AN CHÚIRT ACHOMHAIRC

THE COURT OF APPEAL

[A:AP:IE:2021:000187]
[[2022] IECA 001]

Hogan J.
Donnelly J.
Ferriter J.

BETWEEN/

PEADAR MAC FHLANNCHADHA

RESPONDENT

AND

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

APPELLANT

Judgment of Mr Justice Gerard Hogan delivered on the 11th January, 2022

Introduction

1. The development of the doctrine of direct effect has been one of the greatest jurisprudential innovations of the Court of Justice. It is now almost sixty years since that Court delivered its seminal judgment in Case 26/62 *Van Gend & Loos* and the doctrine of

direct effect remains a cornerstone in the entire edifice of EU law. Leading cases such as Case 71/74 *Van Duyn* and Case 148/78 *Tullio Ratti* subsequently followed. And so it has been clear following this trilogy of cases that a person affected by the operation of a Directive can rely on its provisions as against a public authority where those provisions are intended to create individual rights and are clear, precise and unconditional.

2. The case law is thus replete with examples of where a private citizen could rely on the direct effect doctrine in order to defend himself or herself against an adverse administrative decision or where it was sought to have that decision annulled or otherwise set aside. The Court of Justice also enjoys a jurisdiction to determine that a national law which is inconsistent with the requirements of EU law can be disapplied: see, *e.g., Simmenthal* (Case 106/77, EU:C:1978:49).

3. Yet despite the huge body of case-law on this topic, some uncertainties remain. One particular issue is whether an ordinary citizen is entitled to invoke the direct effect doctrine in order to challenge the compatibility of national primary or secondary legislation on the ground that it is inconsistent with the requirements of a Directive in circumstances where that citizen cannot immediately point to immediate loss and damage which is personal to himself or herself. Does such an entitlement follow naturally from the direct effect doctrine? Or is it the European Commission alone which is entitled to take such infringement proceedings pursuant to Article 258 TFEU? One might have thought it surprising that such a critical point would have remained unresolved in the long history of EU law, but it is precisely this issue which is now presented in this appeal from the judgment of Ní Raifeartaigh J in the High Court dated the 11th June 2021. It arises in the following way.

Background to the proceedings

4. The applicant, Mr. MacFlannchadha, is a native Irish speaker who lives in the Connemara Gaeltacht. He wishes and prefers to conduct his official business in Irish. That, of course, is his perfect entitlement and such is guaranteed by virtue of the provisions of Article 8 of the Constitution.

5. The applicant is a dog owner and a purchaser of animal veterinary products for that animal. His fundamental complaint in these proceedings is that the information accompanying such veterinary products is written in English alone and that the State is in breach of the requirements of Directive 2001/82/EC of the Parliament and the Council relating to veterinary medicinal products (OJ 2001 L 311) (as amended) ("the 2001 Directive"). He contends, accordingly, that the national secondary legislation (namely, European Communities (Animal Remedies) Regulations 2007 (SI No. 144 of 2007) and the European Communities (Animal Remedies) (No.2) Regulations 2007 (SI No. 786 of 2007)) ("the 2007 Regulations") transposing the 2001 Directive has failed to do so properly and is to that extent *ultra vires* insofar as it does not provide that the information is available in both English and Irish.

6. A further complexity is added to all of this by the fact that all of these legislative provisions are due to be replaced by the new provisions of Article 7 of Regulation No. 6/2019 which comes into force in a few weeks time on 28th January 2022. The practical effect of this legislative change is that Ireland will hereafter be permitted to have packing information and labelling requirements in respect of veterinary products in English only.

7. The essential question is whether the applicant is entitled to maintain a challenge of this kind and perhaps more particularly whether he is entitled to a declaration that the relevant domestic regulations transposing the Directive are *ultra vires*. Before doing so,

however, it is necessary to say something about the procedural history of these proceedings.

The procedural history of the proceedings

8. These proceedings already enjoy a rather complex history. The matter first came before Ní Raifeartaigh J in the High Court. She delivered an *ex tempore* judgment in July 2016 in which she held that the relevant provisions in relation to the language labelling requirements of the 2001 Directive were directly effective. She then proceeded to hold that the 2007 Regulations were *ultra vires* inasmuch as they did not specify that the labelling etc. of veterinary products had to be in both Irish and English.

