THE HIGH COURT

[2021] IEHC 647

2016/867 JR

BETWEEN

PEADAR MACFHLANNCHADHA

APPLICANT

V.

MINISTER FOR AGRICULTURE FOOD AND THE MARINE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

JUDGMENT OF MS. JUSTICE NÍ RAIFEARTAIGH DELIVERED ON THE 11TH DAY OF JUNE, 2021.

Nature of the Case

1. This case concerns the question of whether Ireland failed to correctly transpose an EU Directive concerning the written information to be provided by the manufacturers of veterinary products on and with those products. The Directive requires that certain specific product information "*shall appear"* on the packaging and in the accompanying leaflet "*in the language or languages* of the country in which they are placed on the market". The applicant is a native Irish speaker from the Connemara Gaeltacht who uses veterinary products for his pet dog. His case is that the Directive requires the relevant information be provided in both Irish and English when the product is sold in Ireland because both languages are "*the languages of the country".* However, the Irish transposing regulations permit the information to be provided in English only. Therefore, the key question in the case is whether the Directive has direct effect, within the meaning of that concept in EU law, insofar as it concerns the language in which the relevant product information is to be provided. If it has direct effect in that particular, the Irish regulation fails to correctly transpose the Directive to that extent.

2. As the case progressed, a further question arose as to the court's discretion in the matter of the granting of reliefs in circumstances where it reaches a conclusion that an EU Directive has not been correctly transposed. This question arises in part because of the fact that the EU has, since the original hearing in this case, introduced a new Directive giving Member States a clear choice in the matter of the language in which the information is to be published, which will come into effect in January 2022. In those circumstances, the respondent argued that the granting of the reliefs sought would be futile. By the time the product manufacturers would have changed their practice (even assuming they would do so) in response to a change in the Irish Regulation, the new EU legal regime would have come into force. I then referred to the CJEU questions about whether the Court was entitled to exercise discretion to refuse relief in those circumstances and judgment was delivered by that court on the 17 March 2021.

Part 1: The factual and legal context

Factual Background

3. The applicant is a native Irish speaker who lives in the Connemara Gaeltacht. He speaks Irish at home and at work. He conducts all of his official business in Irish as far as he can. Native Irish speakers are more comfortable in their own language than in English, a fact which is often not fully appreciated by the rest of the Irish population. He has a pet dog

and requires veterinary medicinal products for the dog. His complaint is that the information accompanying veterinary medicinal products available in Ireland is written exclusively in the English language. The essence of his claim in these proceedings is that Ireland is in breach of EU law in failing to properly transpose EU Directive 2001/82 which, he says, requires that the information accompanying veterinary products be provided in both of the official languages of Ireland, namely the Irish and English languages.

The Reliefs Sought

4. The applicant seeks the following reliefs: (i) a declaration that the applicable national legislation does not transpose Title V (Articles 58 to 61) of Directive 2001/82 correctly or at all; (ii) a declaration that Irish law must ensure that the appropriate particulars on the package leaflets and packaging in question in Title V of Directive 2001/82 are in the official languages of the State, that is to say, in both Irish and English, on veterinary medicinal products placed on the market in the State; and (iii) a declaration that the Irish authorities must amend national law to ensure a correct transposition of the provisions of Title V of Directive 2001/82.

The current Irish Regulation

5. Before turning to the detailed provisions of the EU Directive, I will deal briefly here with the Irish regulation in its relevant aspects. Directive 2001/82 was transposed into Irish law by the European Communities (Animal Remedies) Regulations 2007 (S.I. No. 144/2007), and subsequently the European Communities (Animal Remedies) (No.2) Regulations 2007 (S.I. No 786/2007). The latter regulation provides that the information which must appear on outer packaging, immediate packaging and the package leaflet for veterinary medicinal products '**shall be in English or Irish'**. Thus it gives a choice in the matter of language.

The EU legislation

Directive 2001/82

6. The Directive in issue in these proceedings is Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products (OJ 2001 L 311, p. 1), as amended by Directive 2004/28/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136, p. 58). It will be referred to in this judgment simply as Directive 2001/82.

7. Title V of Directive 2001/82 contains the relevant provisions, namely Articles 58, 59 and 61. Article 58(1) and (4) of that Directive provide as follows:

> '1. Except in the case of the medicinal products referred to in Article 17(1), the competent authority shall approve the immediate packaging and outer packaging of veterinary medicinal products. Packaging shall bear the following information, which shall conform with the particulars and documents provided pursuant to Articles 12 to 13d and the summary of product characteristics, and shall appear in legible characters:

(a) The name of the medicinal product, followed by its strength and pharmaceutical form; The common name shall appear if the product contains only one active substance and its name is an invented name.
(b) A statement of the active substances expressed qualitatively and quantitatively per unit or according to the form of administration for a particular volume or weight, using the common names;
(c) Manufacturer's batch number;
(d) Marketing authorisation number;
(e) Name or corporate name and permanent address or registered place of business of the marketing authorisation holder and, where appropriate, of the representative designated by the marketing authorisation holder;
(f) The species of animal for which the veterinary medicinal product is intended; the method and, if necessary, the route of administration. Space shall be provided for the prescribed dose to be indicated;
(g) The withdrawal period for veterinary medicinal products to be administered to food-producing species, for all the species concerned and for the various foodstuffs concerned (meat and offal, eggs, milk, honey), including those for which the withdrawal period is zero;
(h) Expiry date, in plain language;
(i) Special storage precautions, if any;
(j) Specific precautions relating to the disposal of unused medicinal products or waste derived from veterinary medicinal products, where appropriate, as well as a reference to any appropriate collection system in place;
(k) Particulars required to be indicated pursuant to Article 26(1), if any;
(l) The words 'For animal treatment only' or, in the case of the medicinal products referred to in Article 67, the words 'For animal treatment only – to be supplied only on veterinary prescription'.

[…]

4. 'The particulars mentioned in paragraph 1(f) to (l) shall appear on the outer package and on the container of the medicinal products in the language or languages of the country in which they are placed on the market.' (emphasis added)

8. Article 59 of Directive 2001/82 provides:

'1. As regards ampoules, the particulars listed in the first paragraph of Article 58(1) shall be given on the outer package. On the immediate packaging, however, only the following particulars shall be necessary:

- name of veterinary medicinal product,
- quantity of the active substances,
- route of administration,
- manufacturer's batch number,
- date of expiry,

- the words 'For animal treatment only'.

2. As regards small immediate packaging containing a single dose, other than ampoules, on which it is impossible to give the particulars mentioned in paragraph 1, the requirements of Article 58(1), (2) and (3) shall apply only to the outer package.

3. The particulars mentioned in the third and sixth indents of paragraph **1 shall appear on the outer package and on the immediate packaging of the medicinal products in the language or languages of the country in which they are placed on the market**.' [emphasis added]

9. Article 61(1) of that directive provides:

'The inclusion of a package leaflet in the packaging of veterinary medicinal products shall be obligatory unless all the information required by this Article can be conveyed on the immediate packaging and the outer packaging. Member States shall take all appropriate measures to ensure that the package leaflet relates solely to the veterinary medicinal product with which it is included. The package leaflet **shall be written** in terms that are comprehensible to the general public **and in the official language or languages of the Member State** in which the medicinal product is marketed.'

