[2017] IEHC 520

**THE HIGH COURT**

**[Record No. 2011/239 MCA]**

**IN THE MATTER OF IRISH LIFE AND PERMANENT GROUP HOLDINGS PLC AND IN THE MATTER OF IRISH LIFE AND PERMANENT PLC AND IN THE MATTER OF AN APPLICATION FOR THE SETTING ASIDE PURSUANT TO SECTION 11 OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010 OF THE DIRECTION ORDER WHICH WAS MADE ON THE 26TH JULY 2011 PURSUANT TO SECTION 9 OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010 AND ANCILLARY ORDERS**

**BETWEEN/**

**GERARD DOWLING, PADRAIG McMANUS, PIOTR SKOCZYLAS AND SCOTCHSTONE CAPITAL FUND LIMITED**

**APPLICANTS**

**AND**

**THE MINISTER FOR FINANCE**

**RESPONDENT**

**AND**

**PERMANENT TSB GROUP HOLDINGS AND PERMANENT TSB PLC**

**NOTICE PARTIES**

**JUDGMENT of Ms. Justice Iseult O'Malley delivered the 31st day of July 2017**

**Introduction**

1. This is the second substantive judgment delivered by me in these proceedings, and should be read in conjunction with the first (*Dowling & Others v. The Minister for Finance* [2014] IEHC 418).

2. The issues in the case arise out of the making of a direction order in respect of Irish Life and Permanent Group Holdings plc by the High Court, in July 2011, pursuant to the provisions of the Credit Institutions (Stabilisation) Act, 2010. Under that Act, the Minister for Finance may, if he or she considers it necessary to secure the achievement of a purpose of the Act, make a "proposed order" proposing that a credit institution covered by the Act be directed to take or refrain from taking a specified action or actions. Having done that, and having complied with the procedural requirements of the Act as to consultation with the Governor of the Central Bank and notification to and receipt of submissions from the institution concerned, the Minister may make an *ex parte* application to the High Court for an order in the terms proposed. The court shall make the order if it is satisfied that the procedural requirements of the Act have been complied with and that the opinion of the Minister (that the proposed order is necessary to secure the achievement of a purpose of the Act) is reasonable and is not vitiated by any error of law. As is made clear in the first judgment, the effects of a direction order can be extremely wide-ranging, and there is no doubt but that they were radical in this case.

3. The application for the Direction Order in this case is described in paragraphs 29.1 to 29.22 of the first judgment. The purposes for which the application was made, by reference to the statutory purposes, are summarised at paragraphs 30.1 to 30.13. The details of the order required are set out in paragraphs 31.1 to 31.4.

4. The applicants seek an order pursuant to s.11 of the Act to set aside the Direction Order. To succeed, they must establish that there was non-compliance with the requirements of s.7, or that the opinion of the respondent Minister as to the necessity for a direction order was unreasonable or was vitiated by an error of law.

5. The substantive hearing in this case took place over a number of weeks in 2014. A lengthy written judgment was delivered on the 15th August, 2014, (hereafter "the first judgment"). A number of findings of fact are set out in it, as are the considered rulings on many of the legal issues. However, for the reasons explained in the judgment I decided that it was necessary to refer certain issues to the Court of Justice of the European Union for preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union. Specifically, the reference was necessary to my final decision because it was not clear to me whether or not the situation was definitively governed by certain judgments of the Court of Justice concerning the rights of shareholders under the provisions of Council Directive 77/91/EEC.

6. The order for the reference was made on the 2nd December, 2014. The CJEU delivered its ruling on the 8th November, 2016, (see *Dowling v. Minister for Finance* C-41/15). A further hearing was subsequently held in this Court to afford the parties an opportunity to make submissions.

7. It must be made clear at the outset of this judgment that it is concerned, firstly, with the application of the ruling given by the CJEU and secondly, where necessary, with the resolution of certain arguments that were not dealt with in the first judgment because, depending on the content of that ruling, they might not have fallen to be determined. It is not intended to embark upon new legal arguments that may have occurred to the parties, or to reopen any findings already made. That would not, save perhaps in exceptional circumstances, be possible.

**Findings in the first judgment**

8. The circumstances surrounding the making of the Order and the relevant provisions of the Act are described in considerable detail in the first judgment. It is not necessary to repeat the evidence here. However, it will be helpful to set out the findings made, since they formed the basis for the reference to the CJEU. As set out in paragraph 41.2 of the first judgment, they are as follows:

> (i) From 2008 onwards, ILP along with other Irish banks became increasingly reliant upon State and EU financial support. As time went by and the financial turmoil of those years did not resolve, the efforts of the Irish Government to support the banks did not succeed in convincing the markets of either the banks' viability or the State's capacity to continue supporting them.
>
> (ii) By late 2010 it was apparent that there was a serious threat to the financial stability of the State, in significant part due to the State's commitments to the banks.
>
> (iii) The State's guarantees in respect of ILP amounted to €26 billion.

(iv) In entering in to the Programme for Support in November 2010, the Irish State entered into binding legal commitments to the European Commission, the European Central Bank and the International Monetary Fund, including a commitment to recapitalise viable Irish banks.

(v) As part of the Programme, the Central Bank committed itself to carry out a Prudential Capital Assessment Review (PCAR) and a Prudential Liquidity Assessment Review (PLAR) and to determine the capital needs of the banks on the basis of the results.

(vi) The PCAR and PLAR results were published on 31st March, 2011.

(vii) The State was legally committed to ensure recapitalisation in line with the reviews by the 31st July, 2011.

(viii) The Governor of the Central Bank then directed ILP to raise regulatory capital in the sum of €4 billion. This direction was binding on ILP and was not the subject of any legal challenge. The direction was made by the Central Bank in its capacity as independent regulator.

(ix) On the balance of probabilities, the required capital could not have been raised from private investors.

(x) On the balance of probabilities, the required capital could not have been raised from existing shareholders.

(xi) On the balance of probabilities, failure to recapitalise by the deadline would have led to a failure of the Bank, whether by reason of a run on the Bank by depositors, revocation of its licence, a call for repayment of the various Notes, a cessation of funding under the ELA scheme or a combination of some or all of these possibilities.

(xii) The failure of ILP would, as a matter of probability, have resulted in a complete loss of value to the shareholders.

(xiii) The failure of ILP would, as a matter of probability, have had extreme, adverse consequences for the Irish State, whether by reason of a run on the Bank and subsequent calls on the State guarantee of up to c. €26 billion, the contagion effects in relation to the other banks, a full or partial withdrawal of funding to the State under the Programme for Support for non-compliance with its terms, sanctions imposed under the Treaty, or a combination of some or all of these possibilities.