9. In the course of that judgment, however, she drew attention to the fact that these provisions of the 2001 Directive were themselves due to be replaced by Regulation No. 6/2019 which was due to take effect later this month. She then requested further submissions on the new point of whether the granting of specific relief of this kind would be pointless given the imminence of the legislative change. In a further ruling on 29 October 2019 Ní Raifeartaigh J made a reference to the Court of Justice pursuant to Article 267 TFEU. With that reference she essentially asked whether a national court enjoyed a discretion to refuse to grant relief in these circumstances on the basis that this would be futile in view of the pending legislative changes.

10. In an Opinion delivered on 14 January 2021 (Case C-64/20: EU:C:2021:14) Bobek AG expressed the view that the court did enjoy a discretion even if there had been a failure to transpose the Directive in question in a proper or complete fashion. He suggested that a domestic court would have to engage in a proportionality analysis by reference to a range of features in order to decide whether such relief should be granted.

11. In its judgment of 17 March 2021 (Case C-64/20, EU: C: 2021:207) the Court of Justice took a different view. It considered that the practical effect of Article 288 TFEU precluded a court from exercising a discretion of that kind and in this manner. It took the view that in such circumstances the domestic court was required (at paragraph 33) to "take all the appropriate general and particular measures to ensure that the result prescribed by that directive is attained."

12. The matter then came back before Ní Raifeartaigh J. In a thorough and comprehensive judgment delivered on 11th June 2021 ([2021] IEHC 647) she applied the judgment of the Court of Justice and granted the appropriate declarations, including a declaration that the respondents "must amend national law to ensure a correct transposition of the provisions of Title V of Directive 2001/82." It is against that judgment that the State parties now appeal to this Court.

The labelling and packaging language requirements of the 2001 Directive

13. Perhaps the most convenient way of approaching this appeal is first to examine what the 2001 Directive in this respect actually requires. The relevant provisions pertaining to labelling and information requirements are contained in Title V, namely Article 58, Article 59 and Article 61.

14. Article 58(1) of the 2001 Directive prescribes the details of the information which each veterinary product or (as the case may be) veterinary medicinal product is to contain. Article 58(4) then states that these details shall "appear on the outer package and on the container of the medicinal products in the language or languages of the country in which they are placed on the market.'

15. Article 59 then provides for the labelling of ampoules. Articles 59(1) states that the relevant particulars "shall appear on the outer package and on the immediate packaging

of the medicinal products in the language or languages of the country in which they are placed on the market."

16. Finally, Article 61(1) provides that the package leaflet "shall be written in terms that are comprehensible to the general public and *in the official language or languages of the Member State in which the medicinal product is marketed*." [aibhsiú curtha leis]

17. Article 58(1) and Article 59(1) of the Directive require that the packaging and information requirements must be supplied to the consumer in the languages of each Member State in respect of which they are placed on the market. It is hard to interpret this other than as a reference to the official languages of the Member State in question. The reference to "language or languages" must, I think, be viewed as *cumulative* having regard to the context in which it appears: this is plainly a reference to those Member States (such as, for example, Belgium, Finland, Ireland, Luxembourg and Malta) where there is more than one official language. In those countries with more than one official language, the obligation is to provide the information in each of these languages.

18. This, in any event, is put beyond doubt by the provisions of Article 61(1) of the Directive with its reference to official language or languages of the Member State. In the case of Ireland, it is clear from Article 8 of the Constitution that *both* Irish and English are the official languages of the State.

The 2007 Regulations

19. How, then, have these requirements been transposed into national law? There are two transposing statutory instruments: the European Communities (Animal Remedies) Regulations 2007 (SI No. 144 of 2007) and European Communities (Animal Remedies) (No. 2) Regulations 2007 (SI No. 786 of 2007). Paragraph (1)(d) of the First Schedule of SI No. 144 provides: "Particulars provided for in Point (a)(vi) to (xii) shall be in the

English or Irish language." The particulars in question refer to the labelling requirements specified in Article 58.

20. This formula is followed elsewhere with regard to the Article 59 labelling requirements: see respectively paragraph 1(a) and paragraph 1(b) of Part II of the Second Schedule. So far as the packaging leaflet requirements of Article 61 are concerned Part III of the Second Schedule is in broadly similar terms when it provides in relation to package leaflets: "…The leaflet shall be comprehensible and in the English or Irish language and shall include at least the following information in the order indicated and conform with the particulars and documents provided in accordance with the application for the product authorisation. (The package leaflet may contain other languages as long as the information provided is identical)."

