



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 11 September 2018¹

Case C-378/17

**The Minister for Justice and Equality,
The Commissioner of An Garda Síochána**
v
**The Workplace Relations Commission;
notice parties:
Ronald Boyle,
Brian Fitzpatrick,
Gerard Cotter**

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Request for a preliminary ruling — A rule dividing jurisdiction between two bodies in specific cases on the basis of the nature of the complaint made — Complaints of discrimination in the context of employment — Limited jurisdiction of a statutory body — No jurisdiction to hear cases requiring the disapplication of national legislation in conflict with EU law — Primacy of EU law — Full effectiveness — Procedural autonomy of Member States — Equivalence and effectiveness)

1. 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.
2. 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').
3. The competent body to hear a case depends on the nature of the complaint put forward. While the WRC generally enjoys jurisdiction to hear complaints in employment equality matters based on Directive 2000/78/EC² and the national legislation transposing that directive, that body has no jurisdiction to hear cases where a successful outcome of the complaint would require disapplication of a provision of national (primary or secondary) legislation. Because of that rule, the WRC has no jurisdiction to consider whether a provision of national law is in breach of EU employment equality legislation. Instead, the competent body for seeking redress for discrimination in cases requiring the disapplication of national law is the High Court.

¹ Original language: English.

² Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

4. The question put to the Court in this case requires consideration of the very *rationale* underlying the line of case-law devolving from the Court's seminal judgment in *Simmmenthal*.³ It invites the Court to examine whether the constitutional principle of primacy, and by extension, the full effectiveness of EU law, requires that a body such as the WRC must have jurisdiction to hear cases potentially involving disapplication of national legislation, even though there is an alternative course of action available that, according to the determinations made by the referring court, complies with the principles of equivalence and effectiveness.

I. Legal framework

A. EU Law

5. Directive 2000/78 lays down rules regarding equal treatment in the context of employment and occupation. In accordance with Article 1 thereof, it seeks to combat discrimination and to put into effect the principle of equal treatment in the Member States.

6. Article 3 defines the scope of the directive. It states:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...'

7. Chapter II of Directive 2000/78 deals with remedies and enforcement. Article 9(1) of the directive concerns the defence of rights. It provides:

'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.'

B. National law

1. The Constitution

8. Article 34 of Bunreacht na hÉireann (Constitution of Ireland) ('the Constitution') provides:

- '1 Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

³ Judgment of 9 March 1978, *Simmmenthal*, 106/77, EU:C:1978:49.

2 The Courts shall comprise:

- i Courts of First Instance;
- ii a Court of Appeal; and
- iii a Court of Final Appeal.

3 1° 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.

2° 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.’

9. Article 37.1 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.’

2. The relevant employment legislation

10. In Ireland, the prohibition of discrimination on grounds of age is set out in the Employment Equality Acts.⁴

11. The WRC (previously the Equality Tribunal) is the quasi-judicial body established to investigate, hear and decide on complaints of discrimination.⁵ Pursuant to the relevant provisions of the Employment Equality Acts, the WRC is entitled to make an order for compensation in the form of arrears of remuneration; an order for equal remuneration; an order for compensation for discrimination; an order for equal treatment; an order of an injunctive kind; and an order that an employer re-engage a complainant, with or without compensation.

12. In accordance with the Garda Síochána regulations,⁶ a person is not admitted as a trainee to become a member of the national police force unless that person is at least 18, but under 35, years of age on the first day of the month in which an advertisement of the vacancy to which the admission relates was first published in a national newspaper.

II. Facts, procedure and the questions referred

13. Between 2005 and 2007, Mr Ronald Boyle, Mr Brian Fitzpatrick and Mr Gerard Cotter (‘the notice parties’) applied for entry to train as members of An Garda Síochána (national police force, Ireland). Entry was refused on the basis that the Garda Síochána regulations set the upper age limit for entry as a trainee at 35 years (‘the age restriction measure’).

⁴ In the case pending before the referring court, the relevant acts are the Employment Equality Acts 1998 to 2004 and, where relevant, subsequent amending legislation.

⁵ As a result of the Workplace Relations Act 2015, the relevant functions of the Equality Tribunal have now been transferred to the WRC.

⁶ The Garda Síochána (Admissions and Appointments) (Amendment) Regulations, 2004 (S.I. No. 749 of 2004).

14. The notice parties lodged complaints against those refusals under the Employment Equality Acts before the (what was then) Equality Tribunal. They alleged that the age restriction measure constitutes discriminatory treatment in the context of employment on grounds of age.

15. Contrary to what its name suggests, the Equality Tribunal is not a court, but a statutory body. It was competent to deal with employment equality complaints until 2015. From then on, the WRC assumed the competence vested in the Equality Tribunal.

16. According to the referring court, Article 34.3.2 of the Constitution reserves to courts the competence to disapply national legislation. Consequently, the Equality Tribunal and its successor, the WRC, have, in their capacity as statutory bodies, no jurisdiction to deal with cases where an effective remedy would require the disapplication of national legislation on the basis of national or EU law.