(xiv) The adverse consequences for the State would, as a matter of probability, have worsened the threat to the financial stability of other Member States and of the European Union.

(xv) The decisions by the State to invest in the recapitalisation was made in fulfilment of its legal obligations and in the interests of the State's financial system, the citizens of the State and the citizens of the European Union.

(xvi) The State decided to recapitalise ILP by way of a subscription by the Minister for Finance for ordinary shares in the sum of €2.3 billion, contingent capital in the sum of €0.4 billion, and a "stand by" investment of €1.1 billion. The price to be paid per share was €0.06345, a discount of 10% to the middle market price on 23rd June, 2011. The calculation of the number of shares required to be issued in return for the €2.3 billion resulted in the acquisition by the Minister of 99.2% of the Company.

(xvii) The share price on that date was not the result of a false market, as argued by the Applicants. The share price had been falling in any event over the previous number of years, and fell dramatically on publication of the PLAR/ PCAR results. As a matter of probability, this was because the market doubted the ability of the Bank to achieve the required recapitalisation in a way that would be attractive to investors.

(xviii) Part of the plan for the recapitalisation of the Bank involved the sale of its asset Irish Life. The Applicants argued that the sale of Irish Life constituted an expropriation of the shareholders of ILPGH. However, this asset belonged to ILP, and not to the shareholders of ILPGH. Its value could not, accordingly, be attributed to those shareholders any more than the liabilities of ILP could have been attributed to them.

(xix) To attribute the value of Irish Life to the shareholders would be to make an unlawful return of capital to the shareholders.

(xx) The paid in share capital of the Company was not counted as part of the recapitalisation and has not been taken out of the Company by the Minister.

(xxi) A Liability Management Exercise resulted in a significant loss to the subordinated debt holders and contributed significantly to the recapitalisation.

(xxii) The European Commission gave approval under State Aid rules for the recapitalisation of ILP by means of the State investment in the same manner, at the same price and to the same extent as that ultimately carried out on foot of the Direction Order made by the High Court.

(xxiii) The Irish Takeover Panel granted a waiver of Rule 9 for the purposes of the State investment on the basis of the same proposal. This did not involve any breach of the Takeover Directive.

(xxiv) The Minister's proposal was supported, albeit reluctantly, by the Board of ILP. The Board considered that the Company had no other option available to it in terms of achieving the required recapitalisation. An EGM was called with a view to passing the necessary resolutions.

(xxv) The State's proposal was not accepted by the shareholders voting at the EGM on 20th July, 2011, who wished to explore other potential avenues for the raising of the required capital. The Board was instructed to seek an extension of time for the recapitalisation.

(xxvi) Neither the Minister nor the Governor of the Central Bank was minded to seek such an extension. Having regard to the source of the deadline, an extension would have required the consent of the External Partners and the members of the European Council.

(xxvii) The Minister decided to make a Proposed Direction Order pursuant to the provisions of the Act.

(xxviii) The Minister informed the Governor of the Central Bank of his intentions and complied with the procedural requirements of the Act in so doing.

(xxix) He informed the Board of ILP of his intentions and complied with the procedural requirements of the Act in so doing.

(xxx) The Governor of the Central Bank communicated his views, which were supportive of the Proposed Direction Order as being likely to achieve the statutory purposes of the Act.

(xxxi) The chairman of the Board of the Company referred the Minister to the letter he had written after the EGM, outlining the views of the dissenting shareholders.

(xxxii) The application for a Direction Order was made and granted by the High Court, in accordance with the procedure prescribed by the Act, on 26th July 2011.

(xxxiii) There was no want of candour and no breach of duty to the Court on the part of the Minister or his legal representative in the making of the application.

(xxxiv) One result of the Direction Order was (as it would have been under the proposal put to the EGM) that the Minister obtained 99.2% of the issued shares of ILPGH. It was therefore necessary to remove the Company's shares from the official lists in Ireland and the United Kingdom. This did not involve any breach of the MiFID Directive.

(xxxv) The Act permits the action taken by the Minister. The Direction Order cannot be set aside or varied unless the Court finds that his opinion that it was necessary was unreasonable or vitiated by legal error.

**The test for setting aside a direction order**

9. Section 11 of the Act provides that the relevant institution, or any member thereof, may apply to the High Court to have the direction order set aside. The court may accede to the application only if it is of the opinion that there has been non-compliance with any of the requirements of s.7 or that the opinion of the Minister was unreasonable or vitiated by an error of law. It is clear, therefore, that the onus of proof lies upon an applicant to establish these matters.

10. At paragraphs 38.1 to 38.48 of the first judgment I discussed the test to be applied by the Court in deciding on an application under s.11 of the Act. I considered that three questions arose for determination. The first was whether there had been any failure to comply with the procedural requirements of the statute, as provided for in s.7, in the making of the application for the Direction Order. I concluded, as set out in findings 27 -31, that there had not.

11. In relation to the procedural aspects I further concluded, in finding 33, that there had been no want of candour on the part of the Minister or his representatives in the application put before the High Court. The argument made by the applicants in that respect had been that counsel had failed to inform the High Court that the Direction Order was invalid having regard to the relevant European Union law and in particular the Second Directive. This aspect is discussed in paragraphs 36.1 and 36.2 of the first judgment. I concluded that there was no breach of duty to the Court.

12. The second question to be addressed by the Court was whether the opinion of the Minister that the Order was "necessary" was reasonable. I ruled that in this context "necessary" meant "really needed". I accepted the argument of the respondent, based on the judgment of Peart J. in other litigation between the same parties (*Dowling & ors. v. Minister for Finance* [2012] IEHC 89), that the Minister did not have to show that the proposed action was the sole method of achieving the statutory purpose. However, I considered that it was desirable that the evidence grounding the application for the Direction Order should demonstrate that the Order sought was the most reasonably practicable method in all the circumstances of the case. The Court would be conscious of the fact that the application might be made in circumstances of urgency, where time would not permit of exhaustive analysis. The Court would also have due regard to the role and responsibilities of the Minister, and to the fact that the Minister would have had access to expert advice in forming the opinion.

