THE HIGH COURT

842JR/2003

BETWEEN

AGRICHEM BV

APPLICANT

AND
MINISTER FOR AGRICULTURE AND FOOD

RESPONDENT

Judgment delivered by Finnegan P. on the 23rd day of March 2005

1. The Applicant is a Dutch Company and is a distributor of generic agrochemical products. It has three products distributed in Ireland which include an active ingredient called "ethofumesate". The products are designed for use in controlling weeds in sugar beet. One of the products was first distributed in Ireland in 1996 and the other two first distributed in 2001. In respect of the products the Applicant held product authorisations and these proceedings arise out of the purported withdrawal of the same by the Respondent.

2. There is a Community regime for the control of plant protection products contained principally in Council Directive 91/414/EEC (hereinafter the 1991 Directive). The purpose of the Directive is to harmonise the provisions for the control of plant protection products in Member States. This is achieved firstly by establishing a Community list of authorised active substances and admission to which list is a matter for the Community. Prior to an active substance being admitted to the Community list Member States could authorise use of the same in their territory for a limited period and the Applicant had the benefit of such authorisation for its three products. Secondly Member States can grant product authorisation for products containing an active substance entered on the Community list. The 1991 Directive provides that there should be uniformity between Member States in that the grant of a product authorisation in one Member State is to be recognised in another. The Directive deals with both the admission of an active substance to the Community list and the authorisation of products containing that substance in a Member State. Ethofumesate was added to the Community list by Directive 2002/37/EC (hereinafter the 2002 Directive) which came into effect on the 1st March 2003.

3. Admission of an active substance to the Community list entails a detailed and expensive process of assessment. The process is carried out by a Rapporteur Member State on behalf of the European Commission, in this case Sweden. The process of evaluation includes several expert bodies and experts from the Member States. The evaluation of ethofumesate took some 6½ years. Active substances authorised for the purposes of the 1991 Directive are set forth in Annex 1 of the same: ethofumesate was added to Annex 1 by the 2002 Directive.

4. With regard to plant protection products Article 4 of the 1991 Directive provides that the same may not be authorised by Member States unless its active substances are listed in Annex 1 and other conditions set out in Article 4 are complied with: the conditions in short provide for the submission of scientific and technical information in relation to the plant protection product. Article 4.3 requires Member States to ensure that compliance with the requirements of Article 4.1 is established by official or officially recognised tests and analysis carried out under agricultural plant health and environmental conditions relevant to the use of the product. Article 4.4 and 5 provide that authorisations may be reviewed. Article 4.6 provides that authorisations may be cancelled or modified.

5. In order to obtain inclusion of an active substance in Annex I the 1991 Directive requires submission of a dossier in accordance with Annex II of the Directive and a dossier in accordance with Annex III of the Directive on at least one preparation containing the active substance. Article 9 provides that application for authorisation of a plant protection product shall be made by or on behalf of the person responsible for first placing it on the market in a Member State to the competent authority of each Member State where the plant protection product is intended to be placed on the market.

6. Article 13 of the 1991 Directive deals with data requirements, data protection and confidentiality. It provides as follows –

> 13 1. Without prejudice to Article 10, Member States shall require that applicants for authorization of a plant protection product submit with their application:
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> (a) a dossier satisfying, in the light of current scientific and technical knowledge, the requirements set out in Annex III; and
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> (b) for each active substance in the plant protection product, a dossier satisfying, in the light of current scientific and technical knowledge, the requirements set out in Annex II.
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> 2. By way of derogation from paragraph 1, and without prejudice to the provisions of paragraphs 3 and 4, applicants shall be exempted from supplying the information required under paragraph 1 (b) except for that identifying the active substance if the active substance is already listed in Annex 1, taking into account the conditions of inclusion in Annex 1, and does not differ significantly in degree of purity and nature of impurities, from the composition registered in the dossier accompanying the original application.
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> 3. In granting authorizations, Member States shall not make use of the information referred to in Annex II for the benefit of other applicants:
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> (a) unless the applicant has agreed with the first applicant that use may be made of such information: or
>
> (b) for a period of 10 years from first inclusion in Annex 1 of an active substance not on the market two years after the date of notificationof this Directive; or
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> (c) for periods not exceeding 10 years from the date of the decision in each Member State and provided for in existing national rules, concerning an active substance on the market two years after the date of notification of this Directive; and
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> (d) for a period of five years from the date of a decision, following receipt of further information necessary for first inclusion in Annex 1, or to vary the conditions for, or to maintain the inclusion of an active substance in Annex 1, which has been taken either to vary the conditions for, or to maintain, the inclusion of an active substance in

Annex 1, unless the five-year period expires before the period provided for in paragraphs 3 (b) and (c), in which case the period of five years shall be extended so as to expire on the same date as those periods.

