VERTICAL DIRECT EFFECT OF DIRECTIVES. CLARIFICATIONS IN THE RECENT CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Abstract
One of the most complicated aspects of European Union Law is linked to the possibility that directives will have a direct effect. Without being provided for in the Treaties (unlike regulations), the possibility that in certain circumstances the provisions of a directive may have direct effect, but only in the vertical relations between individuals and the Member State (vertical direct effect) has been established by the case-law of the Court of Justice of the European Union. The same case-law excludes the possibility that a directive may be invoked in relations between individuals, prohibiting their horizontal direct effect. However, despite the rule of no-horizontal direct effect, the Court has adopted a broad definition of the scope of direct vertical effect of directives, admitting the possibility that the provisions of a directive to be opposed even an entity or a private law body, which may be considered as a "emanation of the state" under certain circumstances.

Making a brief overview of case-law on the direct effect of directives and of doctrinal opinions on this case-law, the paper focuses on identifying the conditions under which a body can be considered a "State" or "emanation of the State", especially in the context of the recent clarifications given by the Court in case Farrell (C-413/15). Underlining the importance and implications of these clarifications, we conclude that the flexible way of interpreting the criteria on which a body must meet in order to be considered an emanation of the state for the purposes of vertical direct effect of a directive are in fact assisting at the blurring of the distinction between vertical and horizontal direct effect of directives.

Keywords: Public Law, European Union Law, Directives, Court of Justice of the European Union, direct effect, emanation of the state

1. Brief considerations about the direct effect of directives
Under article 288 of the Treaty on the Functioning of the European Union (TFEU), directives are addressed to the Member States and shall be implemented in the national legal order by means left to the discretion of Member States, obliging only with respect to the result to be achieved. As such, directives directly generate obligations just to the consignee member states, without constituting, in principle, a direct source of rights and obligations for private natural and legal persons in Member States, in the sense of the principle of direct effect of EU law as
set out in the case *Van Gend & Loos*¹ and developed in the subsequent case-law of the Court of Justice of the European Union ("CJEU"/"Court"). The rights and obligations derive from a directive become operational through national measures for transposition of the directive, between directive and natural or legal person always interposing a national law².

Starting with the case *Van Duyn*³, the Court found, however, that, in certain circumstances, the provisions of a directive may have direct effect, but only in the vertical relationships between the individuals and the Member State (*vertical direct effect*). Reflecting the will of the Court to ensure the full effectiveness of EU law⁴, effectively guaranteeing the protection of the individual rights, this case-law provides that the provisions of a directive which has not been transposed within the time limits laid down or that has been improperly transposed and that has a sufficiently precise and unconditional character⁵ may be invoked by an individual against the State. Selected courting arguments aimed at the binding nature of the directive for the Member States and the fact that non-transposition or faulty transposition thereof constitutes a violation of the obligation of the State and the recognition of a direct effect of the directives seeks "to prevent the State from taking advantage of its own failure to comply with [Union] law"⁶.

The case-law of the Court states that no matter the exact quality of the Member State’s acting, and a directive can be invoked against it whether acting as an employer or public authority⁷.

At the same time, the Court found the interdiction on the *horizontal direct effect* of a directive (between individuals) and the *inverse direct effect*⁸, establishing, in accordance with settled case-law, that a directive which has not been transposed into the domestic legal order of the State cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual in relations with other individuals, or in relations with the State⁹. Consequently,

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⁸ Regarding the fact that a public authority may not apply directly the provisions of a directive against an individual, setting or aggravating his/her responsibility.
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according to the Court, nor even a clear, precise and unconditional provision of a directive which seeks to confer rights or impose obligations on individuals cannot be used as such in the framework of the dispute that opposes exclusive individuals 10.

The arguments of the Court shall take into account, on the one hand, the specific nature of the directive which, by definition, do not directly generate obligations but to the consignee Member States pursuant to Article 288 (3) TFEU and cannot impose obligations to individuals but through their respective national transposition measures. The Court pointed out in this context that the extension of the possibility of invoking non-transposed directives to the sphere of relations between individuals would be to recognize the competence of the European Union’s to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations 11. In other words, by recognizing the direct horizontal effect, the distinction between regulations and directives would be blurred. On the other hand, the Court has held that “the principle of legal certainty prevents directives from creating obligations for individuals” 12 because such a situation would be legally insecure since individuals must be able to rely on national law 13.