17. In the proceedings before the Equality Tribunal, the Minister for Justice and Equality ('the Minister') raised the issue of jurisdiction. Because the notice parties considered that the age restriction measure was contrary to Directive 2000/78 and the Employment Equality Acts, the legislation transposing that directive, the complaints amounted to a request to disapply the age restriction measure, a piece of national legislation. Arguing that the Equality Tribunal had no jurisdiction to disapply national legislation, the Minister requested the Equality Tribunal to deal with the jurisdictional issue as a preliminary issue, before dealing with the substance.

18. The Equality Tribunal declined to do so. Instead, it scheduled a hearing for 11 June 2008, at which both the issue of jurisdiction and the substantive issues regarding age discrimination were to be dealt with.

19. Due to the refusal of the Equality Tribunal to consider the issue of jurisdiction as a preliminary issue, the Minister sought judicial review before the High Court.

20. First, the Minister asked the High Court to prohibit the Equality Tribunal from proceeding with an investigation of the complaints of the notice parties. Second, the Minister asked the High Court to declare that the Equality Tribunal had no jurisdiction to consider the complaints.

21. The High Court ruled on 17 February 2009 that the Equality Tribunal was not empowered, under national law, to proceed with the hearing, which implicitly assumed competence to overrule or disapply national legislation such as the age restriction measure.

22. The Equality Tribunal appealed that decision to the Supreme Court. By the time the matter came to be considered by the Supreme Court, the Equality Tribunal had become the WRC.

23. The Supreme Court delivered a judgment on 15 June 2017 ('the judgment of 15 June 2017').⁷ It confirmed the finding of the High Court that the WRC does not have jurisdiction to disapply national law. The Supreme Court nevertheless added that cases which would ordinarily fall within the jurisdiction of the WRC, but in which that administrative body could have the obligation under national or EU law to disapply national legislation, must instead be brought before the High Court.

⁷ In fact, in addition to the order for reference of 15 June 2017, the referring court also delivered a separate judgment on that date (*Minister for Justice, Equality and Law Reform and Others v The Workplace Relations Commission*, [2017] IESC 43) dealing with the question of jurisdiction of the WRC from the perspective of national law. In that judgment, the referring court also dealt with certain issues of EU law. It considered, in particular, whether the division of jurisdiction between the WRC and the High Court complied with the principles of equivalence and effectiveness.

24. Entertaining doubts as to whether such a division of jurisdiction between a statutory body and a court of law is compatible with EU law, the referring court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Where

- (a) A national body is established by law and has a general jurisdiction conferred on it to *inter alia* ensure enforcement of [EU] 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 [EU] law; and
- (c) Appropriate national courts would have [jurisdiction] to make any appropriate order disapplying national legislation which was required to ensure compliance with the measure of [EU] 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 [EU] law and where the remedy provided in the courts has been assessed, in accordance with the jurisprudence of the [Court], as complying with the principles of equivalence and effectiveness

Must the statutory body concerned nonetheless be taken to have [jurisdiction] to entertain a complaint that national legislation was in breach of relevant [EU] 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 requiring the disapplication of legislation, on a court established under the Constitution rather than the body in question?’

25. Written observations have been submitted by the Minister and the Commissioner of An Garda Síochána, Ireland, the WRC, the first and third notice parties, the Czech Government and the European Commission. Apart from the Czech Government, those parties also presented oral argument at the hearing held on 5 June 2018.

III. Analysis

26. Before examining the question referred, I shall first briefly address an admissibility issue raised by the Czech Government.

A. Admissibility

27. In its written observations, the Czech Government argues that the request for a preliminary ruling should be declared inadmissible. In that government’s view, the referring court has not specified the provision of Directive 2000/78 with which the national legislation in question might be in conflict: rather, the wording of the question referred is so general that it lacks any connection to the directive or other provisions of EU law.

28. That is indeed true. It does not, however, mean that the request is inadmissible.

29. The Court will refuse to answer a question referred only where it is quite obvious that the interpretation of EU law sought is unrelated to the facts underlying the case pending before the referring court, or the object of those proceedings, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the

questions submitted to it.⁸

30. It is clear from the order for reference in the present case that the question referred does not concern the compatibility of the age restriction measure (or the rule of jurisdiction in question) with any specific provision of Directive 2000/78. Rather, the Court is asked to clarify a question of principle that reaches far beyond the individual provisions of the directive. As already indicated, it concerns the compatibility with EU law of a (constitutional) rule that divides jurisdiction between a statutory body, the WRC, and the High Court in specific cases on the basis of the nature of the complaint made.

31. Moreover, the order for reference contains both the factual and legal material necessary for the Court to give a useful answer to the question referred. That order also sets out clearly why the problem is neither hypothetical nor unrelated to the facts underlying the case pending before it.