21. SI No. 786 of 2007 is also in similar terms: see respectively paragraph 1(d) of Part I of the Second Schedule, paragraph 1(b) of Part II of Second Schedule and Part III of the Second Schedule.

22. It follows, therefore, that, at least viewed in the abstract, neither of the 2007 Regulations satisfy these requirements of the Directive and do not transpose these requirements correctly. Both the information leaflets and the packaging details must be provided in *both* official languages: it is not enough that these details are contained in only *one* of those languages in the manner provided for in the 2007 Regulations. In view of the status of Irish as a minority language, manufacturers inevitably provide that the information provided is simply in English. And this, in essence, is the gravamen of the applicant's complaint: that the 2007 Regulations in substance do not *require* that an Irish language version of the labelling or information leaflets on these veterinary products is also supplied.

Whether these provisions of the 2001 Directive are directly effective?

23. The next question is whether the provisions of the 2001 Directive are capable of being regarded as being directly effective. The first thing to observe is that these provisions are in themselves clear, precise and unconditional. They clearly specify in very precise detail what details and information must be supplied to consumers and they are not conditional in any way.

24. It can, I think, also be said that these requirements are designed for the benefit of consumers, so that in Ireland, for example, an Irish speaker who is a purchaser of these products is entitled to say that these provisions of the 2001 Directive operate for his benefit. It may, after all, be recalled that in one of the early leading direct effect cases, *Tullio Ratti*, the Court of Justice held the labelling requirements prescribed by Directive No. 73/173/EEC in respect of chemical solvents were directly effective in this manner. In my opinion, the same can certainly be said by analogy so far as the present case is concerned.

25. In all of these respects I agree completely with the analysis of these questions contained in the judgment of Ní Raifeartaigh J.

Do the national courts enjoy a jurisdiction to declare that the 2007 Regulations are invalid as a matter of national law?

26. A finding that these requirements of the 2001 Directive are directly effective does not, however, quite dispose of the matter and the issue of the Court's jurisdiction to direct the State parties to effect a change in the law is a more troubling one.

27. In this jurisdiction we are perhaps so used to the power of judicial review of legislation contained in Article 34.3.2 of the Constitution that there is (an understandable) tendency to assume that the Court of Justice enjoys similar powers with regard to national

legislation which is found to infringe Union law. It is, of course, unnecessary for us to express any views on the vexed and complex question of the *retrospective* effect of a finding of unconstitutionality (for which see *A v. Governor of Cloverhill Prison* [2006] IESC 45, [2006] 4 IR 88). It is sufficient to say that such a finding of unconstitutionality has immediate, *erga omnes* prospective effects: it is in that sense that a finding of unconstitutionality may be regarded as the equivalent of a "judicial death certificate": see *Murphy v. Attorney General* [1982] IR 241 at 340, per Henchy J.

28. There are, nevertheless, subtle – yet important – differences between our system of judicial review of legislation and that enjoyed by the Court of Justice vis-à-vis national laws. It is, perhaps, easy to overlook the fact the Court of Justice does not, for example, enjoy any express power positively to annul a national law on the ground that it is inconsistent with Union law. It is clear that under the *Simmenthal* doctrine (*Amministrazione dello Stato delle Finance v. Simmenthal SpA* Case 106/77, EU:C:1978:48) the task of both the Court of Justice and (where necessary) the national courts is simply to *disapply* national law which is in conflict with European Union law. In other words, faced with a conflict between two overlapping legal norms – national law and EU law – the court reaches to apply the higher norm (EU law) and disapplies the inferior norm (national law).

29. It is also clear that a finding of disapplication has its limits in a way which is not, for example, the case in respect of a finding of unconstitutionality in our national law. Specifically, with disapplication the national law remains valid (even prospectively) for some purposes, the finding that it has been adjudged to be contrary to EU law notwithstanding. This is illustrated in particular by the judgments of the Court of Justice in two important cases which I propose to consider in a moment: *OSA* (Case C-351/12, EU: C: 2014: 110) and *Smith* (Case C-122/17, EU: 2018: C: 631). I shall first, however,

consider the decision of Carroll J in *Tate v. Minister for Social Welfare* [1995] 1 IR 481, since this was the authority relied on most heavily by the applicant in this context.

