

The foregoing statement of principle, that European law does not permit an administrative body to act outside its statutory remit to disapply national law, appears to be derived from the CJEU decision in *Impact v Minister for Agriculture and Food.*[86] Charleton J. in *WRC* cited numerous passages from the *Impact* decision. The first of those passages cited was as follows:

"... where the national legislature has chosen to confer on specialised courts jurisdiction to hear and determine actions based on the legislation transposing Directive 1999/70, the obligation which would be placed on individuals in the situation of the complainants – who sought to bring a claim based on an infringement of that legislation before such a specialised court – to bring at the same time a separate action before an ordinary court to assert the rights which they can derive directly from that directive in respect of the period between the deadline for transposing it and the date on which the transposing legislation entered into force, would

[85] [2009] IEHC 72 at para 8.
[86] C268/06.

be contrary to the principle of effectiveness if – which is for the referring court to ascertain – it would result in procedural disadvantages for those individuals, in terms, inter alia, of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from that directive."[87]

The first point to note from the foregoing passage from *Impact* is that the CJEU law appears to accept the fact that jurisdiction derives from national law (i.e. "… *the national legislature has chosen to confer on specialised courts jurisdiction to hear and determine actions…"*).

Second, it suggests that there are two conceivable scenarios arising where a person wishes to claim a for breach of an EU law right. First, the claimant may prosecute under national legislation (which transposes an EU Directive). In that case, the claimant *must* prosecute the claim before the administrative tribunal established in national law for those purposes. The second scenario envisaged in *Impact* is that a claimant might, where he seeks to rely on rights protected under the Directive itself (i.e. direct effect), sue in an "ordinary court" (i.e. the High Court). The second scenario might arise where, for example, the Member State has failed to transpose the provisions of the relevant Directive. Or, in the rather more nuanced scenario posed in *Impact,* the Member State was *late* transposing the Directive and failed to provide transitional arrangements for claims which might have arisen between the time for the transposing of the Directive and the commencement of the legislation. In the event, as the deadline for transposing the Directive has passed, the Directive has become directly effective in national law. This allowed a claimant to sue directly under the provisions of the Directive and not under the provisions of national implementing legislation.[88]

There are further passages from *Impact* cited by Charleton J. in *WRC*, as follows:

"If the referring court were to find such an infringement of the principle of effectiveness, it would be for that court to interpret the domestic jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law…

[87] See High Court judgment [2009] IEHC 72 at para 7 citing *Impact* decision (C268/06) and paras 46 to 48, 51, 54 and 55 thereof.
[88] See for e.g. *Van Duyn v Home Office* C41/74 at para 12.

… Community law, in particular the principle of effectiveness, requires that a specialised court which is called upon, under the, albeit optional, jurisdiction conferred on it by the legislation transposing Directive 1999/70, to hear and determine a claim based on an infringement of that legislation, must also have jurisdiction to hear and determine an applicant's claims arising directly from the directive itself in respect of the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by Community law. It is for the national court to undertake the necessary checks in that regard."[89]

In the first of these two passages, the case is made that, "wherever possible" domestic jurisdictional rules should be interpreted in consonance with EU rights. That is uncontroversial. The use of that qualified language suggests that the obligation on the Courts to interpret *jurisdictional* rules (as distinct from substantive rules) consistent with EU law is not an absolute obligation. This suggests that there may be instances where it is impossible to construe jurisdictional rules consistent with the requirement of EU law, for example, where such an interpretation is *contra legem.* It is submitted as a matter of logic that such a scenario (i.e. a scenario whereby it is impossible to interpret domestic jurisdiction laws in a manner which accords with EU law requirements) may arise where the legislation giving power to the decision maker cannot be construed, using traditional methods of statutory interpretation as giving that body the power to, for example, disapply national law. Put more simply, the scenario may arise when the statute giving powers to the decision maker simply cannot bear the interpretation necessitated by EU law. At this juncture it is helpful to consider that, in the Supreme Court, Clarke J. held clearly that any power in Irish law which a decision maker might have to disapply national law would have to be express and could never be implied.[90] Accordingly, the interpretative principle will not enable a tribunal to "find" an implicit power to disapply national laws.

[89] *Ibid.*
[90] [2017] IESC 43 paras 5.7 and 5.11.

The second of the two passages refers to the earlier mentioned scenarios involving a claimant in a case for a breach of EU rights. While the administrative body has jurisdiction to hear the claim in domestic law (implementing EU law rights), it "*must also have jurisdiction*" to hear a claim relying on the directly effective terms of the directive *if* the latter claimant would otherwise be at a disadvantage to the domestic-law litigant. At this juncture it is valid to ask what it means when the Court in *Impact* states that a body "*must also have jurisdiction…*" Does this mean that the tribunal in question *does* have the jurisdiction (i.e. that EU law is self-executing in this regard)? Or, does it mean that the failure to provide such jurisdiction in national law is actionable for failing to implement EU law (under a *Francovich*-type case)? These two questions are explored later in this chapter and further in Chapter 6.

Returning to the High Court decision in *WRC,* Charleton J. concluded that, while the WRC acted with "*proper zeal against age discrimination*" and pursued a "*laudable determination*", it acted *ultra vires*.[91]

Opinion of Advocate General Wahl

The issue of jurisdiction was considered extensively by the AG in his Opinion. The AG stated that it required emphasis that the principle beginning in *Simmethal* was contingent on the body (whether a court or administrative tribunal) acting within the limits of its jurisdiction, which is of course established by *national* law, not European Union law.[92] In two important paragraphs AG Wahl stated (AG's own emphasis):

"However, it must be emphasised that, in accordance with the dictum of the Court in Simmenthal, such an obligation exists only where the organ in question is acting <u>within the limits of the jurisdiction</u> conferred upon it (as a matter of national law).

In relation to national courts in particular, the Court has expressly held that the obligation to disapply national law is circumscribed by the jurisdiction conferred upon the national court asked to apply provisions of EU law. That statement suggests, on the one hand, that the Court is mindful of the freedom that Member States should retain in defining, in accordance with

[91] [2009] IEHC 72 at paras 11 and 12.
[92] Opinion of AG Wahl at para 54.

their constitutional traditions, their judicial and administrative infrastructure. On the other hand, it signals deference to the divergent constitutional systems that together form the foundation of the EU legal system."[93]

The AG proceeded to acknowledge that a rule of national law which confined in "a general manner" the obligation to disapply national laws which are contrary to EU law, to courts only, would be in conflict with the principles in *Simmenthal* and *Costanzo.* However, the case before the AG did not involve such a rule, nor did it call into question the primacy or effectiveness of EU law. Rather, the case was "*about whether EU law mandates which judicial body ought to have jurisdiction to deal with a particular category of case"*[94] In a later passage, he put the matter in very similar terms by noting that the provision of Irish national law "*divides the substantive jurisdiction in specific cases between the WRC and the High Court by confining to the latter exclusive jurisdiction to hear cases involving a challenge to the validity of legislation or requiring the disapplication of legislation.* (emphasis of AG)"[95]

The AG urged caution in drawing parallels with the *Simmenthal* line of cases as the principle derived from that line of case law requiring national decision makers (whether courts or administrative agencies) to disapply national law was contingent on those bodies acting "*within their respective areas of competence."*[96]

Analysing the *Simmenthal* case law, he stated:

"…the case-law does not in my view seek to interfere with the attribution of jurisdiction over cases between courts (and/or administrative bodies). It does not allow a court (or, a fortiori, an administrative body) to ignore rules of jurisdiction in the name of full effectiveness of EU law. That is essentially because Member States enjoy, as a matter of principle, substantial autonomy in devising procedural rules, such as those regarding the designation of the authority or court with jurisdiction in a certain category of case, as long as the principles of equivalence and effectiveness are respected.

[93] *Ibid* at para 54.
[94] *Ibid* at para 63.
[95] *Idid* at para 64.
[96] *Ibid* at para 69.

As I see it, an administrative body or a court can be under an obligation to refrain from applying a provision of national law, in order to give full effect to EU law only if it has been established at the outset that that organ has substantive jurisdiction to consider the case (or indeed, as concerns more broadly authorities, to take a decision on a particular matter).”[97]

The AG was cognisant of the fact that the High Court has jurisdiction to entertain complaints that national law violated EU law.[98] However, importantly, he found that the competence of the WRC to enforce Union law is limited by its jurisdiction. He noted:

“It is true that, within its sphere of competence, the WRC is required to ensure compliance with employment equality legislation, including Directive 2000/78. Nonetheless, that competence is circumscribed by the rule of jurisdiction at issue in the present case.”[99]

The AG found that this was sufficient to dispose of the question referred. As the WRC had no jurisdiction to disapply national law, it failed to engage the principle in *Simmenthal.* He noted that the referring court made findings that the rule in question did not violate the rules of equivalence and effectiveness.

Court of Justice

The Court of Justice was far less comprehensive in addressing the question whether it was a condition precedent to the obligation arising to disapply national law that the body in question is acting within jurisdiction.

The Court of Justice made a number of critical statements of principle. Any law which withheld from a court or tribunal, which has a power to apply EU law (obviously to be determined by national law), the "*power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect*" would be incompatible with the EU legal system.[100] This problem would arise if the resolution to a conflict between Union and national law was reserved

[97] *Ibid* at paras 70 and 71.
[98] *Ibid* at para 73.
[99] *Ibid* at para 74.
[100] *Ibid* at para 36.

"to an authority with a discretion of its own, other than the court called upon to apply EU law."[101]

The Court then arrived at the Principle that bodies (both Courts and administrative entities) have a duty to disapply national rules in order to uphold the primacy of EU law, subject to a very significant rider that it is "*within the exercise of their respective powers.*"[102] The reasoning is unsatisfactory as it begs the question what is meant by "within the exercise of their respective powers." It seems to mean that the body must stay within jurisdiction. If this is so, the question of procedural autonomy, which would potentially save a domestic rule which limits the powers of the WRC in light of the exclusive powers of judicial review of the High Court, arises. However, the point of procedural autonomy is not expatiated by the Court, despite being raised by the referring Court and despite it forming the a central part of the AG Wahl's Opinion in which he upheld the validity of the national jurisdictional limits.

It is also important to note that the CJEU refers to the fact that the WRC is assigned by the Irish legislature with specific powers for enforcing Union law set out in Directive 2000/78.[103] However, the Court's analysis lacks sophistication; a more discerning analysis of the Irish legal system reveals that in circumstances where the claim seeks to impugn primary or secondary legislation, whether as unconstitutional or as violating Union law, the High Court is the national body conferred with jurisdiction to vindicate the rights in question. Viewed in this manner, Irish law in fact charges two distinct entities with ensuring compliance with the provisions of the Directive: the WRC with disputes falling within the relevant statutory instrument and the High Court where the complaint involves an attack on the statutory instrument itself.

The formal ruling of the Court was as follows:

"EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law."[104]

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[101] *Ibid* at para 37.
[102] *Ibid* at paras 38 and 50.
[103] *Ibid* paras 43 to 45.
[104] *Ibid* at para 53.

This suggests that it is the domestic rules of jurisdiction which are contrary to EU law.

Perhaps on a slightly pedantic note, it is notable that the case refers to the preclusion of "*national legislation.*" However, the limit on the WRC's jurisdiction was not from "national legislation" alone; it was in fact primarily constitutional.[105] Admittedly, this is a pedantic point as both the Constitution and domestic legislation must yield to EU law.

ANALYSIS OF JURISDICTION AS A PART OF THE PRINCIPLE

It appears that the line of case law commencing with *Simmenthal* requires courts and administrative tribunals to disapply national measures when that body is acting within jurisdiction. Jurisdiction of course, at least insofar as it is understood in common law – and no contrary definition is put forward by the European Courts - comprises two legs. First, the body in question must have jurisdiction to hear the dispute in question. Second, it must continue, in the course of its hearing of the dispute, its adjudication and the award of remedies, to act within jurisdiction.[106] The requirement to act within jurisdiction exists throughout the entire process.

[105] See generally chapter 2.

[106] *Anisminic Limited v Foreign Compensation Commission* [1969] 2 A. C. 147, per Lord Reid at p 171. See also *State (Holland) v Kennedy* [1977] I. R. 193 at p 201. The *Anisminic* decision has given rise to a great debate concerning the question whether or not a body loses *vires* if it misinterprets a statutory provision in the course of its adjudication (see *Hogan and Morgan* paras 10.95 to 10.130 and O'Reilly, James *"Errors of Fact and Errors of Law as Grounds for Judicial Review,"* Irish Jurist, 2012, 47(1)). In this regard, Hogan and Morgan state that "*this area of the law was in a constant state of flux, both here and in England*" (para 10.121); a recent Irish authority suggests that the debate might be resolved by the application of judicial discretion to the questions of errors of law in a given case (see *SFA v Minister for Justice and Equality* [2015] IEHC 364, per Mac Eochaidh J at para 21). It is suggested that this specific debate is outside the scope of the present project. The sole point from the *Anisminic* case which is relied upon above and which is uncontroversial in Irish administrative law is that a body may embark on an adjudication which it has *vires* to consider, however it may subsequent to embarking on its inquiry do something to lose *vires*, such as violating natural justice. In that regard, refer to *Anisminic* Lord Reid at p.171: "*there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right*

Since jurisdiction is ultimately indivisible (at least as a matter of Irish law), a body which makes a decision contrary to either the "first leg" only or the "second leg" only is ultimately acting outside jurisdiction. Put slightly differently, a body acts outside jurisdiction even if it has jurisdiction under the "first leg" but no jurisdiction to make the orders sought under the "second leg." In all such cases, the body is acting outside jurisdiction.

Further, it must surely be accepted that, leaving aside Irish law and the *Anisminic* case momentarily, as a *concept* one could see a possibility that in the various legal systems of the individual Member States, that jurisdiction might be viewed as referring only to the "first leg." It is clear however that the Court in *Simmenthal* did not purport to hand down a definition of jurisdiction, much less an autonomous definition. From that, it must be inferred that the question of jurisdiction, which is a condition precedent to the obligation arising to disapply national rules, is a concept to be defined in *national law.*[107]

Analysing the Principle in light of this consideration, the following view is offered. In the *WRC* case, the WRC had jurisdiction under the "first leg" in the sense that the substantive dispute was brought under the Equal Status Acts, an act which empowers the WRC to hear the dispute. However, the WRC had no jurisdiction whatsoever under the notional "second leg" of jurisdiction. Like the WRC, many administrative bodies (for e.g. An Bord Pleanála or the International Protection Appeals Tribunal) have a "first leg" jurisdiction to hear a dispute with an EU law dimension. For example, a planning appeal with environmental considerations or an ordinary appeal for international protection, each of which involve the exercise of EU-protected rights. These bodies clearly have jurisdiction under the first of the two legs referred to above; they may adjudicate on the applications before them. However, under the "second leg", that body's jurisdiction may well be limited by national law in terms of the remedies which it may award. In circumstances where national law limits the ability of the body in question to act in a certain manner (by for example giving an administrative decision maker no power to grant injunctive relief or no power to disapply national laws) those tribunals would be acting outside the second leg of jurisdiction if they purported to set aside national law, just

to take into account. I do not intend this list to be exhaustive." This particular principle is not in doubt in Irish administrative law.

[107] A view expressed by AG Wahl in *WRC* at para 54.

as they would act outside jurisdiction if they sought to, for example, injunct a party to the dispute before it.

Accordingly, on one view of the *WRC* case, the principle in *Simmenthal,* where the obligation to disapply national laws arises only where the Court or decision maker is acting *within jurisdiction,* is set at naught by virtue of the manner in which the Principle was applied in the *WRC* case. The WRC had no jurisdiction to disapply national law.

A more harmonious approach to reviewing the *WRC* case is to consider that jurisdiction in *Simmenthal* simply referred to the fact that the judicial body must have jurisdiction to deal with the case before it (i.e. that it had jurisdiction under the first leg referred to earlier). Provided it has jurisdiction under this first leg, it then must disapply national laws which are incompatible with EU laws. Among the laws which a tribunal is required to disapply are those rules which impair its jurisdiction to grant an effective remedy in relation to the case properly before it. Viewed in this way, *WRC* can be read harmoniously with *Simmenthal* and its progenies. However, if this analysis is correct, the *WRC* decision can be criticised for failing to explain this sophisticated analysis clearly. If, of course, the analysis is incorrect, *WRC* represents an unprincipled departure from earlier case law on this important topic.

NO EXECUTING PRINCIPLE FOUND IN EU OR NATIONAL LAW

While it is explored in greater detail in Chapter 6 (on the question of remedies) it is appropriate to mention a further problem with respect to the issue of jurisdiction. The Principle is expressed in terms of a "duty" or "obligation", however, the issue of a corresponding "power" to equip the body in question to carry out its duty is not addressed by the Principle.

In the High Court[108] Charleton J. accepted that a duty to disapply national laws which are inconsistent with Union law existed, however he stated that it could not be done in the absence of a legal framework.[109] This issue is not expanded upon by the Judge, however one view which might be offered is as follows.

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108 [2009] IEHC 72.

109 [2009] IEHC 72 at para 5.

The existence of an obligation to disapply does not equate to a corresponding *power* to do so. On the one hand, it might be thought that this is unproblematic as Irish law generally *implies* a corresponding power to fulfil statutory duties.[110] On the other hand, however, that implication of powers is a phenomenon in *national* law. Yet, both the High Court and Supreme Court ruled clearly that the WRC had no power in domestic law to disapply statutory instruments (or other sources of law). Specifically, the Supreme Court ruled that, even if it were possible to empower a tribunal to disapply national law, this could not arise on an *implied* basis and it would require an *express* statutory basis.[111] In light of this finding, it is axiomatic that the implication of powers will not arise under national law. Accordingly, the WRC requires some framework within which to exercise this power.

This gives rise to a potential problem whereby a body has a duty to act in a particular way, but there is no executing principle giving it the associated powers to so do. While this specific question requires some further detailed analysis in the context of a discussion on remedies (see Chapter 6), it is appropriate to mention it in the context of the present discussion on jurisdiction.

The following conclusion arises from the foregoing analysis. The Principle requires only bodies acting within the limits of their jurisdiction to disapply national law. In light of the foregoing analysis, it must be suggested that there is now a doubt around this aspect of the Principle. Given that *WRC* holds that jurisdictional rules may now themselves be disapplied, this aspect of the Principle is now unclear if not completely abandoned.

One might speculate, that the reference to "jurisdiction" in the Principle must now be understood in its most narrowest sense. However, it is a failure of the Court of Justice to explain this important issue.

The issue of jurisdiction is closely aligned to the concept of procedural autonomy which is an important concept in itself and is considered in detail in the next chapter, Chapter four.

[110] See Hogan and Morgan, Administrative Law in Ireland, 4th edition (2010) at paras 10.41 to 10.59 citing *inter alia Attorney General v Great Eastern Railway Co* (1880) 5 App. Cas. 473, *Magee v Murray* [2008] IEHC 371 and *McCarron v Kearney* [2010] IESC 28.
[111] [2017] IESC 43 para 5.11.

CHAPTER 4 PROCEDURAL AUTONOMY

The principle of procedural autonomy holds that, where there are no Union rules governing the issues as to legal procedure and the jurisdiction of courts, it is for national law to determine which courts or tribunals will have jurisdiction, subject to the requirements of equivalence and effectiveness.[112] In this regard, the concept of procedural autonomy was explained in the following terms in the case of *Alassini v Telecom Italia SpA:*[113]

"… in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, but the Member States are nevertheless responsible for ensuring that those rights are effectively protected in each case…

On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness)…

Those requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law. They apply both as regards the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law and as regards the definition of detailed procedural rules…"[114]

While this thesis is concerned with the full ramifications of the Principle expressed in *WRC* and not merely the facts of that decision, it is worth noting first that, in *WRC,* Union rules *did not* lay down procedural rules on the matter. In that regard, Article 9 of Directive 2000/78 provided:

[112] See below *Alassini v Telecom Italia SpA* C317/08.
[113] C317/08.
[114] *Alassini* at paras 47 to 49.

"Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

Consequently, it is appears that the principle of procedural autonomy should have arisen in *WRC* as, under the Directive at issue in that case, national law must establish the appropriate "*judicial and/or administrative procedures."*

In its analysis of the European law issue, the Supreme Court made the important point that Member States enjoy procedural autonomy in terms of allocating powers to respective national courts and administrative decision makers for the vindication of Union rights. Clarke J. put it as follows:

"In the ordinary way questions relating to the procedure, which needs to be followed before national courts or tribunals, in cases involving an assertion of rights under European Union law, are left to the procedural law of the Member State concerned. That rule of European Union law has been described as one which confers procedural autonomy on the Member States. It is also clear, as a matter of Union law, that a similar approach is adopted to national rules which determine the court or tribunal which is to have jurisdiction in respect of any particular matter in which it is sought to enforce Union law rights... However, that general proposition may be said to be subject to three qualifications."[115]

The first of those qualifications did not arise in the *WRC* case and referred to the fact that, in some cases, a specific provision in European law might limit procedural autonomy. One example of this would include Union rules providing that environmental proceedings shall not be prohibitively expensive.[116]

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[115] [2017] IESC 43 at para 6.1.
[116] [2017] IESC 43 at para 6.2.

The second qualification pertained to the requirement that any national procedural law must comply with the principle of "equivalence." This principle requires that *"the procedure to be followed in enforcing a claimed entitlement under Union law must be equivalent to the procedure which would be followed in the same national court by a party seeking to pursue an analogous claim based purely on national law."*[117]

The third qualification is that national procedural rules must comply with the principle of effectiveness, by which it is meant such rules shall not render remedies *"practically impossible or excessively difficult"* to obtain.[118]

Both the principles of effectiveness and equivalence are analysed in greater detail later in this chapter. Prior to so doing, the manner in which the Advocate General and the Court of Justice in *WRC* dealt with procedural autonomy is considered.

In that regard, Advocate General Wahl in his Opinion, described the question before the Court as involving the proper limits of the concept of procedural autonomy. He put the issue before the Court in the following terms:

"Where do the limits of the procedural autonomy of Member States lie? Or more specifically: to what extent does the principle of the primacy of EU law circumscribe the possibility for Member States to apply (constitutional) rules concerning the attribution of jurisdiction in a particular field of law? That is, in essence, the question put to the Court by the Supreme Court of Ireland in this case.

More concretely at issue is the compatibility with the principle of the primacy of EU law of a rule dividing jurisdiction in specific cases between the High Court and a statutory body, the Workplace Relations Commission ('the WRC')."[119]

[117] [2017] IESC 43 at para 6.3.
[118] [2017] IESC 43 at para 6.4.
[119] Opinion of AG Wahl at paras 1 and 2.

AG Wahl makes reference to the fact that, in a case which involves the disapplication of national law, the WRC has no *vires* to so do under national law; instead, such cases are brought before the High Court.[120]

Notably, the AG notes that the referring Court did not itself ask the CJEU for an interpretation of the principles of procedural autonomy, equivalence and effectiveness. Rather, he notes that the Supreme Court, in referring the question to the CJEU, ruled that the division of labour between the WRC and High complied with the principles of procedural autonomy, equivalence and effectiveness of EU law.[121] The AG considered the principles espoused in the *Simmenthal* case. These principles have been considered earlier in this thesis, but the following short passage from *Simmenthal* explains the obligation to disapply national laws*:*

"' ... [E]very national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."[122]

The AG also referred to the cases of *Costanzo*[123] and *CIF*[124] which expanded the *Simmenthal* principle to require not merely courts, but also administrative decision makers, to disapply national laws contravening EU law.

In referring to the *CIF* case, the AG once again noted a significant point of distinction from the case before him. In *CIF* the administrative authority in that case (the Italian competition authority) in fact had exclusive and unlimited jurisdiction to ensure compliance with the provisions of Union competition law.[125] This is a point of distinction with the *WRC* case as, in the *WRC* case, two separate bodies had distinct powers to ensure compliance with Union law – first the WRC in the case of national laws compliant with Union law; second, the High Court

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[120] *Ibid* at para 3.
[121] *Ibid* at para 43.
[122] *Simmenthal* at paras 21 and 22.
[123] C103/88.
[124] C198/01.
[125] See analysis of *CIF* decision *infra.*

in the case of national laws which require disapplication. The AG turned to the issue of procedural autonomy. He opined that:

"The Court has consistently held that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction (or, as the case may be, administrative bodies) and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The Member States must, however, ensure that those rights are effectively protected in each case. In other words, jurisdiction in a specific field of EU law may be divided between different bodies, provided that the rights in question are adequately protected.

It is within the limits of their respective areas of jurisdiction that such organs are to give full effect to EU law by refraining, where necessary, from applying national law contrary to EU law. In other words, an organ cannot, by dint of the primacy of EU law, simply ignore rules of jurisdiction that circumscribe its substantive competence in a particular field of law, as defined by national law.

I therefore conclude that a rule of jurisdiction such as the one at issue in the main proceedings, which divides jurisdiction in specific cases between a statutory body and an ordinary court on the basis of the complaint made, does not breach the principle of the primacy of EU law and falls within the scope of the procedural autonomy of Member States."[126]

The AG's Opinion is compelling in its formalist approach and it is in sharp distinction to the judgment of the Court of Justice. First, the Court in fact phrased the question before it in the following terms:

"… in essence, whether EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law."[127]

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[126] Opinion of AG Wahl at paras 89 to 91.
[127] Decision of CJEU C378/17 at para 34.

Immediately it can be seen that the manner in which the Court phrases the question before it is different to the AG. In the question as formulated by the AG the central issue was procedural autonomy; here it is the primacy of EU law. Clearly, *both* principles are relevant and require proper evaluation. However, the CJEU does not engage materially with the concept of procedural autonomy. Accordingly, a significant objection to the CJEU decision is its failure to address this principle one way or the other.

The CJEU stated that Member States have the task of designating Courts or institutions which are empowered to determine the validity of national laws. It reads:

"The Member States have the task of designating the courts and/or institutions empowered to review the validity of a national provision, and of prescribing the legal remedies and the procedures for contesting its validity and, where the action is well founded, for striking it down and, as the case may be, determining the effects of such striking down."[128]

On one reading, this expression of the principle of procedural autonomy might be considered too narrow. Procedural autonomy is not limited to assigning powers of judicial review of national provisions. It includes the allocation of powers in applying EU law. The problem with the passage so stated by the CJEU is that either it misinterprets the principle of procedural autonomy in confining it to the allocation of *vires* between national bodies for the purposes of applying *national* law, or it simply glosses over the principle of procedural autonomy and fails to engage with it on the facts of the case before it.

The Court continues to state that on the other hand to the principle referred to above (that it is for domestic Courts to assign the powers of domestic judicial review among national courts) is the principle of the primacy of EU law. That latter principle was put in the following terms:

"... national courts called upon, in the exercise of their jurisdiction, to apply provisions of EU law must be under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or

[128] *Ibid* at para 34.

awaiting the prior setting aside of that provision of national law by legislative or other constitutional means."[129]

It is submitted that the manner in which the CJEU dealt with procedural autonomy is lacking detail and clarity and for that reason it is not understood clearly why that principle could not save the limitations on the WRC's power to disapply national laws.

There is clearly a tension between the propositions in EU law that (i) Members States shall have power to assign jurisdiction among national courts and tribunals subject to qualifications, (ii) and that any entity applying EU law must disapply incompatible national laws. The Court of Justice does provide a clear or principled basis as to why the latter prevailed over the former.

As noted earlier, there are two relevant qualifications on the freedom of Member State procedural autonomy, effectiveness and equivalence. It is proposed to further consider the *WRC* decision in light of these principles and associated case law.

EFFECTIVENESS

One of the exceptions of the application of the principle of procedural autonomy is the principle of effectiveness. Effectiveness means that national law must not "*render practically impossible or excessively difficult the exercise of rights conferred by Community law."*[130]

In *Manfredi v Lloyd Adriatico Assicurazioni SpA*[131] the plaintiff brought actions for damages before the national courts against insurance companies which had been found guilty of violations of competition law in the setting of premiums. One of the questions referred was whether any individual may rely on article 81 EC (now article 101 TFEU which voids agreements made in contravention of that article) in order to claim damages. As this was a Treaty level right, it was directly effective in Member States and had horizontal effect. The Court ruled that an individual could claim compensation for harm where there is a causal relationship between that harm and the prohibited agreement. The Court proceeded to state

[129] *Ibid* at para 35.
[130] *Manfredi (infra).*
[131] Joined cases C-295/04 to C-298/04.

that, this was subject to Member State procedural autonomy.[132] The principle of procedural autonomy is subject to two important riders, namely:

"*… that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)…"*[133]

The Court addressed the question whether article 81 prohibited a rule of national law which required third parties to bring actions for damages arising from the prohibited agreements, whether those actions were founded on the provisions of *Union* or *national* competition rules, before Courts which were different to the ordinary civil courts enjoying jurisdiction for disputes at the same level of damages sought. The point made in the reference of this specific question is that requiring persons to bring such claims to a higher court involved "*a considerable increase in costs and time*" and, it must be inferred, rendered the remedy ineffective. It is worth noting that this is not a dissimilar point to that made in *WRC.*[134]

In answering this question, a doubt arose as to the correct interpretation of the national measure in question. Specifically, a doubt arose as to whether that national measure did in fact require third parties to bring claims founded on either Union law or national before these higher courts (which was the premise on which the question was referred), or whether it simply required claims founded on the breach of *national* competition rules to these higher Courts. The Court of Justice refused to engage in the interpretation of national law, ruling instead that the interpretation of national law was a matter solely for domestic courts.[135]

Notwithstanding its valid reluctance to involve itself in *interpreting* the parameters of the national law assigning jurisdiction among national Courts, the CJEU continued to reiterate that:

"in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to prescribe the detailed procedural rules governing actions for safeguarding rights which individuals

[132] *Manfredi* at para 62.
[133] *Manfredi* at para 62.
[134] [2017] IESC 43 at paras 7.8 and 7.9.
[135] *Manfredi* at para 70.

derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).”[136]

Not only did the Court decline to offer interpretive views of national law (which appears to be a correct approach for the Court to adopt), it stopped short of appraising the impugned law for compatibility with EU law.

A further question referred was answered in virtually identical terms. That question was whether a rule of national law which provided that the limitation period for such actions would commence on the date on which the illegal agreement was adopted was compatible with EU law. The argument appeared to be that a national law fixing the commencement date for the running of limitation period at such an early juncture may prejudice a litigant who would not know of the illegal agreement as at the date of its adoption. Although the Court gave some guidance as to when such a rule of national law might run afoul the principle of effectiveness, it again held that it was for Member States to determine procedural matters subject to the overriding principles of effectiveness and equivalence. It noted that in the case of continuous or repeated infringements “*it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.*”[137]

However, instead of ruling in the case before it, whether in fact the limitation period prescribed in national law did give rise to such a problem, which could clearly condemn the national rule on the grounds of effectiveness, it ruled simply that it was for the national court to assess whether this was so.[138] This is in sharp distinction with the Court’s approach to the Principle in the *WRC* case. In that case, despite the national Court satisfying itself that the national rules concerning the jurisdiction of the WRC and the High Court complied with the principles of

[136] *Manfredi* at para 71.
[137] *Manfredi* at para 79.
[138] *Manfredi* at para 80.

equivalence[139] and effectiveness,[140] the CJEU imposed a different view.[141] The reason why the CJEU departed from the orthodoxy whereby the assessment of effectiveness and equivalence is left to Member States is not explained by the Court and is a point of legitimate criticism.

Returning to the *Manfredi* case, the Court of Justice held that effectiveness required that compensation would include compensation for actual loss plus lost profits plus interest.[142] This has potential significance: if administrative tribunals are permitted to disapply national law, regardless of their stated jurisdictional limits (which it is contended is the manner in which the Court in *WRC* applied the Principle) to ensure effectiveness, there are potentially profound consequences. As a matter of logic, such a principle must mean that those bodies are entitled to disapply national rules which limit the effectiveness of the remedies which they might offer. It is valid to ask in those circumstances whether the WRC could for instance disapply its monetary limit of €15,000 if it was shown for example that someone suffered special damages arising from discrimination in a case before it. Further, it is valid to ask whether the WRC (and other tribunals) could determine that the menu of remedies available to it under statute (say, damages) did not comply with the requirement of effectiveness and that it must assume to itself, in the name of effectiveness, a power to award broader remedies. The question arises as to whether such body might declare itself competent to award punitive damages or even injunctive relief.[143] Such a scenario would be concerning and would elevate lower courts and administrative tribunals to legislators, judicial bodies and executive entities.[144]

The case of *Unibet v Jsutitiekanslern*[145] is relevant to considering both the question of effectiveness and equivalence. However, for present purposes, the case is analysed insofar as it dealt with the issue of effectiveness. One of the remedies sought in that case included a

139 [2017] IESC 43 at para 7.1.
140 [2017] IESC 43 at para 7.16.
141 *CJEU* decision in *WRC* 378/17 at para 45.
142 *Manfredi* at para 100.
143 See Craig EU Administrative Law (page 765) discussing *inter alia* the decision in *Emmott v Minister for Social Welfare* [1991] ECR I-4269 in which it was held that time could not commence for the purposes of the limitation period where a member state had failed to transpose a Directive. However, this decision has been interpreted narrowly and seems to be limited to circumstances where there has been misrepresentation or misleading advice from the person relying on the time limit (Craig, page 769).
144 See further discussion on remedies in Chapter 6.
145 C432/05.

declaration of invalidity of domestic laws which prohibited the promotion of Unibet's services – i.e. a traditional application for judicial review. However, the position in Swedish law was that such actions could not be maintained as a "self-standing application."

However, the referring court noted that Swedish law permitted Unibet to have the compatibility of national law with European law assessed if Unibet was prosecuted for a breach of that law. In other words, in any prosecution in this area, Unibet could challenge the validity of the national law by reference to EU law. Further, it stated that Unibet had the option of bringing an action for damages, in which case the law would be similarly scrutinised. Finally, Unibet had the option of applying for a license and, should its application prove unsuccessful, through judicially reviewing the administrative decision. So, the national court was clear that Unibet had some means in national law to challenge the impugned law, but what Unibet was *not* permitted to do was to maintain a suit seeking declaratory reliefs only.[146]

The referring Court asked whether it was a requirement of the principle of effectiveness that national procedural rules must permit an action for a declaration that national law was incompatible with Union law, in circumstances where the plaintiff had other means by which the national law might be challenged. The Court referred to the principle of procedural autonomy. The Court noted that although in some limited circumstances EU Treaty provisions conferred a right on private persons to bring direct actions, Treaty articles were not intended to "*create new remedies in the national courts*" around the observance of EU law, other than those already laid down in national law.[147] However, that would be otherwise *"only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law."*[148]

[146] In fact, Irish Courts have been reluctant to, although they *may*, award declaratory relief without a more substantive remedy being sought too. For example, see *Omega Leisure Limited v Superintendent Charles Barry* [2012] IEHC 23. See also Order 19, Rule 29, Rules of the Superior Courts which provides: *"No action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not."*
[147] *Unibet* at para 40.
[148] *Unibet* at para 41.

Pausing at this point, subject to some exceptions which are considered below, the European Treaty articles do *not* create new remedies in national courts outside those remedies laid down in national law. There may be a direct action "*only if*", when considering the overall scheme of the national legal system, there was no way in which the right could be vindicated.[149] Notably, the exception here is exclusive in nature ("*only if…*") and one looks to the *entirety* of the Member State legal system to ascertain whether there is or is not a legal remedy to vindicate the right. It is worth considering how that principle, as expressed in *Unibet,* might impact on the *WRC* principle.

Examining the right at issue in the *WRC* case, which is the right to not suffer age discrimination, there is, as expressed in *Unibet*, no right to a remedy outside the framework established by national law *unless* it is demonstrated that, considering the "*overall scheme*" of the national legal system, there is no remedy for the breach of the right. The framework established by national law clearly allowed all claims based upon age discrimination, other than those constituting a collateral attack on the validity of legislation, whether primary or secondary, to be agitated before the WRC. Yet, claimants alleging that instruments of Irish law give rise to discrimination, contrary to European, or indeed Constitutional rights, must take their case to the High Court, in accordance with the allocation of powers of judicial review exclusively to the High Court. If one applied the approach of the Court of Justice in *Unibet* to the *WRC* case*,* the following view might arise. That is, EU law would *not* require a new remedy in the *WRC* case, being the disapplication by the WRC of national law, as the "*overall scheme*" of Irish legal system allowed such an action to be brought before the High Court.

Returning to the analysis of the *Unibet* decision, the Court of Justice reiterated that the principle of effectiveness does not require a free-standing action to assess the compatibility of national law with Union law *"provided that the principles of equivalence and effectiveness are observed in the domestic system of judicial remedies."*[150]

In considering the remedies which were available to the litigants in Swedish law, the first of which permitted a challenge to the validity of national law in the context of a claim for damages and the second of which allowed a challenge to be brought on foot of judicial review of a

[149] *Ibid.* See also Craig, *EU Administrative Law* (3rd ed) at page 759 to 761.
[150] *Unibet* at para 57.

license refusal, the Court of Justice was satisfied that they constituted effective remedies, notwithstanding the fact that national law did not permit an action solely seeking a declaratory relief.

With respect to the procedure available in the course of a damages action, it ruled:

"… where an examination of the compatibility of the Law on Lotteries with Community law takes place in the context of the determination of a claim for damages, that action constitutes a remedy which enables Unibet to ensure effective protection of the rights conferred on it by Community law." [151]

In the context of the availability of judicial review of an administrative refusal to issue a license, the Court ruled that:

"It is to be noted that such judicial review proceedings, which would enable Unibet to obtain a judicial decision that those provisions are incompatible with Community law, constitute a legal remedy securing effective judicial protection of its rights under Community law…"[152]

With respect to the issue of effectiveness, there are some parallels to be drawn between the *Unibet* and *WRC* decisions. In essence, the point is that when one asserts that national law violates Union law, the principle of effectiveness does not necessarily require a new remedy to be created outside those established by national law, provided of course that there is such a remedy available within the "*overall*" system of national law. Applying that to the *WRC case*, as the High Court offers an existing remedy (i.e. judicial review) to a complainant who asserts that the Irish regulations governing admission to An Garda Síochána, there is no need (under the doctrine of effectiveness at least) to create a "new" remedy within national law. In both *WRC* and *Unibet* judicial review was available to the aggrieved litigant.

This analysis would suggest that the principle of effectiveness does *not* require the WRC to assume powers to declare that national law is contrary to Union law. This suggests that Irish

[151] *Unibet* at para 58.
[152] *Unibet* at para 61.

jurisdictional rules should qualify for protection under the principle of Member State procedural autonomy, subject to an analysis of equivalence.

Once more, in the *WRC case,* no explanation is offered by the Court of Justice as to why this approach was not applied. If *Unibet* is decided correctly, the principle of effectiveness does not require the creation of a free-standing EU law remedy outside the framework of national law where judicial review is available.

A further case concerning the issue of effectiveness is *Impact v Minister for Agriculture and Food,*[153] which related to Directive 1999/70 which regulated the use of fixed term employment contracts. There are two provisions in Directive 1999/70 which are germane to the present discussion.

First, the Directive provided that fixed term employees shall not be treated less favourably than comparable permanent employees in terms of their respective employment conditions.[154]

Second, the Directive required Member States to adopt one of a number of measures designed to stem the abuse of multiple successive fixed term contracts. Repeatedly issuing successive fixed terms contracts might facilitation the avoidance of obligations which would otherwise arise in a contract of indefinite duration. One of those permissible measures included the placing of a temporal limitation on the period for which successive fixed term contracts may be utilised before giving rise to a contract of indefinite duration.[155] Irish law adopted this approach and limited the period in which it was permissible to issue successive fixed term contracts without giving rise to a contract of indefinite duration to a period of four years.[156]

The deadline for implementation of the Directive was 10th July 2001,[157] yet the Directive was not in fact transposed into national law until 14th July 2003, being the date of commencement

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[153] C268/06.
[154] C268/06 at para 7 referring to Clause 4 of the Framework Agreement.
[155] C268/06 at para 8 of the decision referring to Clause 5 of the Framework Agreement.
[156] C268/06 at para 12 referring to section 9 of the Protection of Employees (Fixed-Term Work) Act 2003.
[157] C268/06 at para 4.

of the Protection of Employees (Fixed-Term Work) Act 2003.[158] Thus, the Directive was not transposed timely.