The information to be included in that leaflet is set out in Article 61(2)(a) to (i) of that directive.

The impending change in the EU legal regime: Regulation (EU) 2019/6

10. A new EU Regulation, replacing Directive 2001/82, was introduced after the hearing of this case. This is Regulation (EU) 2019/6. It was introduced following an extensive EU-wide consultation process. It repeals Directive 2001/82 (see article 149) and will come into force on the 28 January 2022 (see article 160). For present purposes, what is noteworthy is that there has been a change in the provisions concerning the language in which the relevant information must be published. The Regulation clearly and explicitly gives the Member States which have more than one official language a choice as to what language may be used on the labelling and packaging, rather than requiring it to be in both official languages. However, it has not yet come into force and we are still currently bound by the position under Directive 2001/82.

11. Recitals 52, 53 and 96 of Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC (2019) (OJ 2019 L 4, p. 43) read:

'(52) In order to reduce administrative burden and maximise the availability of veterinary medicinal products in the Member States, simplified rules should be laid down as to how their packaging and labelling are to be presented. The textual information provided should be reduced …. Care should be taken so that those rules do not jeopardise public or animal health or environmental safety.

(53) In addition, Member States should be able to choose the language of the text used in the summary of product characteristics, labelling and package leaflet of veterinary medicinal products authorised in their territory.

[…]

(96) Taking into account the main changes that should be made to the existing rules, and aiming to improve the functioning of the internal market, a regulation is the appropriate legal instrument to replace Directive 2001/82/EC in order to lay down clear, detailed and directly applicable rules. Moreover, a regulation ensures that legal requirements are implemented at the same time and in a harmonised manner throughout the Union.'

12. Article 7 of that regulation, entitled 'Languages', provides:

'1. The language or languages of the summary of the product characteristics and the information on the labelling and on the package leaflet shall, unless the Member State determines otherwise, be an *official language or* languages of the Member State where the veterinary medicinal product is made available on the market. (emphasis added)

2. Veterinary medicinal products may be labelled in several languages.'

PART 2: The proceedings in the High Court prior to the reference to the CJEU

The submissions of the parties

13. The applicant submitted that Directive 2001/82 had not been properly transposed into Irish law because the Irish Regulation permitted the packaging and leaflet information related to veterinary products to be in English only. He submitted that the language of the Directive requiring the information to be made available in both languages of the State was clear, unambiguous and unconditional and therefore fulfilled the criteria under EU law for having direct effect. In this regard, the applicant relied upon such well-known authorities as *Van Gend en Loos* (C- 26/62), *Van Duyn v. Home Office* (C-41/74), and *Ratti* (C-148/78). The applicant also relied upon the principle of the supremacy of EU law; *Costa v. ENEL* (C-6/64); *Simmenthal* (C-106/77); *R (Factortame Ltd) v Secretary of State for Transport* (C-213/89); as well as the principle of effective legal protection in Article 19 of the TEU and the righ to an effective remedy pursuant to Article 47 of the Charter. The applicant relied upon Article 3 of the TEU (which guarantees that the Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced"), and Articles 21 and 22 of the Charter of Fundamental Rights concerning language rights. Article 21 prohibits discrimination on grounds of language (among other things), while Article 22 guarantees respect for cultural, religious and linguistic diversity.

14. The respondent submitted that the applicant lacked *locus standi* to challenge the Directive because it lacked direct effect and that in any event Directive 2001/82 had been properly transposed. It was submitted that the text of Directive 2001/82 was ambiguous as to

whether or not there is a requirement that all the official languages must be used for the information appearing on the packaging and labelling of veterinary medicinal products where there are several official languages in a Member State. Accordingly, Ireland's decision to implement the Directive in a manner which permitted the use of only one of its official languages fell within its margin of discretion in transposing the directive.

15. It was also submitted that the express purpose of Directive 2001/82 was to ensure that users of veterinary products could access intelligible information about those products and that the Directive did not concern cultural or linguistic rights as such. Rights of the latter kind would only be infringed if an applicant were in possession of packaging or labelling which he could not fully understand, which, it was submitted, was not the case here.

16. The respondent also laid considerable emphasis upon the practical consequences of a conclusion that the Directive had not been properly transposed and/or that packaging for veterinary products must be in both Irish and English. It was submitted that if it were the situation that manufacturers were obliged to produce bilingual (Irish and English) instructions, this would entail a grave risk that certain manufacturers would simply withdraw from the Irish market because of its small size. Such an event would ultimately be highly detrimental to the agricultural sector. It was pointed out that the Directive in question was not limited to veterinary products for pets alone but applied across the entire veterinary product sector, including for example, the equine industry. It was submitted that if the applicant were to succeed in his arguments, there could be serious consequences for animal health and, indirectly, to public health as well as severe impact on the economy by reason of potential damage to the entire sector of agribusiness. Attention was drawn to research of the European Commission which showed that 34% of the costs of making a veterinary product available in a State arose from the packaging and labelling costs. Ireland, a small country, should not be placed at a disadvantage by reason of a mandatory requirement to have the packaging and labelling information in both national languages.

The Court's ruling on the question of direct effect

17. Article 288 TFEU provides:

> "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

18. Craig & de Burca, *EU Law: Text, Cases and Materials* observe with regard to the authorities on the principle of direct effect such as *Van Duyn* and *Ratti:*

> "The effect of these rulings was that directives were capable in principle of having direct effect. The key issue was whether the particular provision of the directive was sufficiently clear, precise and unconditional to be capable of being applied directly by a national court. The fact that Member States can choose the means of achieving the result required by a directive does not preclude direct effect where

the content of the individual right can be determined with sufficient precision from the directive.

[…]

In most, though not all, later cases the Court has ruled that the existence of discretion would not prevent a directive from being directly relied upon by an individual. Hence, the individual can rely on a directive where a member state has fully exercised its discretion on implementation; where the state has chosen to exercise or not to exercise a particular discretionary option; where a clear and precise obligation can be separated out from other parts of a directive; or where a clear obligation of result can be identified. Furthermore, even where the provisions of a directive are insufficiently precise to have direct effect in terms of specifying a particular outcome, they may entitle individuals to obtain judicial review to determine whether the state has remained within the parameters set by the directive."

19. Although I am keenly aware of the potentially serious adverse potential consequences of this finding, the relevant provisions of Directive 2001/82 appear to me to be clear, unambiguous and unconditional in their terms. Article 58(4) provides: "The particulars mentioned in paragraph 1(f) to (l) *shall appear* on the outer package and on the container of the medicinal products *in the language or languages of the country* in which they are placed on the market." Article 59(3) provides: " The particulars mentioned in the third and sixth indents of paragraph 1 *shall appear on the outer package and on the immediate packaging of the medicinal products in the language or languages of the country in which they are placed on the market.'* Article 61(1) provides: "The package leaflet *shall be written in terms that are comprehensible to the general public and in the official language or languages of the Member State* in which the medicinal product is marketed." On three separate occasions within those provisions, mandatory language is used ("shall") in connection with the phrase "language or languages" (with the addition of the word "official" on the third occasion) of the Member State. As a matter of grammar and syntax, it seems to me that that where a Member State has more than language, it is mandatory for the relevant information to be provided in both of those languages.