30. In *Tate* the question was whether the State's failure to provide compensation for women who had lost certain entitlements to social security payments when similar compensation had already been provided for men amounted to a breach of the principle of equal treatment contained in Article 4(4) of Council Directive 7/79/EEC. While Carroll J accepted that the plaintiffs were entitled to what amounted to *Francovich* damages, this, of course, was in the context of a case where (unlike the present one) the State's actions in violating the Directive had caused them tangible financial loss.

31. Towards the close of her judgment Carroll J did address the question of jurisdiction ([1995] 1 IR 418 at 448) saying:

> "The last issue is whether the Regulations of 1992 are void on the basis that they are ultra vires the Minister for Social Welfare. His powers under s. 3 of the European Communities Act 1972 are limited to making regulations enabling s. 2 of the Act to have effect, i.e., in furtherance of Community law, not in derogation of it."

32. While Carroll J ultimately did not find it necessary to grant a declaration to that effect, it seems implicit in her judgment that she could have done so. In other words, *Tate* suggests that where a Minister has made regulations under s. 3 of the 1972 Act, those regulations will be held to be *ultra vires* (and void) if they themselves contravene the provisions of Union law. Viewed from the perspective of orthodox principles of our constitutional and administrative law, it seems clear that this reasoning is absolutely correct. A Minister of State is clearly only empowered to make regulations under s. 3 of the 1972 Act where those regulations give effect to Union law and not otherwise.

33. It is equally clear that the applicant has the requisite standing to seek such a declaration. He is an Irish language speaker and a consumer of veterinary services. In these circumstances he is clearly entitled say that (as here) the State has not properly transposed the

terms of a directly effective Directive which affects him by not affording him the benefit of the Irish language version of the labelling, packaging and information leaflets supplied with these products to which he is plainly entitled.

34. If, therefore, this matter was governed solely by domestic public law principles there seems little doubt but that the applicant would be entitled to obtain a declaration of this kind for all the reasons I have just mentioned.

Do the national courts enjoy a jurisdiction to declare that the 2007 Regulations are invalid as a matter of Union law?

35. This brings us to a more fundamental problem: does a national court possess a jurisdiction to declare that national transposing measures which seek to give effect to the terms of a Directive are *invalid* – as distinct from being found to be *inapplicable* in a given case – if such a declaration had *erga omnes* effects? Or would this amount to a form of direct horizontal effect of a directive as against private parties of a kind which Union law does not sanction? This, perhaps, is an opportune point in which to examine the two decisions of the Court of Justice which have already been mentioned where some of these issues were examined.

36. In the first of these cases, *OSA*, a performing rights society sought to recover copyright licence fees from a private health spa in respect of the transmission of music in the latter's hotel bedrooms. The society sought to have the relevant Czech law transposing the provisions of Copyright Directive (Directive 2001/29) set aside as inconsistent with that Directive. The Court of Justice held, however, that the society was not entitled to seek this relief as against a *purely private entity*, saying (at paragraph 47) that the Directive "cannot be relied on by a collecting society in a dispute between individuals for

the purpose of setting aside national legislation contrary to that provision." This suggests that even if a national court can declare a national transposing measure to be invalid, such a declaration cannot have *erga omnes* effects so that it applies as against purely private parties.

37. In the second of these cases, *Smith*, the judgment of the Court of Justice followed an Article 267 TFEU reference from this Court. In that case the plaintiff had received very serious injuries when the van in which he was travelling collided with another vehicle. He had, however, been present in the rear of the van which had no fixed seats. As it happens, the Road Traffic Act 1961 (and the Regulations made thereunder) provided at the time that there was no obligation on the driver to provide insurance in respect of back seat passengers travelling in vans with no fixed seats. This very exclusion from insurance obligations was, however, adjudged by the Court of Justice in an earlier reference which had been made by the High Court to be contrary to Article 1 of the terms of the Third Motor Insurance Directive, Directive. 90/132: see *Farrell v. Whitty* (C-365/05, EU: 2007: C: 745).

38. The validity of this very exclusion played a central role in the plaintiff's action for negligence. In the High Court Peart J adopted a *Marleasing*-style approach to the interpretation of the legislation: [2009] IEHC 55, [2009] 3 IR 355. He ultimately concluded that it was possible to interpret the legislation in such a fashion such that the private insurer was held responsible for the accident. This Court, however, took a different view of the legislation, holding that it was not possible to interpret it in this fashion: see [2016] IECA 389. This Court accordingly stayed the proceedings and referred to the Court of Justice for a preliminary ruling the question of whether EU law meant that in the context of litigation between two private parties (i.e., the plaintiff and the insurance company), a national court was required to disapply the provisions of the 1961 Act

(and, by extension, contractual clauses contained in the insured's policy which reflected that exclusion) which had been already been found by the Court of Justice to be contrary to the terms of the Third Directive.

