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# 'Jurisdiction of Statutory Bodies to Disapply National law, or Nothing': Procedural Primacy taking over Procedural Autonomy in the CJEU's Judgment *Minister for Justice and Equality and Commissioner of the Garda Síochána*

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## 1. Introduction

All organs of the Member States' administration, not only courts, have a duty to disapply national provisions in conflict with EU law. This duty stems from established case law of the Court of Justice (CJEU) following the judgment in *Costanzo*.[1] The preliminary ruling in *Minister for Justice and Equality and Commissioner of the Garda Síochána v Workplace Relations Commission*,[2] delivered by the CJEU in its Grand Chamber composition on 4 December 2018, provides further confirmation of this '*Costanzo* obligation'.[3] Even more interesting, the judgment offers an occasion to investigate the relationship between the primacy of EU law and the procedural autonomy of the Member States, especially in the choice of bodies (judicial or quasi-judicial) that must handle individual complaints based on EU law.

The preliminary question raised by the Irish Supreme Court concerned the compatibility with EU law of a system where, based on the referring court's interpretation of the domestic Constitution, the body established by law to handle discrimination complaints under the Framework Equality Directive[4] had no jurisdiction in cases where an effective solution required the disapplication of statutory provisions. According to the Supreme Court, the jurisdiction was rather vested only in the High Court (which is, by contrast, a court established under the Constitution). In his Opinion, Advocate General (AG) Wahl

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1 Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1861, paras 30-32. In this case, domestic law was in contrast with EU legislation (notably, a Directive. See also Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] OJ C260/8, para 37). However, the same obligation exists when the contrast arises with respect to EU primary law: see Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8079, para 49; Case C-628/15 *The Trustees of the BT Pension* [2017] OJ C382/10, para 54.

2 Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979.

3 See M. Verhoeven, *The Costanzo obligation: The obligations of national administrative authorities in the case of incompatibility between national law and European law* (Intersentia 2011).

4 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

agreed that this division of jurisdiction fell within the scope of the procedural autonomy left to Member States; thus, it should be scrutinized (only) against the EU law limits thereto, the principles of equivalence and effectiveness. Taking a radically different stance, the CJEU found an *a priori* contrast with the principle of the primacy of EU law.

This note starts with the reconstruction of the domestic legal background of the case (section 2). After summarizing the reasoning developed by the CJEU (section 3), the analysis focuses on the relationship between the primacy of EU law and the procedural autonomy of the Member States, comparing the different approaches of the Advocate General and the Court (section 4). The case note ends with a reflection on the meaning and the potential implications of the judgment (section 5).

## 2. National Legal Background and Proceedings before the Referring Court

Between 2005 and 2007, three men were excluded from recruitment as police officers to the Irish police force (An Garda Síochána) because they were above the maximum age for recruitment established by the Admissions and Appointments Regulation: they brought proceedings before the Equality Tribunal. At the time, the Tribunal was granted jurisdiction on discrimination complaints by the same national legislation that had given effect to the Framework Equality Directive (the Employment Equality Acts).[5] Despite the name, the Tribunal was not a court established under the Constitution, but a statutory body created and governed by the said Acts. This is not an *unicum* in Ireland, where there are several 'tribunals' composed not of judges but of qualified specialists, dealing with a range of matters such as taxation, social welfare, immigration, town planning, employment, non-discrimination.[6] The rationale behind this enforcement choice is clearly to provide complainants with a simple, fast, and cheap access to effective solutions.[7]

The Minister for Justice and Equality took the view that, since the complaints amounted in essence to a request to disapply a statutory provision (the contested age limit contained in the Regulation),[8] the Tribunal lacked jurisdiction. As the

5 Under Article 9 of Directive 2000/78/EC, headed 'Remedies and enforcement', the Member States shall make available to victims of an alleged discrimination the judicial or administrative procedures for the enforcement of the obligations deriving from the Directive.

6 See section 'Specialised courts-Ireland' (*European e-Justice portal*), https://e-justice.europa.eu/content_specialised_courts-19-ie-en.do?member=1, accessed 1 July 2019.

7 See Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, Opinion of AG Wahl, para 87.

8 For the sake of clarity, the Regulation was made by the Minister with the approval of the Government, in accordance with the Police Forces Amalgamation Act (1925).

body decided to go ahead, the Minister brought judicial review proceedings before the High Court, which upheld the Minister's claim and made an order prohibiting the Tribunal from proceeding with the consideration of the complaints.[9] This order was then appealed before the Supreme Court. In 2015, pending the appeal, the functions of the Tribunal were transferred to another statutory body, the Workplace Relations Commission (WRC). For the sake of clarity, in the following reference will be made to the latter only.