13. At paragraph 38.42 I addressed the interpretation of the word "reasonable" and held that it should be given the legal interpretation familiar to the courts and the legislature – that is, that the test for reasonableness is that established in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, *The State (Keegan & Lysaght) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, as considered by the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701. It includes considerations of proportionality. I cited Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593 as providing the appropriate framework when he said that the measure must be rationally connected to the objective, not be arbitrary or unfair or based on irrational considerations; must impair the right as little as possible; and must be such that the effects on rights are proportional to the objective.

14. The question whether the Minister's opinion was reasonable was not answered in the first judgment, because I took the view that the answer to the third question was capable of determining the case without reference to the concept. In other words, if the Minister's opinion was vitiated by legal error there would be little point in determining whether or not it had been reasonable.

15. The third question is whether the opinion of the Minister was vitiated by any legal error. I considered that the concept of "legal error" included questions of constitutional and EU law, as well as the interpretation of the Act. I further ruled that the use of the word "vitiated" implied that not every error of law would result in the setting aside of the Direction Order. The relevant considerations, should this latter issue arise, would include the nature of the error and its consequences, which would in turn engage the question of proportionality and the existence of alternative remedies.

16. This third question was not answered in the first judgment because I believed that it was necessary to seek a preliminary ruling on the central issues of EU law raised in the submissions.

**The request for a preliminary ruling**

17. The applicants have raised and argued a wide-ranging set of issues in the case. The decision to make the reference to the CJEU was on the basis of submissions made on the effect of Articles 8(1), 25 and 29 of Council Directive 77/91/EEC ("the Second Directive") on the rights of the shareholders in the circumstances of the case. Again, the relevant provisions, case law and

submissions are dealt with in detail in the first judgment, at paragraphs 40.1 to 40.36, and will not be repeated here.

18. I referred the following questions for ruling pursuant to Article 267 of the TFEU:

> *Having regard to:*
>
> *the Second Company Law Directive (Council Directive 77/91/EEC, as amended);*
>
> *the Credit Institutions Winding Up Directive (2001/24/EC);*
>
> *the obligations of the Irish State under the provisions of the Treaty on the Functioning of the European and in particular Articles 49, 65, 107, 120 and Title VIII of Part Three thereof;*
>
> *the obligations of the Irish State under the EU/IMF Programme of Support;*
>
> *the terms of the Council Implementing Decisions on granting EU financial assistance to Ireland, made pursuant to Council Regulation (EU) No. 407/2010,*
>
> *Does the Second Company Law Directive preclude in all circumstances, including the circumstances of this case, the making of a Direction Order pursuant to section 9 of the Credit Institutions (Stabilisation) Act, 2010, on foot of the opinion of the Minister that it is necessary, where such an order has the effect of increasing a company's capital without the consent of the general meeting; allotting new shares without offering them on a pre-emptive basis to existing shareholders, without the consent of the general meeting; lowering the nominal value of the company's shares without the consent of the general meeting and, to that end, altering the company's memorandum and articles of association without the consent of the general meeting?*
>
> *Was the Direction Order made by the High Court pursuant to section 9 of the Credit Institutions (Stabilisation) Act 2010 in relation to Irish Life and Permanent Group Holdings plc and Irish Life and Permanent plc in breach of European Union law?*

**The judgment of the Court of Justice**

19. The formal part of the ruling setting out the answer to the questions was as follows:

> *"Articles 8(1) and Articles 25 and 29 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of [the second paragraph of Article 54 TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, must be interpreted as not precluding a measure, such as the Direction Order at issue in the main proceedings, adopted in a situation where there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied any pre-emptive subscription right."*

20. Having regard to the submissions now made on behalf of the applicants it is necessary to consider the judgment in greater depth.

21. At paragraph 8 of the judgment reference was made to Council Regulation (EU) No 407/2010, which established the European Financial Stabilisation Mechanism. The regulation was based on Article 122(2) of TFEU, and its recitals described the severe deterioration of the borrowing conditions of several Member States which, if not addressed as a matter of urgency, could present a serious threat to the financial stability of the European Union as a whole. Article 1 of the Regulation reads in relevant part as follows:

> *"With a view to preserving the financial stability of the European Union, this Regulation establishes the conditions and procedures under which Union financial assistance may be granted to a Member State which is experiencing, or is seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control…"*

22. This is the regulation pursuant to which Ireland received a significant proportion of the funding given under the Programme for Support.

23. At paragraph 11 the CJEU noted some of the terms of Implementing Decision 2011/77/EU of the 7th December, 2010, (on granting financial assistance to Ireland). It referred to the recitals, which describe a "*severe economic and financial disturbance caused by exceptional circumstances beyond the control of the government*" that had caused the Irish authorities to seek financial assistance from the European Union, other Member States whose currency was the euro and the International Monetary Fund. This request was made "*with a view to supporting the return of the economy to sustainable growth, ensuring a properly-functioning banking system and safeguarding financial stability in the Union and in the euro zone".*

24. In paragraphs 30 and 31 of the judgment the Court summarised as follows certain of the findings recorded in the first judgment:

> *"30. The referring court concluded, on the balance of probabilities, that ILP could not have raised the required amount of capital of EUR 4 billion either from private investors or from existing shareholders, after the extraordinary general meeting of ILPGH had rejected, on 20 July 2011, the Minister's recapitalisation proposal. In the opinion of that court, if ILP had not been recapitalised by the deadline laid down in Implementing Decision 2011/77, that would have led to the failure of ILP, due to a number of possible developments, such as a run on deposits held with ILP, a call for repayment of various notes or a cessation of funding under the emergency liquidity assistance scheme, or a combination of some or all of these possibilities.*
>
> *31. Further, the High Court considers that ILP's failure would not only have led to the complete loss of value of the shares to the shareholders, but would also have had adverse consequences for Ireland. The court refers to, inter alia, the possibility of a run on deposits held with the national banks, the subsequent call on the guarantee granted to ILP by*

*the Irish State and the possibility of full or partial withdrawal of funding to Ireland under the economic and financial adjustment programme for non-compliance with the terms of that programme. In the opinion of the referring court, those adverse consequences for Ireland would probably have worsened the threat to the financial stability of other Member States and of the European Union."*

25. These two paragraphs correctly summarise some of the key findings in the first judgment.

26. Having set out the context of the questions referred, at paragraph 43 of its judgment the Court of Justice said:

> *"43. That being the case, the two questions referred, which can be examined together, must be understood as meaning that the referring court is seeking, in essence, to ascertain whether Article 8(1), together with Articles 25 and 29 of the Second Directive, must be interpreted as precluding a measure, such as the Direction Order at issue in the main proceedings, adopted where there is a serious disturbance of the economy and financial system of a Member State that threatens the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the approval of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied any pre-emptive right to subscribe."*

