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CENTENARY OF THE ESTABLISHMENT OF IRELAND'S INDEPENDENT COURT SYSTEM:

THE IMPACT OF IRISH PRELIMINARY REFERENCES ON THE CJEU AND EU LAW

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Introduction

I am honoured to be here at the Supreme Court celebrating a key moment in Irish legal history, and indeed in Irish history generally. Today we commemorate 100 years of the current Irish court system, established in 1924, [1] which endured after the adoption of the 1937 Constitution, and which remains the judicial framework of modern Ireland, with the addition of the Court of Appeal in 2014.

2024 also marks just over 50 years of Irish EU membership, which was cause for celebration last year. For half of a century, Irish courts, in cooperation with the Court of Justice, have played a vital role in guaranteeing that in the interpretation and application of the EU Treaties in Ireland, the law is observed. To date, Irish courts have made over 150 references, many of which have contributed

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[1] Courts of Justice Act 1924.

tremendously to the development of EU law. Suffice it to mention cases such as *Burgoa*,[2] *Campus Oil*,[3] *Grogan*,[4] *Masterfoods*,[5] *Impact*,[6] *Metock*,[7] *Digital Rights Ireland*,[8] *Schrems*,[9] *Pringle*,[10] and *Governor of Cloverhill Prison*,[11] to name just a few.

The EU judicial network would be incomplete without our Irish *caírde*, our friends. Ireland's common law tradition has positively influenced the Court of Justice's case law. Building the law following a 'stone-by-stone' approach, distinguishing between lines of case law, and giving value to precedent are all features of the common law tradition that one may find in the case law of the Court of Justice.

It is precisely to that positive influence that I shall devote my contribution to today's celebrations. To that end, I shall explore three

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[2] Judgment of 14 October 1980, *Burgoa*, 812/79, EU:C:1980:231.

[3] Judgment of 10 July 1984, *Campus Oil and Others*, 72/83, EU:C:1984:256.

[4] Judgment of 4 October 1991, *Society for the Protection of Unborn Children Ireland*, C-159/90, EU:C:1991:378.

[5] Judgment of 14 December 2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689.

[6] Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223.

[7] Judgment of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449.

[8] Judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238.

[9] Judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650.

[10] Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756.

[11] Judgment of 16 November 2021, *Governor of Cloverhill Prison and Others*, C-479/21 PPU, EU:C:2021:929.

distinctive features of the judicial dialogue between Irish courts and the Court of Justice. First, that dialogue shows that Irish courts have often been pioneers in opening new lines of case law. Second, whilst being respectful of precedent, Irish courts have asked the Court of Justice to revisit its existing case law. It is through judicial dialogue with Irish courts that the Court of Justice has refined or reconsidered its case law. Third and last, they have contributed to clarifying the law in moments of crisis. This shows, in my view, that Irish courts are firm believers in European integration *through law* and *in keeping with the rule of law*.

I. Pioneer role

The Court of Justice builds its case law in keeping with the common law tradition of interpreting the law progressively, one case at a time or, as I call it in my extrajudicial writings, following a 'stone by stone' approach.[12]

In some areas of EU law, Irish courts laid the foundation stone of a new line of case law. Two areas come to mind as paradigmatic examples of that pioneer role, namely the right to data protection in the context of mass surveillance of electronic communications, and the application of the principle of mutual trust in the area of judicial cooperation in criminal matters.

[12] K. Lenaerts, 'EU citizenship and the European Court of Justice's "stone-by-stone" approach' (2015) *International Comparative Jurisprudence* 1.