In order to compensate the lack of horizontal direct effect of the directives, the Court used in its case-law a number of alternative solutions, designed to give satisfaction to any individual who considers himself injured through improper transposition or non-transposition of a directive. They consist of: the adoption of a broad definition of what constitutes “the State” (“emanation of the State”), the possibility of interpreting national law in a way that conforms to the directive (principle of consistent/harmonious interpretation) and, ultimately, state liability, as a form of remedy.

Thus, the rules in respect of invoking directives are part of the *mechanism in stages* 14 developed on jurisprudential way 15 in order to ensure the effective and

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10 In doctrine, this approach at the Court has been criticized by comparison with the provisions of the treaties, which is addressed to the Member States too, but to which the Court has conferred a direct horizontal effect. See in this regard P. Craig, *The Legal Effects of Directives: Policy, Rules and Exceptions*, European Law Review, Vol. 34, Nr. 3, 2009, p. 349 and the following.


12 Judgment Wells (EU:C:2004:12), paragraph 56. However, „mere adverse repercussions” on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned (paragraph 57).


uniform application of the Union Law at Member State level. However, a part of the doctrine\textsuperscript{16} as well as some Advocates General of the Court\textsuperscript{17} believe that alternative solutions developed to cover the gap created by the lack of a horizontal direct effect of directives is not satisfactory from the perspective of granting effective protection of the rights of individuals, generating complications for the complainants and uncertainty for the defendant. The main arguments relating to the limits of the principle of conform interpretation (impossibility of interpretation contra legem of national law\textsuperscript{18}), with the uncertainty that is created through extensive interpretation of national law in order to implement a directive with regard to the scope of national law, with the possibility that (incidental direct effect\textsuperscript{19}), in this way, individuals to incur obligations which they would not have had in the absence of the directive\textsuperscript{20}, as well as the rules governing the repair of damages\textsuperscript{21}, which often involve the initiation by the applicant of two separate procedures (against the principal defendant, and, once this will have tried and will not be able to win the case against him, against the State)\textsuperscript{22}. Accordingly, it considers that the recognition of a horizontal direct effect of directives “in appropriate circumstances”\textsuperscript{23} would lead to an increase in legal certainty and coherence of the system.

Recently, in case Farrell\textsuperscript{24}, the Court has had the opportunity to clarify the concept of “emanation of the State” for the purposes of vertical direct effect of


\textsuperscript{20} For example, by the existence in national law of another provision (which creates obligations) which may apply in case of suspension of the right contrary to the directive.

\textsuperscript{21} See C. Mătuşescu, The extent of the state’s obligation to repair the damage caused by a breach of EU law in the EU Court of Justice, Valahia University Law Study, issue 1/2014, pp. 47-57.

\textsuperscript{22} See Opinion of Advocate General in Case Farrell (EU:C:2017:492), point 33-34 and the case-law cited.

\textsuperscript{23} Opinion of Advocate General Jacobs delivered on 27 January 1994 in Case Vaneetveld (C-316/93, EU:C:1994:32), points 30-31.

\textsuperscript{24} Judgment of 10 October 2017, Farrell, C-413/15, EU:C:2017:745.
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directives. At the same time, it reaffirmed its previous position with regard to the interdiction on the horizontal direct effect of directives, although the Advocate General in this case had suggested that it would be necessary a reopening of the debate on the recognition of horizontal effect of the directives.

2 The concept of “State” or “emanation of the State” for the purpose of vertical direct effect of directives

The distinction between vertical and horizontal direct effect of directives make it necessary to define the exact meaning of the “State” for this purpose. In the absence of a definition of the notion of “State” in the European treaties, the Court of Justice has attempted to define this concept in such a way to ensure effective and uniform application of the Union law, which led to an assimilation of authorities (public, and even private) bodies of the State. Thus, invoking as arguments the binding nature of directives for the Member States and the necessity to prevent the State from taking advantage of its own failure to comply with the Union law, the Court retained that an individual can invoke the provisions of a directive against the State, regardless of the quality in which it acts, as employer or as public authority. In the light of these considerations, the Court admitted that the sufficiently precise and unconditional provisions of a directive can be invoked by judiciary not only against the State as such, but also against any public authority (such as tax authorities or regional and local authorities) representing, in terms of function, some of the apparatus of the State, which must be considered as the State itself. Court sends directly to the need for “functional interpretations” of the notion of the State, in order to ensure the uniformity and the primacy of the Union law. The directive may be invoked against such authorities without the need for it to take effective responsibility for the failure by a Member State of the obligation to transpose the directive in question. As the Advocate General considers in case Farrell, “[...] the position is that, had the Member States implemented the directive correctly, everyone would have been required to respect the rights granted by that directive to individuals. Therefore, at the very least, any body that is a part of the State should be required to respect those individual rights”.