27. Again, this is an absolutely correct summary of the issue referred to the CJEU. The judgment then goes on:

> *"44. In that regard, it is clear from the information provided by the referring court that the Direction Order was adopted in the context of the financial and economic crisis which led Ireland, in 2008, to grant significant guarantees to the national banks affected by that crisis and, in late 2010, when the financial situation of those banks was continuing to deteriorate and was also threatening the financial stability of that Member State, to request financial assistance from the European Union and to undertake to restructure and recapitalise the national banking sector."*

28. This is a factual and uncontroversial statement.

> *"45. According to the referring court, that situation of serious disturbance of the national economy made it essential, because of the fact that it was impossible for ILP itself to achieve the recapitalisation by the end of July 2011, as required in particular by the Memorandum of Understanding, that the Irish State take action in order to avoid a failure of ILP that would threaten both the financial stability of Ireland and that of other Member States and of the European Union.*
>
> *46. The recapitalisation of national banks, including ILP, by 31 July 2011 was also laid down by Article 1(4) and Article 3(2), (4), (5) and (7)(g) of Implementing Decision 2011/77, as a condition for the payment of European Union financial assistance to Ireland. That financial assistance constituted, in accordance with recitals 4 and 5 and Article 1 of Regulation No 407/2010 – itself adopted on the basis of Article 122(2) TFEU which is designed to allow action to be taken to deal with 'exceptional occurrences' – a measure taken as a matter of urgency with a view to maintaining the financial stability of the European Union."*

29. Again, no issue is taken with either of these paragraphs. At paragraph 47 the Court said:

> *"47. Admittedly, in order to recapitalise ILP, the Direction Order required an increase in the share capital of ILPGH. However, Article 3(7)(g) of Implementing Decision 2011/77 provides for the recapitalisation of national banks, one such being ILP, but does not specify how that was to be achieved. Consequently, the Irish authorities were not obliged to make a direct injection of capital into the share capital of ILP, but could carry out that recapitalisation by means of increasing the share capital of ILPGH."*

30. This deals with the explanation for the fact that the Direction Order was directed to ILPGH.

31. The next paragraph was the subject of much debate at the resumed hearing. The Court of Justice said:

> *"48. Further, as stated in paragraphs 30 and 31 of this judgment, the referring court, after weighing the competing interests, came to the conclusion that, once the decision of ILPGH's extraordinary general meeting of 20 July 2011 was made to reject the Minister's proposed recapitalisation, the Direction Order was the only means of ensuring, within the time limit laid down by Implementing Decision 2011/77, the recapitalisation of ILP that was necessary to prevent the failure of that financial institution and thereby to forestall a serious threat to the financial stability of the European Union."*

32. The dispute in relation to this paragraph is as to whether the competing interests were in fact weighed, and whether the conclusion that the Direction Order was the "only means" of ensuring recapitalisation within the time limit had in fact been reached, in the first judgment. The applicants say that this is the key passage in the CJEU judgment. The argument is that the Court of Justice either erroneously believed that this Court had found the Direction Order to be the only means, and that everything that follows thereafter is posited on that mistake, or else it exceeded its own jurisdiction to make a finding of fact.

33. The Court then continued:

> *"49. The aim of the Second Directive is to achieve, as stated in its second recital, minimum equivalent protection for both shareholders and creditors of public limited liability companies. Accordingly, as ILPGH and ILP and also Ireland have stated in their observations submitted to the Court, the measures provided for by that directive relating to the formation of public limited liability companies and to the maintenance, increase or reduction of their capital guarantee such protection against acts taken by the governing bodies of those companies and relate, therefore, to their normal operation (see, by analogy, Kotnik and Others, C-526/14, EU:C:2016:570, paragraphs 86 and 87).*
>
> *50. However, as is clear from paragraphs 44 to 48 of this judgment, the Direction Order is not a measure taken by a governing body of a public limited liability company as part of its normal operation, but is an exceptional measure taken by the national authorities intended to prevent, by means of an increase in share capital, the failure of such a company, which failure, in the opinion of the referring court, would threaten the financial stability of the European Union. The protection conferred by the Second Directive on the shareholders and creditors of a public limited liability company, with respect to its share capital, does not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State and that is designed to overcome*

*a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned.*

*51. The provisions of the Second Directive do not therefore preclude an exceptional measure affecting the share capital of a public limited liability company, such as the Direction Order, taken by the national authorities where there is a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union (see, by analogy, judgment of 19 July 2016, Kotnik and Others, C-526/14, EU:C:2016:570, paragraphs 88 to 90)."*

34. The Court stated that this conclusion could not be called into question by the fact that the Direction Order could, as argued by the applicants, be classified as an administrative rather than judicial measure. It said that it followed from paragraphs 50 and 51 that "*in circumstances such as those at issue in the main proceedings*" the Second Directive did not preclude the adoption of a measure such as the Direction Order, and that the nature of the national authority that issued the Order was therefore irrelevant.

35. The Court rejected the contention of the applicants that this interpretation was irreconcilable with its judgment in *Pafitis and Others v. Trapeza Kentrikis Ellados* (C-441/93, EU:C:1996:92 – for a discussion of this and other EU case law on the issue see paragraphs 40.1 to 40.36 of the first judgment). In that case, which concerned the insolvency of a single bank, the Court had ruled that the Second Directive continued to apply in the case of "*ordinary reorganisation measures*". That ruling, according to the Court in the instant case, did not cover extraordinary reorganisation measures

*"designed to avoid, in a situation where there is a serious disturbance of the national economy and of the financial system of a Member State, the failure of a bank and thereby to maintain the financial stability of the European Union."*

36. At paragraph 54 the Court continued:

*"54. Further, as ILPGH and ILP and also Ireland have stated in their observations submitted to the Court, the national measures contested in the Pafitis and Others case (C-441/96, EU:C:1996:92) had been adopted in the 1986-1990 period and the Court delivered its judgment on the 12 March 1996, thus well before the start of the third stage for the implementation of the Economic and Monetary Union, with the introduction of the euro, the establishment of the Eurosystem and the related amendments to the EU Treaties. Although there is a clear public interest in ensuring, throughout the European Union, a strong and consistent protection of shareholders and creditors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system established by those amendments (see, to that effect, judgment of 19 July 2016, Kotnik and Others, C-526/14, EU:C:2016:570, paragraph 91."*

37. The Court then proceeded to make the formal ruling set out above.

**The judgment in *Kotnik***

38. It will have been seen that the Court of Justice referred several times to its judgment in *Kotnik and Others v. Slovenia* (C-526/14), which was delivered while that Court's judgment in this case was still pending, and it is helpful to consider it before examining the submissions in the instant case. *Kotnik* concerned the implications of a Communication (referred to as the Banking Communication) issued by the Commission on the 1st August, 2013. It was one of a series of such communications issued during the financial crisis and its purpose was to provide guidance on the rules relating to State aid for the financial sector in that context. In December, 2013 the authorities of Slovenia, acting on the basis of legislation intended to implement the Communication, adopted measures for the recapitalisation of certain banks which involved the writing off of subordinate rights. The court challenge was ostensibly concerned with the constitutionality of the national legislation but the complaints made by the applicants were seen as being directed at the validity and interpretation of the Communication.

