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In this article, the authors examine recent Irish court decisions stating that the Tax Appeals Commission has authority to give full effect to EU law in disputes between taxpayers and Irish Revenue, thereby providing taxpayers with an avenue to enforce their EU law rights before an independent expert body specifically created to resolve tax disputes.

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In the recent cases of *An Taisce v. An Bord Pleanála*, [2020] IESC 39, and *Lee v. Revenue Commissioners*, [2021] IECA 18, the Irish Supreme Court and Court of Appeal respectively stated that the Irish Tax Appeals Commission (TAC) must give full effect to EU law. Those decisions applied the jurisprudence of the Court of Justice of the European Union, which means that when appropriate, the TAC can disapply domestic law that conflicts with or infringes EU law.[1]

That welcome development provides an avenue for taxpayers to fully enforce their rights under EU law before the independent expert body specifically created to resolve tax disputes.

The TAC

The TAC was established March 21, 2016, replacing the Irish Appeal Commissioners.[2] Like the U.K. First-Tier Tribunal, the TAC is a specialist tax tribunal responsible for adjudicating on first instance appeals against tax assessments and other decisions of Irish Revenue. Its determinations may be appealed to the courts established under the Constitution of Ireland only on points of law.[3]

Since its introduction, the TAC has continually demonstrated its expertise in the interpretation and application of Irish domestic tax law and has regularly referenced judgments of EU courts in its determinations. However, in a positive development for taxpayers, recent judgments have reinforced the supremacy of EU law and have increased the significance of EU law in cases heard before the TAC.

Supremacy of EU Law

Origins and Overview

The supremacy of EU law over the domestic law of member states is a long-established cornerstone of EU jurisprudence since the seminal decision in *Costa v. ENEL*, 6/64 (CJEU 1964), in which the CJEU held:

> The law stemming from the Treaty [of Rome], an independent source of law, could not because of its special and

[1] The TAC recently relied on that jurisprudence to uphold the disapplication of a provision of domestic stamp duty law found to be contrary to the EU capital duties directive (2008/7/EC). Determination-08TACD2021, Dec. 8, 2020. Irish Revenue is appealing.

[2] Section 3 of the Finance (Tax Appeals) Act 2015. As of January 1, 2020, the TAC had received 5,832 appeals, 3,084 of which were closed by the end of 2019. In 2019, 624 appeals with a total quantum of €851 million were scheduled for hearing. TAC, "Annual Report 2019," at 16, 56 (2019).

[3] Similarly, U.K. First-Tier Tribunal decisions may be appealed to the Upper Tribunal on points of law; see section 11 of the Tribunals, Courts and Enforcement Act 2007.

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> original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The acceptance of the doctrine of supremacy was facilitated in Ireland by a 1972 constitutional amendment.[4] That amendment, which allowed for Ireland's entry into the European Economic Community (as it then was), is now article 29.4.6 of the constitution and provides that domestic law cannot invalidate legislation necessitated by Ireland's membership in the EU.

The doctrine of supremacy has also been accepted and upheld by Irish courts. In *Meagher v. The Minister for Agriculture and Food*, [1994] 1 IR 329, the Supreme Court pointed out that it is well established that EU law takes precedence over domestic law, and that EU law prevails when the two conflict.

To preserve the supremacy of EU law, and to ensure that the rights it confers are fully vindicated, the CJEU has developed several legal mechanisms to allow for the enforcement of EU law before domestic courts and tribunals. The ability to enforce Community rights domestically is particularly important in the context of EU directives because they are designed for domestic transposition by member states.

The CJEU has developed a substantial legal toolkit that may be invoked to enforce EU law rights in a domestic forum. The two primary mechanisms are (1) direct effect and (2) indirect effect, or the duty of conforming interpretation.

Direct Effect/Disapplication

The doctrine of direct effect, which originated from the leading CJEU judgment in *Van Gend en Loos v. Netherlands Inland Revenue Administration*, C-26/62 (CJEU 1963), provides that when a provision of an EU directive is sufficiently clear, precise, and unconditional, it can be invoked before national courts against any organ or emanation of the state.

A consequence of the principle of supremacy is that national law cannot inhibit or restrict the enforcement of EU law. The CJEU later recognized that when domestic law conflicts with EU law, the domestic provision must be set aside to give immediate effect to EU law: "Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it."[5]

Indirect Effect/Conforming Interpretation

National authorities should disapply conflicting provisions of national law only when there is no available interpretation of national law that achieves compliance with EU law.[6] Thus, national courts and tribunals must give indirect effect to EU law by interpreting domestic law "in light of the wording and purpose" of the relevant directive to bring about the results envisaged under EU law.[7]

That interpretative obligation is significant, and national courts and tribunals must consider national law "as a whole to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive."[8] However, the duty to adopt a conforming interpretation is not absolute; it is limited when domestic law cannot be interpreted in a manner that is not *contra legem* — that is, it cannot be interpreted to produce a result that is contrary to the clear meaning of the relevant domestic law.[9]

The duty to adopt a conforming interpretation of domestic law has been upheld by Irish courts.[10] The U.K. First-Tier Tribunal has applied the concept on many occasions to ensure that national U.K. tax legislation can be rendered compatible

[4] Third Amendment of the Constitution of Ireland. The constitution has been amended several times to take account of amendments to the EU foundational treaties.