20. Further, the question of language appeared to be intrinsically connected with the primary purpose of the Directive which was essentially concerned with the communication of certain key information to users of the products; in those circumstances, the question of what language the information was to be communicated in could not be described as an ancillary objective. The wording of the Directive on the issue of language left no discretion to the Member State nor was it in any way ambiguous. The EU had made a choice, following a process of consultation, and had decided not to leave this matter to the discretion of Member States, unlike the position regarding some other Directives, where a choice regarding the language of communication was left to the Member States. In those circumstances, the Member State did not have discretion to depart from the clear and

unambiguous wording of the Directive in the matter of the language of communication notwithstanding the potentially grave practical consequences that might ensue.

21. I so ruled in July 2016 by way of an *ex tempore* judgment. As I indicated in my ruling at that time, I was of the view that the applicant had *locus standi* to rely upon the provisions of the Directive against the respondent and that the relevant provisions of Directive 2001/82 were of direct effect as regards the matter of language. I was therefore of the view that the State had failed properly to transpose Directive 2001/82. I concluded that the provisions of the Directive were clear, unambiguous and unconditional within the meaning of the caselaw of the EU and that the question of language appeared to be intrinsically connected with the primary purpose of the Directive which was essentially concerned with the communication of certain key information to users of the products. The wording of the Directive on the issue of language left no discretion to the Member State nor was it in any way ambiguous. Insofar as this created a practical problem, it was one was one created at EU level which, in the Court's view, could only be solved at EU level.

22. I then referred to the fact that the EU itself had indeed sought to alter the position itself in recent times. Following a lengthy process of consultation, a new Regulation had been introduced which clearly and explicitly gave a choice to the Member States regarding the language to be used in the packaging of veterinary products. This had been enacted and published but would not come into effect until January 2022. I drew this to the attention of the parties in my ruling; it had not been drawn to the attention of the Court before that point in time.

23. In my ruling, I suggested that the enactment of this new Regulation presented a fresh problem for the Court. This was whether, notwithstanding the Court's view that there was an EU law requirement that the relevant product information be published in both Irish and English upon which the applicant could rely in the domestic courts, the granting of relief would now be futile. The potential futility of any relief granted arose because the entire topic of labelling of veterinary products would soon be regulated in a manner which permitted the English-only labelling of products in Ireland, thus providing a valid legal foundation in EU law to the current practice. Having regard to the potentially serious practical consequences for the economy and the agricultural sector that had been identified by the respondent, together with the fact that the EU legal regime would soon be changing in any event in such a manner as to give legitimacy to the current practice in terms of labelling, there seemed to me a good argument to refuse the relief sought in the exercise of my discretion in judicial review proceedings. However, to my mind this raised a further question as to whether a national court is entitled to refuse relief in judicial review proceedings even when it has made a finding that a Directive has not been correctly or fully transposed, and whether the national court is entitled to exercise discretion in the way it normally would in judicial review proceedings when there is no EU law in issue. Accordingly, I requested written submissions from the parties on this topic and a further oral hearing was held on the question of whether the Court had discretion to refuse the relief sought.

Part 3: The Reference to the CJEU

24. In their written and oral submissions, counsel on behalf of the applicant again emphasized the primacy of EU law and the principle of direct effect, and submitted that these principles would be undermined if the Court were to refuse to grant relief despite having found that a Directive had not been correctly transposed.

25. Counsel on behalf of the respondent submitted that the usual principles with regard to the exercise of discretion in the granting of relief applied. The Court was entitled to have regard to various factors in deciding whether or not to grant relief by way of judicial review including matters such as futility, delay, failure to avail of alternative remedies, lack of candor on the part of an applicant, and impact upon third parties. In the present case, it was submitted, the granting of relief would in effect be futile having regard to the provisions of the new Regulations which would take effect in 2022. Taking into account the practical reality that there would have to be some lapse of time between the granting of the relief sought and the implementation of those reliefs by the State, and the manufacturers in due course, the granting of relief would in effect be futile. It was also submitted that if the relief were granted, there would be significant consequences for third parties not before the Court, and the respondent pointed out that it was precisely the concerns about such adverse implications that had let to the re-wording of the new Regulation due to come into force in 2022.

26. The respondent was not aware of any Irish authority on point but referred to *Walton v The Scottish Ministers* where the view had been taken that a domestic court would retain discretion to refuse relief, even if it concluded that there had been a breach of an EU Directive, on grounds similar to those available under domestic law.

27. The respondent suggested that it would be exceptional for a domestic court to refuse relief in such circumstances but submitted that the present case *was* exceptional by reason of the serious adverse consequences for the economy and for public and animal health that would ensue if the relief were granted.

28. I was of the view that there was considerable merit in the respondent's submissions, but I had a concern that an issue of EU law had been raised upon which there was a lack of clarity, namely the question of whether the Court had discretion to refuse relief. After conducting the supplemental oral hearing, I decided on the 24 October 2019 to refer two questions to the CJEU. The two questions referred were as follows:

> *"(1) Does a national court have discretion to refuse relief in spite of its decision that national law has failed to give effect to a particular aspect of a directive of the European Union (EU) and, if the court does have that discretion, what are the appropriate factors that should be taken into account in relation to the discretion and/or is the national court entitled to take into account those same factors which it would take into account if it were dealing with a breach of national law?*
>
> *(2) Would the principle of direct effect in EU law be undermined if the national court refused to grant relief in this case due to the entry into force of Article 7 of*

[Regulation (EU) 2019/6] of the European Parliament and of the Council of 11 December 2018 (the application of which is deferred until 28 January 2022), in spite of the fact that the national court decided that national law has failed to give effect to the duty in Articles 61(1), 58(4) and 59(3) of Directive [2001/82], that duty being that the packaging and labelling of veterinary products must be in the official languages of the Member State, that is to say, in Irish as well as English, in Ireland?

29. The Registry of the Court of Justice assigned the case reference number C-64/20 and the applicant's name was anonymized to the initials U.H. It may be noted that Ireland raised a preliminary objection on admissibility but this was rejected both by the Advocate General and the court (First Chamber).

30. Advocate General Bobek delivered his opinion on the 14 January 2021. On the questions posed, he expressed the view that a domestic court does have discretion to refuse relief even if there has been a failure to transpose a Directive properly. He said that the domestic court would have to engage in a proportionality analysis in order to decide whether or not relief should be granted in any given case. He discussed at some length the factors which should be taken into account, particularly in a case in which language issues are raised. His opinion is discussed in further detail below.

31. The CJEU delivered judgment on the 17 March 2021. In a short judgment, the court confined itself to a consideration of the questions posed and did not make any comment with regard to the issue of direct effect. It ultimately concluded as follows:

> "Article 288 TFEU must be interpreted as precluding a national court – which, in the context of proceedings laid down in national law for that purpose, finds that the Member State to which it pertains has failed to fulfil its obligation to transpose correctly Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products, as amended by Directive 2004/28/EC of the European Parliament and of the Council of 31 March 2004 – from refusing, on the ground that it appears to it that the national legislation is consistent with Regulation 2019/6 which repeals that directive and will apply with effect from 28 January 2022, to make a declaration that that Member State has not correctly transposed that directive and is required to take remedial steps in that regard."