39. The Communication and the proceedings that it gave rise to obviously post-date the events with which the current proceedings are concerned, and a number of the questions dealt with do not arise here, but the analysis of certain issues by the Court is clearly relevant. At paragraphs 32 and 33 of the judgment the case is summarised in the following terms:

*"32. It must be observed that what lies behind this case is, in essence, the fact that State aid was granted by the Slovenian Government with the objective of ensuring the recovery of the national banking system.*

*33. More specifically, this case concerns the compatibility, with a number of provisions of EU law, of the condition laid down by the Commission that there must be burden-sharing by shareholders and subordinated creditors, if it is to be able to find, under Article 107(3)(b) TFEU, that the State aid granted in the banking sector is compatible with the internal market…"*

40. It is relevant to note that the Court ruled that the Banking Communication did not, and could not, impose independent obligations on the Member States. It established conditions, designed to ensure that State aid to the banks in the context of the financial crisis was compatible with the internal market, which the Commission was therefore obliged to take into account in exercising its discretion under TFEU. The Communication was not, in itself, binding on the Member States. The Court also stated (at paragraph 49) that to come within the permitted discretion conferred by Article 107(3)(b) TFEU the aid had to be necessary for the attainment of the objectives specified in that provision.

41. At paragraph 50 the Court noted the central role played by financial services in the economy of the EU, saying:

*"… Banks and credit institutions are an essential source of funding for businesses that are active in the various markets. In addition, the banks are often interconnected and a number of them operate internationally. That is why the failure of one or more banks is liable to spread rapidly to other banks, either in the Member State concerned or in other Member States. That is likely, in its turn, to produce negative spill-over effects in other sectors of the economy. "*

42. The concept of burden-sharing is discussed at paragraphs 54 to 58, where the Court said:

*"54. When reviewing the compatibility of State aid measures with the internal market, the Commission could take the view that, as stated in point 15 of the Banking Communication, burden-sharing measures were essential in order that State aid in the banking sector should be limited to the minimum necessary and that any distortions of competition in the internal market should be limited.*

*55. First, such burden-sharing measures can be understood as being designed to prevent recourse to State aid merely as a tool to overcome the financial difficulties of the banks concerned.*

*56. Second, the burden-sharing measures are designed to ensure that, prior to the grant of any State aid, the banks which show a capital shortfall take steps, with their investors, to reduce that shortfall, in particular by raising equity capital and by obtaining a contribution from subordinated creditors, since such measures are likely to limit the amount of the State aid granted.*

*57. To act otherwise would be liable to cause distortions of competition, since banks whose shareholders and subordinated creditors had not contributed to the reduction of the capital shortfall would receive State aid of an amount greater than that which would have been sufficient to overcome the residual capital shortfall. In those circumstances, such aid would not, as a general rule, be compatible with EU law.*

*58. Moreover, in order to overcome the problem of 'moral hazard', which is linked to the fact that individuals are inclined to engage in risk-taking when the possible negative consequences of so doing are borne by the community as a whole, it is important to ensure that banks are not encouraged by the possibility of obtaining State aid to have recourse to financial instruments that carry greater risk and are more likely to cause significant losses, the effect of which would be to create serious distortions of competition and to jeopardise the integrity of the internal market."*

43. The Court ruled that the burden-sharing measures in issue did not breach the principle of protection of legitimate expectations (which, in EU law, arises where assurances of a particular nature are given by a competent authority of the EU). Even if the circumstances for the principle to come into play had been established, there was an overriding public interest in ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition.

44. The referring Court asked if there had been a breach of the right to property. At paragraphs 73 to 75 the Court addressed the position of the shareholders in the following terms:

*"73. Further, as regards the shareholders of the banks, it must be recalled that, in accordance with the general rules applicable to the status of shareholders of public limited liability companies, they must fully bear the risk of their investments. It follows from recital 5 of the preamble to Directive 2012/30 [the Directive that replaced the Second Directive] that the aim of that directive is to maintain the share capital that constitutes the creditors' security.*

*74. Since shareholders are liable for the debts of the bank up to the amount of its share capital, the fact that points 40 to 46 of the Banking Communication require that, in order to overcome a bank's capital shortfall, prior to the grant of State aid, those shareholders should contribute to the absorption of the losses suffered by that bank to the same extent as if there were no State aid, cannot be regarded as adversely affecting their right to property.*

*75. The scale of losses suffered by shareholders of distressed banks will, in any event, be the same, regardless of whether those losses are caused by a court insolvency order because no State aid is granted or by a procedure for the granting of State aid which is subject to the prerequisite of burden-sharing."*

45. The Court therefore found that neither the protection of legitimate expectations nor the right to property must be interpreted as not precluding the laying down of a condition of burden-sharing as a prerequisite to the authorisation of State aid.