The Supreme Court recalled that, under Article 34.3.1 of the Irish Constitution, the High Court 'is invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal'.[10] It interpreted this provision as granting the High Court the power to take whatever action necessary to protect rights 'if there is no other obvious court or tribunal which has jurisdiction'.[11] This extends to rights deriving from EU law, which 'is incorporated into Irish law by the Constitution itself'.[12] Moreover, by express provision in Article 34.3.2, the competence to disapply national law in contrast to the Constitution is reserved to the High Court and to the Supreme Court. Whilst Article 37.1 of the Constitution permits, in non-criminal matters, 'the exercise of limited functions and powers of a judicial nature' by persons and bodies authorized by law, the Supreme Court found that the competence to disapply national law could not be regarded as a limited power within the meaning of that provision.[13] It also added that there was 'anything even remotely resembling an express jurisdiction' conferred on the WRC to disapply national law.[14]

The Supreme Court thus concluded that, as 'a matter of fundamental Irish constitutional law', the WRC could not handle cases requiring the disapplication of national legislation.[15] This jurisdiction would be vested only in the High Court, which should be regarded as having also the power to disapply any rules of domestic law that could impede the effective vindication, by this latter, of EU

9 High Court, *Minister for Justice, Equality and Law Reform v Director of Equality Tribunal* [2009] IEHC 72.

10 Supreme Court, judgment of 15 June 2017, *Minister for Justice, Equality & Law Reform v The Workplace Commission* [2017] IESC 43, available at http://www.supremecourt.ie/. The judgment sets out the reasons behind the decision to refer, on the same date, a preliminary question to the CJEU.

11 *Ibid*, point 5.4.

12 *Ibid*. Article 29.6 of the Irish Constitution, which endorses a dualist approach and grants primacy to EU law over domestic law and the Constitution. See G. Hogan, 'Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country', in A. Albi & S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 1323-1371.

13 Supreme Court, judgment of 15 June 2017, *Minister for Justice, Equality & Law Reform v The Workplace Commission* [2017] IESC 43, point 5.8.

14 *Ibid*, point 5.11.

15 *Ibid*, point 5.13.

rights (such as those conferring on the WRC the power to grant certain remedies).[16]

Recalling the case law of the CJEU, the Supreme Court affirmed that the contested division of jurisdiction did not breach the EU law principles of equivalence and effectiveness which constrain national procedural autonomy. On the one hand, it noted that such a division of jurisdiction applied in any field of domestic law; on the other hand, it stressed once more that the High Court was entitled to provide any remedies mandated by EU law, disapplying, if need be, contrasting national provisions.[17]

Against this backdrop, the Supreme Court took the view that, contrary to what the WRC had argued in its written observations, as a matter of national law the Commission was not deprived of its capacity to provide an effective remedy in a case in which it had jurisdiction, because it did not have jurisdiction at all in cases entailing the disapplication of national law.[18] By contrast, the Supreme Court considered that it was not *acte clair* whether EU law required that the WRC were granted jurisdiction to disapply national law.[19] For this reason, the Supreme Court decided to refer this question to the CJEU.

## 3. The Judgment of the Court of Justice

In a nutshell, the judgment states that, as a corollary of the primacy of EU law, a Member State cannot confer on a statutory body general jurisdiction over disputes in an area regulated by EU law and, at the same time, reserve the jurisdiction to a different (judicial) authority when the effective solution of the case requires the disapplication of national rules incompatible with EU law. The CJEU reached this conclusion through four main steps.

At the outset, it upheld the admissibility of the preliminary question, albeit by rephrasing it. According to the Czech Government, the Supreme Court had failed to identify the provisions of Directive 2000/78/EC allegedly breached. The CJEU observed that, from the order, it was clear that the referring court harboured doubts on 'whether EU law, in particular the principle of primacy of EU law' precluded the said division of jurisdiction between the WRC and the High Court.[20]

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16 *Ibid.*

17 *Ibid*, especially points 7.1, 7.15 and 7.16.

18 See Order for Reference to the CJEU 15th June 2017, *Minister for Justice, Equality & Law Reform v The Workplace Commission* (Irish Supreme Court), http://www.supremecourt.ie/, accessed 1 July 2019, available as a doc file on the same page as the Judgment (n. 10), point 6.11.