32. The court therefore reached a different conclusion to Advocate General Bobek on the issue of discretion, implicitly rejecting the proportionality approach he had advocated in favour of the automatic granting of relief once a breach of the Directive was established.

PART 4

After the delivery of judgment on the preliminary reference

33. After the CJEU had delivered its judgment on the preliminary reference, the Court Registrar contacted the parties and it became clear that the respondent wished to make further submissions. This request was facilitated by the Court and in due course the

applicant also filed additional submissions in reply. Two separate matters were raised by the respondent: (1) He invited the Court to revisit and reverse its decision on direct effect and (2) in the alternative, he submitted that any declaration granted should be purely declaratory and should not be mandatory in nature.

34. On the first issue, the respondent invited the Court to revisit the conclusion it had reached on the question of direct effect prior to the sending of the preliminary reference. The respondent relied upon various observations within the Opinion of Advocate General Bobek, suggesting that they supported the Minister's previous arguments on direct effect and that they cast significant doubt upon the Court's earlier conclusion. The applicant strongly opposed this invitation to revisit the Court's earlier conclusion.

35. In the alternative, the respondent also invited the Court to interpret the judgment of the CJEU as precluding the granting of anything in the nature of an order compelling the respondent to change the regulations. The respondent submitted that the outer limit of the Court's jurisdiction was to grant a declaration that the regulations fail to properly transpose the directive, and that to go any further would breach the separation of powers under the Constitution. This was sought to be linked with the wording used in the CJEU's judgment at one point, namely "proceedings laid down in national law for the purpose of" allowing individuals to compel the State to take action to implement a Directive. It was submitted that Irish law does not permit such proceedings, and therefore the Court is not obliged by the CJEU's decision to grant the last of the declarations sought by the applicant, that seeking a declaration that the law in Ireland should be changed to comply with the Directive. Again, the applicant strongly opposed this submission.

36. I will turn now to the first issue which is whether the Court should revisit and alter its conclusion on the question of whether Directive 2001/82 has direct effect such that the information accompanying veterinary products must be in both Irish and English, being the two official languages of the State.

The first issue raised by the respondent: revisiting the court's earlier ruling on the issue of direct effect

37. As noted above, the respondent submits that the Court should revisit its ruling on the issue of direct effect in light of the comments made by Advocate General Bobek in his ruling. The applicant opposes this suggestion. A number of authorities were cited by the parties in connection with the issue of re-opening a judgment in circumstances where a Court has already handed down a decision. I should observe that in the present case, the Court has not yet delivered a written judgment nor has any order been perfected other than an order sending the preliminary reference to the CJEU. The Court therefore has a greater degree of flexibility than it would have in a case where judgment had been delivered and an order perfected. Nonetheless, the Court had already indicated its conclusion on the issue of direct effect and this was the premise upon which the questions were referred to the European Court. In my view, the Court should not lightly interfere with that decision unless there is good reason to do so. I now wish to refer to the authorities cited to me, with the caveat set out in this paragraph, namely that the present case is not one in which a written judgment has been delivered or an order perfected.

38. One of the leading discussions of the issue was in the judgment of Clarke J. (as he then was) in *Re McInerney Homes*. The High Court had delivered judgment in an examinership, but after judgment was delivered, the applicant company invited the Court to revisit its judgment on the basis that it had come to light shortly after delivery that it was now highly probable that the interests of two of the banks involved in the proposed examinership arrangement would be transferred to the National Asset Management Agency. Allowing the matter to be reopened, Clarke J. held that in order for the court to exercise its jurisdiction to revisit a question after the delivery of either an oral or written judgment, it was necessary that there be "strong reasons" for so doing. Further, the new materials must be such that they would probably have an important influence on the result of the case, even if not decisive, and be credible. In addition, such new evidence will not ordinarily be permitted to be relied on if the relevant evidence could, with reasonable diligence, have been put before the court at the trial. He engaged in a comprehensive discussion of the issue at paragraphs 3.1 – 3.8 of his judgment, referring among other things to the timing of the application and in particular whether the proceedings are over or not; the circumstances of the request (such as whether there has been fraud or unconscionable conduct); the value of certainty in proceedings and the need to avoid "litigation chaos". He quoted with approval and at length from *Paulin v. Paulin & Anor*, in which there was a detailed analysis of the correct approach in light of various different factors.

39. I was also referred to the decision in *Nash v DPP*, a Supreme Court decision in which the Court acceded to a request to correct errors of fact in the written judgment but declined to alter the overall conclusion the Court had reached on the merits. The case concerned a claim by Mr. Nash for damages for an alleged breach of his entitlement to a timely trial under either or both of the provisions of the Constitution or the European Convention on Human Rights, a claim which had been rejected by the court and which it declined to overturn. O'Donnell J. engaged in a detailed discussion of when it might be appropriate to reopen a case on the basis of errors, including errors of fact.

40. In both of the above cases, the invitation to reopen the case arose by reason of matters of fact; these were factual errors on the part of the court in the Nash case, and factual events which had occurred since the judgment in the *McInerney Homes* case. In the earlier leading case of *Re Greendale Developments Ltd.* (No. 3), the issue was one of constitutional justice (in its procedural aspect). The applicant sought to have a previous order of the Supreme Court in those proceedings set aside on the ground that the Court had addressed a core issue in its earlier judgment without having given the parties any adequate opportunity of dealing with the point. Ultimately, the Court concluded that there had been no breach of fair procedures, and accordingly there were no special or unusual circumstances warranting a revisiting of the conclusion, but it also made clear that, in an appropriate case, it would exercise this exceptional jurisdiction, where failure to do so would conflict with the guarantee of fair procedures enshrined in the Constitution. It would not do so; however, unless there has been a clear breach of the principles of natural justice such that failure to take steps to remedy such a breach would, in the eyes of right-minded citizens, damage the authority of the court. The nature of the jurisdiction

was again discussed in *Bates v Minister for Agriculture Fisheries and Food* and its exceptionality emphasised.

41. The respondent in the present case does not, of course, suggest that there was any procedural injustice in the original hearing nor that the court made any error of fact. What arises in the present case is that during the playing out of the preliminary reference procedure in Europe, certain comments were made by Advocate General Bobek which, the respondent submits, suggest that the Court was incorrect in its original conclusion on the issue of "direct effect". A decision which has perhaps slightly more resonance in terms of the issue arising before me, because it concerned a matter of EU law, is the case of *Abbeydrive Developments v Kildare County Council .* This case concerned the obtaining of a planning permission by the applicant in default of a decision within the correct time-frame by the Council. An Taisce had originally made a submission to the Council, but was not made aware of the court proceedings. The Supreme Court on appeal from the High Court declared that the applicant was entitled to planning permission by default. An Taisce then applied to the Supreme Court to be heard prior to the making of any final orders in the proceedings. It submitted that the grant of default planning permission in respect of a proposed development which was accompanied by an Environmental Impact Statement, as required by Council Directive 85/337/EEC, as amended, was contrary to European law, referring to *Commission v Belgium* (C-230/00) together with the principle that developments that were subject to the requirements of the EIA directive could not be authorised by way of tacit permission or refusal. The High Court had never considered this issue as it had not been raised by the Council.

