Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 22 June 2017 [1]

Case C-413/15

Elaine Farrell
v
Alan Whitty
The Minister for the Environment, Ireland and the Attorney General
Motor Insurers' Bureau of Ireland (MIBI)

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Definition of an emanation of the State for the purposes of establishing liability of a Member State for failure to transpose a directive properly — Conditions under which a private body may be considered to be an emanation of the State)

1. Ever since the Court developed the doctrine of the direct effect of directives and rendered it applicable to 'vertical' disputes between the individual and the State, but declined to extend that doctrine 'horizontally' to cover disputes between private parties, it has been essential to know what are the boundaries of 'the State' for the purposes of applying the doctrine of vertical direct effect. In this reference from the Supreme Court, Ireland, that question is put under the microscope. Is the Motor Insurers' Bureau of Ireland (the body in Ireland with exclusive responsibility for compensating applicants injured in road traffic collisions where the responsible driver is uninsured or cannot be identified; 'the MIBI') an 'emanation of the State' within the meaning of the test laid down in *Foster and Others* ('*Foster*')? [2] If so, it is the MIBI, rather than the State parties to the main proceedings (namely, the Minister for the Environment ('the Minister'), Ireland and the Attorney General), that will be liable to pay compensation to a victim of a road accident involving a driver who was lawfully uninsured under national law because of Ireland's failure to transpose correctly and in time provisions of EU law requiring that all passengers in motor vehicles should be covered by the insurance taken out by that vehicle's driver.

1 Original language: English.

2 Judgment of 12 July 1990, C-188/89, EU:C:1990:313.

Legal framework

EU law

2. Commencing in 1972, the various Council directives dealing with the obligation to carry insurance against civil liability in respect of the use of motor vehicles sought to ensure that, in parallel with relaxation of rules relating to the movement of travellers, there should be guaranteed compensation for victims of road traffic accidents. To that end, the (rather cumbersome) pre-existing 'green card' system was gradually replaced by a specific EU system. The nature and extent of the compulsory insurance cover were gradually extended in successive directives. [3]

3. Whilst Article 2 of Council Directive 72/166/EEC ('the First Motor Insurance Directive') [4] required Member States to refrain from making systematic checks on insurance against civil liability in respect of vehicles normally based in the territory of another Member State, Article 3(1) instructed each Member State to '… take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance'. Article 3(1) also provided that 'the extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures'.

4. Council Directive 84/5/EEC ('the Second Motor Insurance Directive') [5] recognised that major disparities continued to exist between the laws of the different Member States concerning the extent of the obligation of insurance cover [6] and, in particular, identified the need 'to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified'. [7]

5. Article 1(1) required that 'the insurance referred to in Article 3(1) of [the First Motor Insurance Directive] shall cover compulsorily both damage to property and personal injuries'.

6. The first two subparagraphs of Article 1(4) read as follows:

'Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied. This provision shall be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between that body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident. However, Member States may not allow the body to make the payment of compensation conditional on the victim's establishing in any way that the person liable is unable or refuses to pay.

The victim may in any case apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation.

3 See, for the evolution of civil liability motor vehicle insurance in the EU, judgment of 11 July 2013, *Csonka and Others*, C-409/11, EU:C:2013:512, paragraphs 26 to 38 and the case-law cited.

4 Directive of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (OJ, English Special Edition 1972(II), p. 360), as amended by Third Council Directive of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles ('the Third Motor Insurance Directive') (OJ 1990 L 129, p. 33).

5 Second Council Directive of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8, p. 17), as later amended by the Third Motor Insurance Directive.

6 See recital 3.

7 See recital 6.

…’

7. The Third Motor Insurance Directive recorded that significant disparities still existed in insurance cover [8] and that motor vehicle accident victims should be guaranteed comparable treatment irrespective of where (in the EU) accidents occur. [9] It noted that ‘there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States’ and that ‘to protect this particularly vulnerable category of potential victims, such gaps should be filled’; [10] various necessary improvements in the way that the body set up to compensate the victims of accidents caused by uninsured or unidentified vehicles was to operate were also identified. [11]

8. Article 1 states:

‘Without prejudice to the second subparagraph of Article 2(1) of [the Second Motor Insurance Directive], [12] the insurance referred to in Article 3(1) of [the First Motor Insurance Directive] shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.

…’

9. Pursuant to Article 6(2) of the Third Motor Insurance Directive, Ireland’s deadline for transposing Article 1 of that directive into national law was 31 December 1998 as regards pillion passengers of motorcycles and 31 December 1995 as regards other vehicles.

Irish law

10. Section 56 of the Road Traffic Act 1961 (‘the 1961 Act’), as it applied at the time of the facts at issue in the main proceedings, required every user of a motor vehicle to be covered by insurance for injury or damage to third parties in a public place. However, under Section 65(1), no insurance cover was required for ‘excepted persons’. Thus, in particular, drivers of commercial vehicles not fitted with rear seats did not need to be insured against their own negligent driving. [13]

11. According to Section 78, insurers carrying on vehicle insurance in Ireland must be members of the MIBI. In that capacity, they are also, in practice, bound by agreements concluded between the MIBI and Ireland. [14]

8 Third recital.

9 Fourth recital.

10 Fifth recital.

11 See, in particular, 8th, 9th, 10th and 12th recitals.

12 The *first* subparagraph of Article 2(1) states that any statutory provision or contractual clause which seeks to exclude from insurance the use or driving of vehicles by certain categories of persons shall, for the purposes of Article 3(1) of the First Motor Insurance Directive, be deemed to be void in respect of claims by third parties who have been victims of an accident. However, the *second* subparagraph states that ‘the provision or clause referred to [in the first subparagraph] may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen’. So far as I am aware, there is no suggestion that that provision is relevant to the facts of the main proceedings.

13 The compulsory liability cover did not extend to parts of the vehicle that were not fitted for passengers.

14 See point 19 below.

The MIBI [15]

12. The MIBI's function is to deal with, in particular, claims for compensation where a driver of a vehicle is liable but both uninsured and unable himself to compensate a person who has been injured in a traffic accident. The MIBI was established in November 1954, [16] following an agreement between the Department of Local Government and the insurers writing motor insurance in Ireland. The MIBI is an incorporated body under Irish law: a company limited by guarantee which has no share capital.

13. There have been a number of iterations of the agreement between Ireland and the insurers describing the scope of the responsibilities and powers of the MIBI. It is the agreement concluded between the MIBI and the Minister for the Environment in 1988 that is relevant to the case in the main proceedings. [17] Pursuant to Clause 2 of that agreement, the MIBI may be sued by any person seeking compensation against an uninsured or unidentified driver. Thus, the MIBI may be sued by an injured party to enforce the agreement between Ireland and the insurers even though that person is not a party to that agreement. Clause 4 records the MIBI's agreement to pay the victims of uninsured or unidentified drivers. Moreover, where a judgment against a known defendant driver remains unsatisfied in full within 28 days, the MIBI incurs liability provided that judgment covers 'any liability for injury to person or damage to property which is required to be covered by an approved policy of insurance under Section 56 of [the 1961 Act]'. According to the order for reference, no legislation or other form of public law provides for the MIBI to act on behalf of the uninsured or unidentified driver. Any right or obligation that the MIBI has to do so derives from the MIBI's agreement with the Minister.

14. Where an accident occurs involving an uninsured driver, the MIBI will seek to enter into a contract with that driver, under which the driver gives the MIBI the same mandate to act that his insurance company would enjoy were he insured. If so, the MIBI then acts in a manner similar to a normal insurance company processing a claim on behalf of an insured driver: that is, the MIBI will either settle the claim or enjoy subrogated rights to defend the claim in court. Where the driver refuses to enter into such a contract, it appears that the MIBI simply proceeds to act on behalf of the uninsured driver anyway, deriving its authority and obligation to do so from its private law agreement with the Minister. In the absence of a contract with the uninsured driver, the MIBI can only seek to recover any part of the damages that it pays out or the costs that it incurs by way of an action against that driver for unjust enrichment. Where the driver is unidentified, the MIBI will act by virtue of its obligations under its agreement with the Minister, but will have no party against whom to seek to recover any part of the compensation that it has paid or the costs that it has incurred.