39. The Court of Justice answered this question in the negative, saying in effect that the invalidity of the domestic law applied only to litigation involving the State or emanations of the State. The reasoning of the Court deserves to be set out at some length:

> "41. In that regard, it is true that the question whether a national provision must be disapplied in so far as it conflicts with EU law arises only if no interpretation of that provision in conformity with EU law proves possible (judgments of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 23, and of 10 October 2013, *Spedition Welter*, C-306/12, EU:C:2013:650, paragraph 28).
>
> 42. The fact remains that the Court has also consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see, inter alia, judgments of 26 February 1986, *Marshall*, 152/84, EU:C:1986:84, paragraph 48; of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 20; and of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 108). If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations (see, to that effect, judgment of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 24).Accordingly, even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons (judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 109; of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 42; and of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 36).

43. The Court has expressly held that a directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive (see, to that effect, judgment of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 48).

44. A national court is obliged to set aside a provision of national law that is contrary to a directive only where that directive is relied on against a Member State, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the State or which have been required by a Member State to perform a task in the public interest and, for that purpose, possess special powers beyond those which result from the normal rules applicable to relations between individuals (see, to that effect, judgments of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraphs 40 and 41; of 25 June 2015, *Indėlių ir investicijų draudimas and Nemaniūnas*, C-671/13, EU:C:2015:418, paragraphs 59 and 60; and of 10 October 2017, *Farrell*, C-413/15, EU:C:2017:745, paragraphs 32 to 42)."

40. The Court then went on to say (at paragraphs 54-56):

"54. … Article 1 of the Third Directive, in providing that it is compulsory that insurance against civil liability in respect of the use of the motor vehicle at issue should cover personal injury to all the passengers, excluding the driver, that results from that use, defines the substantive content of a rule of law and falls, consequently, within the scope of the case-law to the effect that a directive that has not been transposed or has been incorrectly transposed may not be relied on by one individual against another.

55. In the light of all the foregoing, it must be concluded that, in the main proceedings, the referring court, which considers that it is unable to interpret Section 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations in a manner that is compatible with Article 1 of the Third Directive, is not obliged, in order to determine whether Mr. Smith was entitled to claim from FBD compensation for the harm suffered by him as a result of the road traffic accident that gave rise to those proceedings, to disapply, solely on the basis of that provision of the Third Directive, those provisions of national law as well as the exclusion clause to be found, as a consequence of those provisions of national law, in the

> insurance contract taken out by Mr. Philip Meade, and thereby to extend the possibility of relying on a directive to the sphere of relationships between private persons.
>
> 56. That said, it must be recalled that, in a situation such as that at issue in the main proceedings, a party adversely affected by the incompatibility of national law with EU law or a person subrogated to the rights of that party could however rely on the case-law stemming from the judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428), in order to obtain from the Member State, if appropriate, compensation for any loss sustained…"

41. What conclusions, therefore, can be drawn from these two judgments – both admittedly concerning exclusively private parties – concerning the jurisdiction of a national court to disapply the provisions of national law that are contrary to EU law? By way of contrast to a declaration of unconstitutionality under Article 34.3.2 of the Constitution which operates *erga omnes,* it is clear from this case-law that the *Simmenthal* disapplication jurisdiction does not operate in this fashion. The jurisdiction of the national court is instead a jurisdiction to disapply the national law "only where that Directive is relied on against a Member State" and that in all other cases the remedy lies merely in *Francovich* damages. It seems implicit in these words ("…relied on against a Member State…") that this jurisdiction *only* arises where a Member State seeks to utilise or rely on the provisions of a Directive against a private individual in some fashion or other.

42. If this is correct, then it might seem that this Court has in fact no jurisdiction to grant the applicant relief which he seeks. The 2001 Directive has not in fact been invoked against the applicant and nor has he claimed that he has suffered any loss of the kind which might sound in a claim for *Francovich* damages. (There is, in fact, no claim for damages). In effect, the applicant is seeking what amounts to an *erga omnes* declaration that the provisions of national law (i.e., the relevant provisions of the 2007 Regulations) are contrary to EU law.