42. The Supreme Court (judgment delivered by Kearns P.) decided not to make any final order until the issue in relation to the EIS was determined by the High Court and remitted that issue to the High Court. Kearns P. (citing *Greendale*) said that a decision of the Supreme Court was ordinarily final and conclusive, but that where special or unusual circumstances were demonstrated, the Court could nonetheless intervene to interfere with its own order. He observed that in considering whether or not the threshold had been reached for the invocation of that special jurisdiction, the overall importance of the point sought to be raised had to be considered which had to be a point which, if valid, would as a matter of probability have affected the outcome of the case. The court was satisfied that the point raised by An Taisce, namely, that the failure to carry out an assessment of the EIS is a point going to the very heart of a decision to grant permission, be it on a 'deemed' basis or otherwise, was one of substance which would, if upheld, have affected the outcome of the proceedings herein.

43. Such resonance as there is between *Abbeydrive* and the present case derives from the fact that in the judgment which it is sought to be revisited (and reversed) is said to have been in error about a key matter of EU law; in the present case, simply by reason of error on the court's part, in *Abbeydrive*, because it was not raised and therefore not addressed. However, and I think this is an important point of distinction, there is a key procedural difference insofar as it was the case in *Abbeydrive* that an interested party (An Taisce) had not been able to present its arguments in relation to the important issue of EU law.

Accordingly, the original decision might be said to have breached aspects of "procedural justice", thus falling within the parameters of the *Greendale* approach (as indeed appears to have been the basis on which Kearns P. approached the matter).

44. The question of revisiting a judgment was also addressed by the Court of Appeal in *Bailey v. The Commissioner of An Garda Síochána & Ors* and, more recently, in *Friends First Managed Pension Funds Ltd v. Smithwick* (judgment of Whelan J.). As with Supreme Court judgments, of course, the principles discussed are primarily relevant to (a) appellate courts and (b) judgments actually delivered in writing which are sought to be revisited by one of the parties who claims that an error has been made.

45. While the basis for the respondent's submission that the Court should revisit its earlier conclusion on direct effect is based neither on an allegation of procedural injustice (as in *Greendale*) nor on an alleged error of fact (as in *Nash*), it seems to me that the following are highly relevant factors in the present case:

    (a) this is a court of first instance;

    (b) no written judgment had been delivered and no order perfected and the court's view had been expressed by way of an oral ex tempore ruling; and

    (c) the comments relied upon by the respondent to reopen the issue are based on comments made by the Advocate General of the CJEU in the course of a preliminary reference proceedings specifically relating to this case.

46. In those circumstances, the barrier to revisiting the Court's earlier conclusion is not as high as it has been stated in the authorities discussed above, which primarily concern conclusions reached in final written judgments delivered by appellate courts. I would be prepared to revisit my earlier conclusion on the issue of direct effect if pronouncements from the Advocate General or the Court of Justice in the course of the preliminary reference proceedings gave me reason to believe that my earlier conclusion was incorrect as a matter of European law, of which the European judicial bodies are of course the authoritative interpreters.

47. This simple and more straightforward approach appears to have been that adopted by the High Court (Hogan J.), although I must admit that this authority not cited to me by the parties. This was in the case of *M.M. v. Minister for Justice and Equality* (No. 3), a case involving the bifurcated procedures then obtaining in asylum and subsidiary protection applications. Hogan J. referred a question to the Court of Justice on a particular matter (whether a draft decision on subsidiary protection adverse to the applicant must be circulated to the applicant in advance of it being adopted) which the court answered in the negative. However, the court went beyond the question asked and made it clear that there was a different problem with the procedure, namely that the subsidiary application decision was not separate and distinct from the asylum decision. The Minister in rejecting the subsidiary application had relied upon findings made in the earlier asylum application, rejecting the applicant's credibility on certain factual matters, without making findings of

his own. The High Court then quashed the Minister's decision, the basis for doing so having arisen directly from the judgment of the Court of Justice. Similarly, I would have no hesitation in reversing my opinion of EU law if the Court of Justice had made clear that I had wrongly decided the issue in my original hearing, and I do not think it is necessary for me to be overly constrained by the other authorities referred to above concerning final judgments by appellate courts.

48. With this in mind, I now turn to what was said in Europe on the first issue, namely the issue of direct effect.

Analysis of events in Europe and whether they should cause the Court to reverse its earlier conclusion on direct effect

49. In this section, the question I address is: Do the comments of Advocate General Bobek, taken in conjunction with the court's judgment, warrant an alteration of my original conclusion on direct effect? It is key to understanding what was said in Europe to note that the preliminary reference did not ask the Court to rule on the issue of direct effect but rather on the question of remedy; more specifically whether, in a case where a court has found a Directive to have direct effect which can be relied upon by an individual before a domestic court, the court is entitled to refuse all or some of the relief in accordance with principles relating to the exercise of discretion.

50. Most of Advocate General Bobek's opinion concerns the specific question asked. However, in the earlier part of his opinion, he discussed the issue of direct effect. The passages in which he touches upon the prior issue direct effect are, in my view, as follows (I have omitted the citations):

> "65. Of course, that is the case under the assumption that the EU provisions at issue have direct effect. As to the structure of the relationship, it is indeed true that the respondents are public authorities and, according to settled case-law, the provisions of a directive may be relied upon by individuals against such authorities where the State has failed to transpose them by the end of the period prescribed.
>
> 66. However, whether the provision(s) of EU law at issue are endowed with direct effect, and precisely what the content of the directly effective rule is, is a different matter. According to settled case-law, an EU law provision has direct effect whenever, as far as its subject matter is concerned, it is sufficiently clear, precise and unconditional to be relied on against a conflicting national measure, or in so far as the provision defines rights which individuals are able to assert against the State.
>
> 67. In the present case, the referring court appears to have settled the matter at a preliminary stage already by finding that, as submitted by the applicant, the EU provisions at issue are sufficiently clear, precise and unconditional to trigger direct effect. The referring court has not asked this Court to examine that issue and I shall respect that decision, despite that issue being raised and put forward by Ireland for the purpose of admissibility. I would, nonetheless, note two elements."

51. I would pause here, before he talks about the 'two elements', to observe that he has not yet expressed any view that the domestic decision on direct effect was incorrect, although one might take the view that his use of language (words such as "however" and "nonetheless") suggests some possible reservations about that decision on his part. Be that as it may, he goes on to discuss what he describes as the 'first element':

> "68. First, precision of the rule, as a condition for direct effect, means that the content of the obligation incumbent on the Member State is indeed clear. The scope of a directly effective rule must not necessarily textually coincide with the entirety of the legal proposition. Thus, it is certainly possible to extract from a larger proposition a narrower, self-standing rule reflecting the minimal obligation incumbent on a Member State. That rule must, however, be clear and precise as to its scope and content."