4. In granting authorizations, Member States shall not make use of the information referred to in Annex III to the benefit of other applicants:

(a) unless the applicant has agreed with the first applicant that use may be made of such information; or

(b) for a period of 10 years from first authorization of the plant protection product in any Member State, where authorization follows the inclusion in Annex 1 of any active substance contained in the product; or

(c) for periods not exceeding 10 years and provided for in existing national rules after the first authorization of the plant protection product in each Member State, where that authorization precedes inclusion in Annex 1 of any active substance contained in the product.

5. The effect of Article 13 is as follows –

The applicant for authorisation of a plant protection product must comply with Article 13.1(a) and (b). Article 13.2 provides that it shall not be necessary to comply with Article 13.1(b) by providing an Annex II dossier but shall be sufficient to identify the active substance if it is already listed in Annex I. Article 13 in effect distinguishes between a first applicant for inclusion in Annex I ("the main notifier") and a generic producer of the active substance. In granting authorisation to a generic user a Member State may make use of information referred to in Annex II or Annex III subject to the limitations set out in Article 13.3 and Article 13.4 in relation to data protected matter. Article 14 provides that the Member States and the Commission shall ensure that information submitted by applicants involving industrial and commercial secrets is treated as confidential if the applicant for inclusion of an active substance or for authorisation of a plant protection product so requests and if the Member State or the Commission accepts that that request is warranted: a number of circumstances in which confidentiality shall not apply are set out in Article 14.

6. In the case of ethofumesate the main notifier on foot of whose application the inclusion in Annex I was made were Hoechst Shering, AgroEvo Gmbh and Feinchemie Schwebda Gmbh. The effect of the Directive Article 13 and 14 is that the Applicant here is entitled to avail of information provided by the main notifier on the application for inclusion in Schedule 1 of the 1991 Directive on any application for authorisation of a plant protection product subject to the restrictions in Article 13.3 and 13.4: where data protection applies equivalent information or a letter of access must be furnished.

7. Having provided for the inclusion of ethofumesate in Schedule 1 of the 1991 Directive the 2002 Directive provided in relation to plant protection products containing ethofumesate which had been authorised under national law as follows –

4. 1. Member States shall review the authorisation for each plant protection product containing ethofumesate to ensure that the conditions relating to ethofumesate set out in Annex I to Directive 91/414/EEC are complied with.

Where necessary, they shall amend or withdraw the authorisation in accordance with Directive 91/414/EEC before 1 September 2003.

2. Member States shall, for each authorised plant protection product containing ethofumesate as either the only active substance or as one of several active substances all of which were listed in Annex 1 to Directive 91/414/EEC by 1 March 2003, re-evaluate the product in accordance with the uniform principles provided for in Annex VI to Directive 91/414/EEC, on the basis of a dossier satisfying the requirements of Annex III thereto. On the basis of that evaluation, they shall determine whether the product satisfies the conditions set out in Article 4(1)(b), (c), (d) and (e) of Directive 91/414/EEC. Where necessary and by 28 February 2007 at the latest, they shall amend or withdraw the authorisation for each such plant protection product.

8. Article 3 of the 2002 Directive requires Member States by the 31st August 2003 at the latest to adopt and publish laws, regulations and administrative provisions necessary to comply with the Directive and to apply those provisions from the 1st September 2003.

9. On the 19th June 2002 the Respondent wrote to the Applicant requiring it before the 1st March 2003 requiring it to –

(i) Confirm by provision of equivalent data or by means of a notorised letter of access that Agrichem BV has supplied or has access to all the data and information required to support the inclusion in Annex I (Directive 2002/37 EC) in accordance with the provisions of Regulation 10 of the European Communities (Authorisation, Placing on the Market, Uses and Control of Plant Protection Products) Regulations 1994 to 2001 and

(ii) where relevant, provide the full Annex II and Annex III data packages used to support the inclusion of ethofumesate in Annex I or confirm that all such data has been submitted to the Pesticide Control Service.