32. Consequently, the request for a preliminary ruling must be declared admissible.

B. Substance

33. In determining whether the WRC had jurisdiction in cases where an effective remedy would require the disapplication of national legislation on the basis of national or EU law, the referring court held that, as a matter of Irish constitutional law, the prerogative of disapplying or setting aside a provision of primary or secondary legislation is in principle confined to ordinary courts.

34. That is because, unless otherwise provided for by EU law, rules of jurisdiction must be interpreted in the light of the fundamental requirement, set out in Article 34 of the Constitution, that justice be administered in courts established under the terms of the Constitution.

35. In that regard, the referring court also observed that, exceptionally, Article 37.1 of the Constitution allows a person or body to be authorised by law to exercise ‘limited functions and powers of a judicial nature’ in non-criminal matters. Thus, under Irish law, powers of a judicial nature may be conferred by statute on a statutory body, provided that those powers are limited.

36. The WRC is such a statutory body with limited judicial functions. In accordance with the Employment Equality Acts, complainants must refer to the WRC for the first instance adjudication of a complaint of discrimination in the context of employment.⁹ More particularly, the WRC deals with complaints regarding breaches (by employers and service providers) of, and disputes as to entitlements under, employment, equality and equal status legislation. Once a complaint is brought before the WRC, the Director General of the WRC considers at the outset whether the case can be referred to a mediation officer for mediation between the parties involved. If the case is not suitable for mediation, the Director General will refer the complaint to an adjudication officer for adjudication.¹⁰

37. In its judgment of 15 June 2017, the referring court found, in the context of the jurisdictional issue that had been brought before it, that the WRC has no authority, as a matter of national law, to disapply a provision of national legislation. That is because no such authority had been conferred on the WRC by statute. The referring court also found that no such authority could arise by implication.

⁸ See, inter alia, judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 20 and the case-law cited.

⁹ Gender discrimination constitutes an exception to this rule: in cases regarding gender discrimination, the complainant can *choose* to go directly to the Circuit Court.

¹⁰ See https://www.workplacerelations.ie/en/Complaints_Disputes/Adjudication/ (accessed on 5 July 2018).

38. The referring court thus held that, in the light of the constitutional requirements of the Irish legal order, cases requiring the disapplication of national legislation fall, as a general rule, outside the jurisdiction of the WRC. Instead of the WRC, complainants must address their claims directly to the High Court, which does have jurisdiction to hear such cases.

39. The division of jurisdiction between the WRC and the High Court is based on the potential remedy required to cure the alleged discrimination. More specifically, the WRC does *not* have jurisdiction to consider a complaint where that case involves (if the complaint were considered to be successful) the need to disapply a measure of primary or secondary national legislation.

40. The High Court has exclusive jurisdiction to hear such cases. Therefore, complainants, such as the notice parties, who consider themselves wronged by a legislative instrument (or whose complaint would otherwise require disapplication of national law) must instigate ‘judicial review proceedings’ before the High Court in order to obtain relief through disapplication of a provision of national law deemed contrary to a superior norm (here: Directive 2000/78).

41. But is the division of jurisdiction between the WRC and the High Court compatible with EU law?

42. That question, referred to the Court for a preliminary ruling, clearly touches upon the limits of the procedural autonomy of the Member States. However, the question requires first and foremost consideration of the constitutional principle of the primacy of EU law, and, as an organic part thereof, the obligation of all organs of the Member State to ensure, within their respective jurisdiction, full effectiveness of EU law.

43. Before addressing those issues, it must be emphasised from the outset that the question referred does not explicitly seek from the Court an interpretation of the principle of procedural autonomy and of the corollary principles of equivalence and effectiveness. On the contrary, the referring court states that it has already determined, in the light of the Court’s case-law, that the rule of jurisdiction complies with those principles. The Supreme Court of Ireland therefore in essence asks the Court to clarify whether, *despite compliance with those principles*, the rule of jurisdiction is contrary to EU law.

44. Bearing in mind the division of tasks between the Court and national courts in the preliminary-ruling procedure under Article 267 TFEU, it is (first and foremost) in that light that the question referred should in my view be examined.

1. The interplay between the principle of primacy and the procedural autonomy of Member States

45. It may certainly be so that the distinction between the act of leaving a provision unapplied and that of setting aside a provision is sometimes merely theoretical in practice. It may also be true that, from the perspective of a specific domestic legal system, no real distinction can be drawn between the two.¹¹ Nonetheless, as a matter of EU law, the distinction between the obligation to refrain from applying a provision of national law (because that provision is contrary to EU law) *in a specific case* and the obligation to set aside such a provision, with the broader effect that that provision is no longer valid for any purpose (*ex tunc* or *ex nunc*), is an important one.

¹¹ The judgment of 15 June 2017, paragraphs 5.3. and 5.6.

46. The line of case-law devolving from *Simmenthal*, establishing the constitutional principle of primacy and underscoring the role of courts and administrative authorities in giving full effect to EU law, builds on that distinction.¹² That distinction is premised on the decentralised architecture of the EU legal system that leaves to each Member State the task of defining the appropriate avenues for seeking redress for breach of rights deriving from EU law, and more importantly, the institutions vested with the authority to set aside (or invalidate) legislation.