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By judgment in case Foster\textsuperscript{32} and the subsequent case-law based on it\textsuperscript{33}, the Court has accepted the possibility that the provisions of a directive having direct effect to be opposed even as an entity or a body governed by private law, under certain conditions they may be qualified as “an emanation of the State”. Sending to its previous case-law, The Court proposes in Foster an abstract definition of what constitutes an emanation of the State for the purposes of vertical direct effect, establishing that the sufficiently precise and unconditional provisions of a directive could be invoked “on against organizations or bodies on which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals” (paragraph 18). As such, it can be considered as an emanation of the State “[... ] a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon” (paragraph 20).

This two-steps formulation of the characteristics which must be fulfilled by an entity in order to be considered emanation of the State - a general formula starting from existing case-law (paragraph 18) and identification of elements that can be relevant to such assessment (paragraph 20), created rather uncertainty about the exact limits and implications of the Foster-test, as is shown by the diversity of doctrinal opinions expressed and subsequent jurisprudence.

Thus, the interpretation of the criteria identified in Foster to establish what constitutes an emanation of the State for the purpose of vertical direct effect, respectively entrustment of public service, State control and special powers did the subject of controversy in the literature, in particular with regard to the cumulative or alternatively nature of those conditions. While some authors have noted that these criteria are not cumulative\textsuperscript{34}, by contrast, others argue that they must be cumulatively met, mostly retain only two of the three criteria (in particular, public service provision and State control)\textsuperscript{35}.

At the same time, the case-law of the Court subsequent to the Foster judgment offers some vague and sometimes contradictory indications as regards to the elements to be considered for qualify an entity or body as an emanation of the

\textsuperscript{32}\textit{Judgment Foster (EU:C:1990:313).}

\textsuperscript{33}\textit{Judgment of 4 decembrie 1997, Kampelmann and others, C-253/96-C-258/96, EU:C:1997:585.}


State. In most decisions, the Court made reference to the criteria set out in paragraph 20 of *Foster* judgment, rather than at paragraph 18 of the same judgment, often leaving to the national court the task of checking whether a provision with direct effect of a directive may be relied upon against the defendant. In cases where it considered that have information needed to provide specific guidelines for the national court, most often the Court did not insist on the presence of all the elements contained in paragraph 20 of the *Foster* decision, which would indicate that these criteria are rated as having an alternative and not cumulative for the determination of the status of the organism concerned. A different point of view is expressed by the Court in *Portgás*, which requires the presence of all elements listed in paragraph 20 of the Foster decision, making reference to the “bodies which, under the control of [the] authorities [of the Member States], have been given the responsibility for a public-interest service and which have, for that purpose, the special powers”.

If uncertainties regarding the conditions under which a body governed by private law may be considered to be an emanation of the State and can be invoked against him the provisions of a directive are likely to have direct effect persisted more than two decades since the *Foster* judgment, recently, the Court (reunited in the High Chamber) has the opportunity to provide the necessary clarification. Thus, in the judgment in case *Farrell*, concerning who was liable for failure to implement EU Motor Insurance Directive properly following a car accident, it has noted that conditions starting from *Foster* judgment “cannot be conjunctive”, a body or an organisation, even one governed by private law, can be considered an emanation of the State if he was delegated by the State to carry out a task of interest of the public and has, to this end, the “special powers”, without having...