10. The letter indicated that failure to comply with these provisions would result in the authorisations for the Applicant's three products being revoked with effect from the 1st September 2003. The Applicant had already set about complying with the letter and it appears from a fax sent by the Applicant to the Respondent on the 30th September 2003 that the position was as follows. The Annex II dossier submitted by the main notifier was considered incomplete by the Respondent mainly due to three studies in respect of which no final report was then available –

1. The uptake of ethofumesate residues in soil by rotational crops under confined conditions.

2. Lysimeter studies with ethofumesate.

3. Study of the absorption, disposition, metabolism and excretion of ethofumesate in laying hens following oral administration.

11. The Applicant sought time to generate its own studies. It noted that it had submitted its Annex II dossier in eight Member States but none had by then been dealt with. By fax dated the 2nd October 2003 the Applicant submitted a detailed argument in support of its response to the Respondent's letter of the 19th June 2002. This was replied to on the 3rd October 2003 revoking authorisation of

the Applicant's products upon the grounds that the Applicant had not established by means of equivalent data or by means of a notorised letter or letters of access that it had supplied or had access to all the data and information necessary to support the inclusion of ethofumesate in Annex I of the 1991 Directive. A list of the data not provided was set out in an annex to the letter.

12. The Applicant raises a number of legal issues as follows –

1. The decision was made by the Pesticide Control Service (PCS) of the Respondent and not by the Respondent.

This is factually correct. The Applicant argues that the provisions of the European Communities (Authorisation, Placing on the Market, Use and Control of Plant Protection Products) Regulations 2003 S.I. 83 of 2003 expressly confer upon the Minister the power to make the decision in issue here. Again this is factually correct. However I am satisfied that the Carltona principle applies. In *Carltona Limited v Commissioners of Works* (1943) 2 All ER 560 Lord Greene MR at page 563 said –

> "In the administration of Government in this country, the functions which are given to Ministers (and constitutionally properly given to Ministers because they are constitutionally responsible) are functions so multifarious that no Minister could ever personally attend to them. To take the example of the present case, no doubt there have been thousands of requisitions in this country by individual Ministries. It cannot be supposed that this Regulation meant that, in each case, the Minister in person should direct his mind to the matter. The duties imposed upon Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the Department. Public business could not be carried on if that were not the case. Constitutionally the decision of such an official is, of course, the decision of the Minister. The Minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected confidently to perform the work, the Minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that Ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

This statement has been expressly approved of by the Supreme Court in *Tang v Minister for Justice* (1996) 2 ILRM 46.

I have had the evidence of Mark Lynch the Officer in the relevant Department responsible for the decision both on Affidavit and on cross examination. I am satisfied that he was duly authorised to make the decision.

Applying the Carltona principle I am satisfied that it was not the intention of the Regulations that each individual decision should be made by the Minister but that the decision could be delegated by him.

2. The Respondent erred in requiring the Applicant to furnish the data and information in Annex II of the 1991 Directive.

The 2002 Directive At Recital 8 envisages that after the inclusion of an active substance in Annex I thereof Member States should be allowed a reasonable period within which to implement the 1991 Directive and review plant protection products authorised under national legislation: it further envisages that a longer period should be provided within which a complete dossier for each plant protection product satisfying the requirements of Annexes II and III to the Directive should be submitted and that product re-evaluated. This two tier process is reflected in Article 4 of the 2002 Directive the first being that set out in Article 4.1 to be completed before the 1st September 2003 and the second that set out in Article 4.2 before the 28th February 2007. The Applicant submits that Article 4(1) of the 2002 Directive only requires the Respondent to review plant protection product authorisations for products containing ethofumesate in order to satisfy himself that the conditions relating to ethofumesate set out in Annex I to the 1991 Directive as amended by the 2002 Directive are complied with. The specific provisions relating to ethofumesate set out in the Annex to the 2002 Directive are as follows –

> "Only uses as herbicide may be authorised.
>
> For the implementation of the uniform principles of Annex VI the conclusions of the review report on ethofumesate and in particular Appendices I and II thereof as finalised in the Standing Committee on the Food Chain and Animal Health on 26 February 2002 shall be taken into account. In this overall assessment Member States may pay particular attention to the protection of the groundwater, where the active substance is applied in regions with vulnerable soil and/or climatic conditions and must apply risk mitigation measures, where appropriate."