15. In addition to the 1988 agreement, the Minister (acting on behalf of Ireland) and the insurers signed two more agreements on 31 March 2004 and 29 January 2009. Those two agreements slightly modify the 1988 agreement. According to the referring court, through these agreements Irish law was brought in line with the Third Motor Insurance Directive. In particular, those agreements correct the lacunae in national law relating to liability to insure in respect of passengers in the rear of vans not fitted with seats (and to liability in respect of passengers who ought reasonably to have known (as opposed to who actually knew) that a vehicle was stolen). [18]

15 The description that follows is drawn partly from the order for reference and the written observations of the parties and partly from the answers given at the hearing in response to questions from the Court.

16 According to the order for reference, the MIBI's memorandum and articles of association date from June 1946. What happened between that date and its 'establishment' in November 1954 is unclear but unlikely to bear upon the present proceedings. I also note that the MIBI appears to have been incorporated on 26 October 1955.

17 In that agreement, the Minister for Transport replaced the Minister for Local Government as the State party to the agreement. The 1988 agreement applied at the time of Ms Farrell's accident.

18 So far as I am aware, there is nothing in the facts to suggest that this provision is of any relevance to the main proceedings.

16. The MIBI does not receive financial support from Ireland. It is funded entirely by its members – that is, the insurers writing vehicle liability insurance in Ireland. Those insurers make contributions to a general fund, which are set at the necessary level to meet the liabilities that the MIBI actually incurs through the scheme. [19] In any individual case (notably where the uninsured driver was previously insured with an identifiable insurer but had allowed his insurance to lapse), a particular insurer may become the 'connected insurer'. In that event, that insurer will assume the obligations of the MIBI and, if necessary, pay out damages and costs. According to the referring court, the premiums insurers charge the public for motor insurance comprise the individual insurance quotation for the driver to be insured together with an element that reflects the cost of their projected liability to contribute to the MIBI. Thus, the members of the MIBI (that is, the insurers) together fund the payment of damages to injured parties and the disbursement of legal costs which the MIBI incurs or for which it becomes liable, together with the MIBI's administrative costs. The actual funding is provided through the mechanism of membership fees that are levied on insurers in proportion to the gross premium income that they derive from writing vehicle insurance business in Ireland (that is, on their market share as expressed in value terms). [20]

17. Changes to the MIBI's memorandum and articles of association require the consent of the relevant minister. According to the referring court, that is not a special requirement arising from the MIBI's particular functions; rather, the same rule applies to all companies limited by guarantee under Section 28 of the Companies Act 1963.

18. By virtue of Section 3 read with Sections 8 and 9 of the Insurance Act 1963, insurers require to be licenced in order to write insurance in Ireland. [21] Under Section 78 of the 1961 Act, membership of the MIBI is one of the conditions for holding such a licence.

19. From time to time, changes to the agreement between the MIBI and the Minister are necessary (for example, to extend the categories of motor vehicle insurance cover for which the MIBI is required to assume liability in the event that the driver is unidentified or uninsured). The referring court states that if an insurer is a member of the MIBI but does not wish to agree to a change to the terms of the agreement between the MIBI and the Minister, that insurer may withdraw from membership of the MIBI. In that event, however, that insurer would no longer satisfy the conditions for holding a licence and would therefore no longer be able to write vehicle insurance in Ireland.

Facts, procedure and questions referred

20. On 26 January 1996, Ms Farrell was travelling in a van, owned and driven by Mr Whitty. The van was not designed or constructed to carry passengers in the rear of the vehicle. Ms Farrell was seated on the floor of the van when Mr Whitty lost control of his vehicle. She was injured. Mr Whitty was uninsured. Under Irish law as it stood at the time, Mr Whitty was not required to insure against negligent injury to Ms Farrell. She came within a class of persons who, whilst they were covered by

19 Under Clause 1 of the principal agreement between the Department of Local Government and the motor insurance companies operating in Ireland granting compulsory vehicle insurance in Ireland of 10 March 1955, those insurers engaged themselves to set up a body called the Motor Insurers' Bureau of Ireland, to become members and to keep that body supplied with all the funds necessary to enable it to discharge its obligations.

20 Regulation 16A(2) of the European Communities (Non-Life Insurance) (Amendment) (No 2) Regulations, 1991, as inserted by Regulation 10 of the European Communities (Non-Life Insurance) (Amendment) Regulations 1992, requires members of the MIBI to fund that body and the guarantee fund established under Article 1(4) of the Second Motor Insurance Directive to an extent proportionate to their gross premium income. These Regulations are now essentially replicated by Regulation 34(2) and (3) of the European Communities (Non-Life Insurance) Framework Regulations 1994.

21 Section 78 of the 1961 Act was inserted by Regulation 9 of the European Communities (Road Traffic) (Compulsory Insurance) Regulations 1992, with effect from 20 November 1992. Certain 'exempted persons' (principally statutory authorities) must provide an undertaking to deal with third party claims on terms similar to those agreed between the MIBI and the Minister.

the Third Motor Insurance Directive and enjoyed rights to protection under that directive, did not enjoy such rights under Irish law. Although the Third Motor Insurance Directive had made such insurance compulsory, at the material time that element of that directive had not yet been transposed into Irish law.

21. Ms Farrell sought compensation from the MIBI.

22. The MIBI refused Ms Farrell's request for compensation because liability for the personal injuries she had suffered was not a liability in respect of which insurance was required under national law.

23. Ms Farrell pursued her claim before the Irish courts; and the High Court duly made a reference for a preliminary ruling to this Court, seeking guidance as to the interpretation of the Third Motor Insurance Directive.

24. In *Farrell*,[22] the Court held that Article 1 of the Third Motor Insurance Directive precludes national legislation under which compulsory motor vehicle liability insurance does not cover liability in respect of personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers. The Court further decided that that provision has direct effect. However, it left it to the national court to determine whether an individual could rely on Article 1 of the Third Motor Insurance Directive against a body such as the MIBI.[23]

25. The referring court explains that Ms Farrell has now been paid an appropriate sum of money by way of compensation.[24] However, a dispute remains as to who bears responsibility for financing the damages paid: the MIBI or the Minister, Ireland, and the Attorney General (collectively, the Member State). The referring court takes the view that that depends on whether the MIBI is, or is not, an emanation of Ireland.

26. Against that background, the referring court has asked the Court for guidance on the following questions:

'(1) Is the test in [*Foster*] as set out at paragraph 20 on the question of what is an emanation of a Member State to be read on the basis that the elements of the test are to be applied

(a) conjunctively, or

(b) disjunctively?

(2) To the extent that separate matters referred to in [*Foster*] may, alternatively, be considered to be factors which should properly be taken into account in reaching an overall assessment, is there a fundamental principle underlying the separate factors identified in that decision which a court should apply in reasoning an assessment as to whether a specified body is an emanation of the State?

(3) Is it sufficient that a broad measure of responsibility has been transferred to a body by a Member State for the ostensible purpose of meeting obligations under European law for that body to be an emanation of the Member State or is it necessary, in addition, that such a body additionally have (a) special powers or (b) operate under direct control or supervision of the Member State?'

22 Judgment of 19 April 2007, C-356/05, EU:C:2007:229 ('*Farrell I*').

23 Judgment of 19 April 2007, *Farrell I*, C-356/05, EU:C:2007:229, paragraph 44.

24 The referring court has not been given the details of that compensation and they are irrelevant to the questions referred.

27. The MIBI, the Minister, Ireland and the Attorney General, the French Government and the European Commission filed written observations and presented oral argument at the hearing on 5 July 2016.

Assessment

Preliminary observations: the background to the test in Foster

28. The concept that EU law is not just about inter-State relations, but confers rights on individuals, goes back to *van Gend & Loos*.[25] The reasoning behind vertical direct effect of directives follows the same logic. A clear, precise and unconditional provision in a directive encapsulates a right that the Member States, in promulgating that directive, agreed should be conferred on individuals. Although 'the choice of form and methods' are left to the Member State when transposing a directive into national law, a directive 'shall be binding, as to the result to be achieved, upon each Member State to which it is addressed' (both those stipulations are to be found in the third paragraph of Article 288 TFEU). In principle, a Member State should naturally comply with its obligations and transpose each directive fully and correctly by the due date for transposition. The directive then becomes, in a sense, invisible, because the rights that it confers are now to be found fully expressed in national law.