A number of applicants claimed that they were treated unequally by reference to their permanent colleagues, thereby breaching the minimum requirements stipulated in the Directive. A number of further applicants claimed that the maximum period allowed for the use of successive fixed term contracts had elapsed and, consequently, they claimed a right to a contract of employment of an indefinite period.

The Complainants were broadly successful at first instance (before the Rights Commissioner), however the matter was appealed to the Labour Court, which referred certain questions to the Court of Justice. One of the questions referred to the Court of Justice was whether the Labour Court had jurisdiction to hear the complaints in the period between 10th July 2001 (i.e. the date on which the deadline to transposing the Directive expired) and 14th July 2003 (i.e. the *actual* date of transposition). The reason why this question was referred was that Directives, which ordinarily do not have direct effect in domestic law, *do* in fact have effect where the deadline for its transposition has passed. Here, the implementing legislation was not commenced prior to 14th July 2003. The referring court noted that individuals could litigate before the High Court claims that their employer failed to comply with the Directive.[159] The referring court also noted that an action could be brought against the State for failing to transpose EU Directives timely.[160]

The Court of Justice found that, where EU law does not stipulate which national courts and tribunals have jurisdiction, it is for Member States to designate the jurisdiction of the respective entities.[161] In addition, Member States are required to ensure that rights are "effectively protected"[162] and this is embodied in the requirement that equivalence and effectiveness are observed in setting jurisdictional rules for national courts.[163]

[158] C268/06 at para 10.
[159] C268/06 at para 36.
[160] *Ibid.*
[161] C268/06 at para 44.
[162] C268/06 at para 45
[163] C268/06 at para 47.

The Court ruled that specialised tribunals, such as the Labour Court, must be permitted to hear disputes emanating directly from the Directive *if "… it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of [EU] rights…"*

Advocate General Wahl in his Opinion in *WRC* notes that the decision in *Impact* concerned a potential obligation to bring multiple proceedings. In that regard, one case is brought to the Labour Court in relation to claims post-dating the commencement of the relevant statute; the second case is brought before the High Court in relation to claims arising in the period from the expiry of the deadline for transposition of the Directive and the commencement of implementing legislation. Pausing to consider this, it is clear that a claimant, such as those claimants in the *Impact* case, whose claim is such that it temporally covers a period before and after the enactment of domestic legislation *must* bring two cases, if he wishes to litigate in the Labour Court at all. This is a clear point of distinction from the *WRC* case. The plaintiff in *WRC* could have applied for judicial review to quash the statutory instruments which offended EU law and applied for damages. That plaintiff in *WRC* was *not* obliged to maintain two separate sets of proceedings.

While not referred to by any of the Courts (domestic or European) in *WRC,* the cases of *NM (DRC) v Minister for Justice and Equality*[164]and *East Sussex County Council v. Information Commissioner*[165] have held that judicial review is itself an effective remedy. (Although there have been cases where the remedy of judicial review has been held, where it imposes abnormally short timelines, to be an ineffective remedy,[166] no issue as to time periods was raised as a ground for suggesting that judicial review was an ineffective remedy.)

An important aspect of the Supreme Court's consideration in *WRC* was that the present case did *not* involve a scenario whereby there was an absence of a national body (whether the WRC or the High Court) which could disapply national laws offending European Union law; the High Court would have this power in the *WRC* case. Rather, the question was in essence

164 [2016] IECA 217 at paras 53 and 54 per Hogan J. See also *Holohan v An Bord Pleanála* [2017] IEHC 268 at para 103 per Humphreys J.

165 C71/14.

166 See *Danqua v Minister for Justice and Equality* C-429/15 at para 49.

whether the claim ought to have been brought before the WRC (with an appeal on a point of law or a judicial review to the High Court) or directly to the High Court. In this regard, the question before the court was "essentially procedural." Clarke J. in the Supreme Court stated that:

"… the real question which arises on this appeal is as to whether it can be said that the measure of national procedural law which would, ordinarily, require an employment equality case such as this to be brought before the High Court, while leaving the vast majority of equality cases to be determined, at least initially, within the Tribunal machinery, can be said to be in breach of Union law."[167]

The Supreme Court focussed its analysis of the concept of effectiveness on the potential exposure to costs of litigation.[168] Notably, Ireland is a jurisdiction in which litigation is considered to be relatively expensive.

A noteworthy point identified by the Supreme Court in relation to effectiveness is as follows. Were the WRC to disapply a duly enacted law, it would likely result in an appeal to the High Court (given that a ruling by the WRC that a provision of national law ought to be disapplied would entail matters of such public importance).[169] Put another way, even if the WRC *did* in fact have jurisdiction to disapply national law, the exercise of such a power would likely result in an appeal to the High Court given the obvious ramifications in setting aside a duly enacted law or statutory instrument. In light of this, it was found that commencing the claim in the WRC would make the process more "*complicated, lengthy and potentially expensive.*"[170]

The thrust of the remainder of the Supreme Court's cost analysis is that the principle of effectiveness is satisfied as the ability of the High Court to award legal costs renders it less likely that a complainant would be left without lawyers willing to take on their case.[171] Conversely, the WRC has no power to award costs in proceedings before it.[172]

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[167] [2017] IESC 43 at para 6.11.
[168] [2017] IESC 43 at paras 7.6 to 7.9.
[169] [2017] IESC 43 at para 7.6.
[170] *Ibid.*
[171] [2017] IESC 43 at paras 7.8.
[172] *Ibid.*

The Supreme Court makes fleeting references to two other factors which support the contention that effectiveness was observed in the *WRC case.* First, Clarke J touches on the fact that the WRC tribunal has expertise which it can bring to bear on a given case. However, given that the High Court's jurisdiction may be invoked on either a point of law or an application for judicial review, the expertise of the WRC may be integrated into High Court litigation as the latter may order that the WRC is joined as a notice party to the proceedings.[173]

The second matter which the Supreme Court touches on in the most brief manner is the fact that the WRC is vested with significant investigative powers. It was found that this does not violate the requirements of effectiveness as the High Court has powers to order disclosure and consequently: *"the ability to establish the facts would be any the less in a case commenced before the High Court as opposed to a case commenced before the Tribunal."*[174]

It is submitted that the Supreme Court's analysis of effectiveness is too narrow. First, it is clear from first principles, that, in order to ascertain whether a particular procedure is effective, one must look beyond issues of costs, expertise and fact finding powers. Axiomatically, one must look at the procedure in its entirety and consider features such as time limits,[175] the standard of review,[176] and remedies.[177]

There is a second feature to the Supreme Court's approach to the question of effectiveness which it is suggested is unsatisfactory. The approach adopted by the Supreme Court, as exhibited above, was to refer to aspects of High Court procedure which are better than, or as good as, the procedure before the WRC. This cannot answer the question whether a particular judicial remedy is effective as the test is whether it renders the vindication of a right practically impossible or excessively difficult. For example, in a scenario whereby a procedure offered before a particular tribunal violates effectiveness it is, manifestly, incorrect to assert that judicial review (or some other similar relief available before a superior national court) is effective, *simply* because that judicial remedy has features which are better than the tribunal.

[173] [2017] IESC 43 at para 7.10.
[174] [2017] IESC 43 at para 7.11.
[175] *Danqua v Minister for Justice and Equality* C-429/15 at para 49.
[176] *East Sussex County Council v. Information Commissioner* C71/14.
[177] *Manfredi* at para 100.

The question always is whether the procedure makes it "*practically impossible or excessively difficult the exercise of rights conferred by Community law* ."[178]

Accordingly, while issue might be taken with the manner in which the Supreme Court approached the question of effectiveness, it is suggested that there is ample authority to support the proposition that judicial review is, at a general level, an effective remedy[179] (if it was not, EU law would mandate the creation of a new remedy in national law in all cases).[180] Accordingly, it is submitted that while it went about it the wrong way, the Supreme Court arrived at an answer that is consistent with case law to date such that judicial review is an effective remedy.

The Opinion of AG Wahl supports the Supreme Court's approach to the question of effectiveness. In that regard, the AG notes that the *Impact* decision pertained to a difference set of circumstances. Specifically, the procedural disadvantage identified in *Impact* arose by virtue of the need to bring *multiple* actions to secure the same rights protected by EU law (i.e. a violation of legislation transposing the directive and a violation of the directly effective provisions of the directive itself both encompassed the same EU law right enshrined in the directive and it was, accordingly, a breach of the principle of effectiveness to require a claimant to bring two separate claims – one before the WRC and one before the High Court to vindicate fully the right protected by the Directive). Therefore, he opined:

"… it would in my view be incorrect to read the Court's dictum as to the principle of effectiveness as impugning, in a general manner, any rule of jurisdiction in a specific field of law which divides jurisdiction between different instances in which the procedural rules are not equally favourable to claimants.

[178] *Manfredi (supra).*
[179] See *NM (DRC) v Minister for Justice and Equality* [2016] IECA 217 at paras 53 and 54 per Hogan J. See also *Holohan v An Bord Pleanála* [2017] IEHC 268 at para 103 per Humphreys J. See also *East Sussex County Council v. Information Commissioner* C71/14. While it is accepted that one could raise a great many questions as to whether judicial review is an effective remedy (in terms of, for example, costs, delays, time limits, the standard applied to leave applications, the *O'Keeffe* standard of unreasonableness and the discretionary nature of the remedy), it is suggested that such an exercise is beyond the scope of the present project and that is suffices to say that present jurisprudence on the matter is that judicial review *is* an effective remedy. See more generally, Hogan, Morgan, Daly, Administrative Law in Ireland (5th ed.) (2019), see also De Blacam, Judicial Review (3rd ed) (2017).
[180] *Unibet* at para 40.

Indeed, it should not be forgotten that the Court's case-law requires that national procedural rules do not render the exercise of rights deriving from EU law excessively difficult. It does not require that all cases in a specific field of law should be dealt with in the same way, by one court or body, in accordance with the rules that are procedurally most favourable for the claimant.

Unlike in the circumstances underlying Impact, the WRC has not been given (optional) jurisdiction by the Irish legislature to hear cases ordinarily falling within the jurisdiction of the High Court. There is instead a clear division of jurisdiction between the WRC and the High Court."[181]

Importantly, he was satisfied with the respective jurisdiction of the WRC and High Court as it allowed claims for the disapplication of national law to proceed more effectively in that such claims are brought to the High Court only. He stated:

"It can be seen from the order for reference that the case pending before the referring court concerns a complaint regarding discrimination inherent in the age restriction measure, a piece of secondary legislation. No complaint of discrimination falling within the jurisdiction of the WRC has been made in the proceedings before the referring court. In such a case, the division of jurisdiction between the WRC and the High Court does not in my view give rise to criticism: there is no other avenue available for the complainants than the High Court. It seems to me that, if anything, the division of jurisdiction ensures efficient resolution of cases requiring disapplication of national law, given that the complainants do not in such cases first have to go to the WRC."[182]

In emphasising the fact that there was no concurrent role for the WRC and High Court and that the division between the two bodies was pure, he concluded:

"A rule of jurisdiction such as the one at issue in the main proceedings, which divides jurisdiction in specific cases between a statutory body and an ordinary court on the basis of

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181 *Ibid* at paras 112 to 114.

182 *Ibid* at para 115.

the nature of the complaint made, is not precluded by EU law, provided that no concurrent jurisdiction may arise within the same complaint."[183]

EQUIVALENCE

Equivalence is the second relevant exception to the principle of procedural autonomy. Equivalence means that *"the procedure to be followed in enforcing a claimed entitlement under Union law must be equivalent to the procedure which would be followed in the same national court by a party seeking to pursue an analogous claim based purely on national law."*[184]

In *Manfredi* one of the questions referred concerned whether national courts had power to award *punitive* damages under EU law, where that was not provided for in national law. Again, the CJEU reiterated that procedural autonomy applied to the setting of criteria for an award of damages, subject to the requirements of equivalence and effectiveness.[185] Helpfully, the Court expanded on the application of the principles of equivalence and effectiveness to the case before it. Equivalence, predictably, requires that if punitive damages were available "*in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules.*"[186]

Manfredi is notable in that provided the *remedy* available is the same for domestic and EU actions, equivalence is satisfied. It is difficult to see how equivalence would not be satisfied in the *WRC* case as judicial review was available to quash the admission regulations, whether that action was founded on Irish law or Union law. One of the main objections made herein is that the CJEU failed to analyse procedural autonomy and equivalence at all.

In considering the question of equivalence, the Court of Justice in *Unibet* noted that Swedish law permitted persons wishing to challenge the validity of national laws in light of "higher-ranking legal rules" to apply to either the "ordinary courts" or "administrative courts", which were under an obligation to disapply the law in question if it contravened those higher-ranking legal rules. The Court in *Unibet* was satisfied that the principle of equivalence was complied

183 *Ibid* at para 119.
184 [2017] IESC 43 at para 6.3.
185 *Unibet* at para 98.
186 *Unibet* at para 99.

with as those ordinary or administrative courts were required to disapply the offending national law if it violated the higher-ranking legal rule, regardless of whether that higher ranking rule was a domestic rule (i.e. a Constitutional provision) or a rule of Union law. Accordingly, the conditions applicable to European law were no less favourable than those applying to national law.

Again, it is worth pausing to compare the approach of the Court of Justice in *Unibet* to that propounded in *WRC*. Where an applicant claims that a provision of Irish law contravenes a right under either the Constitution or Union law, the legal position in Irish law is almost identical; he or she cannot maintain the action before the WRC, but must apply for judicial review before the High Court. This framework does not provide for a less favourable approach for the vindication of Union rights as compared to domestic rights. Admittedly, the national law in *WRC* did not allow the applicant the benefit of an administrative decision, as distinct from a judicial remedy, thereby arguably depriving them of the benefits of administrative decision making – i.e. lower costs and faster, simplified procedures. However, to the extent that such an objection is made, a number of points can be made. First, the applicants in *WRC* are in the same position as a litigant seeking to vindicate a Constitutionally protected right; they are not treated less favourably on the basis that they are agitating rights enshrined in Union law. Second, the remedy offered must pass the test of effectiveness and the Supreme Court found that these specific points would be effectively protected in litigation before the High Court.

The Supreme Court found that equivalence was satisfied in the present case. The logic applied by the Supreme Court was that an applicant seeking to quash secondary legislation must always go to the High Court, regardless of whether the basis on which he asserts the secondary legislation is invalid is by reference to domestic or Union law.[187] In fairness however, there is of course another view. In selecting the "comparator" for the purposes of assessing the equivalence test one could, instead of selecting a plaintiff seeking to quash secondary legislation, select two plaintiffs who sought to prosecute discrimination claims with one founded on national equality law and the other founded in the European Directives.

[187] [2017] IESC 43 at para 7.1.

This question was dealt with by the AG. The first notable aspect of the AG's Opinion insofar as it concerned equivalence is that the AG found no fault in the Supreme Court's analysis that the rule of jurisdiction did not violate the principle of equivalence. The notice parties argued that the correct comparator was not identified by the Supreme Court for the purposes of analysing the issue of equivalence. They argued that the appropriate comparator was either a claim for discrimination which lay outside the Directive, or one which did not entail the disapplication of national law. The AG dealt with this by, first, stating that ordinarily in the course of an Article 267 reference, the findings of the referring court are not disturbed unless they are "manifestly flawed."[188] Second, he was satisfied that the referring Court had in fact identified the correct comparator. He deprecated the argument of the notice parties and ruled:

"Redress can be sought before the WRC where discrimination stems from a practice (typically a decision taken by an employer) in the context of employment. By contrast, an action involving a challenge to the validity of legislation or requiring the disapplication of legislation is fundamentally about the lawfulness of a legislative instrument having the authority of law. That is in my view a crucial difference and should not be overlooked. The differences between the procedural rules applicable to actions brought before the WRC, on the one hand, and before the High Court, on the other, are explained precisely by the inherent difference in the types of action which those bodies have jurisdiction to consider."[189]

In the foregoing passage, the AG was satisfied that the *WRC case* was "about" the disapplication of national law, not a "practice" of discrimination. Consequent upon this finding, he proceeded to hold that the Supreme Court had in fact identified the correct comparator (being a case brought to challenge legislation).

CONCLUSION ON PROCEDURAL AUTONOMY IN *WRC*

On the analysis above, it is suggested that the doctrine of procedural autonomy should have been central to the issues before the Court of Justice. That is not to say that procedural autonomy would have certainly saved the symmetry provided in Irish law which assigns limited jurisdiction to the WRC but full powers of judicial review exclusively to the High Court. It is

[188] Opinion of AG Wahl at para 99.
[189] *Ibid* at para 103.

to say however that the principle deserved fuller attention by the Court of Justice and its failure to exposit this issue is a point of criticism.

This argument is exemplified in the following short passage of Clarke J in the Supreme Court. The Judge found that, in terms of the express provisions of the Directive, "... *Union law does not mandate that any particular type of court or body be given the role of providing appropriate remedies whether at first instance or on appeal. Subject to the principles of equivalence and effectiveness, the choice of the forum within which such rights are to be vindicated is left to the Member States to determine as a matter of their own procedural law. It follows that there is no necessary reason of Union law which requires that there had to be an employment equality type tribunal at all. Ireland could have chosen, had it wished, to leave such matters to an appropriate claim in the courts although there are, doubtless, sound policy reasons why Ireland has chosen the employment equality structures which it has.*"[190]

Accordingly, the Supreme Court was satisfied that the division of labour between the tribunal and the High Court was in conformity with the principles of effectiveness and equivalence.[191]

While it is acknowledged that the analysis above has revealed questions around the manner in which the Supreme Court approached the question of effectiveness, it is suggested that the Court arrived at a result that is consistent with present Irish and European jurisprudence on the matter. Additional authorities demonstrate that it is for *national* courts to determine whether procedures are equivalent and effective and that such findings are *not* disturbed by the CJEU unless the national court's findings in that regard are manifestly flawed.[192]

However, the novelty in the *WRC* case is that rules of jurisdiction, which were typically protected by procedural autonomy, are now among the very rules which a tribunal may be obliged to disapply.[193]

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190 [2017] IESC 43 at para 9.2.

191 [2017] IESC 43 at para 10.2

192 See Opinion of AG Wahl in *WRC* at para 99 concerning equivalence. See also *Impact v Minister for Agriculture and Food* C268/08 at paras 51, 53 and 54.

193 *WRC* at para 53.

Having considered the issues arising in the *WRC* case, the analysis will now turn to a consideration of some of the possible consequences of, and issues arising from, the decision.

CHAPTER 5 LIMITATION PERIODS

In the first four chapters a detailed examination of the *WRC* decisions has been undertaken. An important issue which has arisen from the said analysis is that national laws, including jurisdictional rules, now may have to be disapplied by administrative bodies. It is probable that this requirement, especially insofar as it pertains to disapplying jurisdictional rules, will have far reaching consequences. This thesis has identified a number of those possible consequences for further analysis.

One such consequence is that of the issue of limitation periods and whether a tribunal might have to disapply short limitation periods. Limitation periods have historically been the subject of scrutiny by the Court of Justice and have on occasion been found to be incompatible with EU law.

The relevance of limitation periods to the present analysis is as follows. Limitation periods are provisions in national law which appear to fall within the principle of procedural autonomy (i.e. domestic provisions which regulate the procedure applicable to the vindication of European and other rights). Therefore, in line with the foregoing analysis, they will be compatible with EU law provided they do not violate either the concepts of equivalence or effectiveness. Where limitation periods are incompatible with those two concepts, logically, administrative bodies may have to consider disapplying those time limits in national law. This may be problematic as one may think that a statute-barred claim before an administrative tribunal is outside that tribunal's jurisdiction. However, as the earlier chapters have identified, even jurisdictional rules may now have to be disapplied by tribunals[194] The jurisdictional rule which required disapplication in *WRC* was the principle that only the High Court, not tribunals, had power to disapply statutory instruments. Following the logic through, there is a credible argument that a tribunal, faced with a claim apparently statute-barred in national law, has an

[194] See para 52 of decision of CJEU in *WRC* which rules: *"… EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law."*

obligation under EU law to disapply the national time limit and assume jurisdiction to consider the action. This is a radical proposition in light of the fact that decision makers are creatures of statute and are universally understood to be required to act *intra vires*.