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36 For a detailed analysis of that case-law, see points 58 to 77 of the Opinion of Advocate General Sharpston in Case Farrell (EU:C:2017:492).
38 This conclusion is quite clear from Judgment of 7 September 2006, Vassallo, (C-180/04, EU:C:2006:518), in which it is stated that “It has consistently been held that a directive may be relied on not only against State authorities, but also against organizations or bodies which are subject to the authority or control of the State or have special powers […]” (paragraph 26).
40 See paragraph 34 of the judgment.
41 Judgment of 10 October 2017, Farrell, C-413/15, EU:C:2017:745. This followed another decision, Judgment of 19 April 2007, Farrell I (C-356/05, EU:C:2007:229), in which the Court decided that that provision of the Third Motor Insurance Directive in the discussion has direct effect, stated however that it did not have enough material before it to establish whether the body concerned (Motor Insurers Bureau of Ireland) was an emanation of the State and therefore left that question to the national court, leading in due course to a second preliminary reference.
42 See paragraphs 28 and 29 of the judgment.
43 See paragraph 35 of the judgment.
necessarily to be subject to the authority or control of the State (the two conditions therefore being alternatives).

The Court concluded that against the body of private law in question in this case (Motor Insurers Bureau of Ireland) may by oppose the provisions of a directive capable of having direct effect whereas it was entrusted to a public interest mission (exclusive responsibility for compensating applicants injured in road traffic collisions where the responsible driver is uninsured or cannot be identified), having for this purpose, by virtue of the law, special powers (the power to oblige insurers carrying on motor vehicle insurance in the territory of the Member State concerned to be members of it and to fund it).

To such reasoning, the Court, following the conclusions of the Advocate General, made his reference to contextual character of criteria adopted in paragraph 20 of the Foster judgment and the need to that they be interpreted in light of paragraph 18 of the same judgment, “where the Court stated that such provisions can be relied on by an individual against organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals”\textsuperscript{44}.

To add even more clarity with regard to the bodies or entities which may be considered a “emanation of the State” and to whom it may oppose the provisions of a directive capable of having direct effect, the Court explained that these “[…] can be distinguished from individuals and must be treated as comparable to the States, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform the task in the public interest and have been given, for that purpose, such special powers”\textsuperscript{45}.

This formulation makes it possible to identify more clearly than in the Foster judgment the alternative criteria in consideration of which an entity might be regarded as an emanation of the State:

a) it is governed by the public law;
b) it is subject to the authority or control of a public body;
c) it performs public interest task on the basis of special powers.

At the same time, this is a confirmation of the functionalist approach of the Court (according to which must be considered rather than the nature of the source, the functions exercised), having the potential to represent the new common frame of reference in this matter, including the related fields of law, such as State aid, public procurement or public services\textsuperscript{46}. It makes it possible that the notion of

\textsuperscript{44} See paragraph 27 of the judgment.
\textsuperscript{45} See paragraph 34 of the judgment.
\textsuperscript{46} See also in this regard the correlations made by the Advocate General in Case Farrel (EU:C:2017:492), points 79-101.
emanation of the State for the purposes of vertical direct effect an autonomous notion of Union law, which should be applied uniformly regardless of national legal contexts (in many of them an important part of public missions was entrusted to "foreign" bodies to the State), thus increasing the efficiency of the secondary legislation of the European Union.

3 Conclusions

Despite the voices becoming more numerous supporting the recognition of a horizontal direct effect of the directives, the CJEU has not been engaged in such an approach so far, and it rather for reasons of a constitutional order (related to the allocation of powers under the Treaty)\textsuperscript{47}, than from considerations related to the need to ensure legal certainty, which, as we showed above, can easily be combated.

However, the Court has turned to alternative solutions to enable it to ensure the effectiveness and uniformity of Union law. One of the major developments introduced by the Court for this purpose is the extension of the scope of the vertical direct effect by adopting a broad definition of "State", which allows private persons to be considered as an emanation of the State under certain circumstances. It is appreciated that by accepting that a body governed by private law may be bound to give effect to directly effective rights contained in a directive at the suit of another private individual, "the Court has in reality itself already countenanced a limited form of horizontal direct effect"\textsuperscript{48}.

The flexible interpretation of the criteria that must be satisfied by an entity to be considered an emanation of the State, drawn from the recent case-law of the Court, along with the other exceptions to the prohibition of horizontal direct effect (the duty of consistent interpretation and incidental direct effect rulings\textsuperscript{49}), seem to confirm this appreciation, assisting in fact at the neutralization of the distinction between the vertical and horizontal direct effect of the directives, or a horizontal direct effect in a disguised way.

REFERENCES


\textsuperscript{48}Opinion of Advocate General Sharpston in Case Farrell (EU:C:2017:492), point 149.