52. I interpret what he is saying in that passage as follows: a directive may cover various matters ("a larger proposition") but only some of those matters may have direct effect ("a narrower, self-standing rule reflecting the minimal obligation incumbent on a Member State"). Thus, the 'scope' of the directly effective part of the directive is not necessarily co-extensive with the whole of the directive ("must not necessarily textually coincide with the entirety of the legal proposition"). This is an uncontroversial statement of a general principle. More importantly, for present purposes, the general principle might be said to echo or correspond with the respondent's argument that what was directly effective in this directive was limited to the obligation to publish certain relevant information with veterinary products, and that it did not extent to an obligation to have those instructions in both Irish and English. However, Advocate General Bobek does not apply the principle to the facts of the present case but merely leaves the matter at the level of general principle. He leaves that point and moves on to a different point.

53. Advocate General Bobek's 'second element' is as follows:

> "69. Second, when carrying out such an analysis with regard to a rule contained in a directive, it serves to be mindful that the default constitutional position for the transposition of a directive is the Member State's choice and autonomy*, provided, naturally, that the directive itself does not preclude that choice*. By contrast, if any such choice and discretion is to be granted by a regulation, the text of the regulation must state so expressly. This fact might be particularly relevant when assessing the scope of a given obligation following a change in the type of EU legal source governing an area, in particular, as has recently been the case in a number of areas of EU law, when the regulatory instrument in a certain field has changed from a directive to a regulation." (emphasis added)

54. Again, this seems to me to be at the level of a general proposition, particularly as he contrasts the position of directives and regulations. The passage which I have italicised appears to me particularly relevant in the present case. In my view, the precise wording of Directive 82/2011 itself does indeed preclude choice, to use his own description, by referring explicitly to the Member State's "languages" in the plural.

55. Advocate General Bobek then moves on to consider linguistic rights, but what is crucial in my view, is that he prefaces this discussion with a paragraph which I interpret as signalling that he is now moving to the question of remedy i.e*. what is the appropriate remedy in the event that there is direct effect,* and departing from the question of the prior assessment of whether there is direct effect. It will be recalled that the CJEU will later disagree with him on the question of how to approach remedy and explicitly rejects his proportionality-based approach in this area and his comments should be read with that important fact in mind.

56. On linguistic rights, he says as follows:-

> "71. At the outset, there is hardly any doubt that linguistic diversity is particularly valued in the European Union. According to Article 3 TEU, the Union must 'respect its rich cultural and linguistic diversity' and 'ensure that Europe's cultural heritage is safeguarded and enhanced'. To that end, the Union must, pursuant to Article 165(2) TFEU, promote the teaching and dissemination of the languages of the Member States.
>
> 72. Respect for linguistic diversity is also enshrined in Article 22 of the Charter. Moreover, Article 21 of the Charter prohibits any discrimination based on the ground of, *inter alia*, language.
>
> 73. Furthermore, multilingualism has been a core principle of the European Union's functioning, early evidence of which is the adoption of Regulation No 1 in 1958.
>
> 74. However, while these principles and their value are indeed of the utmost importance, it has also been recognised that language policy involves making choices which are, at times, also politically and socially delicate. In view of this, both the EU legislature and the EU Courts have consistently adopted a rather cautious, diplomatic and pragmatic approach with regard to languages, at EU level, and also when that level is likely to have repercussions at Member States level.
>
> 75. At the level of the Union's internal functioning, the system has never been overly rigid. To begin with, even with regard to EU official languages, exceptions have been made recently, with regard, notably, to Irish or Maltese. More importantly for the purposes of the present case, the Court has consistently dismissed the idea that, as a matter of EU law, there must be absolute equality of all official languages. The maxim of equal authenticity of all language versions or the principle of non-discrimination between the official languages of the Union does not mean that 'all official languages must in all circumstances be treated equally for all purposes'. Differentiated regimes, at EU level, are thus permissible, provided there are sufficient justifications for that.
>
> 76. In addition, when called upon to recognise and uphold linguistic rights flowing from EU law, the EU Courts have striven to ensure that the individuals affected are

protected, while leaving the competent (EU or national) authorities some room for manoeuvre.

77. For example, in *Skoma-Lux*, the Court held that a (then) Community regulation that was not published in the official language of a Member State could not be enforced against an individual living in that State. However, the Court refrained from deriving any more significant consequence, in relation to the validity or the applicability of the act, from the absence of publication. Thus, EU law unpublished in the (one and only) language of a Member State in fact remained valid law of that Member State. It is just that no obligations could be imposed on individuals on the basis of that law."

57. I pause here again to note that in *Skoma-Lux* (Case C-161/06), the court held that a customs fine could not be imposed on the applicant company where the legislation had not been published in the Official Journal in the Czech language, even though the company in question could have learned of the legislation by other means. Advocate General Bobek is undoubtedly correct in saying that the court was able to strike a balance in the sense that it was able to protect the company from the customs fine while at the same time restricting the more general effect of its decision (see paragraphs 63-74 of the court's judgment in *Skoma Lux*). Not every case, however, might be susceptible to such a 'balance' in terms of the remedies, in my view.

58. In any event, he continues:-

"78. This tendency is probably even more apparent where the Court is faced with national measures which reflect national policy choices. It should not be overlooked, in that regard, that language policy at national level falls, by and large, within the competences of the Member States. Indeed, pursuant to Article 6 TFEU, the Union only has the competence to carry out actions to support, coordinate or supplement the actions of the Member States in the fields of culture and education. After all, language policy cannot but reflect the history, culture, traditions and society of each country.

79. The EU Courts have therefore been reluctant to interfere excessively with national choices or impose far-reaching obligations upon Member States. By way of example, in *UTECA,* the Court found national legislation that required television broadcasters to commit a specific proportion of their revenue to the pre-funding of European cinematographic films and TV films the original language of which was one of the official languages of the Member State concerned to be compatible with EU law. In *Runevič-Vardyn*, the Court ruled that EU law did not preclude national authorities from refusing to amend the forenames and surnames of the interested parties as entered on the birth and marriage certificates on the ground that national legislation provided that the forenames and surnames of natural persons must be entered in those documents in accordance with the rules governing the spelling of the official national language. More generally, the Court has consistently stated that the protection and promotion of one or more official languages of a Member State

may justify derogations to the rules on free movement, and declared national measures adopted for that purpose incompatible with EU law only when found to be disproportionate to that aim."