The Respondent in its letter of the 1st March 2003 required provision of full Annex II and Annex III data packages used to support the inclusion of ethofumesate in Annex I or to confirm that all such data had been submitted. The Respondent contends that having regard to the provisions of Article 13 of the 1991 Directive it was required to do so.

The Respondent contends that Article 4(1) of the 2002 Directive cannot be read in isolation but must be read in a systematic way in conjunction with the 1991 Directive. I accept this. From this basis it is argued that to read Article 4(1) of the 2002 Directive in the manner contended for by the Applicants would be to ignore the data protection provisions contained within Article 13 of the 1991 Directive. Article 13.2 exempts an applicant for authorisation of a plant protection product from supplying an Annex II dossier: however this is without prejudice to the data protection provisions of Article 13.3 and 13.4. The Respondent on application for a plant protection product authorisation had always required an applicant to submit a dossier of protected studies satisfying the requirements of Annex II in respect of an active substance: regard could not be had to studies submitted by the main notifier in respect of which data protection is claimed unless the main notifier agreed to provide such access. However the Applicant for approval was not required to provide equivalent studies nor a notorised letter of access in relation to non data protected studies. The same approach is adopted for the purposes of Article 4.1 of the 2002 Directive. The Respondent does not require of an applicant for authorisation a complete Annex II dossier: it requires only that the applicant provide in relation to data protected matter proof of access to protected studies submitted by the main notifier or the provision of equivalent data. To do otherwise, it contends, would be to negative the protection given by Article 13 of the 1991 Directive.

In construing Article 4 of the 2002 Directive assistance can be derived from Recital 8 in the same. This provides as follows –

> "(8) After inclusion, Member States should be allowed a reasonable period within which to implement the provisions of Directive 91/414/EEC as regards plant protection products containing ethofumesate, and in particular, to review existing authorisations in accordance with the provisions of Directive 91/414/EC to ensure that the conditions regarding ethofumesate set out in Annex I to the Directive of 91/414/EEC are satisfied. A longer period should be provided within which a complete dossier for each such plant protection product satisfying the requirements of Annexes II and III to Directive 91/414/EEC should be submitted and that product re-evaluated in accordance with the uniform principles laid down in Directive 91/414/EEC."

Recital (9) provides as follows –

> "(9) It is therefore necessary to amend Directive 91/414/EEC."

Having regard to Recital (9) it is clear that the effect of the 2002 Directive may be to amend the provisions of the 1991 Directive and this may include an amendment of the data protection provisions. Recital (8) envisages the two tier process set out in Article 4.1 and Article 4.2. In relation to the former Recital (8) envisages a review of existing authorisations to ensure that the conditions regarding ethofumesate set out in Annex I of the 1991 Directive are satisfied. I have already recited the conditions regarding ethofumesate set out in Annex I of the 1991 Directive as amended by the 2002 Directive. If it were the legislative intention that a complete dossier satisfying the requirements of Annex II and III of the 1991 Directive was required at the stage of an Article 4.1 review one would expect this to be expressly stated either in Recital (8) or in Article 4.1 itself and this is not the case. The requirement for a dossier to satisfy Annex II and Annex III in relation to the re-evaluation to be carried out under Article 4.2 is expressly provided for and this fortifies me in the view that the same is not required under Article 4.1. There is also this distinction between Article 4.1 and Article 4.2: the former is termed a review while the latter is termed a re-evaluation and having regard to this one must assume that something different in quality is required by each of these provisions and I am satisfied that re-evaluation envisages a far more detailed consideration than a review. Again the timescales provided in Article 4.1 and 4.2 suggest that what is required in the latter is more detailed. I accept that the effect of this interpretation of Article 4.1 negatives to some extent the data protection provisions of Article 13 of the 2001 Directive. However this is not to any significant effect. The re-evaluation provided for in Article 4.2 can be carried out by the Member State as soon as may be provided this is done before the 28th February 2007 and could be carried out forthwith. In these circumstances the deprivation of the benefit of the data protection provisions to the main notifier could be very short-lived indeed.