(a) The need to ensure full effectiveness of EU law: the obligation of all organs of the State to refrain from applying national law that is contrary to EU law

47. The line of case-law devolving from the Court's judgment in *Simmenthal*¹³ concerns the disapplication of legislation, or more specifically, the obligation of the organs of the State to refrain from applying provisions of national law that are contrary to EU law, an inevitable corollary of the constitutional doctrine of direct effect established in *van Gend en Loos*.¹⁴ In addition to laying the groundwork for a network of EU courts, the Court famously held in *Simmenthal*:

'21. ... [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.

22. 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 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.

23. This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary.

*24. ... therefore... a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community 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 provision by legislative or other constitutional means.'*¹⁵

48. In other words, *Simmenthal* concerned (among other issues of fundamental constitutional importance) the powers of a lower court to refrain from applying a provision of national law contrary to EU law without waiting for a superior court to set aside that provision.¹⁶

¹² See, in particular, judgments of 22 October 1998, *IN. CO. GE '90 and Others*, C-10/97 to C-22/97, EU:C:1998:498, paragraph 21. See also Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases *IN. CO. GE '90 and Others*, C-10/97 to C-22/97, EU:C:1998:228, points 16 to 44.

¹³ Judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49.

¹⁴ Judgment of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1.

¹⁵ Judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 21 to 24.

¹⁶ That case-law has been reaffirmed by the Court in a multitude of cases. See, among many, judgments of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, paragraphs 20 and 21; of 4 June 1992, *Debus*, C-13/91 and C-113/91, EU:C:1992:247, paragraph 32; of 2 August 1993, *Levy*, C-158/91, EU:C:1993:332, paragraph 9; and of 5 March 1998, *Solred*, C-347/96, EU:C:1998:87, paragraph 30.

49. The subsequent case-law of the Court has, however, made clear that that obligation also rests on other organs of the State, including administrative authorities. In *Costanzo*,¹⁷ the Court held that administrative authorities are under the same obligation as national courts to apply the provisions of a directive having direct effect. The Court considered that when the conditions under which individuals may rely on the provisions of a directive before national courts are met, all organs of the administration (including municipalities), are obliged to apply those provisions and to refrain from applying provisions of national law which conflict with them.¹⁸

50. In *CIF*,¹⁹ at issue was inter alia the (contested) jurisdiction of the Italian competition authority to disapply national legislation that required or facilitated conduct contrary to Article 81(1) EC (now Article 101(1) TFEU). The undertakings under investigation argued that the authority was under an obligation to apply such national legislation and could not leave it unapplied. The competition authority itself argued that a power to do so derived from the principles of direct effect and the primacy of EU law.

51. In that context, the Court reiterated that the duty to leave national legislation contrary to EU law unapplied concerns all organs of the State, including administrative authorities. That duty entails, if the circumstances so require, the obligation to take all appropriate measures to enable EU law to be fully applied.²⁰

52. The Court then pointed out that a national competition authority was responsible for ensuring that Article 81 EC was observed. That provision, read in conjunction with Article 10 EC (now Article 4(3) TEU), imposed a duty on Member States to refrain from introducing measures contrary to EU competition rules. Those rules would be rendered less effective if the national competition authority was not able to declare a national measure contrary to Article 81 EC (and Article 10 EC) and if, consequently, it failed to disapply that national measure.²¹

53. The abovementioned case-law thus makes clear that it is irrelevant whether the national legal system grants the organ of the State in question the power to refrain from applying a provision of national law that is contrary to EU law. That organ must nevertheless do so where it is necessary in order to give full effect to EU law.

54. 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 *within the limits of the jurisdiction* conferred upon it (as a matter of national law).²²

55. 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 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.

56. In the final analysis, the case-law thus seeks to ensure that an organ of the State, acting within the judicial and/or administrative structure of the Member State concerned, can adequately protect an individual's rights deriving from EU law and thus ensure full effectiveness of EU law.

¹⁷ Judgment of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256.

¹⁸ *Idem*, paragraphs 31 to 33.

¹⁹ Judgment of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430.

²⁰ *Idem*, paragraph 49.

²¹ *Idem*, paragraph 50.

²² Judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 21, and of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 20. See also judgment of 10 April 1984, *von Colson and Kamann*, 14/83, EU:C:1984:153, paragraph 26.

(b) The obligation to ensure full effectiveness of EU law within the limits of the jurisdiction conferred upon the organ in question

57. The WRC is the body specifically designated by the Irish legislature to ensure, in accordance with Article 9(1) of Directive 2000/78, that the obligations arising from the directive are effectively enforced. It ordinarily has jurisdiction to deal with complaints pertaining to discrimination in the context of employment.