19 *Ibid*, points 6.12 and 7.1.

20 Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, para 31.

As a second step, the CJEU clarified the EU legal framework relevant to the case. Interestingly, before resorting to its judicial arsenal on primacy, the Court stressed the 'distinction (...) between the power to disapply, in a specific case, a provision of national law that is contrary to EU law and the power to strike down such a provision, which has the broader effect that that provision is no longer valid for any purpose'.[21] On the one hand, the Member States keep the task of identifying the procedures for that review, the institutions empowered to strike down national legislation, and the effects of their decisions. On the other hand, according to the well-known judgment in *Simmenthal*,[22] the primacy of EU law implies that any national court which is called upon to apply EU law within its jurisdiction must give it 'full effect'. If need be, that court must refrain from applying any conflicting national provision 'without requesting or awaiting the prior setting aside of that provision by the legislature or the Constitutional court'.[23] Any national provision and any legislative, administrative, or judicial practice preventing disapplication by the national court with jurisdiction to apply EU law would therefore be incompatible with 'the very essence of EU law'.[24] This duty to disapply extends to all organs of the State, including administrative authorities, as clarified by the Court in the aforementioned *Costanzo* judgment.[25]

Building on these considerations, as a third step, the CJEU addressed the (reformulated) preliminary question. It observed that the WRC is the body upon which the Irish legislature has conferred the power to ensure the enforcement of Directive 2000/78/EC. Accordingly, the 'primacy of EU law requires [the WRC] to provide, within the framework of that power, the legal protection which individuals derive from EU law and to ensure that EU law is fully effective, disapplying, if need be, any provision of national legislation that may be contrary thereto'.[26] In line with the *Simmenthal* case law, the WRC must 'neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means'.[27] Moreover, the CJEU stressed that, if the WRC satisfied the requirement to be qualified as a 'court or tribunal' for the

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21 *Ibid*, para 33.

22 Case 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 630, paras 14-24.

23 Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, para 35. In paras 35-36, the Court quotes its judgment in *Simmenthal*, together with its more recent Joined Cases C-52-113/16 *'SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal* EU:C:2018:157.

24 Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, para 36.

25 *Ibid*, para 38.

26 *Ibid*, para 45. See also paras 46 and 48, where the CJEU reiterated that the power (in fact, duty) of the WRC to disapply national provisions contrary to EU law is functional to, respectively, the protection of individuals and the effectiveness of EU law.

27 *Ibid*, para 50.

purposes of Article 267 TFEU, it may refer preliminary questions on the interpretation of the relevant EU law; it would then be bound to abide by the Court's judgment, which may require the disapplication of national law.[28]

As a fourth and final step, the CJEU clarified that its conclusion could not be altered by the constitutional status of the national law rules in question, which 'cannot be allowed to undermine the unity and effectiveness of EU law'.[29] Nor was it of any relevance that the High Court is vested with the power to disapply national law incompatible with EU law. Thus, the Court concluded that the principle of primacy of EU law precludes national legislation '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]

## 4. Analysis

In recent years, some EU legislation laying down common procedural rules has been adopted.[31] Yet, in most fields the effectiveness of EU law, and the judicial protection of the rights that individuals derive from it, is still dependent on the procedural rules and the judicial system of each Member State. This is the case with Directive 2000/78/EC, whose Article 9 clearly evokes the so-called principle of the procedural autonomy of the Member States. According to case law that traces back to the CJEU's judgment in *Rewe*,[32] this autonomy covers the determination of both the courts and tribunals having jurisdiction and the detailed procedural conditions governing the actions aims at safeguarding individuals' rights conferred by EU law.[33]

Importantly, procedural autonomy has a two-fold legal nature. It is a prerogative of the Member States, which derives from the broader principle of

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28 *Ibid*, para 47. The Court quotes its preliminary ruling in Case C-363/12 *Z v A Government Department, The Board of Management of a Community School* [2014] OJ C311/5, which it delivered on a reference from the Equality Tribunal (then WRC). On the concept of 'national court' for the purposes of Article 267 TFEU, see also Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others* EU:C:2013:48.

29 Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, para 49. The Court quotes Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] ECR I-8041, para 61. See also Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1126, para 3.

30 Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, para 52.

31 For an overview see the dedicated issue [2015/1] *REALaw*.

32 Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, para 5.