In these circumstances the Respondent was not entitled to require the Applicant to satisfy it in relation to the Annex II dossier that it was not affected by the data protection provisions of Article 13 of the 1991 Directive or in the alternative produce equivalent information or a letter of access. On a review under Article 4.1 the Respondent is restricted to ensuring that the conditions set out in Annex I of the 1991 Directive as amended by the 2002 Directive are complied with.

While having so held the remaining matters raised on this application do not arise I propose dealing with the same. I do so upon the hypothesis that an Annex II dossier is a requirement of Article 4.1 of the 2002 Directive.

3. The Respondent erred in refusing to accept ongoing studies.

The Respondent did indeed refuse to accept ongoing studies. It is a matter for the Respondent to determine whether the studies are sufficient to satisfy it or not. Regard must be had to the precautionary principle. See also the OECD Principles of Good Laboratory Practice, Environment Monograph No. 45 at para 9.1. There is nothing before me to suggest that the refusal to accept ongoing studies is irrational or unreasonable. The Applicant has failed to establish that it is entitled to relief on this basis.

4. The Respondent acted in an arbitrary, irrational or unlawful fashion in arriving at its decision.

The Applicant relies on a number of particulars:-

> (i) The Respondent allowed the Applicant just seven days from the 1st communication that the products registrations were to be revoked on the 26th September 2003 thereby allowing the Applicant insufficient time to deal with the Respondent's requirements.
>
> The burden which the Applicant bore arose pursuant to the 2002 Directive Article 4.1. The Directive is dated the 3rd May 2002 and its provisions were to come into force on the 1st March 2003. The review required was to be carried out in sufficient time to enable an authorisation to be withdrawn by the 1st September 2003. The Applicant accordingly had from the 3rd May 2002 to submit a complete application for the Respondent's consideration and if it failed to do so then it must bear the consequences. It is clear that the Applicant had by 26th September 2003 taken very substantial steps to meet the deadlines set by the 2002 Directive and indeed did so on the basis that it was required to furnish an Annex II dossier. There is nothing in the 1991 Directive or the 2002 Directive to require the Respondent to draw to the Applicant's attention defects in its application.
>
> (ii) The Applicant was required to supply a report on both lactating ruminants and poultry when Annex II Point 6.2 of the 1991 Directive requires one or other of such reports.

This objection is not supported by the wording of Point 6.2 –

> "Metabolism studies on animals, such as lactating ruminants (e.g. goat or cow) or laying poultry, are only required where pesticide use may lead to significant residues in livestock feed…"

Point 6.2 read as a whole makes it clear that metabolism studies on animals may be required where there will be

significant residues in livestock feed. The Clause "such as lactating ruminants (e.g. goat or cow) or laying poultry" makes it clear that "or" does not signify that one or other such reports only is required: lactating ruminants and laying poultry are examples of the animals in respect of which such studies may be required. I am satisfied on the true construction of Point 6.2 that reports on both lactating ruminants and laying poultry may be required of an applicant.

> (iii) The Applicant was required to furnish a study on lactating ruminants notwithstanding that the inclusion of ethofumesate in Annex I had taken place in circumstances where an application to grassland was no longer supported by the main notifier.

Mark Lynch in an Affidavit filed on behalf of the Respondent avers that the Commission required such a report for the inclusion of ethofumesate in Annex I. In these circumstances I am satisfied that the Applicant was entitled to require such a report notwithstanding that the main notifier no longer supported ethofumesate for application to grass: in any event beet tops are fed to cattle and other animals and accordingly such a study had relevance to risk assessments necessary to support Annex I inclusion.

> (iv) The Respondent required the Applicant to submit a final report of an ongoing crop rotation study notwithstanding that the Rapporteur Member State under the 1991 Directive had identified a report as not being data protected in July 2000 and December 2000.

The Respondent makes it clear that the Applicant did not seek to rely on the non data protected report referred to but rather on an unaudited draft report of 24th June 2003 which was unacceptable to the Respondent. If the Applicant intended to rely on the non data protected report it was incumbent upon it to so stipulate and this it did not do. The Respondent was entitled to deal with the application as made and I can see no basis upon which it was required to draw to the Applicant's attention that there existed non data protected reports of which it could avail.