58. It could therefore be argued that the principle of primacy, introduced by the Court in *Simmenthal* in an, at the time, innovative manner, requires that the WRC must be able to disapply the provisions of national law which it deems contrary to Directive 2000/78 (here: the age restriction measure). That is essentially argued by the WRC, the first and third named notice parties and the Commission.

59. Such an approach has a certain appeal. However, I am not persuaded that it is the correct one.

60. At this juncture, it is very important to stress that the constitutional importance of the primacy of EU law as a fundamental principle of the *sui generis* EU legal system cannot be overstated. Because of its fundamental importance, the primacy of EU law does not allow for exceptions. Indeed, allowing exceptions to primacy would be detrimental to the very bedrock on which the EU legal system is built.

61. Therefore, it is clear to me that any domestic rule (constitutional or otherwise) confining, in a general manner, the disapplication of national legislation to courts is clearly contrary to the principle of the primacy of EU law, as established by the Court in particular in *Simmenthal* and *Costanzo*. Indeed, there is no doubt that such a rule would stand in stark contrast to the rule established by the Court according to which *all* organs of the administration are obliged to apply the provisions of EU law having direct effect and to refrain from applying provisions of national law which conflict with them.²³

62. On a closer assessment, however, the present case can be distinguished from the case-law devolving from *Simmenthal*. Significantly, the rule of jurisdiction at issue in the main proceedings does not call into question the primacy of EU law, nor, by extension, the full effectiveness of EU law.

63. This case is about whether EU law mandates which judicial body ought to have jurisdiction to deal with a particular category of case.

64. The present case differs from the situation in which a court having substantive jurisdiction to hear a case, as in *Simmenthal*, or in which an authority undoubtedly having exclusive competence to take an administrative decision, as in *Costanzo*, are limited in their respective powers to give full effect to EU law and thus, where necessary, to provide an effective remedy in case of a breach of EU law.

65. The present case also differs from the situation underlying *CIF* (a variation of the situation described above); that is to say, a situation in which a national authority does not have explicit power to disapply national legislation that is contrary to EU competition rules, the observance of which was to be ensured by that very authority.

66. It should be emphasised that the situation in the present case is one where national law, as interpreted by the referring court, 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.

²³ Judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 21, and of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256, paragraphs 31 to 33.

67. In that very specific procedural context, caution must in my view be exercised in drawing parallels with the line of case-law devolving from *Simmenthal*.

68. As already mentioned, the *rationale* of that case-law lies in ensuring full effectiveness of EU law and in particular in enabling an individual to obtain effective protection for his rights deriving from EU law before the administrative body or court that *has jurisdiction* to consider the case. To ensure such protection, all organs of the State must also have the power to refrain from applying a provision of national law, even where the national legal system does not give that organ power to do so. It would be problematic from the viewpoint of the full effectiveness of EU law if it were first necessary to seek a declaration of incompatibility with EU law, or indeed invalidation, of the relevant provision before a (superior) court.

69. The Court's case-law thus ensures that courts as well as authorities called upon to apply EU law can do so to the fullest extent *within their respective areas of competence*.

70. By contrast, 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.²⁴

71. 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).

72. All parties seem to accept that, as a matter of national constitutional law, the WRC has no such jurisdiction. If the WRC were to consider a complaint requiring the disapplication of a provision of national law, it would no longer be acting within the limits of its jurisdiction.

73. It should be stressed that, according to the referring court, the rule at issue in the main proceedings is one of *substantive* jurisdiction: it divides the jurisdiction in relation to first instance litigation in specific cases between the WRC and the High Court. This entails that, in the particular category of case in which a successful complaint pertaining to discrimination in the context of employment requires the disapplication of a provision of national law, the competent judicial body to consider such a case is the High Court.

74. 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.

75. No argument has been put forward in these proceedings that the WRC would not be able to provide an effective remedy, or to ensure full effectiveness of EU law, in cases in which it has jurisdiction (that is to say, cases where the complaint concerns, in essence, discrimination by an employer, and not by a legislative instrument). It simply does not have jurisdiction *at all* in cases where a successful complaint requires the disapplication of legislation.

²⁴ See, *ex multis*, judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188, paragraph 5; of 16 December 1976, *Comet*, 45/76, EU:C:1976:191, paragraphs 13 to 16; of 14 December 1995, *Peterbroeck*, C-312/93, EU:C:1995:437, paragraph 12 and the case-law cited; of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 39 and the case-law cited; and of 7 June 2007, *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraph 28 and the case-law cited.

76. That circumstance distinguishes in my view the present case from the case-law referred to above: the issue of whether the organ in question had jurisdiction to consider the case (or to take a decision on a particular matter) quite simply did not arise in those cases. Rather, the common denominator in all those cases is that the competent court or authority was limited, not in terms of jurisdiction, but in terms of the *tools* which it had at its disposal to give full effect to EU law.