43. If this is tested by reference to the background facts in *Smith* one may ask whether the plaintiff in that case could have obtained a declaration that the relevant regulations made under the 1961 Act providing for an exclusion from compulsory insurance were ultra vires as being inconsistent with the Third Motor Insurance Directive. It seems implicit in *Smith* that he could not, at least if the effect of the general *invalidation* of the statutory instrument which had sought to transpose the Third Motor Insurance on the basis that it had erroneously provided for these exclusions would *de facto* have amounted to a form of horizontal direct effect as against the private insurance company. This would certainly have been the case if the invalidation of these exclusions would have enabled the plaintiff then, so to speak, to march through the gap in the law and have allowed him to sue the insurance company directly. The judgment in *Smith* seems to imply that the proper remedies in that situation are the disapplication of the law as against the State (and emanations of the State) and, where appropriate, *Francovich* damages.

44. This, indeed, is confirmed by what was said by the Court of Justice in *Poplawski* (C-573, 17, EU:C: 2019: 53) where the Court said (at paragraph 67) that "even a clear, precise and unconditional provision of a directive does not allow a national court to disapply a provision of national law which conflicts with it, if, in so doing, an additional obligation were to be imposed on an individual."

45. As against this, it is also necessary to consider one aspect of the judgment of the Court of Justice in *Minister for Justice and the Commissioner of An Garda Síochána* (C-378/17, EU:C: 2018: 979). This case concerned the question as to whether the Work-place Relations Commission enjoyed a jurisdiction to disapply provisions of EU law or whether this was a function which national law could properly reserve to the High Court. The Court ultimately concluded that the WRC enjoyed a jurisdiction to set aside

national law by virtue of the *Simmenthal* doctrine. What, however, is of interest for our purposes are the following passages from the judgment of the Court which explores in passing at least some aspects of the jurisdictional questions we have just been considering:

> "32. It is apparent from the order for reference that, under Irish law, as interpreted by the Supreme Court, there is a division of jurisdiction between the courts designated as such by national law and the Workplace Relations Commission. On the one hand, the Workplace Relations Commission has jurisdiction to rule on complaints against measures or decisions allegedly incompatible with Directive 2000/78 and the Equality Acts and, on the other, the High Court has jurisdiction where the upholding of such a complaint would require a national provision contrary to EU law to be disapplied or struck down.
>
> 33. In that regard, it should, first of all, be pointed out, as the Advocate General has noted in point 45 of his Opinion, that a distinction must be drawn between the power to disapply, in a specific case, a provision of national law that is contrary to EU law and the power to strike down such a provision, which has the broader effect that that provision is no longer valid for any purpose.
>
> 34. The Member States have the task of designating the courts and/or institutions empowered to review the validity of a national provision, and of prescribing the legal remedies and the procedures for contesting its validity and, where the action is well founded, for striking it down and, as the case may be, determining the effects of such striking down.
>
> 35. On the other hand, in accordance with the Court's settled case-law, the primacy of EU law means that the national courts called upon, in the exercise of their jurisdiction, to apply provisions of EU law must be under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means (see, to that effect, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 17, 21 and 24, and of 6 March

2018, *SEGRO and Horváth*, C52/16 and C113/16, EU:C:2018:157, paragraph 46 and the case-law cited).

36. Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law (see, to that effect, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 22; of 19 June 1990, *Factortame and Others*, C213/89, EU:C:1990:257, paragraph 20; and of 8 September 2010, *Winner Wetten*, C409/06, EU:C:2010:503, paragraph 56)."

46. At the risk of over-interpretation of the judgment, it is, I think, possible to view these passages in one of two ways. One could say on the one hand that the Court expressly acknowledged that the Irish courts enjoyed a power to invalidate national measures which had not properly transposed Directives into national law and saw this as generally unproblematic. On the other hand it could be argued – by reference to paragraphs 33 and 35 in particular – that the Court envisaged that a national court should only *disapply* national law which was found to be contrary EU law under the *Simmenthal* doctrine.

47. If one endeavours to sum up this rather complex case-law, I confess to some uncertainty as to whether national courts actually enjoy such a jurisdiction to invalidate such transposing measures on an *erga omnes* basis. As counsel for the State, Mr. Ó hOisín SC, contended, this, in effect, is a jurisdiction which the Court of Justice alone enjoys under Article 258 TFEU in infringement proceedings taken by the Commission against the Member State in question. As against that, the existence of a national annulment jurisdiction was noted by the Court of Justice in its earlier judgment of 17th March 2021 in

these very proceedings (at paragraph 32) and also in its judgment in *Minister for Justice and the Commissioner of An Garda Síochána* to which I have just referred. While, admittedly, the issue was not squarely before the Court of Justice in either case, it should nonetheless be noted that in neither case did the Court of Justice seem to find the existence of such a national annulment jurisdiction to be problematic as a matter of EU law.