46. The Court then considered whether Articles 29, 34, 35 and 40 to 42 of Directive 2012/30 must be interpreted as precluding a condition of burden-sharing. These provisions replicate the Articles of the Second Directive, concerned with an increase or reduction in share capital, relied upon by the applicants in the instant proceedings. At paragraph 87 of the judgment the Court said:

*"87. The background to Directive 2012/30 is the attainment of freedom of establishment in the internal market, and its principal objective is the protection of the interests of shareholders and others. The directive is intended to reassure investors that their rights will be respected throughout the internal market by the governing bodies of the companies in which they have invested, particularly when a company is formed and when its share capital is increased and reduced. Consequently, the measures provided for by Directive 2012/30 in order to guarantee that protection relate to the normal operation of public limited liability companies.*

*88. By contrast, the burden-sharing measures involving both shareholders and subordinated creditors constitute, when they are imposed by the national authorities, exceptional measures. They can be adopted only in the context of there being a serious disturbance of the economy of a Member State and with the objective of preventing a systemic risk and ensuring the stability of the financial system.*

*89. Contrary to what is claimed by the applicants in the main proceedings, Directive 2012/30 does not preclude measures relating to share capital being adopted, in certain specific circumstances, such as those mentioned in the Banking Communication, without the approval of the company general meeting. That interpretation cannot, moreover, be called into question by the judgment of 12 March 1993 Pafitis and Others (C-441/93, EU:C:1996:92).*

*90. In that judgment, the Court interpreted Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1), in the context of a dispute characterised by the insolvency of a single bank, whereas, in the main proceedings, the burden-sharing measures that are the subject of points 40 to 46 of the Banking Communication are envisaged as a prerequisite for the grant, to banks faced with a capital shortfall, of State aid intended, in an exceptional context of a national economy being affected by a serious disturbance, to overcome a systemic financial crisis capable of adversely affecting the national financial system as a whole and the financial stability of the European Union."*

47. There follows, at paragraph 91, a statement about Pafitis more or less identical to that at paragraph 54 of the CJEU judgment in the instant proceedings.

**Submissions on the CJEU judgment**
48. As noted above, the applicants contend for the proposition that the CJEU incorrectly interpreted the first judgment of this Court,

and/or erroneously purported to make a finding of fact itself. This argument focuses on paragraph 48 of the CJEU judgment, and the contention that the Court understood the situation to be that this Court had found that the Direction Order was "*the only means*" of effecting the recapitalisation of ILP. It follows, according to the applicants, that the ultimate ruling of the Court that a measure "*such as the Direction Order at issue in the main proceedings*" is not precluded by the relevant Articles of the Second Directive can be taken only as relating to a direction order found to be "the only means" of effecting recapitalisation.

49. The applicants therefore contend that all of the earlier jurisprudence in relation to the Second Directive (dealt with in detail in the first judgment) is applicable to this case, and that the judgment of the CJEU in fact affirms their rights in circumstances where, on their case, the method adopted by the Minister was not "the only means" possible. They say that the Court has simply clarified its earlier case law, and has provided for a limited derogation from the relevant Articles of the Directive where a measure such as the Direction Order is "the only means" available. Apart from the reference to *Pafitis*, the Court did not explicitly deal with any of the other judgments in that series of cases and therefore must be taken to have confirmed them. The judgment does not, on this argument, determine that the Second Directive did not preclude measures such as the one in issue where there existed less onerous alternatives.

***Discussion***
50. In my view this argument is based on a misreading of the CJEU judgment. The paragraph encompassing the formal ruling of the Court does not refer back to and is not conditional upon any findings of fact made by this Court, other than those relating to the threat to the stability of the financial system of this State and, as a consequence, to the financial stability of the European Union. The references throughout are to measures such as the Direction Order, "adopted where there is a serious disturbance of the economy and financial system of a Member State that threatens the financial stability of the European Union " and that is intended to prevent the failure of the financial institution concerned and thereby to forestall such a threat. The Court was not purporting to find some form of derogation or discretion to permit a course of action to be taken if it was the only course possible – it stated clearly that the protection conferred by the Second Directive does not extend to and does not preclude a measure taken by the State in the circumstances and for the purpose stated. That this is the proper reading of the judgment is apparent from the analysis of the CJEU of the circumstances of the case, its reference to the terms upon which the decision had been made to grant financial aid to the State, and its references to *Kotnik*.

***Proportionality and the less onerous alternative***
51. The principles of proportionality and the requirement to adopt the measure that is "least detrimental" or "least restrictive" vis a vis the rights at issue are invoked by the applicants. Those principles are particularly significant when the right in question (in this case freedom of establishment) is a fundamental one conferred on individuals by the Treaty. The applicants refer to Jans on '*Proportionality Revisited'*, (2000) 27(3) L.I.E.I. 239 for the proposition that the proportionality principle implies that the disputed measure must be necessary, and that this in turn implies that there is no other measure available that would be adequate for the attainment of the objective but less restrictive of rights.

52. The principle of legal certainty is invoked for the proposition that the CJEU judgment should not be interpreted as allowing for a general derogation from the Second Directive and the case law thereon, in circumstances where less onerous alternatives existed, because otherwise the State would in effect be given *carte blanche* to override the minimum protections guaranteed by that Directive.

53. The judgment in *Kotnik* is sought to be distinguished by the submission that it concerned insolvent banks, and thus is not relevant to this case. It is further contended that Kotnik is about burden-sharing and this case is not.

54. The applicants rely upon the opinion of the Advocate General for the proposition that the requirements set out in the Implementing Decision 2011/77 amounted to conditions for the grant of financial assistance, rather than imposing autonomous legal obligations on the State. While the State had to achieve recapitalisation, neither the Implementing Decision nor any other rule of EU law directed it to do so in a particular fashion.

55. In contending for a less onerous alternative, the applicants rely chiefly on the proposals put by the Board to the Minister on the 20th July, 2011, (see paragraphs 24.1 to 24.8 in the first judgment for the proposals and the Minister's response). In the first instance, the Board sought a placing price in the range 30 – 70 cents per share. This would still have diluted the holding of the existing shareholders, but not to the same extent. The applicants say that any price above the nominal value of 32 cents per share would have sufficed and would have been compatible with burden-sharing principles, and that the reduction in the nominal value was not necessary for the recapitalisation. It is alleged that the only reason for the reduction was to enable the Minister to appropriate a 99.2% stake at a price "*dictated by him*". They say that the nominal value "*did not suit*" the Minister and that he therefore forcibly reduced it.

56. This submission relies very much on the proposition that the Minister was obliged to pay a "fair price" as opposed to the price achievable in the market at the relevant time. The Board's rationale for this was that the market price did not reflect the fundamental value of the Company.

57. The second measure recommended by the Board was that pre-emption rights should be offered to shareholders. It must be stated here that in its presentation the Board expressly accepted that, given the scale of capital required in order for shareholders to "*follow their money*", this would be unlikely to attract significant take-up. The rationale put forward by the Board was that an offer "*would potentially alleviate some of the negative perception around value migration from existing shareholders to the State*". The applicants rely on the principle that pre-emption is a legal right of shareholders, while accepting in their submissions that pre-emption issues are not a tool for recapitalisation and do not always contribute significantly to the capital raise in question. However, the applicants submit that the finding in the first judgment that the required capital could not have been raised from private investors or from existing shareholders does not mean that *some* capital could not have been raised from these sources.