LIMITATION PERIODS GENERALLY COMPATIBLE WITH EU LAW

It is perhaps an obvious starting point to consider whether statutory limitation periods are in fact permissible in EU law. The Court of Justice confirmed in *Palmisani v INPS*[195] that limitation periods are compatible with EU law. In doing so, it stated:

"As regards the compatibility of a time-limit of the kind provided for in the Legislative Decree with the principle of the effectiveness of Community law, the setting of reasonable limitation periods for bringing proceedings satisfies that requirement in principle, inasmuch as it constitutes an application of the fundamental principle of legal certainty"[196]

One specific issue which has arisen in case law is whether Member States may rely on a limitation period to defend vertical actions claiming that a State has violated EU law. The European Courts have held that this is permissible (again this is hardly surprising in light of the principle of legal certainty cited in *Palmisani, supra*).

An example of the Court's view in this regard is found in *Rewe v Landwiirtschaftskammer Fur Das Saarland*[197] where it stated:

"There is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with a defence that limitation periods laid down by national law have expired, it being understood that the procedural condition governing the action may not be less favourable than those relating to similar actions of a domestic nature."

A similar principle was stated in *Barth*[198] whereby the CJEU held:

[195] C261/95.
[196] C261/95 at para 28.
[197] C33/76.
[198] C542/08.

"European Union Law does not prohibit a Member State from relying on a limitation period to resist an application for a special length-of-service increment, such as that at issue in the main proceedings, which, in breach of provisions of European Union law, was not granted, even if that Member State has not amended the national rules in order to render them compatible with those provisions. The situation will be different only if the conduct of the national authorities, in conjunction with the existence of a limitation period, had the effect of depriving a person of any opportunity of enforcing his rights before the national courts."[199]

Accordingly, the *general* position is that limitation periods are not necessarily incompatible with EU law. A review of the case law relating to the compatibility of limitation periods with Union law suggests that there are two circumstances in which the limitation period may be contrary to EU law. The first are cases in which the limitation period, when coupled with culpable conduct[200], renders effectively impossible the litigant's possibility of vindicating its right. The second type of issue which has arisen is where there were individual circumstances in a particular case which rendered the limitation period unlawful. Each of these types of case is considered below.

LIMITATION PERIODS AND CONDUCT

Emmott v Minister for Social Welfare[201] involved a question referred by the Irish High Court to the Court of Justice around the potential disapplication of statutory limitation periods in national law where a directive was not transposed.

The Court of Justice stated that:

"*Whilst the laying down of reasonable time-limits which, if unobserved, bar proceedings, in principle satisfies the two conditions [of equivalence and effectiveness] mentioned above, account must nevertheless be taken of the particular nature of directives."*[202]

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[199] C542/08 at para 33.
[200] Such as the failure to transpose a Directive timely (as per *Emmott, infra*) or giving an employee deliberate misrepresentation thereby stymieing her ability to prosecute a claim with the time limit (as per *Levez, infra*).
[201] C208/90.
[202] C208/90 at para 17.

Accordingly, in the passage above, the Court stated that, usually, the setting of reasonable time limits in national law would satisfy the requirements of equivalence and effectiveness. However, the nature of directives themselves must be considered.

The Court then notes that whilst Directives leave the "*choice of form and methods*" and the "*ways and means*" for achieving the result envisaged by a Directive, there was an obligation on Member States to ensure that the Directive is "*fully effective*" in relation to the objective pursued.[203] The Court held that this obligation extends to ensuring the full application of the Directive in a "*sufficiently clear and precise manner*" such that, where individual rights are established by a Directive, persons *"can ascertain the full extent of those rights and, where necessary, rely on them before the national courts."*[204]

The Court seems to consider two principles arising. First, limitation periods in national law usually satisfy equivalence and effectiveness and therefore lie legitimately within a Member State's procedural autonomy. Second, Member States are under an obligation to transpose a Directive in a manner which is sufficiently clear to allow individuals to ascertain the full extent of their rights under the Directive.

The Court resolved these principles by finding that Member States may not rely on an argument that an individual has delayed (i.e. acted outside a statutory limitation period) in circumstances where the Directive was not transposed. The Court stated that:

"*... until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual' s delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time."*[205]

The Court ruled as follows:

[203] C208/90 at paras 18 and 19.
[204] *Ibid.*
[205] C208/90 at para 23.

"Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by Article 4(1) of Directive 79/7, on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system."[206]

On one analysis, the foregoing paragraph urges Courts to disapply national time limits insofar as those time limits countenance the running of time whilst a Directive is not properly transposed. Admittedly, *Emmott* was not "about" whether administrative tribunals must disapply limitation periods, however, *Emmott* stands for the proposition that limitation periods *may* be contrary to EU law if they allow a Member State to rely on a time period during which a Directive has not been transposed. If the Principle as applied in the *WRC case* is correct, administrative decision makers must now disapply limitation periods set out in national law, where they are incompatible with EU law.

It must be noted that the Court in *Emmott* appeared to impugn the limitation period on the basis that it would render the exercise of Union rights ineffective.[207] Accordingly, it is notable that any limitation period which renders the exercise of rights ineffective cannot be saved under the doctrine of procedural autonomy.

In *Levez v TH Jennings (Harlow Pools) Ltd*[208], Ms Levez claimed for pay discrimination of which she only became aware after she left her job. Shortly after realising this, she commenced proceedings. Two questions referred to the Court of Justice.[209]

The first question referred was whether Union law precluded national limitation periods governing an employee's right to claim damages for infringement of the principle of equal pay, in circumstances where, first, the delay in bringing the claim was based on a deliberate

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[206] C208/90 at para 24.

[207] This is inferred from the fact that the Court held that at para 21 that: "*[s]o long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights."* Given that the doctrine of effectiveness requires that the exercise of rights cannot be rendered impossible or very difficult, this finding by the Court appears to engage that principle.

[208] C326/96.

[209] C326/96 at paras 1 to 16.

misrepresentation given to the employee, and second, the national court had no power to extend the limitation period.[210]

The Court reiterated the principle that reasonable limitation periods in national law were not open to criticism.[211] However, the Court noted that on the facts before it, the rule of national law *"manifestly precludes the possibility of either full compensation or an effective remedy"*[212] and that an employee provided with false information such as that in the present case would have no way of determining whether he or she is the subject of discrimination.[213]

The Court ruled that Union law "*precludes the application of"* the limitation period,[214] as the effect of such a rule would be to "*facilitate the breach of Community law by an employer whose deceit caused the employee's delay in bringing proceedings."*[215]

The reference to the phrase "precludes the application of" suggests that Courts must disapply the law in question. Once again, if the Principle in *WRC* essentially brings administrative tribunals up to the same level of responsibility as courts as far as disapplying offensive domestic laws are concerned, administrative tribunals must disapply time limits which are contrary to EU law.

The second question referred concerned whether the limitation period at issue could be saved in circumstances where Ms Levez had an alternative remedy but which entailed procedures or conditions which were less favourable than prosecuting a claim before the administrative tribunal.[216]

Importantly, the Court noted that "in principle" it is for national courts to establish whether the principle of equivalence is satisfied.[217]

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[210] C326/96 at para 17.
[211] C326/96 at paras 19 and 20.af
[212] C326/96 at para 22.
[213] C326/96 at para 31.
[214] C326/96 at para 34.
[215] C326/96 at para 32.
[216] C326/96 at para 36.
[217] C326/96 at para 39.

The Court issued guidance as to how national courts might assess whether a particular rule satisfied the principle of equivalence. First, equivalence requires that the rule in national law "*be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar.*"[218] Second, equivalence does *not* require a Member State to extend its "*most favourable rules to all actions brought*" in employment law.[219] Thirdly, in assessing equivalence, which is the duty of the *national* court, it must consider "*both the purpose and the essential characteristics of allegedly similar domestic actions.*"[220] Fourth, when assessing whether a rule of national procedural law meets the requirements of equivalence, a Court must "*take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.*"[221]

The final ruling of the Court is interesting in that it holds that a limitation period may be contrary to Union law particularly if the only other remedy available (for example a non-time barred judicial remedy) would entail procedure or conditions which are less favourable than those applicable to domestic actions only.[222] Crucially, however, the Court finds that this is for *national courts* to assess and not the Court of Justice. This restrained approach is in contrast to the *WRC case* which went so far as to impugn the national rule.[223]

Commentators have noted that while *Emmott* and *Levez* concerned "*the exercise of a fundamental Treaty right (to free movement or equal treatment)*" there was no principled reason why those cases "*should not apply to other rights enjoyed as a matter of community law.*"[224] Presumably this refers to rights enjoyed under a Directive, Regulation or Decision as distinct from Treaty-level rights. It is submitted that this is correct as there is, simply, no principled reason why rights arising from, for example a Directive but not traceable to a Treaty right, would be subject to a lower level of protection than a right which has a Treaty basis.[225]

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[218] C326/96 at para 41.
[219] C326/96 at para 42.
[220] C326/96 at para 43.
[221] C326/96 at para 44.
[222] C326/96 at para 53.
[223] C-378/17 at para 52.
[224] *Dougan* "National Remedies Before the Court of Justice" Hart publishing (2004) at page 13.
[225] Notably in *Aprile Srl v Amministrazione delle Finanze dello Stato* C-228/96 the Court did not follow the approach of the Court in *Emmott* as the claim before it was not based on a right which enjoyed direct effect.

The approach in *Emmott* was not followed in *Aprile Srl v Amministrazione delle Finanze dello Stato* C-228/96, although for reasons set out below, it would appear that *Aprile* was a fact-specific judgment which does not operate to overrule *Emmott* at a level of principle.

In *Aprile,* the Italian State had, in earlier proceedings, been found to be in breach of EU Treaty obligations on certain customs charges rendered over a period of time. Thereafter, Italian law was amended, prospectively-only, to address the matter substantively. Additionally, the Italian legislature passed a law (in the period following the decision that it had levied charges and taxes contrary to EU law) to reduce the limitation period for claims concerning "customs" payments charges to a period of five years and later three years, each of which were shorter than a 10 year limitation period in national law for claims relating to sums paid but not due).

The plaintiff in *Aprile* sought repayment of customs duties. The defendants sought to argue that the claim was statute barred and relied on national limitation periods of 5 and, subsequently 3, years.

The question referred was whether such limitation periods were compatible with Union law.

One of the defences put forward was that the shorter limitation periods (of five and three years) applied to actions for the recovery of customs charges, regardless of whether those claims were based on national law or Union law. This appeared to be accepted by Court of Justice, with it adding that *"the position would be different only if those detailed rules applied solely to actions based on Community law."*[226]

Notably, the Court held that it is impermissible for a Member State to effectively frustrate decisions of the Court of Justice concerning, for example illegal taxes or levies, by changing national limitation periods to specifically target individuals who had claims pending against the State in relation to those (unlawful) charges prior to, or at the date of, the decision in question.

This is perhaps a very narrow distinction which provides Members States with the opportunity to, in an indirect manner, cause claims to become statute barred. It might be said that in the

[226] C228/96 at para 21.

wake of a judgement finding that charges levied by a Member State were unlawful, the changing of the limitation period for actions relating to "customs" is just as impactful as simply enacting legislation to specifically target specific types of claim within or under that rubric. Yet, in *Aprile* the Court finds that the former is permissible, whereas the latter is not. In that regard, *Aprile* might be criticised for doing little to ensure the effective protection of Union rights. Perhaps *Aprile* might best be considered to be a case confined to its facts as the following finding appears to be of central importance to the reasoning in that case: that the impugned legislation "*cannot be regarded as a measure intended to limit specifically the consequences of the Court's findings [that the charges were incompatible with Community law].*"[227]

A not dissimilar issue was earlier considered in *Q-Beef NV v Belgische Staat.*[228] There, the question referred was whether it was compatible with Union law to impose a five year limitation period on actions to recover sums paid to a Member State under a scheme which was found to be unlawful. The Court stated that it neither infringed the principle of equivalence or effectiveness. It appears that there was no great effort displayed by the plaintiffs in that case to elucidate particular features of their case which rendered the five year time frame a violation of the principle of effectiveness. Rather, the Plaintiff's seemed to argue (at least a reading of the judgment leaves one with that impression) that the five year time limit was incompatible with EU law simpliciter. This is evident from the following sentence (with added emphasis): *"the applicable limitation period is five years, which, <u>in the absence of particular circumstances brought to the attention of the Court</u>, cannot be regarded as being contrary to the principle of effectiveness."*[229]

The Court picked up on theme in the *Emmott* case and ruled that: *"the Court has held that EU law does not preclude a national authority from relying on the expiry of a reasonable limitation period <u>unless the conduct of the national authorities combined with the existence of a limitation period result in totally depriving a person of the opportunity to enforce his rights before the national courts.</u>"* [230]

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[227] C C228/96 at para 31.
[228] Joined Cases C-89/10 and C-96/10.
[229] Para 37.
[230] Para 51.

When *Aprile* is read in light of the earlier case of *Q-Beef* it is suggested that *Emmott* remains good in principle insofar as it holds that a limitation period coupled with conduct on the part of Member States which renders the vindication of rights excessively difficult, is contrary to Union law.

INDIVIDUAL CIRCUMSTANCES

A number of cases suggest that limitation periods may be incompatible where they are too short in light of the individual circumstances of the case involved.

It is relevant to note that in *Q-Beef* (*supra*) the Court rejected an argument that a five year limitation period was contrary to the principle of effectiveness as no *"particular circumstances [were] brought to the attention of the Court."*[231]

In *Danqua v Minister for Justice and Equality*[232], the question whether a 15 day time limit to apply for subsidiary protection was raised. There, the Court ruled that the 15 day time limit was contrary to EU law as it was contrary to the principle of effectiveness. It stated:

"... taking account of the difficulties such applicants may face because of, inter alia, the difficult human and material situation in which they may find themselves, it must be held that a time limit, such as that at issue in the main proceedings, is particularly short and does not ensure, in practice, that all those applicants are afforded a genuine opportunity to submit an application for subsidiary protection and, where appropriate, to be granted subsidiary protection status. Therefore, such a time limit cannot reasonably be justified for the purposes of ensuring the proper conduct of the procedure for examining an application for that status."[233]

A recent decision of relevance is *Cogeco Communications Inc. v Sport TV Portugal, SA.*[234] There, the CJEU considered the compatibility of a three year time limit in domestic Portuguese law.

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[231] *Q-Beef* at para 37.
[232] C429/15.
[233] C429/15 at para 46.
[234] C 637/17.

The case concerned Directive 2014/104 (known as the "Remedies Directive") which governed the manner in which competition law infringements were enforced by national authorities; additionally the Directive provided for horizontal actions for infringement of competition law.

The Directive in fact contained detailed provisions around the establishment of time limits (in national law). In that regard, the Directive mandated that:

"Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer."

Additional provisions in the Directive provided that limitations must be at least five years and that the period must be suspended if the national competition authority commenced investigations or proceedings.

It is perhaps worth pausing to observe that it is a little unusual for a Directive to prescribe the parameters of national time limits given that, as has been canvassed earlier, Member States enjoy procedural autonomy subject to the provisions of effectiveness and equivalence. Time limits axiomatically fall within the concept of procedural autonomy.[235] The reason perhaps why the provisions of the directive were so prescriptive may be explained by the fact that abuses of competition law are prohibited by Articles 101 and 102 of TFEU. As these abuses are prohibited at a Treaty-level it is perhaps understandable to see the Union legislature stipulate strict requirements.

[235] See for e.g. the comments by the Court at para 42: *"it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an abuse of dominant position prohibited under Article 102 TFEU, <u>including those on limitation periods, provided that the principles of equivalence and effectiveness are observed</u>…"* See also decision in *Barth v Bundesministerium für Wissenschaft und Forschung* C-542/08 in which it was stated at para 16: *"… a limitation period constitutes a procedural condition governing an action intended to ensure that a right derived by an individual, such as the applicant in the main proceedings, from European Union law is safeguarded."*

Portuguese law provided in fact that a right to compensation for infringement of competition law expires after three years from the date on which the injured party was aware of its right, *even if* the complainant was unaware of the identity of the person liable and unaware of the full extent of the damage.

The case involved a somewhat complex factual background, which is necessary to consider briefly.

Cogeco was a shareholder of Cabovisão and the latter lodged a complaint before the domestic competition authority in Portugal on 30th July 2009 against Sport TV alleging abuse of a dominant position.

On 14th June 2013, the competition authority ruled that Sport TV was guilty of infringements of both EU and domestic competition rules and ordered Sport TV to pay a fine.

On 4th June 2014, that decision was partly annulled by the Competition, Regulation and Supervision Court of Portugal which ruled that Sport TV was, in fact, guilty of infringing only national competition law but not EU competition law (in that regard the Court drew a distinction between national rules prohibiting discriminatory pricing, on the one hand, and Union rules prohibiting the abuse of a dominant position on the other hand).

A challenge to that decision was dismissed on 11th March 2015 by the Portuguese Court of Appeal.

On 27 February 2015, Cogeco commenced horizontal proceedings against Sport TV and others before the national courts seeking *inter alia* damages for anticompetitive conduct in the period from 3 August 2006 to 30 March 2011. The defendants in those proceedings claimed that the action was time barred, by reference to a three year time limit in national law.

As the wrongs alleged pertained to a period before the Directive became effective in national law both the Court and AG Kokott found that the provisions in the Directive which governed national time limits did not apply to the present case.[236] This was a crucial finding as it meant,

[236] See decision of the Court at paras 33 and 34 and AG Kokott Opinion at Para 64.

in consequence, that the "yardstick" by which the legitimacy of the national time limit was to be measured were the "general principles of EU law" and not the detailed substantive provisions of the Directive.[237] In other words, the detailed provisions in the Directive around permissible domestic time limits were inapplicable as the Directive was not active in relation to the present dispute.

Both the Court of Justice and AG Kokott found that the Treaty article in question gave rise to direct effects (in other words, a complaint that Article 102 TFEU was violated is directly actionable).[238]

In that regard, AG Kokott opined:

"If the referring court should thus conclude that the business practices of Sport TV were capable of appreciably affecting trade between Member States, it would have to apply Article 102 TFEU in the main proceedings and ensure that the right of the injured party to seek compensation for the harm sustained due to abuse of a dominant market position can be effectively enforced. As long as the harmonisation brought about by Directive 2014/104 does not yet apply, it is for the domestic legal system of the Member State in question to prescribe the rules on the enforcement of this right to compensation, provided that the principles of equivalence and effectiveness are observed."[239]

The Court of Justice and AG Kokott swiftly found that the limitation period in question did not violate the principle of equivalence as it applied "*equally to claims for damages based on EU law and to those under national law.*"[240]

Consideration then turned to whether the provision was consistent with the requirements of effectiveness. In that regard, the AG found (unsurprisingly) that a limitation period of three years was not of itself contrary to the principle of effectiveness.[241]

[237] See AG Kokott Opinion at Para 73.
[238] See decision of the Court at paras 38 to 41 and AG Kokott Opinion at Paras 65 and 66.
[239] See AG Kokott Opinion at Paras 74 and 75.
[240] See AG Kokott Opinion at Para 76 and see also para 54 of the decision of the Court.
[241] See AG Kokott Opinion at Para 78.

However, he referenced two important aspects of the limitation period in question. First, that the limitation period ran despite the fact that the complainant was unaware of the wrongdoer, and, second, that domestic legislation did not make provision for the suspension of the limitation period while proceedings were ongoing before a national competition authority.[242]

In concluding that the rule in national law was contrary to the principle of effectiveness, the AG opined:

"Firstly, knowing who the person responsible is, especially under antitrust law, is indispensable for a successful assertion of non-contractual claims for damages, in particular by bringing an action before the courts. The undertakings responsible for infringements of the competition rules are mostly organised as legal persons which are not infrequently part of groups of undertakings or corporate structures that are difficult for outsiders to penetrate, and may, moreover, be subject to restructuring operations over the course of time. Secondly, a correct legal appreciation of infringements of the competition rules in many cases requires the assessment of complex economic relationships and internal business documents, which often come to light only as a result of the work of the competition authorities."