29. Sometimes, however, that does not happen; and individuals need to refer back to the directive itself. In formulating the principle of vertical direct effect of directives, the Court has emphasised that a Member State should not be allowed to take advantage of its own failure to transpose a directive; and that an individual can therefore rely on a clear, precise and unconditional provision in a directive as against the Member State itself.[26]

30. The Court's case-law makes it clear that it is immaterial in what precise capacity the Member State is acting.[27] Nor is it a prior condition for vertical direct effect that the particular part of 'the State' that is the defendant in a particular case should bear any actual responsibility for the Member State's failure to implement the directive in question.[28]

31. Rather, the position is that, had the Member State 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.

32. Where a directly effective right in a directive cannot be relied upon (because the defendant is not the State or an emanation of the State), the general model may be described thus. A directive states, often in rather abstract terms, the rights that are to be transposed into, and given flesh by, national law. Because rights under EU law must be effective, no right can exist without a corresponding remedy

25 Judgment of 5 February 1963, 26/62, EU:C:1963:1, '... the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon the institutions of the Community' (p. 12). The specific doctrine of direct effect as crafted by the Court was not greeted with universal enthusiasm, however. In a famous early article ('*The doctrine of "direct effect": an infant disease of Community law*': reprinted in E.L.Rev. 2015, 40(2), pp. 135-153), Judge Pierre Pescatore argued that 'legal rules, by their very nature, have a practical purpose. Any legal rule is devised so as to operate effectively (we are accustomed, in French, to speak here about *effet utile*). If it is not operative, it is not a rule of law. … Practical operation for all concerned, which is nothing else than "direct effect", must be considered as being the normal condition of any rule of law … In other words, "direct effect" must be presumed, it has not to be established a priori' (see p. 135).

26 See, inter alia, judgment of 12 July 1990, *Foster*, C-188/89, EU:C:1990:313, paragraph 16 and the case-law cited.

27 Judgment of 12 July 1990, *Foster*, C-188/89, EU:C:1990:313, paragraph 17 and the case-law cited.

28 Thus, in *Marshall* (judgment of 26 February 1986, 152/84, EU:C:1986:84) there was no suggestion that the hospital authorities bore the slightest responsibility for the non-implementation of the directive there at issue.

('*ubi jus, ibi remedium*'). The first step is therefore to turn to national law to see what (if anything) already exists there that may serve as a (partial) implementation of the directive [29] and, concurrently, to examine whether the directive itself has specified a remedy to be provided by national law where the right conferred is infringed. The next step is to scrutinise the available remedies under national law with a view to using what can there be found to provide an appropriate remedy, whilst respecting the autonomy of national procedural law, by applying the (now classic) principles of equivalence and effectiveness within the overarching obligation that national legislation is to be interpreted in conformity with EU law ('interprétation conforme'). [30] Only where that does not result in effective protection for the right guaranteed by EU law does one turn to the doctrine of State liability. State liability for damages is thus a remedy, not of first resort, but rather of last resort.

33. The process of analysis that I have just described is often a complicated and elaborate exercise. An 'interprétation conforme' of existing national legislation will not be possible if such an interpretation would be *contra legem*. [31] Claiming damages against the Member State [32] requires the applicant either to join the Member State as an additional defendant (with a concomitant exposure in costs towards the Member State should he succeed against the principal defendant) or to institute a second set of proceedings against the Member State having tried and failed to recover against the principal defendant. Unless the litigation arises against the background of total non-implementation of a directive, damages against the Member State are not a foregone conclusion. [33]

29 Often there will have been some legislative initiative that has resulted in partial, or imperfect, implementation. Even if that is not the case, there may be pre-existing legislation in the field covered by the directive that can be read in the light of the directive's requirements.

30 For the sake of brevity, I shall use the French expression below.

31 For a statement of the principle of 'interprétation conforme' that is almost contemporaneous with *Foster*, see judgment of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395, paragraphs 8 to 14 (*Marleasing* itself builds on Case 14/83 (judgment of 10 April 1984, v*on Colson and Kamann*, EU:C:1984:153, paragraph 26). For a careful examination of the exact scope of, and limitations to, this obligation, see later judgment of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 107 to 119. The Court made it clear beyond doubt in *Dominguez* (judgment of 24 January 2012, C-282/10, EU:C:2012:33) that 'the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem*' (paragraph 25 and the case-law cited).

32 The principle of such damages has its genesis in *Francovich and Others* (judgment of 19 November 1991, C-6/90 and C-9/90, EU:C:1991:428). There, the provisions of Directive 89/987/EEC were unconditional and sufficiently precise as to the content of the guarantee of payment of unpaid wage claims but not as to the identity of the person required to provide that guarantee; and the Court therefore turned to examine whether there could be State liability in damages. It held that liability could exist as a matter of principle and laid down three conditions (in paragraphs 39 to 41) for establishing such liability. The test as there stated seemed to imply strict liability if those conditions were satisfied. In *Brasserie du pêcheur and Factortame* (judgment of 5 March 1996, C-46/93 and C-48/93, EU:C:1996:79), the Court made it clear that, whereas that was the test where a Member State was under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive (paragraph 46), the test in circumstances in which the Member State enjoyed a wide discretion was whether the breach was 'sufficiently serious' (paragraph 51), defined as 'whether the Member State … concerned manifestly and gravely disregarded the limits on its discretion' (paragraph 55).

33 As Advocate General Jacobs at points 30 and 31 of his Opinion in in *Vaneetveld*, C-316/93, EU:C:1994:32, trenchantly observed:
'30. The possibility for the individual, under *Francovich*, to claim damages against the Member State where a directive has not been correctly implemented is not, in my view, an adequate substitute for the direct enforcement of the directive. It would often require the plaintiff to bring two separate sets of legal proceedings, either simultaneously or successively, one against the private defendant and the other against the public authorities, which would hardly be compatible with the requirement of an effective remedy.
31. It cannot, I think, be objected that imposing obligations on individuals will prejudice legal certainty. On the contrary, perhaps the most significant feature of the existing case-law on this point is that it has generated uncertainty. It has led, first, to a very broad interpretation of the notion of Member State so that directives can be enforced even against commercial enterprises in which there is a particular element of State participation or control, notwithstanding that those enterprises have no responsibility for the default of the Member States, and notwithstanding that they might be in direct competition with private sector undertakings against which the same directives are not enforceable. And it has led to great uncertainty on the scope of national legislation, in view of the duty imposed on national courts to stretch to their limits the terms of national legislation so as to give effect to directives which have not been properly implemented. Moreover, where national legislation is interpreted extensively so as to give effect to a directive, the result may well be to impose on individuals obligations which they would not have in the absence of the directive. Thus directives which have not been correctly implemented may already give rise to obligations for individuals. Against that background, it does not seem a valid criticism that enforcing directives directly against individuals would endanger legal certainty. On the contrary, it might well be conducive to greater legal certainty, and to a more coherent system, if the provisions of a directive were held in appropriate circumstances to be directly enforceable against individuals.'

34. Where, however, national law contains *nothing* that can be regarded as an implementation of the right that was to have been granted in accordance with the directive (as here), the choice is binary. If the obvious defendant (here, the MIBI) is properly to be characterised as either 'the State' or 'an emanation of the State', the applicant can rely directly on his directly effective rights under the directive itself (vertical direct effect) and obtain reparation from that defendant. If not, the remedy lies against the Member State in damages under the principle clearly laid down by the Court in *Dillenkofer*. [34]

The first question

35. By its first question, the referring court asks whether the test in *Foster* should be applied conjunctively or disjunctively. It is a fair question. Paragraph 18 of *Foster* is formulated disjunctively: '… the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organisations *or* bodies 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'. [35] However, the formulation in paragraph 20 appears to be conjunctive: 'It follows from the foregoing that 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.' [36]

36. As a matter of logic, the premiss behind the first question is that the elements identified by the Court in *Foster* represent an *exhaustive list* of what needs to be taken into account when answering the question: 'is this defendant an emanation of the State for the purposes of vertical direct effect?' If the test is disjunctive, the presence of A *or* B *or* C *or* D in the background facts will suffice. If it is conjunctive, A, B, C and D will all need to be present. But either way, the presence (or absence) of a further factor (E or F, say) is irrelevant. Put another way: the premiss is that the Court in *Foster* set out to identify – and did identify – all the components that would be relevant to assessing whether a particular defendant is, or is not, an emanation of the State for the purposes of vertical direct effect.

37. I suggest that a closer examination of the Court's reasoning in *Foster* makes it clear, however, that the Court was *not* there engaged in the (hazardous) exercise of seeking to foresee all possible future constellations of facts that might give rise to the question: 'is this defendant an emanation of the State?' Rather, it was abstracting from cases that it had already decided to the extent required to give an answer to the referring court in that specific case. If that is right, it then follows in logic that the answer to the first question must be that the test as formulated in *Foster* is neither disjunctive nor conjunctive.