As to the first example, it is safe to say that all started with ***Digital Rights Ireland***.[13] It was the 'foundation stone' of that line of case law, whose latest brick was laid last month when the Court of Justice, sitting in Full Court, delivered the seminal judgment in the *Quadrature du Net II* case.[14]

In *Digital Rights Ireland*, the Court of Justice put in place the first signposts that courts must follow when called upon to weigh up the competing imperatives of the fundamental rights to privacy and data protection, and the fight against serious crime. Notably, it found – and I quote – that '[so] far as concerns the right to respect for private life, the protection of that fundamental right requires ... that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary'.[15] That finding, which concerns the proportionality test to be applied by national courts, consistently appears in subsequent case law. For example, in ***G.D. v Commissioner of An Gárda Síochána ('on guard-a shee-uh-kaw-nuh')***,[16] a reference made by the Irish Supreme Court, the Court of

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[13] Judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238.

[14] Judgment of 30 April 2024, *La Quadrature du Net and Others (Personal data and action to combat counterfeiting)*, C-470/21, EU:C:2024:370.

[15] Judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, para. 52.

[16] Judgment of 5 April 2022, *Commissioner of An Garda Síochána and Others*, C-140/20, EU:C:2022:258.

Justice once more applied the same proportionality test and did so again recently in *Quadrature du Net II*.

The *Schrems* saga is another good example of Irish courts being pioneers in developing a new line of case law involving the right to data protection.[17] The judgment of the Court in *Schrems I* is important not only because of what was at stake, namely the transfer of personal data from the EU to the US, but also because the Court of Justice declared, for the first time, a Commission Decision invalid on the ground that it violated the very essence of the rights to privacy and data protection, as well as that of the right to effective judicial protection. The violation was so serious and comprehensive –namely, allowing the NSA to have access to all data transferred and not providing any judicial remedies against that access – that there was no need to carry out a proportionality assessment.

That pioneer role can also be found in the case law concerning the execution of a European Arrest Warrant (an 'EAW'), in which the Court of Justice had to find the right balance between the principle of mutual trust and the right to an independent court. Until the judgment in *Celmer*,[18] which involved a reference made by the Irish High Court, the Court had been invited twice to balance the principle of mutual trust against a fundamental right, holding that in exceptional

[17] Judgments of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, and of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559.

[18] Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586.

circumstances limitations could be imposed on that principle. In *N.S.*,[19] those exceptional circumstances involved systemic deficiencies in the Greek asylum system that could give rise to a serious risk of violating Article 4 of the Charter, which prohibits torture and inhuman or degrading treatment or punishment. In *Aranyosi and Căldăraru*, those exceptional circumstances involved systemic or generalised deficiencies in the prison system of the Member State that issued the EAW in question, which could give rise to a serious risk of violating Article 4 of the Charter.[20] In that judgment, the Court of Justice put forward a two-step assessment that the national court of the executing Member State had to carry out before denying the execution of the EAW in question. The first step focuses on the situation of the prison system of the Member State concerned as a whole, whilst the second step looks at the circumstances of the case at hand.

It is worth recalling that, in the context of the second step, the Court of Justice referred extensively to its previous findings in *Lanigan*,[21] another reference made by the Irish High Court, in which the Court of Justice emphasised the importance of dialogue and cooperation between the judicial authorities of both the issuing and the executing Member States. Drawing on that previous judgment, the Court posited

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[19] Judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865.

[20] Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198.

[21] Judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474.

in *Aranyosi and Căldăraru* that the executing judicial authority must offer the opportunity to the issuing judicial authority to regain that trust, before denying the execution of the EAW in question.

Two important questions arose in the *Celmer* case. First, whether a serious risk of violating the right to an independent court, enshrined in Article 47 of the Charter, could qualify as 'exceptional circumstances'. Second, whether the two-step assessment remained relevant where the justice system of the issuing Member State suffered from systemic deficiencies. The Court of Justice replied in the affirmative to those two questions. In so doing, it sought to find the right balance between, on the one hand, protecting judicial independence as an essential component of the right to a fair trial and, on the other hand, respecting the prerogatives of the EU political institutions under Article 7 TEU.