The Court itself made similar observations in ruling that the limitation period in the present case was contrary to the principle of effectiveness. It ruled:

"Short limitation periods that start to run before the person injured by the infringement of EU competition law is able to ascertain the identity of the infringer may render the exercise of the right to claim compensation practically impossible or excessively difficult. It is indispensable, in order for the injured party to be able to bring an action for damages, for it to know who is liable for the infringement of competition law. The same applies to a short limitation period that cannot be suspended or interrupted for the duration of proceedings following which a final decision is made by the national competition authority or by a review court."[243]

The Court proceeded to conclude that the limitation period violated the principle of effectiveness and held:

[242] See AG Kokott Opinion at Para 82.
[243] See paras 40 to 51 of the decision of the Court.

"In that context, it must be held that a limitation period of three years, such as that at issue in the main proceedings, which, first, starts to run from the date on which the injured party was aware of its right to compensation, even if the infringer is not known and, secondly, may not be suspended or interrupted in the course of proceedings before the national competition authority, renders the exercise of the right to full compensation practically impossible or excessively difficult."[244]

Since, as has been mentioned above the compatibility of the domestic time limit was measured by reference to the general principles of EU law, as distinct from the detailed provisions of the Directive, the findings in *Cogeco* are important at a level of principle and are likely to have effect beyond the strict ambit of the Directive in that case.

It is worth noting perhaps that, in contrast to the decisions in *Danqua* and *Cogeco*, a failure to show that there are individual circumstances in a given case which render a limitation period unlawful is likely to result in a limitation period withstanding scrutiny for compliance with EU law. A case which illustrates this is *Barth v Bundesministerium für Wissenschaft und Forschung*[245]. That case concerned a challenge to a three year national limitation period for the recovery of special length of service increments which had been unlawfully withheld from migrants. The Court of Justice noted:

"... in the absence of particular circumstances brought to the attention of the Court, a limitation rule such as that applied against the applicant in the main proceedings, providing for a three-year limitation period, which may be extended by nine months, cannot be regarded as being contrary to the principle of effectiveness."[246]

ANALYSIS OF PRINCIPLES EMERGING CONCERNING LIMITATION PERIODS

By way of analysis, the following is suggested. Case law from the Court of Justice suggests that there are instances whereby time limits in national law may be contrary to European Union law. Thus, in light of *WRC,* persons agitating claims with an EU law dimension before

[244] Para 53 of the decision of the Court.
[245] C-542/08.
[246] C-542/08 at para 29.

administrative decision makers might rely on EU principles to invite those administrative decision makers to disapply national time limits. The full impact of this possibility is not yet apparent.

In terms of the case law concerning national limitation periods, EU law does not in principle regard such provisions as incompatible with EU law. However, in certain instances, abnormally short periods have violated EU law.[247] Similarly, limitation periods when coupled with adverse conduct on the part of the State or other person acting in violation of EU law to such an extent that they render the vindication of rights impossible.[248]

One immediate problem with this line of case law is that EU law appears to require a highly individualised assessment of the circumstances of any individual claim that a limitation period is incompatible with EU law.[249] The problem with such an individualised approach is that it undermines the very principle which EU law invokes as justification for reasonable time limits, namely legal certainty. Legal certainty is hardly vindicated in circumstances where the same period of time is compatible with EU law in one context but incompatible in another context. For example, where a plaintiff is an applicant for international protection thereby, taking his or her difficult human and material situation into account, entitled to a greater period within which to bring his or her claim than someone who is not in such a difficult situation. In this regard, case law does not reveal a precise principle capable of application in all cases.

Moreover, these cases may be relevant to an administrative decision maker in circumstances where there is some doubt as to the applicability of a time limit to a case. For example, these cases are relevant if a statute setting down the time limit is unclear and requires interpretation.[250] If the wording of the statute is unclear, a national court must interpret the statute in a manner which compatible with EU law. Thus, the duty to interpret national laws consistent with EU law, where possible, might arise.[251] These cases are also relevant if, for example, an administrative decision maker is presented with a "soft" time limit which it may

[247] See *Danqua, supra.*
[248] See *QV-Beef, supra.*
[249] See for e.g. *Cogenco* and *Barth, supra.*
[250] This might arise if for example the date on which time commences is unclear or whether an issue arises in interpreting the time period itself.
[251] See *Marleasing, Impact v Minister for Agriculture and Food* C268/06 and Opinion of AG Kokott in *Cogenco.*

extend in its discretion.[252] The principles expressed in these cases are likely to arise in the context of either of those two scenarios.

[252] For example section 21 of the Equal Status Act 2000, which empowers the WRC to extend the time period for sending a notification in the case of discrimination complaints from 2 months to 4 months (where there is "reasonable cause") or to simply disregard the requirement to send a notification within 2 months (in exceptional cases). See also Garda Compensation Act 1941, section 5 which empowers the Minister for Justice to entertain applications for authorisation outside the stated 3 month time limit.

CHAPTER 6 IMPLICATIONS FOR THE RIGHT TO A REMEDY

EU LAW REMEDIES GENERALLY

There are three principles which are relevant to the present analysis on remedies.

First, Treaty provisions provide for the right to an effective remedy. In that regard, the material part of Article 47 of the Charter of Fundamental Rights of the European Union provides for the right to an effective remedy; it reads:

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law…"

Moreover, Article 19 TEU reads (in material part only): "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*"

A helpful statement on the right to an effective remedy is found in *Johnston v Chief Constable of the RUC*[253] in which he Court stated:

"By virtue of Article 6 of Directive No 76/207, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the Directive. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of community law and of national legislation intended to give effect to the rights for which the Directive provides."[254]

Second, it has been established that it is for Member States to establish and stipulate which bodies have jurisdiction to hear disputes, subject to the principles of equivalence and effectiveness.[255]

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[253] C-222/84.
[254] *Ibid* para 19.
[255] See discussion on procedural autonomy (supra).

Third, where a Member State fails in its obligations in EU law, a person affected by this failure may sue that Member State for damages in a vertical action.[256]

These three principles give rise to a key question which is relevant to the *WRC* decision concerning remedies. Where the Member State is deemed to have failed in its obligations to empower all necessary tribunals with sufficient power to implement EU law (and this was the finding made against Ireland in *WRC*), what remedy exists for the complainant?

On the one hand there is some limited authority for the proposition that Courts may have to assume jurisdiction to hear cases involving EU law,[257] even where that particular case may not be justiciable before that Court as a matter of national law. This approach bears some resemblance to the *WRC* decision which requires the WRC effectively[258] to assume jurisdiction on the basis that EU law demands it. The other principled solution is that domestic legislation is taken as it is and the complainant simply sues the State for failure to properly implement EU law. The difference in practice would be significant: in the former case, the rules of jurisdiction for Courts and tribunals are augmented in line with EU law requirements. In this scenario, EU law might be said to be jurisdiction-conferring. By contrast, in the latter scenario, the rules of jurisdiction are unimpeached but the claimant seeks damages for failure to vest the relevant body (i.e. the WRC or another administrative decision maker) with sufficient vires to deal with EU law complaints.

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256 See *Francovich v Italy* C6/90 and C9/90.

257 See *Unibet v Jsutitiekanslern* C-432/05, *Borelli v Commission* C-97/91 and *Kühne v Jütro Konservenfabrik GmbH* C-269/99.

258 Strictly speaking the Court of Justice found that the WRC must disapply any national law purporting to limit its jurisdiction, which effectively means the WRC must assume a jurisdiction which it otherwise does not have in national law. See *WRC* CJEU decision at para 52: *"… EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law."*

MAY EU LAW OBLIGATIONS BE JURISDICTION-CONFERRING?

In *Borelli v Commission*[259] the applicant sought to annul a decision of the Commission refusing an application for agricultural aid. That application, which was made to the Commission and through the Italian authorities. The Commission could not in law grant the application for aid owing to the unfavourable opinion given to it by the national authorities. The applicant claimed that the decision of the local authority was tainted with an error of law and argued that the Commission's decision was unlawful as the latter decision was infected by the former (erroneous) opinion. However, the Court of Justice refused to grant relief as it had no powers "*to rule on the lawfulness of a measure adopted by a national authority.*"[260]

The Court proceeded to hold that it is for national courts to judicially review national measures. That much is uncontroversial. However, crucially, the Court held that where such an action (for domestic judicial review) was not admissible in national law, the national courts were required under EU law to hear such application. The relevant passage from the Court of Justice states:

"*… it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure at issue on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties and, consequently, to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case.*"[261]

The basis for this obligation on the national court to step into the breach was the doctrine of judicial control: as the decision taken by the national state influenced the decision of a Union institution (i.e. the Commission) the requirement for the national court to take jurisdiction of the complaint arose under EU law. The Court stated:

"*… the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the*

[259] C97/91.
[260] C97/91 at para 9.
[261] C97/91 at para 13.

Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Since the opinion of the Member State on whose territory the project is to be carried out forms part of a procedure which leads to the adoption of a Community decision, that Member State is obliged to comply with the aforesaid requirement of judicial control."[262]

The principle in *Borelli* was applied in *Kühne v Jütro Konservenfabrik GmbH.*[263] There, a dispute arose over the registration of pickles as emanating from a specified region. National authorities were required to check applications for compliance with the terms of an EU Regulation and whether the application was justified. Thereafter, the Commission performs "*only a simple formal examination to check whether those requirements are satisfied."*[264] The Commission could only grant registration if the national authorities submitted an application which they deemed to be justified. The respondent was a third party which complained that its rights and interests could be adversely affected by the decision of the national authority. The respondent complained that it could not bring an application for domestic judicial review as domestic rules did not permit it to do so.[265] The Court resolved this issue by invoking the principle referred to in *Borelli* above whereby the national court *must* deem admissible such complaints. The following short passage gives an insight into the Court's reasoning (with emphasis added):

"[The requirement for a national court to deem such a complaint admissible] *must also be complied with with regard to a measure, such as the application for registration at issue in the main proceedings, which constitutes a necessary step in the procedure for adoption of a Community measure, <u>where the Community institutions have only a limited or non-existent discretion with regard to that measure.</u>"*

Here, as the Union institution (i.e. the Commission) has such a limited ability to exercise discretion, the national authority's decision takes on an increased importance to such an extent that EU law demand the availability of domestic judicial review of latter decision.

[262] C97/91 at paras 14 and 15.
[263] C-269/99.
[264] C-269/99 at para 52.
[265] C-269/99 at para 56.

The relevance of the Court's rationale in *Borelli* and *Kühne* is that it demonstrates that the circumstances giving rise to the obligation on national courts to accept jurisdiction to hear judicial review applications, even where judicial review would not ordinarily be available in national law, were fairly unique. In other words, the obligation on the national courts to accept jurisdiction to hear judicial review applications arose as the impugned decision (taken by a national body) in fact impacted on a decision of the Commission relating to EU law. In those circumstances, it is questionable whether *Borelli* and *Kühne* would have a very widespread application. The nature of the decisions the subject of complaint in *Borelli* and *Kühne* are described as *"provisional decisions adopted by national authorities where, in themselves, such acts are capable of affecting the claimant's legal interests."*[266]

There are other examples where national courts had to "find" additional jurisdiction to award wider remedies than those provided in national law.

The Court of Justice has on a number of occasions stated that EU law required national courts to fashion appropriate remedies beyond those found in national law.

For example, in *Factorame I*[267] the Court of Justice ruled that the principle of effectiveness required national courts to assume a jurisdiction to award *interim* remedies even where that was not provided for in national law. The Court stated:

"In accordance with the case-law of the Court, it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law…

The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and

[266] See *Dougan* at page 7.
[267] C-213/89.

effect are incompatible with those requirements, which are the very essence of Community law…

It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule…

Consequently, the reply to the question raised should be that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule."[268]

A further example is found in *Manfredi*[269] where the Court of Justice held that the principle of effectiveness in EU law required that "loss of profit" and "interest" be recoverable in damages, even where that was not the position in national law. The Court stated:

"… in the absence of Community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed…

…it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest."[270]

[268] *Ibid* at paras 19 to 23.
[269] Joined cases C-295/04 to C-298/04.
[270] *Ibid* at paras 98 to 100.

Also relevant is the decision in *Heylens*[271] where the Court stated that effective judicial review required that a decision maker would tender reasons and that the Court must be competent to review those reasons for legality. The Court stated:

"Since free access to employment as a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right. As the court held [in Johnston v RUC]... that requirement reflects a general principle of community law which underlies the constitutional traditions common to member states and has been enshrined in articles 6 and 13 of the [Convention].

Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, would have full knowledge of the relevant facts, whether there is any point in there applying to the courts."[272]

***FRANCOVICH* ACTIONS**

In contrast to *Borelli* and *Kühne* is the principle that a person affected by a Member State's failure to comply with EU law obligations is entitled to damages.

In that regard, the case of *Francovich v Italy*[273] provided that States may be liable to individuals for losses arising from the failure to implement EU law, subject to three conditions. The applicable conditions are:

"The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the

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[271] C-222/86.
[272] *Ibid* at paras 14 and 15.
[273] C6/90 and C9/90.

content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State' s obligation and the loss and damage suffered by the injured parties."[274]

Thus, according to this approach, EU law does not in fact confer a jurisdiction which does not otherwise exist in national law. Rather, the jurisdiction of the respective national Courts and tribunals remains governed by national law. Any complainant aggrieved by those rules must take a vertical action against the State.

The case of *Dorsch Consult v Bundesbaugesellschaft Berlin mbH*[275] is relevant in this regard. In that case, an unsuccessful tenderer applied to a reviewing body to have a public contract award process stopped. The reviewing body declined that application as the reviewing body had no jurisdiction to review awards relating to *services*.

The question referred was whether Directive 92/50, which pertained to public *service* contracts, required that reviewing bodies, which enjoyed jurisdiction under a previous iteration of the directive which concerned public contracts *other* than services contracts (namely *public works contracts and public supply contracts*), to have jurisdiction to review the awards of *public service* contracts. Directive 92/50 had not been transposed by the deadline for transposition and had therefore become directly effective. The argument made was that the review bodies established by the previous directive, Directive 89/665 (dealing with *public works contracts and public supply contracts*), must also have jurisdiction to hear disputes as to services contracts, after the deadline for transposition. Prior to examining the rationale of the Court, it is worth noting that the reviewing body derived its jurisdiction to review public contracts awards from national legislation implementing Directive 89/665.

In resolving this case, the Court of Justice referred to the principle that national courts must, if and to the extent that it is possible, interpret national legislation in conformity with the relevant EU Directive.[276] That exercise is, clearly, for the national courts to undertake and, accordingly, the Court of Justice made no finding in this regard.

[274] C6/90 and C9/90 at para 40.
[275] C-54/96.
[276] C-54/96 at para 43.

However, the Court of Justice did give guidance as to what may occur if domestic legislation (including domestic legislation assigning jurisdiction to review public contracts awards to national authorities) cannot be interpreted in compliance with the Directive. It stated:

"... the question of the designation of a body competent to hear appeals in relation to public service contracts is relevant even where Directive 92/50 has not been transposed. Where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, the Court has recognized, subject to certain conditions, the right of individuals to rely in law on a directive as against a defaulting Member State."[277]

Accordingly, where a litigant is faced with a scenario whereby domestic laws assigning jurisdiction to hear complaints to national authorities is not in compliance with a Directive, the litigant's cause of action is against the Member State for failure to transpose the Directive in question. The relevant passage states:

"If the relevant domestic provisions cannot be interpreted in conformity with Directive 92/50, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed."[278]

If *Dorsch* is correctly decided, it would appear to be in tension with the *WRC* case. *Dorsch* rules that a failure to implement an EU law obligation by vesting the appropriate authority with jurisdiction opens the State to a vertical action for damage. By contrast, the *WRC* decision rather requires the administrative decision maker to assume a jurisdiction it never had in domestic law (in effect, in *WRC* EU law becomes a jurisdiction creator).

[277] C-54/96 at para 44.
[278] C-54/96 at para 45.

CHAPTER 7 DISAPPLICATION OF OUSTER CLAUSES

OUSTER CLAUSES IN DOMESTIC LAW

Ouster clauses are provisions found in domestic law which, in one way or another, restrict a Court's or a tribunal's jurisdiction. These clauses may take the form of an outright ouster of jurisdiction which operates to totally strip a body, usually a Court, of its powers of judicial review. One example of this occurred in *Anisminic Limited v Foreign Compensation Commission*[279] in which a statute provided that a decision of the respondent could not be reviewed by a Court.

There are similar provisions, which, by their nature operate to interfere with the manner in which a Court (or indeed an administrative decision maker) could carry out judicial review (or, in the case of an administrative tribunal, the ability to carry out first instance adjudication). These provisions are perhaps slightly different to "ouster clauses" in a pure sense, as these provisions do not strictly deprive a court or tribunal of jurisdiction, rather they impair the rigour with which the body can go about its decision making business. One example of such a provision is legislation with provides that a certain piece of evidence is conclusive of either the lawfulness of a decision or the reasons for taking such a decision. These provisions affect the manner in which a tribunal might adjudicate on the merits of a dispute at first instance or the rigour with which court can interrogate that decision on review. Despite the fact that there is some considerable difference between these two types of clause, some commentators treat these two distinct types of statutory provisions under the rubric "ouster clauses."[280] The present discussion will use the term "ouster clause" in the broader sense thereby embracing clauses which impair the rigour of the decision making process without in fact stripping that body of jurisdiction.

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[279] [1969] 2 A. C. 147.

[280] See for e.g. *De Blacam* Judicial Review 3rd edition at para 9.23. See a more nuanced discussion in Hogan, Morgan and Daly, Administrative Law in Ireland 5th edition at chapter 11 where these matters are tackled as full ouster clauses, partial ouster clauses, and other clauses indirectly excluding judicial review.

The present discussion is not concerned with a detailed examination of all the issues arising with ouster clauses. Those clauses give rise to some problems at a domestic level around the rule of law and constitutional provisions.[281] We are not concerned with the issues of ouster clauses in domestic law save to note that there is no guarantee that an ouster clause will in fact be consistent with domestic law. Assuming they are in any given case, we turn to examine their compatibility with EU law.

OUSTER CLAUSES AND EU LAW

Where a right involving EU law is engaged, or a dispute otherwise concerns an area of Union competence, the compatibility of an ouster clauses with EU law may arise. The consequence of a finding that an ouster clause is contrary to EU law is that the clause must be disapplied by the national court or tribunal.

Disapplication of an ouster clause will have one of two consequences. First, it may result in a body (a Court or tribunal) which would otherwise not have jurisdiction to make or review a decision at all, accepting jurisdiction. Second, and in the case of those provisions which were described earlier as not stripping a body of jurisdiction *per se*, it may result in a body adopting a heightened standard of engagement with the evidence, or, in the case of review or appeal, carrying out a more intense review or appeal.

The compatibility of ouster clauses with EU law has been considered by the European courts on a number of occasions.

While the focus of the present discussion is on the role of EU law in the case of administrative decision makers, cases involving ousters of a *Court's* jurisdiction are relevant by analogy. That

[281] See for e.g. recent decision of UK Supreme Court in *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22. The complexity of the question whether ouster clauses are constitutionally permissible is evident from both the length of the judgment and two starkly opposite views on this fundamental issue. In that regard, contrast decision of Carnworth L (Hale and Kerr LL concurring) at para 144 per Lord Carnworth: *"I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law"* with dissenting judgment of Lord Wilson at para 253: *"I conclude that Parliament does have power to exclude judicial review of any ordinary errors of law made by the IPT."*

is so as EU law does not differentiate between these two species when it comes to the duty to disapply laws conflicting with Union law.[282]

In common law, the principal objection to ouster clauses is that they are an assault on the rule of law in allowing a first instance decision maker to act without any, or a limited, prospect of judicial review of the lawfulness of its behaviour.[283]

In the context of European law, the objection is similar. The objection can be founded specifically on the requirement for effective judicial control.[284]

JOHNSTON V CHIEF CONSTABLE OF ROYAL IRISH CONSTABULARY

The background to *Johnston v Chief Constable of Royal Irish Constabulary*[285] is the Secretary of State decided to arm male police officers, but not female police officers in Northern Ireland. Therefore, the Chief Constable decided that general police duties should not be assigned to female police officers (who were unarmed) and consequently failed entirely to offer or renew any contracts with female officers, including Ms Johnson who claimed discrimination on the ground of sex.