38. It is therefore necessary to do a little careful archaeological work on the text of the judgment in *Foster*. [37]

34 Judgment of 8 October 1996, *Dillenkofer and Others*, C-178/94, C-179/94 and C-188/94 to C-190/94, EU:C:1996:375, paragraphs 16 and 19 to 29: a logical conclusion from what the Court had already said in *Francovich and Others* (paragraphs 39 to 41) and confirmed in *Brasserie du pêcheur and Factortame* (paragraph 46). The binary nature of this choice may explain why Ms Farrell has, fortunately, already been paid compensation for her injuries (see point 25 above).

35 Emphasis added.

36 Emphasis added: the absence of any conjunction before the word 'and' necessarily means that the various components listed up to that point are to be read cumulatively.

37 I am assisted in that task by a curious quirk of history: I was the référendaire working on *Foster* with Sir Gordon Slynn, the acting President of the Court for that case and primary draftsman of the judgment.

39. The essential facts may be simply stated. Five women employees of the British Gas Corporation ('the BGC') were required to retire at age 60, in accordance with the BGC's policy of requiring its employees to retire when they reached State pension age (at the time, 60 for women and 65 for men). They wished to continue working and claimed before an Industrial Tribunal that the BGC's policy, although not prohibited by national rules, was contrary to Article 5(1) of Council Directive 76/207/EEC.[38] They argued that they could rely on that provision as against the BGC.

40. The known characteristics of the BGC, as they emerge from the judgment, were as follows.[39] By virtue of the United Kingdom Gas Act 1972, which governed the BGC at the material time, the BGC was a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly over the supply of gas. The members of the BGC were appointed by the competent Secretary of State. He also had the power to give the BGC directions of a general character in relation to matters affecting the national interest and instructions concerning its management. The BGC was obliged to submit to the Secretary of State periodic reports in the exercise of its functions, its management and its programmes. Those reports were then laid before both Houses of Parliament. Under the Gas Act 1972, the BGC also had the right, with the consent of the Secretary of State, to submit proposed legislation to Parliament. The material before the Court, as recorded in the report for the hearing, also included the fact that, as a matter of English law, the BGC was a 'public body' and a 'public authority' for the purposes of various domestic statutes.

41. The Industrial Tribunal, the Employment Appeal Tribunal and the Court of Appeal all dismissed the employees' claim. They appealed to the House of Lords, which made a reference for a preliminary ruling in what became Case C-188/89.

42. The Court, having disposed of a preliminary argument on admissibility, turned in paragraph 16 of its judgment to the substance of the question that it had to decide.

43. It began by setting out the parameters. First, it recalled (paragraph 16) that the effectiveness of directives (which place Member States under a duty to adopt a certain course of action) would be diminished if individuals could not rely on them and national courts could not take them into account. This it had already said as early as 1982 in *Becker*.[40] 'Consequently', a Member State that is in default in implementing a directive by the deadline for transposition cannot use 'its own failure to perform the obligations which the directive entails' to defend itself against a claim by an individual. 'Thus' (another word for consequently), directly effective provisions of a directive may be relied upon (i) 'as against any national provision which is incompatible with the directive' or (ii) 'in so far as the provisions define rights which individuals are able to assert against the State'.

38 Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

39 What follows is taken from paragraphs 3 to 7 of the judgment in *Foster*.

40 Judgment of 19 January 1982, 8/81, EU:C:1982:7. The defendant in *Becker* was the office of the municipal tax authority. Organically, it was part of the State, under the authority and control of the State, and it possessed 'special powers' to impose and levy taxes in the interest of facilitating agreed public spending.

44. Next (paragraph 17), the Court recalled that it had already held in *Marshall*[41] that, for the purposes of vertical direct effect, the exact capacity in which the State-as-defendant is acting is immaterial (in *Marshall*, that was 'regardless of … whether [the State was acting] as employer or as public authority'). And the Court here gave the key to why it considered that directives should have vertical direct effect against Member States: 'In either case *it is necessary to prevent the State from taking advantage of its own failure to comply with [EU] law*.'[42]

45. The Court then proceeded (paragraph 18) to offer a definition of the types of defendant against which an individual may invoke 'unconditional and sufficiently precise provisions of a directive' (in shorthand, what is an emanation of the State for the purposes of vertical direct effect). The introductory phrase 'On the basis of those considerations, the Court has held in a series of cases that …' serves as a flag to inform the reader that the Court is about to give him an abstract formula whose components can all be derived from existing case-law.

46. It is therefore no surprise to find that the Court immediately (paragraph 19) made good on its claim that everything that it had just said could be derived from existing case-law. The list of cases contained in that paragraph is introduced by the formula, 'the Court has *accordingly* held that …'. The individual cases cited – *Becker* ('tax authorities'),[43] *Busseni* ('tax authorities'),[44] *Costanzo* ('local or regional authorities'),[45] *Johnston* ('constitutionally independent authorities responsible for the maintenance of public order and safety')[46] and *Marshall* ('public authorities providing public health services')[47] – can be matched against one or more of the individual components that the Court set out in its abstract formulation in paragraph 18.

47. Here, I draw attention to the fact that paragraphs 18 and 19 of the judgment could just as easily have been written in the opposite sequence. Whether one says: '(i) here is how I am going to formulate the test in abstract terms; and (ii) you can see the characteristics that I have identified in the following cases that the Court has already decided' (the actual order of those paragraphs) or '(i) look, here are various cases that the Court has already decided which exhibit certain characteristics; and so (ii) here is how I am going to formulate the test in abstract terms' (the order reversed), the reasoning is essentially the same.

41 Judgment of 26 February 1986, 152/84, EU:C:1986:84. The defendant in *Marshall* was the Southampton and South-West Hampshire Health Authority (the organisation responsible, at the material time, for hospitals and medical services in its particular designated geographical area). Organically, it was not part of the State, but it was under the authority and control of the State. The judgment does not state whether it possessed 'special powers' and nothing suggests that it did, in fact, possess such powers (see further below, point 49). It clearly had a mission to serve the public interest by providing appropriate public healthcare within its designated area. Functionally, therefore, it could be considered to be acting on behalf of the State.

42 Emphasis added.

43 Emphasis added. Judgment of 19 January 1982, 8/81, EU:C:1982:7.

44 Judgment of 22 February 1990, C-221/88, EU:C:1990:84. The Court there held that, in the absence of implementing measures, the European Coal and Steel Community ('the ECSC') could rely upon a recommendation (once the period laid down for its implementation had expired) as against a Member State which had failed to implement it; however, the preferential status of the debts owed to the ECSC might be recognised only as against that State, the ECSC's claims being placed on the same footing as any claims by the State. Thus, it did not prejudice the rights of creditors other than the State under national legislation on the rights of creditors in the absence of the recommendation. See paragraph 30 and point (1) of the operative part.

45 Judgment of 22 June 1989, 103/88, EU:C:1989:256. The defendant in *Costanzo* was the municipal executive board of an Italian commune. Organically, it was part of the State, sharing in the organic State functions of authority and control, possessing the usual State powers (such as the power to regulate) and operating to serve the public interest.

46 Judgment of 15 May 1986, 222/84, EU:C:1986:206. The defendant in *Johnston* was the Chief Constable of the Royal Ulster Constabulary: the titular official responsible for the police service in Northern Ireland. The judgment describes the police service (in the person of its Chief Constable) as an independent public authority exercising State authority and control, possessing 'special powers' (since the State has a monopoly on the lawful use of force) and charged with the maintenance of public order and safety.

47 Judgment of 26 February 1986, 152/84, EU:C:1986:84. I have already described the nature of the defendant in this case (see footnote 42 above). As to the absence of any indication that the defendant in that case enjoyed 'special powers', see further point 49 below.