33 See, amongst many, Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgium* [1995] ECR I-4615, para 12; Case C-432/05 *Unibet* [2007] ECR I-2301, para 37; Case C-286/06 *Impactv Minister for Agriculture and Food and Others (Impact)* [2008] ECR I-2533, para 44; Case C-93/12 *Agrokonsulting-04* [2013] para 36; Case C-234/17 *XC and Others* [2018], para 21.

national institutional autonomy.[34] At the same time, however, it is connected to – and constrained by – the duty of sincere cooperation now enshrined in Article 4(3) TEU, which requires that the Member States take any appropriate measures to ensure the obligations arising from EU primary and secondary law.[35] From there the CJEU has inferred two limits, known as the principles of equivalence and effectiveness, which state, respectively, that national procedural rules must not be less favourable than those governing similar domestic actions and must not render in practice impossible or excessively difficult the exercise of EU rights.[36] The ultimate responsibility to test the equivalence and effectiveness of domestic rules rests on national courts. However, the case law of the Court of Justice clearly shows the potential of these two principles to act as levers for the impact of EU law on the national procedural rules.[37] The Member States' duty to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', now enshrined in Article 19(1) TEU and backed by Article 47 of the EU Charter of Fundamental Rights, on the right to an effective remedy and a fair trial, further strengthens this process.[38]

The judgment in *Garda Síochána* provides a powerful example of the progressive narrowing down of Member States' autonomy. Interestingly, however, the limitation comes directly from the principle of primacy of EU law, which precedes – and makes superfluous – any assessment on the basis of the principles of equivalence and effectiveness. These are never mentioned in the judgment, nor is the principle of the Member States' procedural autonomy. The Court's reasoning rather implies that the contested division of jurisdiction falls *a priori* outside the scope of national procedural autonomy.

Before discussing this point further, it is worth stressing that the CJEU also puts emphasis on an aspect of Member States' autonomy that is not affected

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34 According to this principle, it is for the Member States to designate which institutions within the national system shall be empowered to adopt the measures required to give effect to EU law. See Joined Cases 51-54/71 *International Star Fruit* [1971] ECR 1107, para 3.

35 On the many dimensions of the duty of sincere (or loyal) cooperation see M. Klamert, *The Principle of Loyalty in EU Law* (Oxford 2014).

36 See Case C-378/17 (n. 20).

37 The expression 'functionalized procedural competence' is used by D.U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer 2010). The Court's activism is a compensation for the inertia of the EU legislature according to A. Adinolfi, 'The "procedural autonomy" of Member States and the constraints stemming from the ECJ's case law: Its judicial activism still necessary?' in H. Micklitz (ed.), *The ECJ and the Autonomy of Member States* (Intersentia Ltd 2011) 281-303.

38 Whilst it is possible to identify differences between the effectiveness strand of the *Rewe* test and the principle of effective judicial protection, a clear dividing line does not emerge (yet) from the case law of the CJEU. See S. Prechal & R. Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 *REALaw* 31, 31-50; J. Krommendijk, 'Is there light on the horizon? The distinction between "*Rewe* effectiveness" and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*' (2016) 53 *CMLRev* 1395, 1395-1418.

by the primacy of EU law. As a premise to its reasoning, the Court has stressed that the duty to leave unapplied, in a specific case, a provision of national law that is contrary to EU law does not affect the validity of that provision in the domestic legal order (at least, as a matter of EU law). Any decisions on how, by whom, and with what effects national legislation should be invalidated fall within the Member States' autonomy. This is not a minor difference: the coexistence between a model of decentralized application of EU law inspired by the latter's primacy and a centralized system for reviewing the validity of national law rests on this fundamental distinction. The CJEU made this point already in its judgment *IN. CO. GE.'90*.[39] The European Commission had advanced the argument that, based on the *Simmenthal* judgment, the incompatibility with Community law of a national rule subsequently adopted had the effect of rendering this latter 'non-existent'.[40] The Court rejected this interpretation and stressed that '[f]aced with such a situation, the national court is, however, obliged to disapply that rule'.[41]

From a substantive point of view, in the *Garda Síochána* judgment the CJEU reiterates the point made in *IN. CO. GE.'90*, though the added value lies more in the clear and unequivocal formulation used to reassert it. The Court probably took the occasion to provide a clarification of a general character, whose relevance goes beyond the case at issue. At the same time, this precision appears the essential premise of, and counterbalance to, the CJEU's reasoning, which is built exclusively on the principle of the primacy of EU law.