58. It is argued that there was no legitimate reason to deprive the shareholders of this right. It is noted that Bank of Ireland did make an offer of a rights issue in 2011 in conjunction with its capital raising.

59. The third proposal made by the Board was that all or part of the State investment could be structured by way of Class B shares, with a pre-determined buy-back price, in case the losses projected by the March 2011 PCAR did not materialise.

60. The applicants point out that the European Financial Stability Mechanism ("the EFSM") was not the only source of funds available to the State at the time. They maintain their contention that the deadline imposed as a condition of the EFSM aid could have been extended on request by the Minister, or could simply have been extended unilaterally without consequence.

***Discussion***
61. In my view these arguments fail to engage with the evidence adduced on behalf of the Minister and the notice parties, and also fail to engage with the judgments of the CJEU in this case and in *Kotnik*.

62. It is clear that the process engaged in by the Minister amounted to a grant of State aid and that therefore the approval of the Commission was required. The evidence in relation to that approval is set out at paragraphs 22.1 to 22.25 of the first judgment. The Commission's guidance, as set out in the Communication referred to in paragraph 22.13, stated that the issue price of new shares to be taken in such circumstances was to be based on a market oriented valuation. The market price of the applicants' shares at the relevant time was a very long way short of 32 cents.

63. The price proposed by the Minister was considered by the Commission to be "very significant" in its decision to grant approval precisely because of the level of dilution of the shareholders. Furthermore, the same fact contributed to the finding that the proposed aid was proportionate, because in State aid terms the degree of burden-sharing by the shareholders was "very material".

64. The CJEU judgment in *Kotnik*, referred to extensively in the judgment in this case, makes a similar point. Shareholders must fully bear the risks of their investments. Where State aid is granted, in circumstances in which such aid is permissible, a measure that requires the shareholders to contribute to the absorption of the losses suffered by the Bank to the same extent as if there were no State aid is not an attack on their rights. In any event, they would suffer the same loss if there was no State aid and the Bank failed.

65. In these circumstances it is impossible to see how a price in the range suggested by the applicants would have been approved by the Commission, or could be regarded as legally necessary for the protection of the applicants' rights.

66. The evidence in relation to the potential results of a rights issue is set out in paragraphs 32.21 to 32.29. Even when making the case for the offer of a right of pre-emption, the Board admitted that the main purpose would be to dispel a negative perception on the part of the shareholders, without any belief that there would be a significant take-up. The legal obligation of the State in respect of the conditions for the funding under the Programme required recapitalisation by the deadline.

67. The argument in respect of the class B shares was responded to on behalf of the Minister in the correspondence set out in paragraphs 24.1 to 24.8 of the first judgment. The applicants have not demonstrated that this analysis was legally flawed, or why the Minister, rather than the shareholders, should bear the risks in relation to the recapitalisation while accepting a capped "upside".

**A measure "taken by a national authority"**
68. The applicants submit that the CJEU erred in describing the Direction Order as being a measure taken by a national authority, having regard to s.47 of the Act. That section provides that a direction order may include a provision to the effect that the powers, or any specific power, exercisable by the members in a general meeting shall be exercised by the Minister, and such an exercise shall be taken for all purposes to have been that of the members.

**Discussion**
69. This argument is misconceived. It is the application for, and the making of, the Direction Order, under the relevant legislation, that is the measure taken by the national authority.

***Submissions relating to the findings in the first judgment***
70. The applicants repeat their submission, which they have maintained throughout, that the Company was at all times solvent, viable and operating normally. They say that it had adequate Tier 1 capital. In their view it simply suffered, as did all banks at the time, from temporary illiquidity.

***Discussion***
71. The concentration by the applicants on the technical definition of solvency involves disregarding the reality of the Bank's situation and the exposure of the State to the risks created by that situation. The Bank was, presumably, paying its debts as they fell due. However, the evidence adduced in the application for the Direction Order, set out in paragraphs 29.1 to 29.22 of the first judgment, was in my view sufficient to ground the finding that a failure to recapitalise would on the balance of probabilities have led to a failure of the Bank.

***"Theoretical" findings***
72. One of the findings in the first judgment was that the failure of ILP would, as a matter of probability, have resulted in "*a complete loss of value to the shareholders*". It is suggested by the applicants that this must be taken to mean the seven shareholders of ILP, rather than the shareholders of ILPGH. Without prejudice to that suggestion, it is asserted that the finding is "purely theoretical" rather than practical. The same submission is made in relation to the findings made in the first judgment as to the risk that the Bank's licence could have been revoked, or that it might fail as a result of failure to recapitalise by the deadline. This to some extent re-opens the argument that the stress test scenarios (which led to the imposition by the Central Bank of the requirement that the Bank should recapitalise to the amount of €4 billion) were unrealistic. In addition, the applicants say that the Bank could not have failed because its liabilities were guaranteed by the State.

73. For these reasons, the applicants submit that the findings as to the adverse consequences of failure (in terms of the risks to the financial stability of the State, other Member States and the European Union) must also be seen as theoretical and as not justifying the abrogation of fundamental provisions of EU law.

***Discussion***
74. The finding in relation to the losses likely to be suffered by the shareholders quite clearly related to the applicants and their fellow shareholders.

75. The findings referred to here were not "theoretical". They were grounded on the evidence set out in the judgment, and formed the basis for the reference to the CJEU. The risks created by the Bank's situation were considered to be very real by the State, the Commission and the External Partners, and I accepted the reality of those risks. The arguments put forward by the applicants do not address those concerns. The proposition that there was no need to intervene, and therefore no need to dilute the shareholders' rights, because the State guarantee would have ensured that the Bank did not fail, ignores both the scale of the funding that the State would have to have found and the catastrophic possibility of the collapse of the financial system in this State, with the consequential effects in other member States.

**Other EU law issues**

***Alleged violation of Article 10 of Directive 2009/101/EC***
76. Article 10(1) of this Directive provides for the general rule that a company is bound by acts done by the organs of the company. It is submitted that it was violated by the Direction Order, in that the Order revoked resolutions lawfully passed by the general meeting.

***Discussion***
77. This argument is misconceived. The rule referred to is primarily concerned with the protection of third parties. If the Direction Order was otherwise lawful, the rights of third parties are clearly affected by operation of the relevant provisions of the Act and by the Credit Institutions Winding-Up Directive ("CIWUD"), but it is not a matter in respect of which these applicants are entitled to complain.