48. The Court might have stopped there, having provided the abstract formulation. Strictly speaking, the answer to the specific question whether *the BGC* was an emanation of the State under that test was a matter for the referring court to decide on the facts.[48] However, that court had asked in terms, 'was the BGC … a body of such a type that the appellants are entitled in English courts and tribunals to rely directly upon [Directive 76/207] so as to be entitled to a claim for damages on the ground that the retirement policy of the BGC was contrary to the directive?' and the Court clearly felt that it had enough material before it to give clear guidance as to what the answer should be.[49] The various factual elements recorded about the BGC sufficed to show *that the BGC in fact satisfied each of the criteria listed*.[50] The Court therefore proceeded to state (paragraph 20) that 'it follows from the foregoing' that a body that combines the various characteristics identified in paragraph 18 (together with several additional glosses) '*is included in any event* among the bodies against which the provisions of a directive capable of having direct effect may be relied upon'.[51]

49. I pause to suggest that the additional glosses introduced by paragraph 20 fit better with the proposition that that paragraph contains the *application* of the abstract formulation to the BGC rather than with the proposition that it contains the test itself. First, there is the reference to '*a body, whatever its legal form*' which extends (perhaps, a little casually) the earlier test derived from case-law involving essentially *public* authorities to other bodies whose 'legal form' may be part public and part private, or indeed exclusively private, rather than exclusively public.[52] Second, there is the statement that the body in question is one that 'has been made responsible, pursuant to a measure adopted by the State, for *providing a public service*' (there is no express mention of 'providing a public service' in paragraph 18). Third, the '*special powers* beyond those which result from the normal rules applicable in relations between individuals' (already identified in paragraph 18) are enjoyed '*for that purpose*' – that is, to enable the body to provide a public service. Fourth, whilst three of the bodies referred to in the case-law cited in paragraph 19 had 'special powers', the fourth (the health authority in *Marshall*) did not. That places a question mark over whether that element should be construed as a necessary part of the definition of what constitutes an emanation of the State for the purposes of vertical direct effect. However, the BGC *did* have such special powers.[53] These additional glosses explain to the national court (in barely coded language) that the facts that the Court has ascertained through the order for reference about the BGC suffice to classify the BGC as an emanation of the State.

50. Most telling, however, are the words '*is included in any event*'. These confirm that the Court is not attempting, in paragraph 20, to formulate any type of general test or to cover all eventualities for the future. It is dealing with the specific case at hand and saying to the national court: 'whatever *other* bodies may (or may not) be emanations of the State, a body that displays *all* these characteristics *is* an emanation of the State – which is what you wanted to know about'.

48 Indeed, the Court had earlier (at paragraph 15) pointed out that it had 'jurisdiction, in proceedings for a preliminary ruling, to determine the categories of persons against whom the provisions of a directive may be relied on'; whereas it was 'for the national courts, on the other hand, to decide whether a party to proceedings before them falls within one of the categories so defined'.

49 It is not unknown for the Court to give a clear hint to a referring court as to what the result of applying the abstract guidance that it has just given probably should be. A striking example some six years after *Foster* is to be found in the 'third Factortame case' (judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79). At paragraph 51 of that judgment, the Court formulated the test for when damages lie against a Member State for breach of EU law and, at paragraph 56, stated in general terms 'the factors which the competent court may take into consideration'. Then, at paragraphs 58 to 64, the Court provided guidance to the two referring courts – the Bundesgerichtshof and the High Court of Justice, Queen's Bench Division, Divisional Court, respectively – as to the likely answers ('… it will be helpful to indicate a number of circumstances which the national courts might take into account'). The various damming factors identified in paragraphs 61 to 64 in respect of the United Kingdom Government's enactment of the Merchant Shipping Act 1988 all pointed towards a finding that there should be liability in that case. After a spirited fight by that government when the case returned to the domestic courts, that was indeed the outcome.

50 The Court appears to have based its conclusion that the BGC had special powers on the fact that it had a monopoly of the supply of gas (paragraph 3).

51 Emphasis added.

52 See further points 62, 79 to 105, 114 and 120(1) below.

53 See footnote 50 above.

51. That reading is reinforced by what happens between paragraph 20 and the operative part of the judgment. In paragraph 21 the Court recalled that it had already held in *Marshall*[54] that Article 5(1) of Directive 76/207 satisfied the test for direct effect. Paragraphs 20 and 21 are then combined (in paragraph 22, repeated as the operative part) in order to give the referring court a precise answer to the question referred. The words 'are included in any event' that appeared in paragraph 20 are now dispensed with as being unnecessary – indeed, inappropriate – in the operative part.

52. I conclude that the Court in *Foster* had no intention of trying to enumerate exhaustively and for all time the components of the test for what is an emanation of the State for the purposes of vertical direct effect. It created an abstract formulation out of existing case-law (paragraph 18), which it then applied with glosses to identify a body whose characteristics meant that it was in any event to be included in the category of emanations of the State (paragraph 20). And there the ruling stops. Neither the derivation of the actual test from pre-existing case-law in paragraph 18 nor the application of that test in paragraph 20 purport to be exhaustive; and both logic and good sense militate against retrospectively categorising them as such.

53. It follows that the answer to the first question is that the test in *Foster* as to what constitutes an emanation of the State for the purposes of vertical direct effect of directives is to be found in paragraph 18, not paragraph 20, of the judgment in that case. The test there formulated is to be read neither conjunctively nor disjunctively. Rather, it contains a non-exhaustive listing of the elements that may be relevant to such an assessment.

54. Before turning to the second question, I should deal briefly and in parentheses with one curious feature of the components used by the Court to create the test: namely, the reference to 'special powers'. In the original French in which the draft judgment was prepared and deliberated, the term used was 'pouvoirs exorbitants' – a term of art in French administrative law, for which 'special powers' is not a particularly adequate English translation.[55] The locus classicus for the concept of the public service in French administrative law is, as I understand it, the ruling of the Tribunal des conflits (Jurisdiction Court) of 8 February 1873 in *Blanco*,[56] which recognised both the possibility of State liability in damages as a result of actions by the 'service public' and the exclusive jurisdiction of the administrative courts (as distinct from the ordinary civil courts) to hear such cases.[57] The judgment of the Conseil d'État (Council of State) in *Bureau Veritas*[58] provides additional helpful guidance on the French law concept of 'l'exercise des prérogatives de puissance publique … conférées pour l'exécution de la mission de service public dont [la société en question] est investie' (the exercise of the State powers … conferred in order to enable [the company in question] to implement the public service

54 Judgment of 26 February 1986, 152/84, EU:C:1986:84.

55 Since the reference came from a United Kingdom court, the English language version of the judgment is the 'authentic' text and the proposed translation was accordingly reviewed by the United Kingdom Judge (Sir Gordon Slynn) and his senior référendaire (myself) with the then head of the English translation service of the Court. We were conscious of the fact that 'special powers' did not capture the full nuance of the French draft; but no one could come up with a better suggestion at the time. A review of some of the other language versions of the judgment shows that the expression was translated into Spanish as 'poderes exorbitantes', German as 'besondere Rechte', Italian as 'poteri' (with no reference to the powers being 'special'), Dutch as 'bijzondere bevoegdheden' and Portuguese as 'poderes exorbitantes'. This suggests that the translation into some languages was a considerably easier exercise than in others.

56 Tribunal des conflits of 8 February 1873, 00012, published in the recueil Lebon (the text in French can be found on https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007605886).

57 *Blanco* concerned a damages claim brought on behalf of a minor who had been injured by the action of workers employed by the tobacco authorities in Bordeaux. The key part of the (short) ruling is as follows: 'Whereas the liability, which may be incumbent on the State, for the damage caused to individuals by the actions of persons that it employs in the public service, cannot be governed by principles which are established in the Civil Code, for relations between individuals; whereas this liability is neither general nor absolute; whereas it has its special rules which vary according to the needs of the service and the requirement to reconcile the rights of the State with private rights; whereas accordingly … the administrative authority alone has jurisdiction to hear them'.

58 Judgment of 23 March 1983, Conseil d'État, *SA Bureau Véritas et autres*, nº 33803, 34462. *Bureau Veritas* concerned an appeal on a point of law by Bureau Veritas and the French State in a claim brought by an airline against Bureau Veritas as the body empowered to issue certificates of airworthiness for aircraft for damages arising from the latter's delay in issuing such a certificate. Bureau Veritas was held to have been entrusted by the State with the performance of a public service and to exercise prerogative public powers for that purpose. As a corollary, the State itself was held not liable for the damage caused.

mandate vested in it). That said, the text of the Court's judgment in *Foster* does not seek to define 'special powers' for the purposes of EU law save to say that such powers are 'beyond those which result from the normal rules applicable to relations between individuals'. I shall return to that concept in addressing, in particular, the third question referred. [59]

The second question

55. By its second question the referring court wishes to find out – on the assumption that the elements listed in *Foster* constitute a bundle of factors to be taken into consideration (as I have suggested in the answer that I propose to the first question) rather than a restrictive, conjunctive test – whether there is a fundamental principle underlying the separate factors identified which a national court should apply to the facts before it in order to determine whether a given defendant is, or is not, an emanation of the State for the purposes of vertical direct effect of directives.

56. It is necessary to begin by asking whether the post-*Foster* case-law indicates decisively whether the Court has, *since* that judgment, effectively opted for a disjunctive or conjunctive test (so that the second question becomes redundant), or has given particular weight to one or other of the components that it identified in *Foster*.