[5] *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, C-106/77 (CJEU 1978), at [21].

[6] *Dominguez v. Centre Informatique du Centre Ouest Atlantique*, C-282/10 (CJEU 2012), at [23].

[7] *Von Colson v. Land Nordrhein-Westfalen*, C-14/83 (CJEU 1984), at [26].

[8] *Pfeiffer and Others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, joined cases C-397/01, C-398/01, C-399/01, C-400/01, C-401/01, C-402/01, and C-403/01 (CJEU 2004), at [115].

[9] *Environmental Protection Agency v. Neiphin Trading Ltd.*, [2011] 2 IR 575.

[10] *See, e.g., Murphy v. Bord Telecom Eireann*, [1989] ILRM 53.

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with EU law, often reading additional words into the domestic provision to achieve conformity.[11] The Irish TAC recently adopted a similar approach to resolve a conflict between a provision of domestic Irish stamp duty law that was found to be contrary to the EU capital duties directive.[12]

EU Law Enforcement by Administrative Bodies

WRC

The CJEU has continually emphasized that national administrative bodies and tribunals are bound to give full effect to EU law. In *INASTI*,[13] it held that a national social insurance agency had to disapply conflicting laws to give effect to the supremacy of EU law, and in *CIF* said that "the duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities."[14]

Irish superior courts have traditionally relied on the principle of national procedural autonomy to justify a narrower approach to the jurisdiction of administrative bodies and tribunals to disapply domestic law. In *WRC*, the Irish Supreme Court held that as a matter of Irish law the jurisdiction to apply EU law in priority to domestic law was exercisable only by the superior courts — that is, High Court, Court of Appeal, and Supreme Court.[15] However, the Supreme Court accepted that there was a lack of clarity in whether EU law obliged national tribunals, such as the one at issue in the case (the Workplace Relations Commission), to set aside conflicting provisions of national law. It therefore referred a question to the CJEU for guidance on whether as a matter of EU law, the Workplace Relations Commission was obliged to disapply national law when faced with a conflicting EU provision.

The CJEU confirmed that EU law obliged a statutory body such as the Workplace Relations Commission to disapply conflicting provisions of national law:

> The duty to disapply national legislation that is contrary to EU law is owed not only by national courts, *but also by all organs of the State — including administrative authorities*. . . . It follows that the principle of primacy of EU law requires *not only the courts but all the bodies of the Member States* to give full effect to EU rules.[16] [Emphasis added.]

Thus, the CJEU confirmed that when necessary, the Workplace Relations Commission had to set aside provisions of Irish domestic law, and that national constitutional or procedural rules should not prevent those types of agencies from exercising the power of disapplication. "This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such caselaw by legislative or other constitutional means," the Court said.

Thus, consistent with its previous statements on the role of domestic tribunals and administrative bodies in enforcing EU law, the CJEU confirmed that the obligation on national bodies to uphold the principle of supremacy applies to nonjudicial bodies.

Post-*WRC* Developments

The CJEU has continued to reiterate the obligation on national administrative authorities to give immediate effect to EU law over conflicting provisions of national law.

Relying on *WRC*, it held that Spanish tax tribunals were required to set aside national law that was incompatible with EU law, even though the Spanish tax tribunals did not qualify as a court or tribunal that could make a preliminary reference to the CJEU.[17] The CJEU said the obligation to ensure that EU law is applied and to disapply national provisions that appear contrary to EU law falls on all competent national authorities, not only judicial authorities.

[11] *See, e.g., Gifford v. HM Revenue & Customs*, [2019] UKFTT 410 (TC).

[12] *Supra* note 1.

[13] *Larsy v. Institut National d'Assurances Socials pour Travailleurs Indépendants (INASTI)*, C-118/00 (CJEU 2001).

[14] *Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato*, C-198/01 (CJEU 2003), at [49].

[15] *Minister for Justice, Equality and Law Reform and Commissioner of An Garda Siochána v. Workplace Relations Commission (WRC)*, [2017] IESC 43.

[16] *WRC*, C-378/17 (CJEU 2019), at [38]-[39].

[17] *Banco de Santander SA*, C-274/14 (CJEU 2020), at [78].

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That decision demonstrates the scope of the obligation on national nonjudicial bodies and the CJEU's ongoing focus on ensuring that EU law is applied in a manner consistent with the principle of supremacy across all the member states.

Recent Irish Superior Court Judgments

An Taisce

While the CJEU's judgment in *WRC* was a strong message of support for the jurisdiction of national administrative bodies and tribunals, commentators awaited the response of Irish courts to assess the decision's full import under Irish law.

In an early indication of the case's impact, the Irish High Court in *Sweetman v. An Bord Pleanála*, [2020] IEHC 39, relied on *WRC* to hold that a body such as that responsible for appeals regarding planning permission was subject to the obligation of disapplication if there is a conflict between EU law and national law.[18]

Following the application of *WRC* by lower courts and domestic tribunals it was somewhat unsurprising that the Irish Supreme Court took the opportunity to comment on its impact. In *An Taisce*, the Court indicated that bodies such as that at issue in the case must disapply national law that is inconsistent with EU law.