***Alleged violation of Articles 5, 42 and 45 of Directive 2001/34/EC and alleged violation of Directive 2004/39/EC***
78. The applicants submit that the findings in the first judgment do not address the issues raised by them in respect of these Directives, which relate to the rules for the admission and regulation of securities on official stock exchanges.

***Discussion***
79. The issues raised are summarised in brief form in paragraph 37.4 of the first judgment. It had been submitted that the Direction Order derogated from or abrogated the requirements of the London and Irish Stock Exchanges.

80. The finding that the Directive had not been breached was based on acceptance of the explanation given in the affidavit grounding the application for the Direction Order – that is, that once the Minister acquired the new shares, the Company would have to apply to have its membership of those markets cancelled because it would no longer satisfy the requirement that at least 25% of the Company be in public hands (paragraph 31.4 of the judgment). This explanation would hold true unless and until the Direction Order was set aside.

81. The issue raised as to the lawfulness of the overriding of the decisions of the general meeting depends on the outcome of the general argument as to the lawfulness of the Direction Order.

***Alleged violation of the Takeover Directive***
82. It is submitted that the judgment did not address the issues in relation to this Directive.

83. The waiver granted by the Takeover Panel is discussed at paragraphs 21.1 to 21.3 of the first judgment. It was, and remains, my view that the submission of the applicants in this regard is dependent on the legality of the Direction Order. If that were to be set aside, the conditions of the waiver will not have been fulfilled. The case made by the applicants, in brief, has been that approval should not have been granted because the Direction Order was unlawful as a result of the various breaches alleged in respect of the Second Directive.

**The Constitution**
84. The Points of Claim filed on behalf of the applicants in these proceedings set out a wide-ranging attack on the constitutionality of the Act under consideration. However, by order of the High Court made on the 21st February, 2013, it was directed that any constitutional challenge should be taken by way of separate plenary proceedings. Such proceedings were duly issued, and are in abeyance pending the outcome of the instant proceedings.

85. As a result, this aspect of the argument has not been developed much beyond the assertion that the State has breached the rights of the applicants under Article 40.3 and 43 of the Constitution. In particular, it was contended that the Direction Order amounted to an expropriation of the applicant's property rights without compensation; that it was based on an unfair share valuation brought about by a false market; that no adequate opportunity had been afforded for the making of representations by affected persons; and that there had been a failure to have regard to the principle that rights should be affected as little as possible.

86. The issue raised as to expropriation is clearly a matter for the constitutional challenge to the validity of the legislation. The application before the Court is to set aside the Direction Order, and the constitutionality of the provision must be presumed. That is not to say that there is not a constitutional aspect to these proceedings – the applicants are entitled to argue that the legislation has been, in this case, operated in such as manner as to breach their constitutional rights – but for the most part the arguments as pleaded are directed at the validity of the Act itself.

87. I have already held in the first judgment that the share price was not the result of a false market. I have also held that the statutory process for notifying the Company and affording it an opportunity to make representations was complied with. The shareholders did, as a matter of fact, make representations both to the Board and to the Minister – the latter are described at paragraphs 25.1 to 25.9.

88. The issue of proportionality has been discussed above. The same considerations apply, in my view, to a debate on the issue in the constitutional context.

**The European Convention on Human Rights**
89. By virtue of s.2 of the European Convention on Human Rights Act 2003 this Court is obliged, when interpreting and applying any statutory provision, to do so in a manner compatible with the State's obligations under the European Convention on Human Rights and Fundamental Freedoms, in so far as that is possible and subject to any relevant rules of law relating to such interpretation. Section 4 of that Act requires the Court to take judicial notice of any relevant declaration, decision, advisory opinion or judgment of the Court of Human Rights, the European Commission on Human Rights or the Committee of Ministers.

90. It is submitted by the applicants that the terms of the Direction Order violated their property rights, in breach of the Convention. They rely in particular on the following guarantee set out in Article 1 of the First Protocol:

> *"Protection of property*
>
> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or*

*other contributions or penalties."*

91. There is no difficulty in accepting the argument that shares are "possessions" within the meaning of the Protocol, and that a shareholder's rights include property rights. However, the submissions made by the applicants do not go beyond the argument that the violation of their property rights under the Convention and Protocol lies in the violation of the principles of shareholder protection under EU law. Their case under this heading therefore stands or falls with the outcome of the EU law debate.

92. The applicants assert that there has been a breach of their Article 6 rights (the right to a fair and public hearing) in the determination of their civil rights, by reason of the excessively short period of time afforded for bringing the application to set aside the Direction Order. Since these applicants have brought such an application, and it has been heard, that complaint has not been made out.

**New arguments raised by the applicants**

**The Minister's shareholding**

93. The applicants now seek to raise an argument that in obtaining the Direction Order the State breached Article 42 of the Second Directive. This is based on the fact that at the relevant time the Minister held 5,000 shares in the Company. Therefore there was, it is alleged, a failure to ensure equal treatment to all shareholders.

94. This argument was not pleaded or argued previously. The applicants maintain that they are entitled to raise it now because, they claim, it was "concealed" from them and the Court. While it is admitted that the information is to be found in the papers before the Court, it is said that the Minister did not draw attention to it, and that there were "millions" of pages of papers in the case. It is submitted that this justifies the re-opening of the findings as to candour and duty to the Court.

95. This claim is entirely without merit. Thankfully for all concerned, the papers in the case may be voluminous but they do not run to millions of pages. The case began in 2011 but did not come on for full hearing until 2014. There is no basis for a claim of concealment – the shareholding is referred to in an exhibit sworn for the purpose of the *ex parte* application for the Direction Order. In any event, the substantive point is without merit. In making his application to the Court the Minister for Finance acted under the statutory powers conferred on him in that capacity by the Act, and not in his capacity as shareholder.

***Apple***

96. A claim has been raised in respect of the Commission's decision on the tax treatment afforded to Apple in this State. It is said that this demonstrates that Ireland had available to it alternative sources of funds, and that therefore less onerous alternatives to the Direction Order existed.

97. It is recorded in the CJEU judgment that the applicants sought unsuccessfully to re-open the oral argument before that court for the purpose of addressing this issue.

98. This Court has no jurisdiction to consider this argument in the context of these proceedings.

**Conclusion**

99. The applicants have not succeeded in demonstrating that the opinion of the Minister that the Direction Order was necessary to achieve the statutory purposes for which it was sought was unreasonable or was vitiated by legal error. In those circumstances I will dismiss the application.