57. So far as I can see, the short answer in both respects is 'no'; but for the sake of good order I shall now proceed to examine that case-law in a little more detail. I shall deal with that case-law in the chronological order in which the various judgments were delivered.

58. The first relevant post-*Foster* decision was the judgment in *Kampelmann and Others*. [60] Mr Kampelmann and three colleagues, the applicants in Cases C-253/96 to C-256/96, were employees of the Landschaftsverband (regional council), which was responsible for, inter alia, highway construction and maintenance in Westfalen-Lippe and for managing a number of the *Land*'s highway services. [61] Mr Schade (Case C-257/96) and Mr Haseley (Case C-258/96) were employed, respectively, by Stadtwerke Witten (Municipal Works Department, Witten) and Stadtwerke Altena (Municipal Works Department, Altena), which were public undertakings providing the energy supply services in the towns of Witten and Altena respectively. [62] They wished to rely directly, as against their respective employers, on Article 2(2)(c)(ii) of Council Directive 91/533/EEC [63] in the context of a dispute as to their grading. Having concluded that that provision was directly effective, [64] the Court set out an amplified version of the disjunctive listing in paragraph 18 of *Foster* [65] and answered the national court's second question by reiterating the formula in paragraph 18 of *Foster*. [66]

59 See point 129 et seq. below.

60 Judgment of 4 December 1997, C-253/96 to C-258/96, EU:C:1997:585.

61 Paragraph 12 of the judgment.

62 Paragraph 17 of the judgment.

63 Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32).

64 Paragraph 45 of the judgment.

65 '[A directive] may, however, be relied on 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, such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility, by the public authorities and under their supervision, for providing a public service' (paragraph 46). Curiously, that paragraph of the judgment refers neither to paragraph 18 nor to paragraph 20 of *Foster*, but to paragraph 19, together with *Costanzo* (judgment of 22 June 1989, 103/88, EU:C:1989:256), at paragraph 31 ('… when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply those provisions').

66 Paragraph 47 of the judgment and point 2 of the operative part.

59. The defendant in *Collino and Chiappero*[67] was Telecom Italia, the successor company in a series of undertakings enjoying the exclusive concession for the telecommunications services for public use awarded by the Italian State.[68] The applicants were challenging the terms of their transfer from the original concession holder to the next concession holder.[69] The referring court considered that, objectively, a transfer of an undertaking had taken place but noted that Italian law had introduced a special scheme derogating from the general law on transfers of undertakings which would have the effect of defeating the applicants' claim. The referring court asked the Court whether the derogating rules introduced by Italian Law No 58/92 were compatible with Council Directive 77/187/EEC.[70]

60. Telecom Italia sought to challenge the admissibility of the reference, arguing that the referring court 'could not in any event apply provisions of [Directive 77/187] to the main proceedings, all the parties to which are private individuals'.[71] The Court agreed that, in accordance with settled case-law, a directive may not have horizontal direct effect; but then went on to recall both the principle of 'interprétation conforme' and that where persons are able to rely on a directive as against the State, they may do so regardless of the capacity in which the latter is acting, because it is necessary to prevent the State from taking advantage of its own failure to comply with (then) Community law. The Court then cited paragraph 20 of *Foster*, left it to the national court to ascertain whether the applicants could rely directly on Directive 77/187 and proceeded to answer the substantive questions referred.[72]

61. In *Rieser Internationale Transporte*,[73] the applicant haulage company sought repayment of tolls which it considered that it had overpaid for the use of the Brenner motorway. The defendant ('Asfinag') was the body responsible for the construction, planning, operation, maintenance and financing of Austrian motorways and expressways, including the Brenner motorway, under a licence between it and its sole shareholder, the Austrian State. The haulage company (and the Commission) considered that the relevant provisions of the directives at issue could be relied upon against a body such as Asfinag by reason of the close links connecting that company to the State in the management of Austrian motorways. Asfinag opposed that interpretation, arguing that it was incorporated in the form of a joint stock company governed by private law, that its board was not bound by instructions given by bodies of the Austrian State, that it did not perform State duties and that it levied tolls on its own account.[74]

62. After citing the principles behind vertical direct effect laid down in *Becker*,[75] *Marshall*[76] and *Foster*,[77] the Court set out verbatim the test in paragraph 20 of *Foster* as echoed in *Collino and Chiappero*.[78] It then embarked upon a careful analysis of the material placed before it in the order for reference.[79] The Court considered that it was clear from those facts that Asfinag was a body to which, pursuant to an act adopted by the public authorities, the performance of a public-interest service had been entrusted, under the supervision of those public authorities, and which for that purpose

67 Judgment of 14 September 2000, C-343/98, EU:C:2000:441.

68 See paragraphs 7 to 9 of the judgment.

69 See paragraphs 10 to 13 of the judgment.

70 Directive of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26).

71 Paragraph 19 of the judgment.

72 See paragraphs 20 to 25 of the judgment. The Court's use of paragraph 20 of *Foster* (with its statement that a body that fulfils the listed criteria 'is included in any event' among those against which the provisions of a directive capable of having direct effect may be relied on) could be read as a gentle hint to the national court that Telecom Italia was indeed an emanation of the State for the purposes of vertical direct effect.

73 Judgment of 5 February 2004, C-157/02, EU:C:2004:76.

74 See paragraphs 20 and 21 of the judgment.

75 Judgment of 19 January 1982, 8/81, EU:C:1982:7, paragraphs 23 to 25.

76 Judgment of 26 February 1986, 152/84, EU:C:1986:84, paragraph 49.

77 Judgment of 12 July 1990, C-188/89, EU:C:1990:313, paragraphs 16 and 17.

78 Judgment of 14 September 2000, C-343/98, EU:C:2000:441, paragraph 23.

79 See paragraphs 25 and 26 of the judgment.

possessed special powers beyond those resulting from the normal rules applicable in relations between individuals.[80] The Court therefore concluded that 'such a body, whatever its legal form, is included among those against which the provisions of a directive capable of having direct effect may be relied upon'.[81]

63. As I read the judgment in *Rieser Internationale Transporte*, the Court there did exactly what it had earlier done in *Foster*. From the material it had at its disposal, the Court felt able to conclude that Asfinag satisfied *all* of the components enumerated in *Foster*. Asfinag was therefore 'included in any event' amongst the bodies against whom a claimant could invoke vertical direct effect of directives. I would add that the ruling in *Rieser Internationale Transporte* makes it clear beyond doubt that a joint stock company governed by private law whose board is not bound by instructions given by the State may nevertheless be an emanation of the State for the purposes of vertical direct effect.

64. *Sozialhilfeverband Rohrbach*[82] concerned the question whether the employment contracts of employees of the Sozialhilfeverband, a social assistance organisation governed by public law, were transferred to two new limited liability companies governed by private law whose sole shareholder was the Sozialhilfeverband. The reference was decided by reasoned order in accordance with what is now Article 99 of the Court's Rules of Procedure. The Court appears to have placed the main emphasis on the fact that the new limited liability companies were under the control of the sole shareholder which was itself an emanation of the State. As far as I can tell, it did not really examine whether the Sozialhilfeverband enjoyed special powers.[83]

65. In *Vassallo*,[84] the defendant was a hospital and the issue of whether it was an emanation of the State arose in the context of an inadmissibility plea. The hospital observed that it was run neither by the Italian State nor by a ministry. It was an autonomous establishment with its own directors who were required, within the framework of their management, to apply the provisions of national law which they could not challenge and from which they could not derogate.[85] The Court contented itself with stating that it was apparent from the order for reference that the national court regarded it as an established fact that the hospital constituted a public sector institution attached to the public authorities. That was sufficient for the Court (using the same expanded formulation of the test for an emanation of the State that it had put forward in *Kampelmann and Others*) to conclude that the hospital's inadmissibility plea should be dismissed.[86] Again, I can find no examination of 'special powers' in the Court's analysis. Nor is it intrinsically likely (see *Marshall*) that a public sector hospital would possess such powers.

66. In *Farrell I*, the Court cited the test set out at paragraph 20 of *Foster* (together with *Collino and Chiappero* at paragraph 23 and *Rieser Internationale Transporte* at paragraph 24), rather than paragraph 18 of *Foster*. However, the Court immediately expressly stated that it did not have enough material before it to establish whether the MIBI was an emanation of the State and therefore left that question to the national court,[87] leading in due course to the present reference.