Interestingly, Advocate General Wahl suggested a different path of argument, maintaining that the contested division of jurisdiction does not raise an issue of primacy; rather, its compatibility with EU law should be tested against the principles of equivalence and effectiveness. It is worth recalling the main steps of the AG's Opinion in further detail.

The entire reasoning of Advocate General Wahl is premised on the idea that the situation at issue in the *Garda Síochána* case would fall *a priori* outside the scope of the CJEU's *Simmenthal* case law. For the sake of clarity, it is convenient to recall that in the leading judgment *Simmenthal* the CJEU censured the mechanism, fashioned by the Italian Constitutional Court, whereby ordinary courts should raise a question of constitutionality instead of immediately leaving unapplied, in the cases pending before them, national provisions in conflict with EU law.[42] Thus, the *Simmenthal* case law refers to cases in which a national

39 Joined Cases C-10-22/97 *Ministero delle Finanze v IN.CO.GE.'90 and Others* [1998].

40 *Ibid*, para 18.

41 *Ibid*, para 21. Curiously, this judgment is not quoted by the CJEU in *Garda Síochána*; rather, the Court refers to the Opinion of AG Wahl, who recalls the *IN.CO.GE.'90* judgment in a footnote.

42 See Case 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 630, paras 22-24.

court (or, following the *Costanzo* judgment, a national administrative authority) is deprived, *in the exercise of its jurisdiction*, of the power to leave unapplied national rules incompatible with EU law. According to the Advocate General, the situation in the *Garda Síochána* case is different because, under national law, the WRC has no jurisdiction on cases which could entail the disapplication of national law.[43]

Therefore, the second part of the AG's reasoning tackles the question of the compatibility of the rule of jurisdiction with the principles of equivalence and effectiveness. Whilst he considers that the equivalence requirement is satisfied,[44] his answer with respect to the effectiveness parameter is more nuanced. Relying on the Court's judgment in *Impact*,[45] the AG anchors the compliance with the principle of effectiveness to the exclusive jurisdiction of the High Court in cases entailing the disapplication of EU law. In other words, the division of jurisdiction must not imply that the applicants must bring multiple complaints – before the WRC and the High Court – to deal with the different aspects of their case. However, this assessment ultimately rests with the Supreme Court.

Is the dividing line drawn between the *Garda Síochána* and *Simmenthal* cases by the AG convincing? In general, a rule that prevents the exercise of certain powers within the scope of the conferred jurisdiction differs from a rule that allocates the jurisdiction amongst different authorities based on the powers they can exercise. Yet, when looking at the effective application of EU law, which is the *raison d'être* of its primacy over national law, this difference tends to fade away. The practical outcome of such division of jurisdiction is that a national court or authority – the Workplace Relations Commission, in our case – is, at the same time, entrusted with the application of EU law in a specific area and deprived of the power to leave unapplied national provisions incompatible with that law. This makes the *Simmenthal* case law fully relevant to the *Garda Síochána* case. From there it follows that the 'full force and effect' of EU law rests on the power (and duty) of any national courts and authorities to disapply, if need be, incompatible domestic provisions. Thus, the national mandate to ensure the application of EU law cannot be disconnected from the power (and duty) to leave domestic provisions unapplied, which derives directly from the nature of EU law. In the Court's words, any national provision or practice contrary to EU law is 'incompatible with the requirements which are the very es-

43 See, notably, Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, Opinion of AG Wahl, paras 48, 54, 62-72, 76 and 91.

44 Because the contested division of jurisdiction has a general nature, concerning any legal fields.

45 Case C-286/06 *Impact* [2008] ECR I-2533.

sence of EU law';[46] this includes merely temporary impediments, because another authority may subsequently disapply the domestic law at issue.[47]

## 5. Concluding Remarks

The *Garda Síochána* judgment exemplifies a(nother) situation in which, according to the Court of Justice, national arrangements for the administration of justice are inherently in conflict with the need to ensure the full effectiveness of EU substantive law.[48] Therefore, their incompatibility with EU law is established directly on the imperativeness of primacy and they are *a priori* excluded from the procedural autonomy of the Member States. In so doing, the Court recalls that, on top of the national procedural autonomy, there is the procedural primacy of EU law.[49] This is a corollary of the primacy of substantive EU law and requires the disapplication of conflicting national provisions, judicial interpretations, or practices.[50] Like its substantive counterpart, procedural primacy has an absolute nature with respect to external (potential) constraints, meaning that national provisions, even of a constitutional nature, cannot affect it.[51]

At the end of the day, the freedom to manoeuvre allowed under national procedural autonomy encompasses (only) two options: either statutory bodies entrusted with handling complaints based on EU law are granted the power to disapply national law or such complaints are reserved to ordinary courts. The varying constitutional geometry of Member States' choices as regards the administrative, quasi-judicial, or judicial enforcement of EU law must reconcile

46 Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, para 36.