II. Inviting Reconsideration

As is the case in the common law tradition, the Court of Justice shows the utmost respect to precedent. The Court is fully aware of the fact that its own decisions must only be revisited exceptionally, since otherwise it may lose its authority, credibility and legitimacy.

That said, the preliminary ruling mechanism is based on a constructive dialogue between national courts and the Court of Justice. As part of that dialogue, national courts must be able to invite the Court of Justice to depart from its existing case law, either

because their own experience has shown that the case law is difficult to apply; that it raises more questions than it answers, or that it is inconsistent with other lines of case law or with legal principles of fundamental importance.

It is important for national courts to rely on the preliminary ruling mechanism, in order to draw these issues to the attention of the Court of Justice. In my view, it is through constructive criticism and cooperation that justice at EU level can improve.

The judgment of the Court in *Metock* constitutes an excellent example in that regard. In that case, the question was whether a third-country national could benefit from a derived right of residence in the host Member State as a spouse of an EU citizen, despite the fact that this third country national was not lawfully resident in another Member State. In *Akrich* and *Jia*,[22] the Court replied in the negative, holding that the host Member State enjoyed discretion in imposing the condition of prior lawful residence in another Member State. However, in *Metock*, which concerned a reference made by the Irish High Court, the Court of Justice revisited its existing case law. It held – and I quote – 'that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State'.[23] Indeed, the Court reasoned that if

[22] Judgments of 23 September 2003, *Akrich*, C-109/01, EU:C:2003:491, and of 9 January 2007, *Jia*, C-1/05, EU:C:2007:1.

[23] Judgment of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449, para. 58.

Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed. That was so regardless of the existence or absence of prior lawful residence in another Member State.

Metock serves to illustrate that the Court is open to change its mind through dialogue, and to develop its case law as a living instrument that evolves and tries to cope with an ever-changing world.

III. Dialogue in Times of Crisis

Last but not least, Irish courts do not shy away in times of crisis when confronted with difficult cases involving highly politically charged questions that attract the attention of the media. I am referring here to the seminal judgment of the Court of Justice in the *Pringle* case.

Pringle is important at two levels. At the judicial level, *Pringle* was decided by the Full Court, which highlights the complexity and difficulty of the questions referred by the Irish Supreme Court. On a personal note, I was *juge rapporteur* in that case and I have to say that it was not an easy task, because *Pringle* was also dealt with under the expedited procedure. Most importantly, at the constitutional level, the Court of Justice was asked to examine the compatibility of a new form of integration, namely the ESM Treaty, with the Founding Treaties and, in particular, with the simplified procedure to modify

the Treaties (Article 48 TEU), the principle of conferral and the no-bail out clause.

In doing so, the Court laid down the requirements that international agreements entered into by Member States whose currency is the euro must meet, in order to provide those Member States with financial assistance in times of financial hardship, whilst respecting the EU *acquis* and, in particular, the competences of the EU in matters relating to EMU.

Concluding remarks

Dear friends,

Writing extrajudicially in 1987, Mr Justice Brian Walsh noted that when applying EU law, national judges 'in effect ceas[e] to be… national judge[s] and… become Union judges.' [24] The Irish courts embody this statement. Over the course of the last 50 years, the courts of the Irish judiciary have been loyal partners in the preliminary reference procedure.

Not only have Irish courts taken the initiative in referring questions that have fundamentally shaped how the Court interprets EU law, they have laid down the 'foundation stone' for new lines of case law, they

[24] Brian Walsh, 'Reflections on the Effects of Membership of the European Communities in Irish Law' in *Du droit international au droit de l'intégration: Liber amicorum Pierre Pescatore* (Nomos 1987), at p. 807.

have asked the Court to reconsider its existing case law and have not shied away in times of crisis.

The dialogue between Irish courts and the Court of Justice is, in my view, a shining example of European integration moving forward *through law* and *in keeping with the rule of law*.

Thank you very much

Go raibh maith agaibh