80 Paragraph 27 of the judgment. However, as to the 'special powers' element of the test, see further at point 130 et seq. below.

81 See paragraph 28 of the judgment.

82 Order of 26 May 2005, C-297/03, EU:C:2005:315.

83 For the facts on which the Court's decision was based, see paragraphs 11 and 12 of the reasoned order. The Court's brief analysis of Question 1 (the relevant question for present purposes) is to be found at paragraphs 27 to 30. It contains no mention of 'special powers'.

84 Judgment of 7 September 2006, C-180/04, EU:C:2006:518.

85 Paragraph 24 of the judgment.

86 See paragraphs 26 and 27 of the judgment.

87 Judgment of 19 April 2007, *Farrell I*, C-356/05, EU:C:2007:229, paragraphs 40 and 41.

67. In *Dominguez*,[88] the Grand Chamber was dealing with a claim under the recast Working Time Directive (Directive 2003/88/EC[89]) brought by an employee against the Centre informatique du Centre Ouest Atlantique (Data Processing Centre for the Centre Ouest Atlantique Region) which, as the Court noted, was 'a body operating in the field of social security'.[90] The Court contented itself with citing paragraph 20 of *Foster* and leaving it to the national court to determine whether a directly effective provision of EU law (Article 7(1) of Directive 2003/88) could be relied upon against that defendant.[91] Again, there was no express finding as to whether the defendant possessed special powers.

68. With *Carratù*[92] the Court was dealing with fixed-term clauses in employment contracts. The defendant was the Poste Italiane (Italian postal service). The Court's reasoning in relation to the emanation of the State argument was succinct.[93] It recorded the fact that Poste Italiane was a body wholly owned by the Italian State through its sole shareholder, the Minister for Economy and Finances, and that it was under the supervision of the State and the Corte dei Conti (Court of Auditors), a member of which sat on Poste Italiane's Board of Directors. Against that background, the Court concluded that Poste Italiane satisfied the cumulative version of the elements identified in *Foster* as being 'amongst the entities' against which vertical direct effect may be prayed in aid.[94]

69. I confess that I am less sure that I fully understand the ruling in *Portgás* (Fifth Chamber),[95] delivered on the same day as *Carratù* (Third Chamber).

70. At the material time, Portgás was a company limited by shares under Portuguese law which held an exclusive public service gas concession within the meaning of Article 2 of Council Directive 93/38/EEC.[96] It received EU co-financing under the European Regional Development Fund which it used, in particular, to finance the procurement of gas meters. Following an audit, an arm of the Portuguese State (the manager of the Programa Operacional Norte (Operational Programme North)) ordered the recovery of that financial assistance on the ground that Portgás had failed to comply with the relevant EU rules contained in Directive 93/38 governing such public procurement. Those rules had not yet been transposed into Portuguese law. Was Portgás an emanation of the State for the purposes of vertical direct effect of directives and, if so, could the Portuguese State itself rely on the unimplemented directive as against Portgás?

71. In his Opinion, Advocate General Wahl conducted a two-part analysis: (i) against whom, and (ii) by whom, may the directly effective provisions of a directive be relied upon 'vertically'? He took paragraph 20 of *Foster* as his starting point, considering that it 'enshrined' the test laid down by the Court in that case.[97] He concluded that the fact that Portgás was a public service concession-holder

88 Judgment of 24 January 2012, C-282/10, EU:C:2012:33.

89 Directive of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

90 Paragraph 36 of the judgment.

91 Paragraphs 39 and 40 of the judgment.

92 Judgment of 12 December 2013, C-361/12, EU:C:2013:830.

93 Everything that follows about this case is drawn from paragraphs 29 to 31 of the judgment.

94 Interestingly, the Court did not cite *Foster* directly, but relied on *Kuso* (judgment of 12 September 2013, C-614/11, EU:C:2013:544) (a case that proceeded to judgment without an Opinion), which cites paragraph 20 of *Foster*. There also does not appear to be a specific finding in relation to the 'special powers' element of the test in *Foster*.

95 Judgment of 12 December 2013, C-425/12, EU:C:2013:829.

96 Directive of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1).

97 See point 35 of his Opinion and footnote 16. It will be clear from what I have already said that I regard paragraph 18 as the key paragraph in *Foster*, not paragraph 20. In that connection, I note that (at point 43 of his Opinion) Advocate General Wahl cites the Opinion of Advocate General Van Gerven in *Foster* (C-188/89, EU:C:1990:188) as (the sole) authority for the proposition that 'the fact that a private undertaking is entrusted with providing, as sole concession-holder, a service in the public interest is not sufficient for being able to invoke against it the provisions of a directive which has not been implemented in the domestic legal order. It is necessary to establish that that undertaking has special powers and is subject to the control of the public authorities'. Since the Court in *Foster* did not make any use of that particular suggestion, it is hard to see how the authority cited takes the matter further.

and contracting entity within the meaning of Article 2 of Directive 93/38 did not necessarily mean that it was to be regarded as an emanation of the State; and that, since the referring court had 'not provided sufficient information concerning Portgás to determine whether, at the material time, that undertaking had special powers and was subject to the control of the public authorities, in accordance with the rule established in [*Foster*] and the approach traditionally adopted by the Court in similar cases', it was for the referring court to examine whether all those conditions were satisfied.[98] If, however, Portgás was an emanation of the State, he saw no obstacle to the State relying on directly effective provisions of the directive as against Portgás.[99]

72. In its judgment, the Court first held that the relevant provisions of Directive 93/38 were indeed unconditional and sufficiently precise to have direct effect.[100] Next, it cited paragraph 20 of *Foster* as echoed in *Collino and Chiappero* (paragraph 23), *Rieser Internationale Transporte* (paragraph 24), *Farrell I* (paragraph 40), and *Dominguez* (paragraph 39).[101] It derived from that case-law the proposition that 'even if a private party comes within the group of persons covered by a directive, … that directive may not be relied on as such against [them] before the national courts'. (I agree with that conclusion; but would suggest that it derives from *Faccini Dori*,[102] not from the case-law cited.)

73. The Court went straight on to state that 'consequently … the mere fact that a private undertaking which is the exclusive holder of a public service concession is among the entities expressly referred to as constituting the group of persons covered by Directive 93/38 does not mean that the provisions of that directive may be relied on against that undertaking'.[103] Here, I agree with the conclusion but for a slightly different reason. It seems to me that Article 2 does no more than define the material scope of Directive 93/38. It clearly has two limbs: Article 2(1)(a) (public authorities or public undertakings) and Article 2(1)(b) (contracting entities which are *not* public authorities or public undertakings but which have as their activities any of those referred to in Article 2(2) 'and operate on the basis of special or exclusive rights granted by a competent authority of a Member State'). I do not see that definition of material scope (which answers the question, 'who has to comply with this directive once it is implemented?') as automatically answering the different question, 'if this directive has *not* been implemented, can its directly effective provisions be relied upon as against all bodies that are defined as coming within its scope?'.

74. The Court next stated that 'it is necessary that that public service should be provided under the control of a public authority and that that undertaking should have special powers beyond those which result from the normal rules applicable in relations between individuals', giving as its authority for that proposition paragraphs 25 to 27 of *Rieser Internationale Transporte*. I have already commented on that case.[104] Those three paragraphs of *Rieser Internationale Transporte* contained the *application* of paragraph 20 of *Foster* to the detailed facts in *Rieser Internationale Transporte* and led to the conclusion (in paragraph 28, not cited in *Portgás*) that 'such a body, whatever its legal form, is

98 See point 45 of the Opinion. Advocate General Wahl cites 'inter alia, *Collino and Chiappero*, paragraph 24; *Farrell*, paragraph 41; and *Dominguez*, paragraph 40' in support of what he describes as 'the approach traditionally adopted'. It may be that the Advocate General merely meant by that 'leaving the decision on the facts to the national court' (as the Court indeed did in all three cases that he cited). If, however, he meant that there is a 'traditional approach' which consists in requiring the cumulative presence of all the elements listed in paragraph 20 of *Foster* before a body is to be considered to be an emanation of the State, it will be clear from what I have said above (at points 43 to 54) that I do not accept that such an approach has knowingly and consistently been incorporated in the Court's case-law.

99 See points 62 to 66 of Advocate General Wahl's Opinion.

100 See paragraphs 19 and 20 of the judgment.

101 See my detailed analysis of each of those cases set out above. The individual paragraphs cited in paragraph 24 of *Portgás* cite paragraph 20 of *Foster* (and they all include phraseology that makes it clear that a body that fulfils all the criteria there laid down is included in the category of 'emanations of the State'). The authorities cited do not in my view support the proposition that paragraph 20 of *Foster* constitutes a definitive definition encompassing all bodies that are emanations of the State.