47 *Ibid*, para 51. The same point can be found in the Court's judgment in *Simmenthal*, para 23, and *Winner Wetten*, para 57.

48 See the distinction between direct and indirect collisions between EU law and national law proposed by R. Ortlep & M. Verhoeven, 'The principle of primacy versus the principle of national procedural autonomy' (2012) *NALL*, DOI: 10.5553/NALL/.000004.

49 See J.S. Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9 *ELJ* 599, 599-613.

50 See D. Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali* (Giuffré Editore 2018) 137.

51 Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979, para 49. On the prevalence of EU substantive law on national constitutional law, see Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1126, para 3; Case C-399/11 *Melloni* EU:C:2013:107, paras 59-60. On the existence of internal limits to the primacy of EU law see the recent A. Arena, 'Sul carattere "assoluto" del primato del diritto dell'Unione europea' (2018) 13 *Studi sull'integrazione europea* 317, 317-340.

with either of these alternatives. There is no 'third way' such as the one delineated by the Irish Supreme Court, which the CJEU has definitively dismissed.[52]

The implications of the judgment are significant, at least in Ireland where, as the Supreme Court itself remarked, 'there are a range of statutory bodies, such as the [Working Relations] Commission, on whom an adjudicative role is conferred'.[53]

One may wonder whether granting the power to disapply national law in contrast with EU law to statutory bodies is compatible at all with the Irish Constitution. This is a matter for the Supreme Court to determine in the appeals decision.[54] However, the judgment providing the reasons for the preliminary reference to the CJEU is premised on the idea that the jurisdiction issue at stake involves both a national and a European dimension.[55] Taking the move from national procedural autonomy, the Supreme Court focused initially on the jurisdiction issue as a matter of national law and upheld the reconstruction of the respective roles of ordinary courts and statutory bodies most in accordance with the Irish Constitution (or, better, to its interpretation). By contrast, it did not exclude that EU law could mandate a different conclusion (in fact, this is precisely the reason for the reference to the CJEU) and, most importantly, it did not anticipate that an EU law requirement to grant the power to disapply national law to statutory bodies would be in conflict with the Constitution.

If the constitutional impact of the *Garda Síochána* judgment remains to be assessed, one can identify some non-marginal practical implications it may have, at least in Ireland. If statutory bodies must disapply domestic law that is in conflict with EU law, they and their members must be equipped with the legal expertise, tools and procedures necessary to effectively perform their tasks. For instance, because of this empowerment they may feel more 'compelled'[56] to refer preliminary rulings to the Court of Justice. Obviously, adequate resources must be allocated to assist a meaningful evolution of the national adjudication system along these lines. At the same time, the alternative solution theoretically available is not without problems. In fact, reserving the enforcement of EU law to the 'ordinary' administrative authorities and courts or getting rid of quasi-judicial bodies would equally entail a dramatic change. With all probability, there would be negative consequences on the costs and the length of proceedings, and the issue of the technical expertise required to handle cases in certain

52 See C. O'Mara, 'The Court of Justice limits the procedural autonomy of Member States and affirms the power to dis-apply national legislation that conflicts with European Union law' (2019) *Irish Employment Law Journal* 28, 28-30.

53 See point 4.7 of the Order for Reference (n. 18).

54 At the time of writing, this is not yet available.

55 Supreme Court, judgment of 15 June 2017, *Minister for Justice, Equality & Law Reform v The Workplace Commission* [2017] IESC 43, point 2.3.

56 Since the decisions of these statutory bodies can be appealed before ordinary courts, there is no obligation to refer under EU law.

fields should be addressed. The effective protection of the rights conferred on individuals by EU law may ultimately be frustrated.

On a final note, whilst the significance of the case for the Irish legal order is unequivocal, it does not seem limited to it. In light of the general trend of creating *ad hoc* adjudication bodies in specific fields, the *Garda Síochána* judgment might cast a long shadow – especially when (highly) technical issues or assessments are involved.