> (v) The Respondent required the Applicant to submit Lysimeter reports within seven days when it knew or ought to have known that such a request could not be complied with within that period because of delay by the Rapporteur Member State in informing the Applicant that such studies as existed were data protected.

The Respondent in relation to this ground avers that it was obliged to act on the basis that documents listed as data protected in the final Commission review report of 15 May 2002 were indeed data protected and this it did. The position therefore is that both the Applicant and Respondent were under the misapprehension that Lysimeter reports which could have been availed of by the Applicant were data protected. Equally both believed that the Applicant was required to provide equivalent data. As the onus rests upon an Applicant to satisfy the Respondent by means of non data protected reports or equivalent data or letters of access it was the Applicant's choice although made under misapprehension to rely on equivalent data and that choice having been made the Respondent dealt appropriately with the application.

> (vi) The Respondent identified data gaps in the Applicant's application where none such existed.

It is quite clear that a number of reports were outstanding at the date of the communication of the Respondent's decision relating to the Applicant's authorisation. On the Affidavits before me this submission is not borne out by the facts. In this regard it is clear from the Applicant's fax to the Respondent at 30th September 2003 that reports were indeed outstanding at least in that interim reports only were available in relation to residues in soil, Lysimeter studies and a study on absorption, disposition, metabolism and excretion of ethofumesate in laying hens following oral administration.

> (vii) The Respondent from time to time between the 28th February 2003 and the 26th September 2003 indicated that the dossier had been reviewed positively.

It is clear from the Affidavits filed that there was engagement between the Applicant and the Respondent.

In the Grounding Affidavit of Ms Van Esbroeck at paragraph 24 the Deponent avers that she made a number of contacts with the Respondent prior to 26th September 2003 and that at all stages the feedback which she received was positive. In particular she contacted Mr. Trevor Myles of the Respondent by telephone on the 3rd September 2003 and was told by him that the Applicant would probably get clearance but that an official decision had not been made. On the 19th September 2003 she spoke with Ms Dillon of the Respondent and was again told that no official decision had been made. In the supplementary Affidavit Ms Van Esbroeck exhibits a note of her telephone conversation with Mr. Myles. In this is contained the phrase "looking very favourable very good". Mr. Myles in an Affidavit avers that in his recollection of the telephone conversation he did not give any indication that a decision was likely to be favourable and that in any event he did not have any role in the decision making process on the application.

If notwithstanding the conflict on Affidavit Ms Van Esbroeck's account of her telephone conversation with Mr. Myles is accepted I do not accept as claimed by the Applicant that as a result of the same the decision was arbitrary or irrational, unlawful or *ultra vires*. It was at all times quite clear that the decision had not in fact been made and that the application was still being considered. In these circumstances the position is quite different from that in *Frenchchurch Properties Limited v Wexford County Council* 1992 2 I.R. 268. In that case the Applicant was dealing with an official of the respondent local authority who knew of a point upon which the applicant for planning permission was relying and which the Planning Authority considered invalid and the Planning Authority failed to draw the point to the applicant's attention and give it an opportunity to deal with the same. This is not the position here where no decision on any point had at the stage of Mr. Myles' telephone conversation been reached.

I am not satisfied that the Applicant has made out a case on this basis that the decision was arbitrary, irrational, unlawful or ultra vires.

> (viii) The Respondent purported to revoke the registration of the Applicant's products and there is no power under the Directive to revoke a registration.

The Applicant is correct on this submission if one has regard to the words of the 1991 Directive and the 2002 Directive.

They do not refer to either "revocation" or "registration". The words used are "authorisation" and "withdrawal". However I am satisfied that by use of the words "registration" and "revocation" the Respondent intended to refer to "authorisation" and "withdrawal" and the meaning those words bear in Article 4 of the 1991 Directive and were so understood by the Applicant. There was no confusion or misunderstanding.

13. The Applicant has failed to satisfy me in any of the particulars relied upon that the Respondent acted in an arbitrary, irrational or unlawful fashion in arriving at its decision.

15. In summary the Applicant succeeds on the issue identified by me at 2. above but fails on all the other issues which I have identified. I will hear Counsel as to the appropriate Order to be made.