During those proceedings, the Respondent relied upon a certificate issued by the Secretary of State stating *inter alia* that the decision in question "*was done for the purpose of (a) safeguarding national security and (b) protecting public safety and public order.*"

The statutory instrument in question contained a derogation from the general prohibition on discrimination on the grounds of sex, where it was done *"for the purpose of safeguarding national security or of protecting public safety or public order."* That instrument also provided

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[282] See for e.g. *Costanzo SpA v Comune di Milano* at para 33 *"... administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of [Community law] and to refrain from applying provisions of national law which conflict with them."*
[283] See for example *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 where Lord Carnwath at para 114, characterised the appellant's argument as follows: *"a clause purporting to 'oust' the supervisory role of the High Court to correct errors of law cannot properly be upheld because it would conflict with the 'rule of law'"*
[284] See *Johnston* C-222/84 at para 2.
[285] C-222/84.

that a certificate signed by the Secretary of State shall be conclusive evidence that the act was done for those stated purposes.

That provision was found to contravene EU law.[286] It is also worth noting that this provision was not strictly a pure or "full" ouster clause removing jurisdiction from the tribunal;[287] the tribunal undoubtedly had jurisdiction to determine the dispute. Rather, this provision compelled the tribunal to, in essence, resolve the dispute in favour of the Respondent, in light of the conclusivity of the certificate.

Advocate General Darmon put the question before the Court as to whether the public order provisions in the Treaty could be invoked by a Member State to shut down judicial review in these zones. He wrote:

"… it will be necessary to investigate whether a Member State is entitled, for reasons of public order, to exclude all possibility of judicial review of the legality of a national measure in the light of national or Community law.

If it may not do so, it will be necessary to investigate whether, and the conditions under which, the measure in question may, subject to review by the courts, be justified in Community law on the grounds of public order."[288]

While it is a pedantic point, this was not necessarily a case shutting out "judicial review" *per se*. The impugned provision affected the manner in which the tribunal ought to exercise its jurisdiction. Obviously, administrative tribunals are not exercising powers of *judicial review,* even though they may be exercising quasi-judicial functions. It is clear that the provision deeming the certificate of the Secretary of State conclusive did have consequences for the intensity with which the tribunal could consider the overall merits of the dispute referred. The tribunal simply had to accept that the Secretary of State did in fact issue the certificate for the reasons stated and could not look behind the certificate. This is not consistent with the notion of judicial review. While it may be accepted that *if* the impugned provision of national law *did*

[286] *Johnston* at para 21.
[287] See discussion on this point at the beginning of this chapter.
[288] *Johnston* Advocate General Darmon's opinion at para 2.

have the effect of rendering the Secretary's certificate "conclusive," it would stymie judicial review in the *administrative* sense if and when the matter was considered by the High Court. However, it appears that it would have been very much open to the English courts (had the case gone that far) to judicially review the *legislation* itself and to quash it for violating the separation of powers or for breach of fundamental rights. Put another way, even if the effect of the provision governing the conclusiveness of the certificate rendered it impossible to judicially review the tribunal's decision (which is judicial review in the administrative law sense), it could not have prevented the Courts from quashing that provision for unconstitutionality (which is judicial review of legislation). Accordingly, it is suggested that the Advocate General was wrong to think of this case as concerning the shutting out of "judicial review." This was rather a clause which compelled a first instance tribunal to treat an item of evidence as conclusive.

In approaching the case, the Advocate General noted that there was a Treaty-level right to obtain a judicial determination in the case of the violation of rights and that:

"a corollary of the principle of legality—that, whilst the demands of public order may be allowed to modify the scope of judicial review, they cannot override the actual right to obtain a judicial determination."[289]

In finding that the principle of the rule of law, as enshrined in Union law, did not permit the shutting down of judicial review, he opined:

"... a provision of national law, purportedly based on considerations of public order, which excluded the very possibility of such review, would, in my opinion, be incompatible with the Community legal order. By removing measures taken by the Member States from the ambit of Community law—primary, secondary or such as implemented by national laws—such a provision would in fact allow the national authorities to create a 'no-go area for the law' as and when they saw fit, thus calling in question the very foundations of that legal order."[290]

Owing to the obligation on all authorities of Member States to give effect to EU law, it was stated that

[289] *Ibid* at para 4.
[290] *Ibid.*

"… a national court cannot, without infringing Article 5 of the Treaty and the directive, hold itself bound by a provision of national law which purports to exclude on the grounds of public order all judicial review of the implementation of Community legislation."[291]

In citing *Simmenthal,* the Advocate General opined that a national court (and presumably by analogy an administrative tribunal at first instance) must disapply those provisions.[292]

The Court of Justice came to a similar conclusion, but approached the matter slightly differently. It considered that one of the issues referred was "*whether it is compatible with Community law and [the] Directive… for a national court or tribunal to be prevented by a rule such as that laid down in [the impugned provision of national law] from fully exercising its powers of judicial review"*.[293]

At the risk of repetition, it must be noted again that the impugned provision of domestic law did not exclude "judicial review", rather it compelled a first instance tribunal to reach a particular decision on the facts before it, thereby limiting its adjudicatory powers in a practical sense, although not limiting its jurisdiction. It cannot be said that judicial review was impinged, rather the provision affected first instance adjudication.

In dealing with this question, the Court identified the requirement of judicial control as a principle of EU law (enshrined in the respective Directive and also protected under the ECHR). Accordingly, the treatment of the certificate was unlawful, as:

"A provision which… requires a certificate such as the one in question in the present case to be treated as conclusive evidence that the conditions for derogating from the principle of equal treatment are fulfilled allows the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the Directive. Such a provision is therefore contrary to the principle of effective judicial control laid down in… the Directive"[294]

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[291] *Ibid* at para 4.
[292] *Ibid.*
[293] *Johnston* at para 12.
[294]*Johnston* at para 20.

It therefore ruled that the principle of effective judicial control did *"not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purpose of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise if any power of review by the courts."*[295]

It is clear from *Johnston* that ouster clauses which are in the nature of "conclusive evidence" clauses are contrary to EU law and must be disapplied by national courts and tribunals.

CONNECT AUSTRIA V TELEKOM-CONTROL-KOMMISSION

Prior to analysing the next significant decision of the Court of Justice in this area, it is worth recalling the finding of the Court of Justice in *Dorsch Consulting*[296]. In that case, there was no ouster clause at all, rather the national legislature failed to properly transpose a procurement directive insofar as it failed to nominate an administrative body to hear appeals in relation to the awards of *public service contracts*. The question arose in *Dorsch* as to whether the administrative bodies which heard similar appeals pursuant to other procurement directives (namely appeals in relation to awards of *public works contracts* and *public supply contracts)* ought, as a matter of EU law, to assume jurisdiction to hear appeals of awards of *public service contract disputes*. The Court found that this was a question which ought to be dealt with by the national court through first interpreting its domestic laws consistent with the right to appeal laid down in the procurement directive, where possible. Where this was not possible, a claim would lie against the Member State for *Francovich* damages.[297]

Against that backdrop, the case of *Connect Austria v Telekom-Control-Kommission*[298] arose. This case involved an issue relating to the award of a telecommunications license. Connect Austria appealed against the decision of the Telecom Control Commissions ("TCK") to grant the extension of an existing license of a rival company, Mobikom.

[295] *Johnston* at para 21.
[296] C-54/96.
[297] *Dorsuch* C54/96 at paras 44 to 46.
[298] C-462/99.

Article 5(3) of Directive 90/387 provided for a right of appeal against certain decisions of a national regulatory authority. It provided that: *"Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved."*

Connect Austria appealed the decision of TCK to the Constitutional Court, which dismissed the appeal as it found that Connect Austria was not harmed by either a *"breach of a constitutionally guaranteed right or through [the] application of an unlawful general rule."* The Constitutional Court remitted the case to the national Administrative Court. There was, however, a troublesome provision in domestic law (Article 133(4) of the relevant domestic statute) which provided that the Administrative Court had no jurisdiction in cases involving a "*collegiate body comprising at least one member of the judiciary*," save where the law expressly provides for such an appeal.[299] TCK was a body which fell within this ouster clause. The Constitutional Court referred the appeal to the Administrative Court it seems for two reasons. First, Article 5(3) of Directive 90/387 was sufficiently precise to enjoy direct effect. Secondly, the primacy of EU law required the disapplication of national law which ousted the Administrative Court's jurisdiction.

In essence, the Administrative Court now faced a dilemma created in no small part by the Constitutional Court. Connect Austria had a directly effective right to an appeal from the decision of TCK under EU law, yet, domestic law prevented the Administrative Court from hearing the appeal. An obvious solution to this dilemma would have been for the Constitutional Court to quash the provision of Austrian law which stripped the Administrative Court of jurisdiction, thereby allowing the Administrative Court to hear the appeal. However, the matter was referred by the Constitutional Court to the Administrative Court. Faced with this problem, the Administrative Court turned to the CJEU for guidance and specifically asked whether it was required by EU law to disapply Article 133(4) of the Austrian statute and declare itself competent to hear the appeal brought by Connect Austria.

The Court ruled that the first step for the national court was to establish whether national law could be interpreted in consonance with the directive in question. Specifically, it must

[299] See Opinion of Advocate General Geelhoed at para 12.

determine *"whether that right of appeal may be exercised before the court or tribunal competent to review the lawfulness of actions taken by the public authorities."*[300]

Thereafter, the Court ruled, in effect, that if the national court was unable to interpret national law in a manner that was consistent with the Directive (in vindicating a right to an appeal from a domestic regulatory authority), the Administrative Court must accept jurisdiction to hear the appeal (by disapplying Article 133(4) of the Austrian statute which stripped the Court of jurisdiction). In that regard the CJEU ruled:

"It follows that a national court or tribunal which satisfies the requirements of Article 5a(3) of Directive 90/387 and which would be competent to hear appeals against the decisions of the national regulating authorities if it was not prevented from doing so by a provision of national law which explicitly excluded its competence, such as Article 133(4) of the B-VG, has the obligation to disapply that provision.

Therefore, the answer to the first question referred for a preliminary ruling must be that in order to ensure that national law is interpreted in compliance with Directive 90/387 and that the rights of individuals are effectively protected, national courts must determine whether the relevant provisions of their national law provide individuals with a right of appeal against decisions of the national regulatory authority which satisfies the criteria laid down in Article 5a(3) of Directive 90/387. If national law cannot be applied so as to comply with the requirements of Article 5a(3) of Directive 90/387, a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excluded its competence, such as that at issue in the main proceedings, has the obligation to disapply that provision."[301]

The requirement that courts must disapply national laws which restrict their jurisdiction is well and good but can give rise to some principled problems as it did in *Connect Austria.* The Constitutional Court referred the dispute to the Administrative Court as the Constitutional Court had a limited power of review. However, it was surely arguable that the limited power

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[300] *Connect Austria* at para 39.
[301] *Connect Austria* at paras 41 and 42.

of the Constitutional Court was a mere domestic rule of jurisdiction which could and must have been disapplied for the sake of primacy of Union law. There is no principled basis on which the Constitutional Court could in effect itself refuse jurisdiction and remit the case to the Administrative Court. Undoubtedly, the principle of subsidiarity would lead one to think that the matter should be decided by the lowest court, however, the reality was that the case was brought before the Constitutional Court and it had to act in a manner consistent with its obligations in Union law, which rests on *all* courts of a Member State.[302]

This appears to run counter to the decision in *Dorsch.* As noted earlier, while *Dorsch* was not an ouster clause case, a point arose in that case as to what happens when EU law required that a national body be established to hear certain appeals, but national law failed to provide jurisdiction to such a body. In *Dorsch* EU law was held to *not* be jurisdiction-conferring. Put another way, if the tribunal had no jurisdiction to hear the appeals in *Dorsch* as a matter of *domestic* law, the would-be appellant had one remedy: an action in damages against the State for failing to transpose EU law. The appellant could not, on the logic in *Dorsch,* require the body to assume jurisdiction of the appeals.

By contrast, *Connect Austria* suggests that a tribunal should in fact accept jurisdiction. While *Dorsch* and *Connect Austria* admittedly involve different facts, it is not possible to discern a principled reason for the divergence in approach in each case. In fact, in *Connect Austria* the Advocate General and the Court in fact diverged on this point. In opining that Austria had failed to implement the Directive insofar as national law did not allow an appeal,[303] the Advocate General stated that the appropriate resolution of the case was that the complainant ought to seek compensation from the State for its failure to transpose the Directive (an approach which was consistent with *Dorsch*). It was not possible, in the Advocate General's view, to rely on EU rights directly. EU law provided for a right of appeal, however, that could not be relied upon directly as *"[i]n all cases, the intervention of the national legislature is required to designate the court or tribunal which has jurisdiction to hear appeals."*[304] And, he opined that the *"designation of a competent court or tribunal falls expressly within the discretion of the Member State itself."*[305]

302 See *Simmenthal (supra)* the duty to disapply national law applies to "*every national court.*"
303 *Connect Austria* Advocate General Opinion at para 50.
304 *Connect Austria* Advocate General Opinion at para 52.
305 *Connect Austria* Advocate General Opinion at para 53

The approach propounded by the *WRC* decision is that limits on an entity's jurisdiction may have to be disapplied. The leans towards the approach in *Connect Austria.* It is suggested therefore that ouster clauses are now a particularly vulnerable species of national law in the aftermath of *WRC*.

CHAPTER 8 EVIDENCE, BURDEN OF PROOF AND THE CHARTER

The rules of evidence which administrative tribunals follow may also give rise to a conflict with European Union principles, with significant consequences for hearings before such tribunals.

Prior to considering case law in this area, it is worth considering the overall framework in which rules of evidence might be limited by EU law.

RELEVANT PROVISIONS OF THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

Where EU law is engaged the rules of evidence can engage fundamental rights. In that regard, a number of articles of the European Charter on Fundamental Rights are relevant.

Article 41 provides (in material part):

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

the right of every person to be heard, before any individual measure which would affect him or her adversely is taken"

Article 47 provides (in material part):

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

While the focus on this paper has generally been on civil law, the Charter includes provisions related to the criminal law which could engage rules of evidence. Article 48 provides:

"1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed."

These provisions demonstrate that EU fundamental rights can be engaged by evidential rules. A rule in national law which infringes these rights will be incompatible with EU law.

CASES CONCERNING EVIDENTIAL RULES

In *Steffensen,*[306] the appellant was fined by an administrative authority for the incorrect labelling of sausages. Mr Steffensen argued that a provision in domestic law around the admissibility of samples (taken from the offending pork and veal products) impacted on his European rights, in particular his right, enshrined in the relevant Directive, to have a second opinion on the samples taken.

The administrative authority relied on samples which it had taken from the products in retail outlets. On each occasion, the authorities left a second sample of the meat at the retail outlet. It was unclear whether Mr Steffensen or his employers (who presumably did not work in the retail outlets) were ever informed of the samples having been taken. This created a significant problem as, generally, such samples left at retail outlets were kept for a period of one month only. Consequently, when the results of the samples taken by the authorities were communicated to Mr Steffensen it was impossible for him to exercise his right to have a second opinion on the quality of the offending meat.

Mr Steffensen challenged the fine before a German Court, which in turn referred a question to the Court of Justice. The question referred was whether EU law prohibited the use of samples

[306] C-276/01.

taken by an authority where the manufacturer was unable to exercise its right to a second opinion.

The respondent sought to argue that this was a purely domestic, procedural issue and which could not be questioned by EU law.[307] An intervener in the case sought to argue strikingly that *"it does not follow from fundamental rights such as the right to a fair hearing that evidence obtained improperly must be excluded under the Directive or Community law in general."*[308]

Perhaps unsatisfactorily, the Court of Justice remitted the matter to the domestic court to decide, however the Court issued helpful statements of principle.

Unsurprisingly, the Court noted that rules of evidence generally fall within the procedural autonomy of Member States, provided that those rules comply with the principles of equivalence and effectiveness.[309]

The Court confirmed that national courts must comply with fundamental rights derived from the European Convention on Human Rights.[310]

The Court referred to the fact that the right to a second opinion on the samples derived from EU law and provided the following helpful statement of principle:

"... since observance of the right to a second opinion guaranteed by Community law and the consequences which an infringement of that right may have as regards the admissibility of evidence in an appeal such as that in the main proceedings are at issue, the national rules applying in relation to the taking of evidence fall within the scope of Community law. Accordingly, those rules must comply with the requirements arising from the fundamental rights."[311]

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[307] *Steffensen* at para 55.
[308] *Steffensen* at para 57.
[309] *Steffensen* at paras 60 and 63.
[310] *Steffensen* at paras 70 and 72.
[311] *Steffensen* at para 71.

Steffensen is unusual in the sense that EU law stipulated rules of evidence in that it allows an aggrieved party an opportunity to obtain a second opinion on samples take. The ambit of that Convention right (which is protected by EU law also) embraced the manner in which evidence is taken, in that it:

"… requires essentially that the parties be given an adequate opportunity to participate in the proceedings before the court [and] relates to the proceedings considered as a whole, including the way in which evidence was taken."[312]

It was also stated in a similar manner that *"where the parties are entitled to submit to the court observations on a piece of evidence, they must be afforded a real opportunity to comment effectively."*[313]

In an important statement of principle, the Court ruled that, if a national court finds that the admission of evidence would contravene the right to a fair hearing, it must under EU law exclude the results of the offending test.[314]

This is an extremely important point which, when coupled with the Principle, means that national administrative bodies might have to spurn statutory provisions dealing with the body's collection, and assessment, of evidence if the provisions breach EU law. It is clear that many, if not all Member States, will have the benefit of a rigorous constitution which might, in the first instance, weed out such offending provisions. However, the Principle is extremely important since it commands an administrative body to act to disapply the offending domestic provision notwithstanding that the national courts have not struck it down as unconstitutional.

A further case in this area is *Nike European Operations Netherlands BV v Sportland Oy.*[315] That case concerned the question as to the proper law to be applied to an application to annul certain payments made prior to the commencement of insolvency proceedings.

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312 *Steffensen* at para 76.
313 *Steffensen* at para 77.
314 *Steffensen* at para 79.
315 C-310/14.

The background to that case was that Sportland, a company based in Finland, retailed goods supplied by Nike, a Dutch company, under a franchising agreement governed by Dutch law. Insolvency proceedings were initiated against Sportland in Finland. Sportland applied to have certain payments it made to Nike annulled and sought restitution from Nike in respect of those payments.

The parties were at odds as to the proper law to be applied to the application to annul those payments.

EU law provided, first, that the law of the State in which insolvency proceedings were opened shall govern the insolvency proceedings. That law also applies to applications as to the "*voidness, voidability or unenforceability of legal acts detrimental to all the creditors.*" This rule (providing that the substantive law governing the application to annul corresponds to the law of the State in which the insolvency proceedings were brought) was subject to an exception. The exception at issue was found in Article 13 of Regulation 1346/2000 and it arose: *"... where the person who benefited from an act detrimental to all the creditors provides proof that: the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case."* The rationale for this fairly cumbersome provision appeared to be explained by the Court in the course of its judgement as protecting the legitimate interest of the person benefitting from the act, to the detriment of other creditors, by basing the validity of that act on the law applicable at the date on which the act was concluded.[316]

In essence, Nike urged the Finnish Court to apply *Dutch law* to the question whether the payments should be annulled. In other words, with insolvency proceedings having commenced in Finland, Nike urged for the application of the exception found in Article 13 such that Dutch law would apply. Conversely, Sportland argued that Finnish law ought to apply as it argued Nike had not produced evidence to qualify itself for the exception.[317]

A number of questions were referred to the Court of Justice, several of which centred on substantive insolvency law and are not relevant to the present analysis.

[316] *Nike* at para 41.
[317] *Nike* at paras 11 and 12.