59. I think it is important to observe that the two cases he refers to in those passages were almost the converse of the situation in the present case. In both cases, the Member State was exercising a choice at a national level with regard to a national language while the relevant EU legal instrument did not refer to the language question explicitly. In the present case, it is the EU measure which is explicit and the national measure which seeks to depart from it. In *Runevič-Vardyn* (C-391/09), what was in issue was that Lithuania had decided that names and surnames should be registered in accordance with Lithuanian spelling, and the applicants (a married couple, one of whom was Polish) were dissatisfied with the form of their names on various official registration documents. The EU measures they sought to rely upon (unsuccessfully for the most part) were Directive 2000/43 (anti-discrimination) and Articles 18 (prohibition on discrimination on grounds of nationality) and 21 (right to free movement) of the TFEU. In the *UTECA* case (C-222/07) what was in issue was a national measure requiring television operators to allocate, first, 5% of their operating revenue for the previous year to the funding of full-length and short cinematographic films and European films made for television and, secondly, 60% of that funding to the production of films of which the original language is one of the official languages of the Kingdom of Spain. The EU measure in question (a directive concerning television broadcasting activities) did not impose any requirement about languages. Thus, Spain was seeking to promote its own national languages, and it was held that its doing so was not in breach of the EU requirement to allocate a certain proportion of broadcasting funding to films. So while one can readily accept Advocate General Bobek's proposition that EU law is sensitive to, and seeks to respect, national choices about language in those contexts, the problem which arises in the present case is of an entirely different kind, because it is in the EU Directive itself (and not the national measure) that the explicit language requirement appears. The Advocate General continues:-

'80. I draw two conclusions from the case-law illustrations set out above. First, although there is no doubt that language rights are of the utmost importance in the Union, and individuals are certainly entitled to obtain protection against any breach of those rights, there are no automatic consequences that stem from their potential breach. In that respect, the EU Courts have generally preferred a balanced and nuanced approach, in which the specific circumstances of each case have been duly considered, and weighted one against the other, in order to reach a fair (and not disruptive) outcome.

81. Second, that approach has been embraced not only with regard to the use of languages vis-à-vis specific sectoral or area-dependent rules (such as the above quoted examples from the free movement case-law), but also with regard to constitutional choices. Thus, in other words, if even the structural or constitutional cases show a fair degree of flexibility and absence of any automatic outcome in terms of results, it would be rather surprising to insist that a discreet, secondary

law regime in a specific regulatory field would suddenly give rise to an absolute linguistic right.'

60. It seems to me that this passage is about what remedies should be available to persons alleging a breach of language rights and not whether a measure is directly effective in the first place. He goes on to say that the flexibility he has discerned in the cases described should lead to a proportionality-based approach to remedy, which he then describes in some detail. I must confess to finding Advocate General Bobek's approach to the question of remedy very persuasive, namely a flexible, balancing, proportionality-style approach in which the above analysis of language-rights would feature; but it must be acknowledged that this overall proportionality approach did not find favour with the court itself. For the purpose of this section of my judgment, however, the essential point that I am making is that I do not think the Advocate General in the above-cited passages is casting doubt upon my original conclusion on direct effect but rather that he is offering guidance how the question of remedy should be approached.

61. The court (First Chamber) did not discuss the question of direct effect but rather focussed in on the precise questions referred to it concerning the issue of discretion. It took a very different view and concluded that a domestic court does not have discretion to refuse relief if it is finds that a directive was incorrectly transposed. It said that the only body which has the authority to withhold relief on a discretionary basis in this context is the CJEU itself:

"32. In the present case, it is apparent from the order for reference that Irish law allows individuals to obtain a judicial declaration that Ireland has not correctly transposed a European Union directive and is required to transpose that directive, while leaving it open to the national courts to refuse to make such a declaration, on the grounds established by that law.

33. In that regard, it should nevertheless be recalled that, as the referring court has found that Directive 2001/82 was incorrectly transposed, *it is required to take all the appropriate general and particular measures to ensure that the result prescribed by that directive is attained* (see, to that effect, judgment of 24 October 1996, *Kraaijeveld and Others,* C 72/95, EU:C:1996:404, paragraph 55). (emphasis added)

34. The fact that the Irish legislation is already compatible with Regulation 2019/6, which will apply with effect from 28 January 2022, *cannot call into question the finding that that legislation is incompatible with EU law before that date or, a fortiori, justify such incompatibility.* (emphasis added)

35. Until Directive 2001/82 is repealed by that regulation, the provisions of the directive remain binding for so long as the Court of Justice has not ruled that they are invalid (see, to that effect, judgments of 13 February 1979, *Granaria,* 101/78, EU:C:1979:38, paragraph 5, and of 21 September 1989, *Hoechst v Commission,* 46/87 and 227/88, EU:C:1989:337, paragraph 64).

36. Accordingly, the Court alone may, exceptionally and for overriding considerations of legal certainty, grant a provisional suspension of the effects of a rule of EU law with regard to a national law that is contrary to it (see, to that effect, judgment of 28 July 2016, *Association France Nature Environnement,* C 379/15, EU:C:2016:603, paragraph 33 and the case-law cited).

37. In those circumstances, Article 288 TFEU precludes a national court of a Member State from disregarding the obligation imposed on that state to transpose a directive on the ground that that transposition is purportedly disproportionate as it might prove costly or serve no purpose on account of the forthcoming application of a regulation intended to replace that directive, with which the law of that Member State is fully compatible.

38. It follows that, under Article 288 TFEU, the referring court, which has found that the national legislation is incompatible with Directive 2001/82, *is required to uphold the application for a declaration that Ireland is under an obligation to remedy the incorrect transposition of that directive*. (emphasis added)

39. It follows from all of the foregoing that Article 288 TFEU must be interpreted as precluding a national court – which, in the context of proceedings laid down in national law for that purpose, finds that the Member State to which it pertains has failed to fulfil its obligation to transpose correctly Directive 2001/82 – from refusing, on the ground that it appears to it that the national legislation is consistent with Regulation 2019/6 which repeals that directive and will be applicable with effect from 28 January 2022, to make a declaration that that Member State has not correctly transposed that directive *and is required to take remedial steps in that regard.*" (emphasis added)

Conclusion on whether the Court should reverse its earlier ruling on direct effect

62. Having regard to the above, while Advocate General Bobek makes interesting general comments about direct effect, it is not at all clear to me that he is expressing a view which is critical of the Court's conclusion on that issue in the present case. Further, his analysis of the language rights cases, and his view that they demonstrate the CJEU's respect for national choices in the matter of language and the need for the CJEU to be flexible in this area, forms part of a discussion about what remedy should be granted if there has been a breach of direct effect regarding language rights.

63. Further, and most importantly, the First Chamber itself was entirely silent on the issue of direct effect. It seems to me highly unlikely that the court would have hesitated to say that the premise of the questions referred by the High Court to them was incorrect if it had thought this to be the case; the referred questions would in those circumstances have been entirely hypothetical or moot. The court could easily have declined to rule upon the questions referred if it had thought they were moot. The court's decision to say nothing about my conclusion about direct effect, particularly when it followed upon the discursive opinion of Advocate General Bobek containing the comments set out above, seems to me to support the view that the Directive was capable of being interpreted as

one of direct effect in the matter of the languages to be used on the veterinary product instructions/packaging. As noted above, the Court of Justice had no difficulty in the M.M. case in expressing difficulties with one particular legal issue even though this was a different legal issue to the one actually referred to it.

64. Accordingly, on a close examination of the opinion of Advocate General Bobek together with the judgment of the CJEU, I do not see anything to give me sufficient reason to reverse my earlier conclusion that Directive 2001/82 has direct effect with regard to the use of both official languages of the State in the matter of veterinary product instructions. If I am wrong in my conclusion on the issue of direct effect, I will no doubt be corrected on appeal. But in the specific context of an invitation to revisit a conclusion already reached by me at an earlier stage in the proceedings, I do not see anything in the European pronouncements arising from my preliminary reference which warrants a reversal of my earlier conclusion.