Importantly for taxpayers, the Court specifically named the TAC as a statutory body covered by *WRC*, thus accepting *WRC*'s relevance in determining the scope of the TAC's jurisdiction. However, because the Supreme Court did not find it necessary to determine whether the agency at issue was obliged to apply EU law over national law, its comments regarding *WRC* are dicta. Even so, being authoritative statements from Ireland's highest judicial body, the comments must be afforded a high level of respect.

Lee

The Supreme Court in *An Taisce* recognized that giving statutory bodies the ability to disapply national law could lead to some administrative challenges. But the Court of Appeal recently confirmed in *Lee* that nonjudicial bodies must set aside conflicting national law — and did so in a decision involving the jurisdiction of the Appeal Commissioners, the TAC's predecessor.

The court concluded that the Appeal Commissioner's jurisdiction was limited to determining whether an assessment to tax correctly charges the taxpayer in accordance with the relevant provisions of Irish tax law. Importantly, the Court of Appeal said that in addition to examining domestic tax provisions, the Appeal Commissioners were necessarily required to consider relevant provisions of EU law when exercising its statutory function. It stated:

> The questions of law thus arising before the Commissioners may sometimes be complex, and indeed may on occasion (and in particular when issues of European law arise) stray outside the direct interpretation of the tax code. However, they are always issues that come back to the question of whether there is a charge to tax properly applied in accordance with the relevant statutory provisions and, if so, its amount.

Although EU law was not directly implicated in *Lee*, making the court's comments dicta, the case is a strong endorsement of the now TAC's obligation to apply EU law over national law when necessary. The Court of Appeal said *WRC* applies a principle of EU law that arises when a national tribunal must give supremacy to EU law in determining a dispute before it. Thus:

> If a taxpayer wishes to contend that the application of a particular provision of the TCA [Taxes Consolidation Act] breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, *to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated*. [Emphasis added.]

[18] The Irish International Protection Appeals Tribunal has also been willing to disapply conflicting provisions of national law (see Determination, Dec. 21, 2018), and the Supreme Court has indicated that the concept applies with equal force to the Circuit Court, a court with limited jurisdiction (see *Dún Laoghaire Rathdown County Council v. West Wood Club Ltd.*, [2019] IESC 43).

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Consistent with the CJEU case law discussed above, the Court of Appeal grounds the obligation to disapply on the principle of supremacy and, in a statement reflective of the CJEU's perspective, finds that obligation is derived "from the mandates of European law."

Importantly, *Lee* also demonstrates the options available to a taxpayer before the TAC. The Court of Appeal recognized that the agency was required to "disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated." That statement shows that direct effect and disapplication are only part of the toolkit available to taxpayers, and the possibility of resolving a tax dispute via conforming interpretation should be considered.

In an indication of the importance of this line of case law, the TAC recently applied *WRC* and the subsequent treatment in *An Taisce* to uphold its jurisdiction to disapply a provision of Irish stamp duty legislation found to be contrary to the EU capital duties directive.[19]

What the Cases Mean for Taxpayers

The impact of EU directives on Irish tax law — and indeed tax regimes across the EU — is significant and continues to grow. Direct and indirect effect are important protections for taxpayers to ensure that the rights in EU tax directives can be enforced domestically, even if a directive has been transposed into domestic law incorrectly or not at all (for example, the capital duties directive in Ireland).[20]

In light of *WRC*, *An Taisce*, and *Lee*, it appears that taxpayers can rely on the doctrines of direct and indirect effect to challenge assessments and other decisions of Irish Revenue before the TAC without having to institute proceedings before the High Court. That ability is significant for several reasons, including:

- The TAC is a special independent statutory body established to resolve tax disputes.
- A taxpayer is entitled to elect for proceedings before the TAC to be held in camera, and if proceedings are private, the TAC's determination is published in an anonymized form. In contrast, tax disputes in the High Court are not generally private and published decisions are not generally anonymized.
- TAC proceedings are intended to be less formal than proceedings in the High Court and are therefore generally less costly.
- Each party to a dispute before the TAC is liable for its own costs. In contrast, legal costs are generally recoverable against the unsuccessful party in High Court proceedings.
- The TAC process includes an active case management system that seeks to facilitate pre-hearing resolution wherever possible.
- The parties in a dispute before the TAC can seek to have the matter expedited. To expedite a tax case in the High Court, it is generally necessary to apply to admit the matter to the commercial division, which requires a fee of €5,000.

Taxpayers in the United Kingdom have been relying directly on EU law in cases argued before the U.K. First-Tier Tribunal for many years[21] (although Brexit might now impair their ability to do so). Thus, it is a welcome development that Irish taxpayers should now also be able to vindicate their EU law rights before Ireland's equivalent tribunal for resolving tax cases. ■

[19] *Supra* note 1.

[20] *Id.*

[21] *See, e.g., HSBC Holdings PLC and Another v. Revenue and Customs Commissioners*, [2012] SFTD 913.

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