The Court found that, on a proper interpretation of EU law, the exception established in Article 13 *supra* could only arise where the "defendant" to the application to annul that payments could prove the matters required by Article 13. In other words, the person or entity seeking to invoke the exception in Article 13 bears the burden of proof. Moreover, and in light of that, national rules of evidence cannot operate to shift the burden of proof onto another party. In that regard it ruled:

"… since [EU law] does not set out, inter alia, the ways in which evidence is to be elicited, what evidence is admissible before the appropriate national court, or the principles governing that court's assessment of the probative value of the evidence adduced before it, it is for the national legal order of each Member State to establish such details in accordance with the principle of procedural autonomy provided, however, that the principles of equivalence and effectiveness are respected. National rules of evidence that are not sufficiently rigorous, the application of which would, in practice, shift the burden of proof, would not be consistent with the principle of effectiveness."[318]

In light of the finding that it is for the "defendant" to the annulment application to prove the facts justifying the application of the exception, the Court commented on the limited circumstances in which any burden could be placed on the applicant. It was impermissible to do so unless the defendant had proven the facts. It ruled:

"It follows that the national court with jurisdiction can rule that it is for the applicant in an action relating to the voidness, voidability or unenforceability of an act to establish the existence of a provision or principle of the lex causae on the basis of which that act can be challenged only where that court considers that the defendant has first proven, in accordance with the rules generally applicable under national rules of procedure, that the act at issue cannot be challenged on the basis of the lex causae…"[319]

[318] *Nike* at para 43.
[319] *Nike* at para 44.

CONCLUDING REMARKS ON EVIDENTIAL RULES

Evidential rules are essentially procedural in the sense that they are certainly not substantive. Therefore, one expects that these rules are likely to fall within the ambit of national procedural autonomy and subject to the usual limits of effectiveness and equivalence.

Nike demonstrates that while rules as to evidence are within the procedural autonomy of Member States, they are not beyond review for compliance with EU law. A particularly clear breach of EU law will arise where, for example, EU law provides that one party must establish part of its case but the rules of evidence in national law transfer that burden of proof to the other party. Tribunals must disapply such measures.

A more vexed question might arise in circumstances where EU law is silent as to the party who bears the burden of proof. It is unlikely that national laws on evidence will be completely immune from challenge since they must still comply with effectiveness and equivalence. The rules of evidence cannot make it impossible or very difficult to prosecute an EU law protected right.

The consequence of the *Steffensen* and *Nike* cases were stated in the following terms by Advocate General Bobek in *W v Sanofi Pasteur*[320]:

"… when laying down rules of proof and evidence, Member States may seek to redress imbalances between the consumer and the producer, which might for example result from asymmetry of information…

However, in laying down rules of proof and evidence applying to cases falling within the scope of the Directive, the procedural autonomy of Member States is not unlimited. The combined effect of national rules of proof and evidence must respect the principles of equivalence and effectiveness….

In particular, national rules of proof and evidence that unduly hamper the national court's ability to assess relevant evidence, or that are not sufficiently rigorous so that they in practice

[320] C-621/15 at paras 23 to 26 of the Advocate General's opinion.

result in a reversal of the burden of proof, would not be consistent with the principle of effectiveness."

The comments of Advocate General Bobek suggest that *Steffensen* and *Nike* have application at a level of principle and they are not necessarily to be confined to their facts. The principles of effectiveness and equivalence always, it seems, limit national legislatures' discretion in laying down rules of proof and evidence.

Accordingly, there is scope for the principles, as summarised by the Advocate General in *W,* to have a wider application. A rule of evidence which renders it excessively difficult to prosecute a claim with an EU dimension is susceptible to violating EU law.

For example, it is the experience of some legal practitioners in Ireland that some domestic tribunals apply the rule that a person may not give evidence in the course of examination in chief on foot of a leading question. This may raise a question of compliance with EU law. Take an example whereby a person has a critical piece of evidence but does not respond non-leading questions to volunteer that evidence. Such a scenario could arise in the context of an application for international protection where an applicant before the tribunal may have language or comprehension difficulties or due to the witness simply not appreciating the gravity of the seemingly mundane piece of evidence. Assume that the person's legal representative then puts a leading question to the witness in an attempt to elicit that crucial evidence, but the question and answer are ruled inadmissible. There is an argument that such a ruling could be susceptible to judicial review for failing to comply with EU, particularly where a tribunal is tasked with cooperating with an applicant or appellant as opposed to adopting an adversarial approach.

Thus, since evidential rules may be for scrutiny for compliance with EU law they, are prone to disapplication by tribunals in light of the Principle. The Principle, as illuminated in *WRC*, now requires administrative bodies to act, by disapplying evidential rules, in the dispute before it: it does not require to await the quashing of that legislation by national superior courts (such as the High Court or above in Ireland).

The provisions of the Charter illuminate why EU law might be concerned at all with the rules of evidence set down in national law.

CHAPTER 9 THE E.U. CHARTER OF FUNDAMENTAL RIGHTS

INTRODUCTION

The Charter of Fundamental Rights of the European Union (the "Charter") is the primary human rights instrument at an E.U. level.

It is proposed to analyse the manner in which the Charter interacts with the obligation on administrative bodies to disapply national laws which are contrary to E.U. law. It is not, however, proposed to engage in a general exposition of the Charter. Insofar as any issues arise concerning the Charter which do not also concern the Principle, those issues are not analysed herein.

In that regard, a number of issues have been identified for analysis in this Chapter.

First, the scope, and field of application, of the Charter are considered, specifically with a view to identifying the manner in which the Charter applies to the work of national administrative bodies. The extent to which the Charter and the Principle interact depends, in the first instance, on the application of the Charter to a dispute before an administrative body.

Second, the manner in which the substantive rights under the Charter apply to the resolution of disputes before national administrative bodies is considered. This issue concerns the circumstances where the Charter requires national administrative bodies to disapply national law. In considering this issue, the application of the Charter is analysed under the following rubrics: direct effect, indirect effect and exclusionary effect.

SCOPE AND FIELD OF APPLICATION OF THE CHARTER

A number of introductory points may be made about the Charter which are relevant to its scope and field of application.

No change in competence

An important point regarding the Charter's scope and field of application is that the Charter does not sanction the extension of the field of application of E.U. law. This is provided in Article 51(2), which reads:

"The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

This is also confirmed in Article 6(1) TFEU which provides (in material part) *"... [t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*"

Thus, the E.U. institutions gained no further competence arising from the promulgation of the Charter. Equally, E.U. law did not gain a wider field of application than was the case immediately prior to the entry into force of the Charter. The distinction between the proper zones of Member State competence and E.U. competence was not altered by the Charter coming into effect.

The Charter is largely, although not exclusively, a consolidation of pre-existing human rights principles, rather than an expression of an entirely new suite of rights.[321] It has been described as a *"creative distillation of the rights contained in the various European and international agreements and national constitutions on which the CJEU had for some years already drawn."*[322] This notwithstanding, the applicability of the Charter to Member State action is "contentious" in some respects as some Member States are resistant to the planting of Union human rights standards into this zone.[323]

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[321] EU Law, Text, cases and materials, Craig and De Burca (7th ed) p 429.

[322] EU Law, Text, cases and materials, Craig and De Burca (7th ed) p 429.

[323] EU Law, Text, cases and materials, Craig and De Burca (7th ed) p 441. See also Aida Torres Pérez, "The federalizing Force of the EU Charter of Fundamental Rights" – Int J Constitutional Law (2017) 15 (4): 1080 at pp 1095 and 1096: *"In fact, the imposition of absolute uniformity under the primacy principle could produce political backlash, particularly if integration leads to lowered constitutional standards of protection. In the pluralist EU framework, accommodation of variant understandings might actually serve the integration process in the long run. For instance, the imposition of a uniform understanding of the equality principle that excludes certain types of affirmative action measures and public policies could lead to skepticism over and disaffection with the integration project."* See also Jasper Krommendijk: *"Principled Silence or Mere Silence on Principles? The Role of the EU Charter's*

"Implementing E.U. law"

A further important aspect of the Charter's applicability is that the Charter applies only when its addressees are "*implementing E.U. law.*"[324]

In this regard, Article 51 is important in providing:

"The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

The express addressees of the Charter are not just E.U. institutions, but also Member States. In this context, the term "Member States" includes administrative bodies when they are implementing E.U. law. [325]

Since the Charter arises when a national body is "implementing Union law" it has an overlap with the Principle. In other words, where a body is implementing Union law it is required to disapply national laws which are contrary to E.U. law. The Charter and the Principle therefore share the same zone of application – i.e. national bodies implementing E.U. law.

In order for the Charter and the Principle to arise for consideration, the national administrative body must be implementing E.U. law. The Charter has no autonomous application outside of such a situation. This criterion requires that E.U. law and the act complained of have a "*degree*

Principles in the Case Law of the Court of Justice" who makes particular reference to the dissatisfaction among some Member States, notably, the United Kingdom, Denmark and the Netherlands, with the inclusion of "social rights" in the Charter.

[324] Article 51 of the Charter.

[325] See "Explanations relating to the Charter of Fundamental Rights" which states: *"Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law."*

of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other."[326]

This criterion is easily met where, for example, national law is enacted in order to transpose a directive or to give effect to some other obligation in the Treaties.[327]

However, cases have arisen where it was unclear whether the Member State was implementing E.U. law, within the meaning of the Charter. For example in *Siragusa v Regione Sicilia*[328], the plaintiff made unauthorised changes to his property which was located in "*a landscape conservation area*." He was ordered to restore the site. He challenged that decision and invoked Article 17 (right to property) of the Charter and the general principle of proportionality in E.U. law. The referring Court felt that there was a possible connection between the national law at issue in the domestic proceedings, which concerned the protection of the landscape, and the protection of the environment. The latter is clearly an area of E.U. competence. The referring Court was unsure whether this action fell within the scope of E.U. law having regard to a number of instruments which concern the environment, such as the Aarhus Convention and various regulations, directives and Treaty articles. The Court of Justice gave guidance on the criterion, of "implementing E.U. law," in the following, seemingly non-exhaustive, terms:

"In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it…"[329]

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[326] *Siragusa v Regione Sicilia* C-206/13 at para 24.
[327] See Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," European Constitutional Law Review, 8: 375–403, 2012: "*it appears that the expression 'only when [Member States] are implementing Union law' should cover all situations where member states fulfil their obligations under the treaties as well as under secondary EU law (adopted pursuant to the treaties), i.e., the Charter applies whenever member states fulfil an obligation imposed by EU law*." See also *AMS* C-176/12 at para 43.
[328] C-206/13.
[329] *Siragusa* at para 25.

On the facts before it, the Court of Justice found that there was insufficient connection between the Italian laws in question and E.U. law.[330]

A case on the opposite end of this continuum is *Kremzow v Republik Österreich*.[331] This case pre-dated the Charter but sought to invoke *inter alia* Treaty rights without a sufficient connection between E.U. law and the domestic complaint. There, the plaintiff complained, in domestic proceedings, that he was unlawfully imprisoned on foot of convictions for murder and unlawful possession of a firearm. He sought to argue that his unlawful imprisonment engaged E.U. law by virtue of the fact that he was unable to exercise various Treaty rights, including free movement of persons across Member States. Even though the plaintiff was imprisoned on foot of convictions stemming from purely domestic laws, an imprisoned person clearly could not exercise the right to free movement. The Court refused to entertain that argument on the basis that *"a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions."*[332]

A further example is found in the joined cases of *N.S. and M.E.*[333] in which the provisions of the "Dublin Regulations" were engaged. The relevant provision of the Dublin Regulations, granted a Member State a *discretion* to examine and determine an international protection application even though that Member State was not otherwise *obligated* by the Dublin Regulations to examine the application in question. The question arose whether a Member State which invoked its discretion to examine such an application was "implementing EU law" and therefore obliged to comply with the Charter. That question was answered in the affirmative.[334]

Relatedly, the Court of Justice has ruled that where a Member State is availing of a *derogation* from a particular obligation of E.U. law, the Member State is implementing EU law and therefore obliged to respect fundamental rights.[335]

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330 *Siragusa* at para 35.
331 C-299/95.
332 C-299/95 at para 16.
333 Joined Cases C-411/10 and C-493/10.
334 *NS and ME* at para. 69.
335 See *ERT* C-260/89 at para 43. See also further analysis in Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," European Constitutional Law Review, 8: 375–403, 2012: "*It seems to me that the terms 'implementing Union law' must be read so as to also include the*

In *Åklagaren v Åkerberg Fransson*[336] Mr. Fransson was charged with various tax offences, including underpayment of VAT, having been previously fined a number of years prior in relation to the same offences. He claimed that the national proceedings violated Article 50 of the Charter (the right not to be punished twice for the same offence). Notably, the national legislation on foot of which he was charged was not expressed to be a transposition of any E.U. law obligation. Nevertheless, the Court found that there was a significant nexus between E.U. law and the national measures in question. In that regard, it found that sufficient obligations under various Directives and Treaty articles could be discerned. It ruled:

"It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter."[337]

It appears from the foregoing that the caselaw is largely fact-specific and does not set down a very durable or precise test as to whether a Member State is "implementing E.U. law." It is not immediately obvious by what specific yardstick it could be said that the national laws in *Åklagaren* engaed E.U. law but not those in *Siragusa.* Surely, the general obligation on Member States to provide for environmental protection could be said to infuse the national legislation in *Siragusa,* just as did the general obligations concerning payment of VAT in *Åklagaren.* While there may be differences in the extent of the connection between national and E.U. law, its not clear just how connected the two must be. Peréz adopts the position that *"the application of the Charter must be triggered by another EU legal norm, but the exact intensity of the necessary connection between state action and EU law is elusive."*[338] There is a lack of a precise test, rather than relatively general principles. Therefore, the point must be

derogation situation… all derogations put forward by a member state must always pass muster under EU law, of which the Charter is now part and parcel."

[336] C-617/10.

[337] C-617/10 at para 27.

[338] Aida Torres Pérez "*The federalizing force of the EU Charter of Fundamental Rights*" Int J Constitutional Law (2017) 15 (4): 1080.

made that, the question whether a national administrative authority is implementing E.U. law must be considered carefully and its answer may not always be clear.

The question whether a Member State in passing a particular domestic law is implementing national law will be straightforward when it is expressly transposing a directive[339] or implementing an obligation under the European Treaties.[340] It will be more complex in other cases, namely where the national law is not expressed to be the transposition of a Directive but nonetheless touches on an area of EU competence, like payment of VAT. These cases will be resolved by analysis of the facts and the legislation in question.[341]

SUBSTANTIVE APPLICATION OF THE CHARTER

Having addressed the threshold question of the scope of the Charter, it is now proposed to consider issues concerning the application of the substantive articles of the Charter to the work of administrative bodies.

This task is broken down into the following headings for further analysis: direct effect of the Charter (including horizontal direct effect), the indirect (or interpretative) effect of the Charter and the exclusionary effect of the Charter. The reason such an approach is adopted is those are the three ways in which the Charter might in fact apply to a given dispute (assuming the threshold question whether the Charter applies is overcome). It will be noted that all of those headings essentially collapse into one proposition for the purpose of the Principle, namely: the Charter can provide a freestanding ground for the disapplication of national laws by administrative bodies.

Before addressing those three areas of application, it is worth mentioning an anomaly which arises in the case of the Charter and the work of administrative bodies.

[339] *AMS* at para 43.
[340] See Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," European Constitutional Law Review, 8: 375–403, 2012.
[341] Contrast *Hernandez* C193/13 at paras 44 and 45 with *Florescu C-258/14* and see discussion in relation to both cases found in Peers et al "*The EU Charter of Fundamental Rights: a commentary*" 2nd edn (Hart, 2019) at paras 55.13 to 55.15

The anomalous position of administrative bodies and the Charter

In the area of fundamental rights, there are at least two sources of law for the purpose of the present discussion: the fundamental rights of Member States and the fundamental rights of the E.U. set out in the Charter. In the implementation of E.U. law a Member State *may* – for example, when an area or question is not completely determined by E.U. law – apply its own fundamental rights standards, subject to one provisio. The level of protection afforded by national law cannot be lesser than that provided by the Charter.[342]

Peréz describes it in the following way:

"Thus, in situations partially determined by EU law (as opposed to situations that are totally determined), constitutional protection above the Charter floor may have bite. The underlying rule, however, is the same: In both situations totally or partially determined by EU law, the Charter displaces the constitution as the standard of review when the sacrosanct primacy, unity, and effectiveness of EU law are compromised."[343]

This gives rise to a notable anomaly in the present context. It is very often, if not exclusively, the case that national administrative bodies do not have the power in national law to quash or set aside national legislation.[344] Therefore, a national administrative body is in a highly anomalous position insofar as it cannot disapply a law which infringes national fundamental rights derived perhaps from a national constitution, but it can, and must, disapply that same law if it infringes Union rights standards as set out in the Charter. This is remarkable having regard to the fact that the Charter is not designed to alter the respective competencies of the E.U. and Member States.

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342 See Article 53 of the Charter. See also *Melloni v Ministerio Fiscal* C-399/11 at paragraph 60 and see *Aklagaren* at para 29: *"... where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised…*"

343 Aida Torres Pérez "The federalizing force of the EU Charter of Fundamental Rights" – Int J Constitutional Law (2017) 15 (4): 1080.

344 See Chapter 2.

Direct effect

In order to deal with the issues of direct, horizontal and interpretative effect, it is first necessary to mention the Charter's status in the E.U. legal order.

The Charter enjoys Treaty-level status. Article 6 TFEU provides:

"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

This has two implications. First, Treaty level recognition is the supreme status under E.U. law and therefore the Charter is placed at the apex of the hierarchy of rules under E.U. law.[345] Second, Treaty articles are, in principle at least, capable of direct effect, including horizontal direct effect.[346] This means that Treaty articles may, in principle, be capable of application in litigation between an individual and the State and also in litigation between two or more individuals.

Insofar as the Principle interacts with the Charter, one basis on which a national administrative body might be required to disapply national law is through the doctrine of direct effect. Where a right under the Charter has direct effect, clearly any contrary national law would have to be disapplied.

The Court of Justice has found a number of provisions of the Charter to have direct effect.

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[345] See also Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," European Constitutional Law Review, 8: 375–403, 2012: *"Since 1 December 2009, when the Treaty of Lisbon entered into force, the Charter of Fundamental Rights of the European Union… stands on an equal footing with the TEU and the TFEU. Stated differently, the Charter is primary EU law.*"

[346] See for e.g. *Defrenne v Sabena* C-43/75 in which the Court of Justice ruled that article 119 of the EEC Treaty which prohibited discrimination was directly effective (para 24) and also capable of horizontal application (para 39).

In *Bauer Broßonn*[347] it was held that Article 21(1) of the Charter (prohibition on discrimination) and Article 31(2) (right to paid leave) were sufficient to confer a right applicable in private disputes and which could be relied upon and which requires the disapplication of incompatible national legislation.

In *Egenberger*[348] the Court found that Article 47 (right to an effective remedy) is directly effective. The Court stated:

"… it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such."

In fact, without unduly complicating this matter, the Principle itself is a manifestation of the right to an effective remedy and the principle of effective judicial protection.[349] The Principle itself is therefore evidence that certain provisions of the Charter are directly effective.

A sub-category of direct effect is the issue of horizontal direct effect.

In the case of the Principle one is frequently concerned with disputes between private persons brought before national administrative authorities. For example, many disputes between employees and private employers are brought before the Workplace Relations Commission in Ireland. The question arises as to whether the Charter has any application in such disputes.

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[347] C-569/16 and C-570/16 at paras 89 to 91.

[348] C-414/16 at para 75.

[349] Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," European Constitutional Law Review, 8: 375–403, 2012: "*This means that a national court may have recourse to the principle of effective judicial protection, as enshrined in Article 47 of the Charter, in order to set aside a national procedural rule that prevents a legal person from bringing a claim seeking to establish state liability under EU law. Stated differently, the principle of effective judicial protection, as enshrined in Article 47 of the Charter, applies in relation to national procedural rules which hinder the effectiveness of EU law in general and thus, relate to the implementation of EU law in the member state concerned. That is sufficient to qualify these procedural rules as 'implementing Union law'. Hence, they fall within the scope of application of the Charter."*

As noted earlier, the Charter enjoys Treaty-level status and Treaty articles are, in principle, capable of horizontal application.[350]

Furthermore, there are some suggestions in the text of the Charter itself which suggest that it might be capable of horizontal application. For example, Article 24(2) which deals with the rights of the child states, in material part: *"[i]n all actions relating to children, whether taken by public authorities <u>or private institutions</u>, the child's best interests must be a primary consideration." (Emphasis added).* Other rights would be hopelessly devoid of meaning were they to apply only in the case of citizen-State relationships. For example Article 8 (the protection of personal data), Article 21 (non discrimination)[351] and several provisions on workers rights found in Title IV "Solidarity," including the protection against unjustified dismissal. These rights would be very limited if they had no application beyond vertical actions between an individual and the State.