The second submission of the respondent; the appropriate relief to be granted

65. The respondent makes a further argument that the Court is not entitled, as a matter of Irish law, to make an order compelling the Minister to amend the regulations in order to bring them into line with the directive. He argues that the judgment of the First Chamber does not require the Court to grant reliefs of a mandatory nature unless the domestic proceedings are of a kind that permit such relief to be granted.

66. Reliance is placed on *Dudley v An Taoiseach* to support this proposition, but this reliance appears to me to be misplaced. The case concerned a delay in the calling of a byelection and the judgment was delivered in respect of an application for leave to bring judicial review proceedings. The High Court (Geoghegan J.), granting leave to institute judicial review proceedings as against the government of Ireland and the Attorney General and directing that Ireland should be joined as a respondent. It is true that he held that declaratory relief was not obtainable as *against Dáil Éireann;* this was, he said, because such relief should only be granted where it could be followed up by an enforceable order and a court cannot grant an order of mandamus compelling the body of members of the Dáil to vote in a particular way on a particular motion. However, leave was granted in respect of Ireland and the Attorney General.

67. Further, the respondent did not cite the more recent case of *Doherty v Government of Ireland and Attorney General*, in which the High Court (Kearns P.) granted a declaration that there had been unreasonable delay in moving the writ for the by-election in Donegal South West, but declined to grant a declaration that the Government was obliged to set down and support the motion for the issue of a writ or at least not impede or oppose such a motion. In the course of his judgment, he said: "I would hope, however, that any clarification provided by this judgment would have that effect" but that –

> "The court might in another case… feel constrained to take a more serious view if any government, and not just necessarily the present one, was seen by the courts to be acting in clear disregard of an applicant's constitutional rights in continually refusing over an unreasonable period of time to move the writ for a by-election.

That the Court can intervene in a more draconian way in extreme cases to protect constitutional obligations was made clear by O'Flaherty J. in *O'Malley v An Ceann Comhairle* [1997] 1 I.R. 427 and by Murray C.J. in *TD v Minister for Education* [2001] 4 IR 259 at p. 337. This is not yet such a case but in my opinion it is not far short of it."

Accordingly, the separation of powers does not preclude the Court from granting mandatory relief of various kinds where appropriate, but the courts must be careful to consider all of the circumstances and consider what form of relief is warranted in the particular case and whether the granting of mandatory relief would be going too far in the particular case before it.

68. The applicant has provided the Court with a copy of the order granted in the *Uí Riain* case, which concerned the Irish language aspect of packaging on tobacco products. The court in that case granted the following declaratory reliefs, and did so with the consent of the Minister:

'1. A declaration that the *Respondents must amend the law of the State*, and in particular Statutory Instrument 425/2003, to correspond to Directive 2001/37/EC, specifically *that the law of the State shall provide for* the warning and information notices about tar, nicotine and carbon monoxide referred to in Directive 2001/37/EC in *both Irish and English*, with the font of both versions to be of equal size, and that *the two official languages shall be treated equally in accordance with Article 5(6) of the Directive*, with the percentages and areas corresponding to a Member State which has two official languages in accordance with Article 5 of the Directive.

2. *An order of Mandamus requiring the respondents to amend the law of the State, and in particular Statutory Instrument 425/2003, to correspond to Directive* 2001/37/EC, specifically that the warning and information notices about tar, nicotine and carbon monoxide referred to in Directive 2001/37/EC shall be in both Irish and English, with the font of both versions to be of equal size, and that the two official languages shall be treated equally in accordance with Article 5(6) of the Directive, with the percentages and areas corresponding to a member state which has two official languages in accordance with Article 5 of the Directive.' (emphasis added).

69. Given that the above order was made on consent, it is surprising that the respondent is now making the argument that the court has no jurisdiction to make an order of this kind. Another authority in point is *Tate v Minister for Social Welfare* where the reliefs granted included:

(1) A declaration that the defendants have failed to fully or properly implement Directive 79/7/EEC.

(2) A declaration that the plaintiffs were entitled as from the 23rd December, 1984, to receive the same benefits and to have the rules under the Social Welfare Acts and Regulations, 1981 to 1992 that were paid and applied to married men in the same situation paid and applied to them.

(3) A declaration that the defendants are not entitled to rely on any portion of the European Communities (Social Welfare) Regulations, 1992, which has the effect of not recognising the plaintiffs' rights under the direct effect of the Directive.

70. Damages were also awarded in the *Tate* case, but that was (unlike the present case) a plenary action in which one of the causes of action was for damages to compensate for the financial loss suffered by the plaintiffs as a result of the State's failure to implement the directive. Nonetheless, the declarations granted in the *Tate* case had far-reaching effects, as can be seen from their content as set out above, which required the State to disregard or disapply any aspects of the Irish regulations which failed to implement the directive, the effect of which would have significant financial consequences for the State.

71. Having regard to the above, the respondent has failed to persuade the Court that it is not possible to grant all of the declarations sought as a matter of Irish law; the real question is whether the mandatory form of declaration would be inappropriate in light of the separation of powers. In that regard, I note that the declarations sought in the present case would not go as far as the form of declaration described in the Doherty case (to set down and support the motion for the issue of a writ for a by-election or at least not impede or oppose such a motion). Instead they simply declare a state of affairs (that the Directive was not correctly transposed) and state that this creates an obligation on the part of the respondent to rectify the situation (which is an obligation under EU law in any event). Further, they are similar to the declarations granted on consent with regard to tobacco products in the *Uí Riain* case. In the circumstances, there does not seem to be any reason to read the CJEU judgment in a restrictive manner suggested by the respondent in respect of the reliefs to be granted. The Court of Justice said that the domestic court "is required to take all the appropriate general and particular measures to ensure that the result prescribed by that directive is attained" and "is required to uphold the application for a declaration that Ireland is under an obligation to remedy the incorrect transposition of that directive". I therefore propose to grant all of the reliefs sought by the applicant.

72. The Court will accordingly grant the following reliefs: (i) a declaration that the applicable national legislation does not transpose Title V (Articles 58 to 61) of Directive 2001/82 correctly; (ii) a declaration that Irish law must ensure that the appropriate particulars on the package leaflets and packaging in question in Title V of Directive 2001/82 are in the official languages of the State, that is to say, in both Irish and English, on veterinary medicinal products placed on the market in the State; and (iii) a declaration that the respondent must amend national law to ensure a correct transposition of the provisions of Title V of Directive 2001/82.

73. It gives me no pleasure to reach a conclusion which may have adverse practical consequences in the Irish agribusiness sector but my conclusion has been reached on the basis of my best understanding of the correct legal position in EU law having regard to the explicit terms of EU Directive 2001/82 and the guidance of the CJEU provided to me on the preliminary reference sent to it.

74. The applicant has succeeded in his judicial review proceedings. As this judgment is being delivered electronically, I would propose to award costs in favour of the applicant unless the respondent within 14 days from the delivery of this judgment indicates by email or otherwise in writing to the Office of the High Court that he wishes to contend for some other order as to costs. If he does so indicate, this court will schedule a short costs hearing, but the respondent should be aware that in the event that his contentions are unsuccessful he may be ordered to pay in addition the costs of that costs hearing.

An official Irish language version of this judgment shall be available in due course.