77. Certainly, it would be tempting to draw parallels with *CIF*. As the Commission pointed out at the hearing, in *CIF* there would have been an alternative route for an individual seeking redress for a breach of EU competition rules: ordinary courts. Those courts would, in accordance with the Court's case-law, have been obliged to refrain from applying national legislation contrary to EU competition rules. Even though in theory such an alternative existed, the Court held that the Italian competition authority was under an obligation to refrain from applying national legislation in order to ensure full effectiveness of EU competition rules.

78. However, it is of particular importance here that the jurisdiction of the Italian competition authority to ensure the observance of EU competition rules was not limited by national law: quite the contrary, it was the (sole) organ vested with the power to ensure the observance of EU competition rules. Unlike in the present case, the substantive competence of that authority was not limited to a certain category of case. Bearing that in mind, the need to ensure the full effectiveness of EU law did indeed require in *CIF* that a national competition authority could leave national legislation unapplied: in the case in question, it would have been difficult, if not impossible, for that authority to ensure observance of the EU competition rules which it was to apply, if it did not have such power.

79. I find it difficult to identify a similar need here.

80. Once a complaint potentially requiring the disapplication of national legislation has been brought before the competent body (the High Court), that court can refrain from applying national legislation where deemed contrary to EU law, or to another superior norm, and provide any other remedy needed to cure the alleged discrimination. It is also crucial to stress that no alternative avenue exists for complainants, given that jurisdiction to hear complaints involving a challenge to the validity of legislation or requiring the disapplication of legislation is vested solely in the High Court.

81. That is why I also cannot accept the argument that the rule of jurisdiction prevents a body such as the WRC, which has the status of a 'court or tribunal' for the purposes of Article 267 TFEU,²⁵ from ensuring that effective protection is afforded to rights deriving from EU law.

82. A closer look reveals the weakness of that argument: the WRC could not make a preliminary reference on the substantive issue of whether a legislative instrument breaches Directive 2000/78 in the first place, because consideration of such cases falls outside its jurisdiction. By contrast, as the competent court to hear the case, the High Court could have requested a preliminary ruling on the compatibility of the age restriction measure.

83. A corollary argument was discussed at the hearing at some length. According to the WRC in particular, if the Court were to hold that the rule of jurisdiction is not contrary to EU law, the effectiveness of the preliminary ruling procedure under Article 267 TFEU would be compromised. The rule at issue could prevent the WRC from giving full effect to a judgment given by the Court holding that a provision of Irish legislation is contrary to Directive 2000/78.

²⁵ In a case falling within its jurisdiction, the Equality Tribunal has referred to the Court a case for a preliminary ruling. See judgment of 18 March 2014, Z., C-363/12, EU:C:2014:159.

84. In that regard, I note that that argument presupposes that the case falls within the jurisdiction of the WRC. However, none of the parties has been able to give a concrete example of a situation where both of the following elements are present: namely, on the one hand, that the case falls within the jurisdiction of the WRC because it does not involve a claim requiring disapplication of national law, and, on the other hand, a finding made by the Court, on the basis of a preliminary reference from the WRC, that a provision of national law is incompatible with Directive 2000/78.

85. The difficulties encountered by the parties in devising a concrete example of a situation where the rule of jurisdiction would compromise the effectiveness of the preliminary ruling procedure under Article 267 TFEU seem to have a rather simple explanation: such a situation can arise only if the WRC were either taken to have jurisdiction or if it were to exceed the limits of its jurisdiction and consider such a complaint.

(c) An interim conclusion

86. There may be sound reasons that warrant the division of jurisdiction in a specific field of law between different (judicial) bodies.

87. It is increasingly common that the resolution of conflicts arising from day-to-day life, such as consumer disputes and conflicts in the workplace, are ‘out-sourced’ from courts to specialised bodies with (limited) powers to mediate and/or adjudicate expediently such disputes.²⁶ It is equally commonplace that, as is the case of adjudication officers at the WRC, persons resolving conflicts in such bodies do not necessarily have a legal qualification. Arguably, such bodies are better placed than courts to provide low-cost, speedy and effective solutions to conflicts of that kind.

88. Nonetheless, not all disputes, in particular those raising important questions of principle with broader legal implications, are best dealt with by such bodies.

89. 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.²⁷ The Member States must, however, ensure that those rights are effectively protected in each case.²⁸ 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.

90. 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.

91. 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.

²⁶ These procedures fall under the broad umbrella-term of ‘alternative dispute resolution’ or ‘ADR’.

²⁷ See, for example, the case-law referred to in footnote 24 above and judgments of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 44, and of 8 September 2009, *Budějovický Budvar*, C-478/07, EU:C:2009:521, paragraph 88 and the case-law cited.

²⁸ See, for example, judgments of 9 July 1985, *Bozzetti*, 179/84, EU:C:1985:306, paragraph 17; of 18 January 1996, *SELM*, C-446/93, EU:C:1996:10, paragraph 32; and of 17 September 1997, *Dorsch Consult*, C-54/96, EU:C:1997:413, paragraph 40.