48. This, however, is a point of some very considerable importance in EU law generally. In ordinary circumstances it would, I think, have been appropriate and desirable that the Court of Justice should rule on this very issue. I am, however, acutely conscious of the time pressures which attend this case given that the law will change on 28th January 2022. This may well have the effect of rendering this case moot and, in all likelihood, any such Article 267 TFEU reference would thereby be rendered futile by reason of this intervening legislative change. This is the only reason which I suggest that this Court should not make an Article 267 TFEU reference.

49. In these unusual circumstances it falls to us to reach a determination on this appeal in accordance with our understanding of what is permitted by law and is just and appropriate. I think that the best remedy in the circumstances is simply to grant a declaration that the State has failed properly to transpose the requirements of Article 58, Article 59(1) and Article 61(1) of Directive 2001/81/EC inasmuch as neither SI No. 144 of 2001 or SI No.786 of 2001 stipulate that the relevant packaging, labelling or information leaflet requirements shall be in both the English and Irish languages. In all the circumstances I do not think it necessary to go any further by way of directing the State parties to introduce new amending legislation and it is also unnecessary for this Court to pronounce on whether our jurisdiction actually extends that far. In order to avoid the

risk of according possible horizontal direct effect to the Directive by a general declaration of this kind, I would further declare that this declaration binds only the State and all emanations of the State and that it does not apply to private parties.

Conclusions

50. Summing up, therefore, I am of the view that:

a. First, the labelling, packaging and information requirements contained in Article 58, Article 59(1) and Article 61(1) of Directive 2001/81/EC are directly effective so far as the language obligations are concerned. Furthermore, the applicant as an Irish language speaker and consumer of veterinary products is entitled to rely on that very direct effectiveness in these proceedings.

b. Second, the provisions of SI No. 144 of 2007 and SI No.786 of 2007 do not properly transpose the relevant provisions of Article 58, Article 59(1) and Article 61(1) of Directive 2001/81/EC so far as the language requirements are concerned.

c. Third, I would grant a declaration that the State has failed properly to transpose the requirements of Article 58, Article 59(1) and Article 61(1) of Directive 2001/81/EC inasmuch as neither SI No. 144 of 2001 or SI No.786 of 2001 stipulate that the relevant packaging, labelling or information leaflet requirements shall be in *both* the English and Irish languages. To avoid the risk of according possible horizontal direct effect to the Directive by a general declaration of this kind, I would further declare that this declaration binds only the State and all emanations of the State and that it does not apply to private entities such as manufacturers or suppliers.

51. In all the circumstances I do not think it necessary to go any further by way of directing the State parties to introduce new amending legislation and it is also unnecessary for

this Court to pronounce on whether our jurisdiction actually extends that far. To that extent, and to that extent only, I would set aside the finding of the High Court in respect of the declarations granted at relief numbers 2 and 3 in the High Court Order.

52. I would therefore dismiss the appeal of the State parties and affirm the declaration made by the Ní Raifeartaigh J. that European Union Regulations (Animal Medicines) 2007-2014, Title V of the 2001/81/CE Directive (as amended), specifically Article 58-61 therein, are not properly transposed by the first respondent, but for the reasons set out above, I would vary the order of Ní Raifeartaigh J. by adding to that declaration the following "this declaration binds only the State and all emanations of the State and that it does not apply to private entities such as manufacturers or suppliers". I would accordingly set aside the making of the final two declarations (declarations 2 and 3) made by the High Court. The question of whether the Court enjoys a jurisdiction to make an order of this kind is a matter which will have to await resolution in another and more appropriate case.

Costs

53. In accordance with current practice, it is also appropriate that I should express my view on the issue of costs given that this judgment is being delivered electronically. My *provisional* view is that given that as the applicant has in substance succeeded in obtaining the relief which he seeks, he is entitled to the costs of the proceedings both in the High Court and in this Court, to be adjudicated in default of agreement. Should the parties wish to dispute this or urge a different view, I would suggest that they communicate with the Registrar in writing within *fourteen* days of the delivery of this judgment.