However, notwithstanding those provisions and suggestions that the Charter might apply horizontally, the Charter is in terms directed only towards the Union legislature and Member States. It is generally not directed towards private parties.

In *AMS*[352], the Court of Justice ruled that Article 27 of the Charter (workers' right to information and consultation) did not have direct effect in the context of a dispute between an organisation established by contract and an appointee to a position within its trade union section.[353] The Court stated *"for this article to be fully effective, it must be given more specific expression in European Union or national law."*[354]

However, the Court of Justice confirmed in *Egenberger*[355] that the right to non discrimination under Article 21 of the Charter was capable of horizontal direct effect. The Court of Justice stated:

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[350] See *Defrene* (supra).

[352] C-176/12.
[353] *AMS* at paras 46 to 48.
[354] *AMS* at para 45.

"That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law… As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals…

Accordingly, some provisions of the Charter may be relied upon directly in litigation between private parties. However, it remains somewhat unclear as to what articles of the Charter might be amenable to horizontal application and those which are not.[356] Contrasting the judgments in *AMS* and *Egenberger,* it would seem to be the case that the text of the relevant Article of the Charter is important in establishing whether it is sufficiently precise to give rise to direct effects (which, incidentally is the same test to establish whether a provision of a Directive, which is passed its transposition deadline, is directly effective).[357]

The question of direct effect and horizontal direct effect is useful in determining whether the provisions of a Charter might be *determinative* of a dispute before a national administrative body. However, the objectives of this project is to analyse the Principle whereby a national administrative body might have to disapply national laws. Clearly, in the case of direct effect, including horizontal direct effect, the Principle is engaged and a national body must disapply any incompatible provision.

However, there are two further ways in which the Principle and Charter interact. First, where the Charter has indirect or interpretative force such that it influences the interpretation of a secondary provision of EU law, such as a Directive. This in turn might result in a provision of national law being found contrary to E.U. law depending on the interpretation ascribed to the latter. Second, the Charter might be utilised to exclusionary effect.

Indirect effect

[356] EU Law, Text, cases and materials, Craig and De Burca (7th ed) p 453.
[357] See van Duyn v home office C-41/74.

The doctrine of indirect effect (whether horizontal or vertical) is a less radical role for the Charter than that of direct effect. There is no controversy at all in contending that the Charter should influence the manner in which E.U. legislation is to be interpreted.[358] Since the Charter is directed towards *inter alia* the E.U. legislature it is entirely uncontroversial to say that any acts of the E.U. legislature might, where possible, be interpreted in accordance with the Charter rather than in a manner which is contrary to the Charter. This is indirect effect and it may arise in vertical or horizontal cases.

Accordingly, in a dispute between private parties which is agitated before a national administrative body, that body is entitled to interpret Directives and Regulations consistent with the Charter and for the purpose of deciding the dispute and *inter alia* the question whether any provision of national law ought to be disapplied. This is an uncontroversial position.[359] It does not provide for a radical role for the Charter.

Craig describes matters in the following way:

"*It would, therefore, be possible in principle for courts to use Charter rights as interpretative guides when construing the rules applicable between private parties… It could be argued that giving Charter rights a degree of indirect horizontal effect fits with the injunction that Charter rights should be respected, observed and promoted. A similar argument could be made in relation to national courts. This includes national courts, which would therefore also be subject*

[358] See Peers et al at para 55.54: *"From a constitutional perspective, both secondary EU law and national law implementing EU law must be interpreted in light of the Charter and general principles of EU law."*

[359] The duty to interpret domestic law in conformity with E.U. law applies to "*the requirements of Community law…*" See *Munster v Rijksdienst voor Pensioenen* (C-165/91) para 34. Ward states in "*Judicial Review and the Rights of Private Parties in EU law*" (second edition) (OUP 2007) that *"the findings in Munster are sufficiently broad to support the contention that the interpretative duty applies in the context of all [original emphasis] EC Treaty Articles, even those lacking sufficient precision to attract direct effect. This appears to function in much the same way as the interpretative duties that attach to national laws when a Directive is relevant to a dispute."* See also Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," European Constitutional Law Review, 8: 375–403, 2012: *"… the Charter also serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter."*

to the injunction to respect, observe, and promoted the application of Charter rights, irrespective of whether the case involves a public authority or not.”[360]

Similar comments were made by the Court in *Egenberger.* The Court stated:

“Consequently, in the situation [where a national court cannot interpret a national provision consistent with EU law], the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law…”[361]

In this sense, provided a national administrative tribunal is “*implementing E.U. law*” in the case of a dispute before it, the Charter should always be available as an interpretative tool. This impacts the Principle in that national law may or may not be incompatible with a provision of E.U. law depending on the interpretation ascribed to the latter. The administrative body should strive to avoid an interpretation of E.U. law which is incompatible with the Charter.

Exclusionary effect

It is important to note that the Principle is a “negative” act insofar as it involves the disapplication of laws. The Principle is not a sword and it is unnecessary to find a provision of the Charter directly effective in order to have recourse to the Principle.

Direct effect of E.U. law usually arises where national law does not go far enough to establish a right which is actionable before domestic courts, thereby necessitating recourse to direct rights under EU law.

However, the Principle arises where national law is in contravention of a provision of EU law. So, while a national administrative body will certainly have to disapply national laws which are incompatible with directly effective provisions of the Charter, the Principle is not confined to applicability of direct effect. To take a hypothetical example. The Court in *AMS* found that

[360] Craig, EU Administrative Law 3rd edition, page 502. See also *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* C-684/16, para. 59; *Bauer* C-569/16, para. 26; *Pöpperl* C-187/15, para. 43; *Dominguez*, C-282/10, para. 27; *Pfeiffer and Others*, C-397/01 to C-403/01, paras. 114, 115

[361] *Egenberger* at para 79.

workers' right to information and consultation did not have direct effect.[362] However, that does not mean that a national law could not be disapplied if it encroached on that right.

Notwithstanding the Charter's obvious application in cases whereby it is directly or indirectly effective, cases may exist whereby a national law must be disapplied arising from its incompatibility with the Charter.[363]

In *Åklagaren v Åkerberg* C-617/10, the Court of Justice found that that a principle in national law, which limited the jurisdiction of a national court to disapply national law for breach of the Charter only when that breach was clear, was incompatible with E.U. law. The Court of Justice stated:

"... it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means…

Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European

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[362] *AMS* at paras 46 to 48.

[363] See EU Law, Text, cases and materials, Craig and De Burca (7th ed) p 453 which refers to national courts: *"... if the national court cannot interpret the national legislation to be in accord with the directive, a private party can nonetheless have recourse to the background Charter right in an action against another private party, and the national court will be obliged to set aside/disapply the offending national legislation and any contrary provision of national law."* It is submitted that this reasoning applies *mutatis mutandis* to national administrative bodies. See for example Peers et al: para 55.54 *"national law implementing EU law that contravenes [Charter provisions]… must be set aside."* See also Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," European Constitutional Law Review, 8: 375–403, 2012: *"Second, just as general principles, the Charter may also be relied upon as providing grounds for judicial review. EU legislation found to be in breach of an Article of the Charter is to be held void and national law falling within the scope of EU law that contravenes the Charter must be set aside."*

Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law…."[364]

It follows, by identical logic, that national administrative bodies must also disapply national laws which are incompatible with the Charter.

Ackerberg has proved to be particularly controversial on its facts. There, national legislation provided for penalties for non payment of VAT. Even though the national legislation was not enacted for the purpose of transposing the relevant Directive, the CJEU held that:

"*It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of [Directives and Treaty Articles]...*

The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union."[365]

A note on the distinction between rights and principles

For completeness it is proposed to touch on the point that the Charter includes both *rights* and *principles*[366] and there is some academic commentary as to the different effects which rights and principles have. It is not essential to carry out an exposition of this distinction as both rights and principles are capable of engaging the Principle, thereby requiring disapplication.

[364] *Ackerberg* paras 45 and 46.
[365] *Ackerberg* paras 27 and 28.
[366] Example of rights include the right to life (article 2), the right to liberty and security (article 6) and the right to marry (article 9). Examples of principles include the principle of non discrimination (article 21 and see C-555/07 *Kücükdeveci*), the principle of a high level of consumer protection (article 38 and see C-470/12 *Pohotovost* Opinion of AG Wahl at para 66), the principle of integrating persons with disabilities (article 26 and see *Glatzel* C-356/12).

Krommendijk[367] suggests that when Article 52 of the Charter (which deals with the scope and interpretation of rights and principles) is parsed, the "rights" and "principles" referred to therein have different consequences for litigation.[368] One problem in this regard is that rights and principles are intermixed in a single Charter; they are not separated. He is critical of the Court of Justice's apparent failure avail of a number of opportunities to clarify the distinction between a right and a principle. The Court's position on rights appears relatively straightforward; they are capable of direct effect when sufficiently specific. By contrast, principles are not directly effective. Having surveyed the caselaw *Krommendijk*, suggests:

"... it can be argued that the main difference between rights and principles is that the latter cannot create standing or give rise to direct claims for positive action before courts. Nonetheless, it is submitted that both rights and principles can be used as judicial standards for legality review of EU and national acts and measures, as well as standards or tools of interpretation. One limitation for Charter principles, however, is that the intensity of the review of acts and practices is generally more limited than rights."[369]

Thus, even principles can have a negative, or "exclusionary effect."

This statement belies some exceptions where the Court of Justice has given direct effect to a principle. For example in *Kücükdeveci*[370] the Court found that the principle of "non discrimination" was directly effective.[371]

Returning to *Krommendijk's* comments, he stated:

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[367] Jasper Krommendijk, "Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice," European Constitutional Law Review, 11: 321–356, 2015.
[368] Contrary views also exist, see for e.g. Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," European Constitutional Law Review, 8: 375–403, 2012 in which the author opposes this *"dual regime"* which *"give[s] rise to arbitrary divergences as to the actual quality and potency of those rights."*
[369] Jasper Krommendijk, "Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice," European Constitutional Law Review, 11: 321–356, 2015.
[370] C-555/07.
[371] *Kücükdevec* at para 23 where it was stated that the principle of non-discrimination would apply where the case fell within the ambit of E.U. Law; in other words, it was directly effective..

"Principles can thus be used as standards for legality review or tools of interpretation. This twofold function corresponds to the earlier discussed French tradition of 'limited justiciability' or justiciabilité mediate where principles can have an 'exclusionary effect' or invocabilité d'exclusion and exclude the application of a conflicting national or Community norm. This broader understanding of the possibilities for judicial review of principles also corresponds with more expansive readings of the notion of direct effect. These readings posit that a provision of EU law can have independent 'exclusionary effects' independently of the principle of direct effect when there is a provision of national law that is incompatible with this provision of EU law. They treat the primacy or supremacy of EU law as the dominant concept governing the relationship between EU law and national law."[372]

The significance of the analysis by *Krommendijk* to the present project is as follows. Where a principle (as opposed to a right) is found in the Charter it can be deployed to exclude an incompatible provision of national law. In other words, these provisions of the Charter can be the subject of the Principle that a national administrative body must disapply incompatible provisions of domestic law. Therefore, for the purposes of this project at least, the disjunction between rights and principles under the Charter is redundant since each may be engaged by the Principle which is analysed in this project.

CONCLUSION

The Charter did not alter the symmetry between the respective competences of Member States and the E.U. In consequence, the obvious point arising in the present context must be that national administrative bodies did not acquire additional competences on foot of the entry into force of the Charter. Moreover, national administrative bodies are bound by the Charter, but only where they are implementing EU law. The Charter will not apply autonomously but only where there is a sufficient connection between the work of the administrative body and the Charter.

[372] He also states: *"a principle can indeed have an interpretive function, even in relation to acts that do not explicitly implement that principle."* He further states: *"It has been shown above that while principles indeed cannot act as a 'sword', they can certainly act as a shield and offer protection against conflicting EU or national norms. This means that when a litigant has standing on the basis of another ground than the principle, a judge can strike down a legislative or executive act on the basis of a principle in the Charter."*

This analysis has sought to delve into the manner in which the Charter affects the Principle. In other words, when might the Charter impact upon the obligation of a national administrative body to disapply national laws. The provisions of the Charter are relevant to the work of national administrative bodies and the Principle in at least three respects: where a provision is directly effective (including a provision with horizontal direct effect), whether the Charter applies in an interpretative manner (known as "indirect effect") and where the Charter otherwise applies to have *exclusionary* effect. This analysis all collapses into a single uncontroversial proposition, where an administrative body is implementing E.U. law it will be essential to disapply any national law which contravenes the Charter.

CHAPTER 10 CONCLUSION

A number of conclusions are arrived at herein.

The first four are particularly important now in the immediate aftermath of the ruling in *WRC.* The remainder deal with some of the future issues which might arise in light of the *WRC* ruling and are, to some extent, an exercise in thoughtful and careful prospection and speculation.

First, the most significant finding in *WRC* is not that tribunals must disapply national laws. Rather, the finding that jurisdictional rules are among the very rules which an administrative tribunal may be obliged to disapply is revolutionary. This appears to have been without precedent and represents an extension of the duty, which was always confined to circumstances where a body was acting within jurisdiction (which, in turn, is always determined by national law). This is the main innovation found in *WRC* and it is the main finding of this project.

Second, and relatedly, a further issue which has been identified, in light of cases like *Manfredi*, is the potential ability of a tribunal to offer greater remedies than those prescribed in national law. *Manfedi* holds that EU competition law demands that an effective remedy requires compensation for actual loss plus lost profits plus interest. The issue arises whether the Principle now requires administrative bodies to check whether the remedies which they are empowered to grant under national law are sufficient to meet the requirements of EU law in a given case. This could have consequences in terms of the level of damages (which are usually capped in national law) which a body might award and also whether a body might need further powers – such as the ability to grant injunctive relief – to effectively remediate a breach of EU law.

Third, administrative bodies are clearly creatures of limited jurisdiction, arising from and set out clearly in national acts of parliament. Those very acts are the means by which a tribunal can act. In Ireland at least, tribunals have no inherent powers or jurisdiction beyond those powers conferred by statute. If the very rules which a decision maker relies upon to act may also be disapplied, clarity is required as to the role of a national laws in establishing a tribunal's jurisdiction. In that regard, it is argued that the only manner in which the *WRC* case can be reconciled with existing jurisprudence and the stated interplay between national and European courts, is through developing a sophisticated understanding of "jurisdiction."

Thus, the view offered herein is as follows. Where a tribunal is empowered to deal in *some way* with an existing dispute, the Principle is engaged. Thus, the tribunal has jurisdiction in a "narrow" sense. This notion of jurisdiction might be termed "narrow" as there is also a "broader" concept of jurisdiction which may limit the *manner* in which the body can deal with the dispute properly before it. Those latter limits may restrict the jurisdiction of the body to award certain remedies, procedural rules, rules pertaining to fair procedures, limitation periods and rules prohibiting the body from disapplying national laws. Obviously, these latter rules also impact jurisdiction insofar as they limit the way in which a tribunal can go about its business. However, these rules go to a "broad" notion of jurisdiction. In other words, while a body might have jurisdiction at the outset to hear a particular dispute (being a narrow conception of jurisdiction), where that body acts in a particular manner during its deliberations – such as by violating fair procedures, or purporting to make an award in excess of a monetary limit – it steps outside its jurisdiction (jurisdiction in a broad sense).

Thus, it is suggested that the case law which referred to the fact the duty to disapply national laws arose where a body was acting within jurisdiction, must refer to a narrow conception of jurisdiction.

In relation to the finding in *WRC* that a body may be required to disapply jurisdictional rules, this must relate to a broad version of jurisdiction and include rules as to the manner in which the tribunal shall deliberate and grant remedies.

If this analysis is correct, where a decision maker has jurisdiction to entertain a dispute, it must thereafter disapply any rules which are incompatible with EU law. Among those rules are provisions which limit the tribunal's ability to deal *effectively* with the dispute.

Fourth, a perhaps less significant aspect of the judgment is that it may prompt further referrals to the Court of Justice on the question whether jurisdictional rules are to be saved under the principle of procedural autonomy. While it was previously the case that national courts determined whether jurisdictional were to be respected under procedural autonomy, the ruling in *WRC* implicitly holds that Irish law could not avail of procedural autonomy – presumably as the requirement to litigate in the High Court was seen as an ineffective remedy (it did not say so expressly but it must be inferred).

This may cause domestic courts to increase referrals on the question whether their laws can be applied.

Whether it is desirable or not that the EU courts may rule definitively on this issue, as opposed to wholly ceding that role to national courts is debatable. However, it is difficult to say that the Court of Justice has no business in this area in its role as a reference court. Rather, *a fortiori,* in cases where there is a particular doubt as to whether a rule is compatible or not with a principle of European law, national courts can refer the question to the Court of Justice under the Article 267 reference procedure. This is the essence of the role of the Court of Justice.

Beyond these four primary points, there are an array of issues arising logically from the Principle. Each of these issues suggest a more radical role for tribunals in the Irish legal system. This is brought out in greater detail in the more specific chapters 5 to 9.

The **fifth** conclusion arrived at is that very strict and short time limits on bringing an action before a domestic tribunal might be a species of national law which is vulnerable to disapplication by a tribunal.

Sixth, the ruling in *WRC* is not entirely capable of reconciliation with other decisions of the Court of Justice (such as *Dorsch*) in which it was held that the remedy for a failure to properly prescribe the appropriate national tribunal to hear a dispute is an action for *Francovich* damages. *WRC* rather more boldly holds that the solution to a failure to give a tribunal the powers it requires under EU is for that body to spurn national law.

Seventh, since rules limiting jurisdiction are among the national laws which are prone to disapplication by domestic tribunals, ouster clauses must now be considered conspicuously open to disapplication by national tribunals.

Eighth, a domestic tribunal's rules of evidence and procedures must be compatible with EU law. Given the rights protected by the Charter, a there is a necessity to implement evidential rules and procedures compatible with EU law. The principles of effectiveness and equivalence always, it seems, limit national legislatures' discretion in laying down rules of proof and evidence. Where domestic statutes prescribe such rules which are incompatible with EU law, administrative tribunals appear now to be armed with the power to disapply those rules too.

Ninth, the Charter is the primary instrument concerning fundamental rights at an E.U. level. Where an administrative boy is implementing E.U. law it must uphold the Charter by, if necessary, engaging the Principle and disapplying incompatible national laws. While the Charter itself might apply to a dispute in various ways, namely through direct effect, indirect effect or exclusionary effect, in all instances, its provisions must be sercured by the disapplication of problematic domestic laws.

Tenth, with respect to the fifth to ninth conclusions the following comment is offered. It would be considered most unusual to expect a tribunal to foray into areas such as disapplying time limits, affording remedies not otherwise within its jurisdiction, rejecting ouster clauses or reviewing and augmenting its rules of evidence, burden of proof and procedures more generally. To provide an indirect avenue into these areas reduces the differences between a court and a tribunal and so reduces the point of having tribunals. This analysis predicts that tribunals will have to grapple with these virtually unprecedented (in the context of tribunals) questions. This, in turn, will require increased sophistication on the part of administrative bodies.

Eleventh, a perhaps unintended consequence of such a radical expansion of the normative role of tribunals may result in legislatures growing reluctant to place responsibility for disapplying national laws in the hands of decision makers who may in some instances have no legal background. It is probably the principle justification for having tribunals that they offer a simpler, quicker, cheaper means of resolving disputes (frequently without the need to involve lawyers) than do courts. Thus, in the context of disputes involving EU law, which is growing in numerous and unexpected directions, the consequences of the *WRC* decision might manifest in a reversal of the legislative trend to place more areas into the hands of quasi-judicial tribunals and, rather, leaving the issues with the Courts. This is surely an unintended and undesirable outcome.

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