92. If the Court were to adhere strictly to the wording of the question referred, that would settle the matter. That is because, as the question makes clear, the referring court has already made determinations concerning the compatibility of the rule of jurisdiction with the requirements of equivalence and effectiveness: indeed, the question referred is itself premised on the finding that the rule of jurisdiction at issue does not infringe those principles.²⁹

93. It is of course true that, in the final analysis, it is for the national court to determine whether the impugned national procedural rule complies with the principles of equivalence and effectiveness. Nevertheless, given the attention afforded to those principles by the parties in both their written and oral submissions, I consider it necessary to address the main arguments put forward by the parties regarding the determinations made by the referring court, in particular as concerns the principle of effectiveness.

2. The division of jurisdiction between the WRC and the High Court: compliance with the principles of equivalence and effectiveness

94. According to the Court's rich case-law on the matter, 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 render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).³⁰

(a) Equivalence: the search for the correct comparator

95. In its judgment of 15 June 2017, the referring court considered that the rule of jurisdiction satisfies the requirements of the principle of equivalence because exactly the same regime would apply irrespective of whether the legal norm on the basis of which proceedings were brought derived from national law or EU law. In other words, the rule of jurisdiction at issue would also apply, and confer jurisdiction on the High Court, in an action based on purely national law.³¹

96. I find no fault in that assessment.

97. Specifically, the Court's case-law requires that the national rule at issue must be applied without distinction, that is, in the same way irrespective of whether the action is based on rights which individuals derive from EU law or is based on an infringement of national law, where the purpose and cause of action are similar.³² In other words, the assessment of equivalence proceeds in two steps. First, the correct comparator must be identified. Second, it must be assessed whether the action based on EU law is treated less favourably than the comparable action based on national law.

98. The first and third notice parties have suggested in this regard that the referring court has not chosen the most appropriate comparator. In their submission, a more appropriate comparator could be found in a complaint of discrimination based on a ground falling outside the scope of Directive 2000/78, or which does not involve the disapplication of national law.

²⁹ In the question referred for a preliminary ruling, it is stated somewhat ambiguously that the 'remedy provided in the courts' has been assessed as complying with the requirements of equivalence and effectiveness. Nevertheless, in the light of the judgment of 15 June 2017, it can be understood that the referring court has determined that the *procedure* before the High Court available for complainants, in the event that their case falls outside the jurisdiction of the WRC, complies with those principles.

³⁰ See, *inter alia*, the case-law referred to in footnote 27 above.

³¹ Judgment of 15 June 2017, paragraph 7.1.

³² Judgment of 27 June 2013, *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 39 and the case-law cited.

99. In that regard, it should first of all be recalled that it is for the referring court, which has direct knowledge of the detailed procedural rules applicable, to ascertain whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics.³³ It seems to me, therefore, that the Court may only exceptionally, where that assessment proves to be manifestly flawed, call into question a finding made by the referring court regarding the principle of equivalence.

100. There is no need for such a drastic measure here. On the contrary, it seems to me that the referring court has chosen the only reasonable comparator.

101. As the Court has consistently held, the principle of equivalence does not require Member States to extend their most favourable rules to all actions brought in a certain field of law.³⁴

102. As far as can be understood from their written submissions, the first and third notice parties suggest that all employment equality claims should be seen as comparable to each other, in essence because the proceedings before the WRC are less cumbersome and involve no financial risk for the complainant.

103. If that approach were adopted, it would in practice render the test of equivalence devoid of any real purpose. It would entail comparing the incomparable. As this case aptly illustrates, not all cases concerning a specific field of law are comparable: complaints of discrimination in the context of employment may differ in their purpose, cause of action and essential characteristics depending on the *source* of discrimination. 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.³⁵ 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.³⁶

104. In other words, the most appropriate comparator, as established by the referring court, must be an action brought before the High Court on the basis of purely national law.

(b) Effectiveness: the need to bring several actions to assert rights deriving from EU law

105. According to settled case-law, an assessment of effectiveness must take into account the role of the provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.³⁷

³³ See, for example, judgments of 29 October 2009, *Pontin*, C-63/08, EU:C:2009:666, paragraph 45 and the case-law cited, and of 12 February 2015, *Baczó and Vizsnyiczai*, C-567/13, EU:C:2015:88, paragraph 44 and the case-law cited.

³⁴ Judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 34 and the case-law cited. In any event, the question of what constitutes an ‘unfavourable’ procedural rule is, in the final analysis, a question of perspective. See, in that regard, judgment of 12 February 2015, *Baczó and Vizsnyiczai*, C-567/13, EU:C:2015:88, paragraphs 46 and 47 regarding the question of whether, on the one hand, the designation of hierarchically superior courts to deal with certain types of case and, on the other hand, the different cost regimes applicable in the procedures compared could be regarded as ‘unfavourable’.

³⁵ It is my understanding that these would typically involve, for example, a refusal to promote an employee due to one of the protected grounds of discrimination, a refusal to give a raise to an employee on a discriminatory basis or a refusal to accommodate the disability of an employee in the work-place and the tasks which that employee is required to perform.

³⁶ It can be seen from the case-file that the procedure before the WRC is inquisitorial, whereas the procedure before the High Court is adversarial. Moreover, the cost regimes are different: before the High Court, a complainant runs the risk of having costs awarded against him, while that is not the case before the WRC. That is because parties may be legally represented but the adjudication officer has no power to award costs. Moreover, adjudication officers have only limited powers to compel the attendance of witnesses and the production of documents and evidence is not given under oath. What is more, because only limited adjudicative powers have been conferred on the WRC by statute, an adjudication officer cannot join a party who is not named in the proceedings.

³⁷ See, inter alia, judgments of 14 December 1995, *Peterbroeck*, C-312/93, EU:C:1995:437, paragraph 14; of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 54; and of 8 September 2011, *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 92 and the case-law cited.

106. In its judgment of 15 June 2017, the referring court examined inter alia the powers of the High Court to obtain evidence, the costs regime, the adversarial nature of proceedings before that court, and the power of the High Court to provide any remedy required to vindicate rights guaranteed by EU law. After examining those features of the procedure before the High Court, the referring court came to the conclusion that the rule of jurisdiction satisfied the requirements of effectiveness.³⁸

107. The referring court did not, however, expressly examine the procedural disadvantages that may arise from the need to split a complaint between two bodies, an issue dealt with by the Court in *Impact*.³⁹ That judgment was discussed at length at the hearing. It seems to me therefore useful to provide some remarks on that issue.

108. *Impact* concerned a procedural rule which forced claimants to bring multiple actions in order to assert rights under Directive 1999/70.⁴⁰ More specifically, Irish law provided that claims regarding fixed-term work based on the legislation transposing the directive could be presented to the Rights Commissioner (a specialised court), whereas claims based directly on the directive (that is, claims which had arisen after the deadline for transposition but before Ireland had fulfilled its obligations) were to be initiated in the High Court.

109. In its judgment, the Court found at the outset that a claim based on infringement of the measure transposing the directive and a claim based directly on the directive are covered by the same form of action.⁴¹ Notwithstanding formal distinctions as to their legal basis, both claims, sought, in other words, the protection of the same rights deriving from EU law.⁴²

110. The Court then considered that, in circumstances where the Irish legislature had chosen to confer on a specialised court jurisdiction (albeit optional) to hear and determine actions based on the legislation transposing Directive 1999/70, it would be contrary to the principle of effectiveness to require claimants 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. That was in particular so if such an obligation was found by the national court to result in procedural disadvantages for the individuals concerned, in terms of, inter alia, cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from the relevant directive.⁴³

111. The Court's judgment in essence confirms and elaborates on a well-established line of case-law pertaining to the application of the principle of effectiveness. The Court took issue with the procedural disadvantages of having to bring different actions in a situation where the legislature had given jurisdiction to a specialised court to consider a claim based on the national legislation transposing the directive, but where that body could not also deal with a claim based on the directive.

112. It is important to read the Court's statement in its proper context. The statement regarding procedural disadvantages was made in the specific context of an obligation to bring multiple actions to assert, in essence, the same rights arising from EU law (but regarding different periods of time). Bearing that specific aspect of *Impact* in mind, 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.

38 Judgment of 15 June 2017, paragraphs 7.2 to 7.16.

39 Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 51.

40 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

41 Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 50.

42 Opinion of Advocate General Kokott in *Impact*, C-268/06, EU:C:2008:2, point 58.

43 Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 51.

113. 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.⁴⁴

114. 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.

115. 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.

116. Undoubtedly, the absence of an alternative avenue for complainants who consider themselves wronged by a legislative instrument explains why the referring court has not examined the rule of jurisdiction in the light of the Court's judgment in *Impact*.

117. Nonetheless, it does not seem impossible to envisage a situation in which a complainant brings a case alleging that he has been discriminated against (contrary to Directive 2000/78) not only on the basis of a legislative measure *but also* on the basis of an employer's practice. If, in such a situation, the WRC retains jurisdiction to hear some part of such a complaint, it seems to me that the statement of the Court in *Impact* must apply in full. If, instead, the High Court's jurisdiction trumps that of the WRC, meaning that the latter has no jurisdiction *at all* (and that the High Court is taken to have exclusive jurisdiction to deal with the entire complaint), the statement of the Court does not appear relevant.

118. That assessment is, however, not for this Court to undertake: determining the correct interpretation of the relevant national rules regarding the division of jurisdiction between the WRC and the High Court in such a context is a matter for the referring court.

119. On that basis I 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 (established under the Constitution) on the basis of the nature of the complaint made, is not precluded by EU law, provided that no concurrent jurisdiction may arise within the same complaint.

IV. Conclusion

120. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Supreme Court (Ireland) as follows:

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

⁴⁴ See, to that effect, judgment of 12 February 2015, *Baczó and Vizsnyiczai*, C-567/13, EU:C:2015:88, paragraphs 51 and 52 and the case-law cited.