102 Judgment of 14 July 1994, C-91/92, EU:C:1994:292, paragraphs 19 to 25 (in particular, paragraphs 24 and 25).

103 See paragraph 25 of the judgment.

104 See points 61 to 63 above.

included among those against which the provisions of a directive capable of having direct effect may be relied upon'.[105] They do not, as such, support the proposition that all the elements listed in paragraph 20 of *Foster* have always to be present before a body is properly to be classified as an emanation of the State.

75. In paragraphs 27 to 30, the Court proceeded to examine the information at its disposal concerning Portgás. It concluded that, since it did not have all the necessary material conclusively to decide whether Portgás *was* an emanation of the State, the national court should carry out the necessary analysis (paragraph 31, which contains a reformulation of paragraph 20 of *Foster*).[106] The second part of the judgment then addressed the issue of whether the State itself might rely on an unimplemented directive against an emanation of the State – a question that, like the Advocate General, the Court answered in the affirmative.[107]

76. I suggest, respectfully, that the Fifth Chamber in *Portgás* appears to have proceeded on the basis of an incomplete understanding of the proper test to be applied. Nor does its insistence on requiring the presence of all the elements listed in paragraph 20 in *Foster* seem to me to be mirrored elsewhere in the Court's post-*Foster* case-law.

77. I conclude from that review of the post-*Foster* case-law that the Court has not necessarily decided to opt for a restrictive, conjunctive test for what constitutes an emanation of the State for the purposes of vertical direct effect of directives. True, it has tended to cite paragraph 20 of *Foster* more often than paragraph 18 of that judgment. But it seems to me that, in terms of outcome, the Court has not insisted rigorously on the presence of all the components there mentioned. Rather, just as in *Foster*, it has given specific conclusive guidance to the national court in those instances where it felt that it had the material before it to do so (notably, in *Rieser Internationale Transporte*). Elsewhere it has left it to the national court to determine whether the test is satisfied.[108]

78. Even if I am wrong in that assessment, given that the question of how to define what is an emanation of the State for the purposes of vertical direct effect of directives is now before the Grand Chamber, the Court has the opportunity in the present reference to provide the necessary clarification.

Inspiration from other areas of EU law

79. I pause at this point to investigate whether assistance may be derived from three areas of EU law – State aids, the rules governing the provision of services of general economic interest ('SGEIs') and public procurement – in which the Court has already had to grapple with issues that are conceptually not very far removed from the present problem of how to refine the test in *Foster* for what is an emanation of the State for the purposes of vertical direct effect of directives. All those areas contain the notions of public authority and service provision in return for remuneration; all involve the State entering into relationships with different types of bodies or undertakings. I do not suggest that any of the sets of rules that apply in those areas of EU law can be transposed automatically or in their entirety to the present context. They may, however, shed helpful light on the criteria that should be adopted in order to draw the line between 'the State and its emanations' and 'private parties'.

105 Emphasis added.

106 A slightly modified version of that reformulation then appears in the second paragraph of the operative part. As regards the 'special powers' element of the test, see further point 129 et seq. below.

107 Academics have since puzzled over whether this latter problem is really unrelated to the issue of (vertical or horizontal) direct effect of directives, as both the Advocate General and the Court appeared to suggest (placing emphasis instead on the Member State's obligation to ensure that a directive is complied with). See, for example, Albors-Llorens, A., 'The direct effect of EU Directives: fresh controversy or a storm in a tea-cup? Comment on Portgás' in (2014) EL.Rev p. 851.

108 See points 58, 60, 65, 66 and 67 above.

– State aids (Article 107 TFEU)

80. It is often necessary to assess whether a particular measure is a State aid for the purposes of Article 107 TFEU. In that context, the test of whether a particular measure favouring an undertaking is of 'State origin' is used to determine whether that measure should be considered to have been 'aid granted by a Member State or through State resources'. The State origin of a measure involves, on the one hand, the concept of imputability of the measure to the State, and, on the other hand, the concept of the use of State resources.

81. Where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State, even if the authority in question enjoys legal autonomy from other public authorities. [109] It is settled case-law that no distinction is to be drawn between cases where the aid is granted directly by the State and those where it is granted by public or private bodies which the State establishes or designates with a view to administering the aid. [110] The same then applies if a public authority designates a private or public body to administer a measure conferring an advantage. EU law cannot permit the rules on State aid to be circumvented through the creation of autonomous institutions charged with allocating aid. [111]

82. Where the advantage is granted through a public undertaking, it is less evident that the measure should be imputed to the State. [112] In such cases, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure. The mere fact that a measure is taken by a public undertaking is not of itself sufficient for the measure to be imputable to the State. [113] However, it does not need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question. [114]

83. Since relations between the State and public undertakings are necessarily close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent manner and in breach of the rules on State aid laid down by the Treaty. [115] Moreover, precisely because of the privileged relations that exist between the State and public undertakings, it will as a general rule be very difficult for a third party to demonstrate in a particular case that measures taken by such an undertaking were in fact adopted on the instructions of the public authorities. [116]

109 See Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU ('the Commission State Aid Notice'). That notice was most recently updated in June 2016 (OJ 2016 C 262, p. 1).

110 Judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 23.

111 Judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 23 and the case-law cited, and of 20 November 2003, *GEMO*, C-126/01, EU:C:2003:622, paragraph 23. See further judgment of 12 December 1996, *Air France* v *Commission*, T-358/94, EU:T:1996:194, paragraph 62. See finally Opinion of Advocate General Kokott in *UTECA*, C-222/07, EU:C:2008:468, point 124.

112 See, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 24. A helpful definition of what constitutes a public undertaking is to be found in Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17). Article 2(b) of that directive states that 'public undertakings' means 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

113 Judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 52. See also judgment 26 June 2008, *SIC* v *Commission*, T-442/03, EU:T:2008:228, paragraphs 93 to 100.

114 Judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 53. It is, furthermore, not necessary to demonstrate that in a particular case the public undertaking's conduct would have been different if it had acted autonomously: see judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 48.

115 Judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 53.

116 Judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 54.

84. For those reasons, the imputability to the State of a measure taken by a public undertaking may be *inferred from a set of indicators* arising from the circumstances of the case and the context in which the measure was taken. [117]

85. So far as use of State resources is concerned, in general only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Article 107(1) TFEU. However, the case-law demonstrates that resources of private bodies can also, under certain circumstances, be considered to be State resources for the purposes of Article 107(1) TFEU. The origin of the resources is not relevant provided that, before being directly or indirectly transferred to the beneficiaries, they come under public control and are therefore available to the national authorities. [118] It is not necessary that the resources become the property of the public authority. [119]

86. Does that mean that, where an undertaking or a body receives financing from the budget of the State and that financing takes place under conditions which qualify as a State aid under Article 107 TFEU, that suffices to turn the beneficiary into an emanation of the State for the purposes of vertical direct effect of directives? I do not think so. Thus, it seems to me that a private bank or a coal mine which was the beneficiary of an aid with a view to its restructuring would not become an emanation of the State within the meaning of the *Foster* case-law. At the other end of the spectrum, nor can I conceive that the mere fact that an undertaking or a body is paid from public funds to deliver goods or services would turn it into an emanation of the State. Thus, an undertaking responsible for delivering office supplies to a government ministry under a contract awarded after a public procurement procedure would not fall within the definition.

– *SGEIs*

87. Undertakings entrusted with the provision of SGEIs within the meaning of Article 106(2) TFEU are 'subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'. [120] Provided that they can bring themselves within that provision, the fact that such undertakings receive funds from the State or are granted special or exclusive rights will not lead to the conclusion that the arrangement is a (prohibited) State aid. The four conditions applied to determine whether a given undertaking provides SGEIs were defined in the well-known *Altmark* judgment. [121]

88. The first *Altmark* condition (the only one of the four that is relevant to the present discussion) requires that 'the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined'. To that the General Court later added two further requirements: 'the *presence of an act of the public authority entrusting the operators* in question with

117 Judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 55 (emphasis added). The possible indicators for imputability are listed in section 3.1.1 of the Commission State Aid Notice. They include the integration of the public undertaking into the structures of the public administration, the fact that the undertaking through which aid was granted had to take account of directives issued by governmental bodies, the nature of the public undertaking's activities and whether it operated on the market in normal conditions of competition with private operators.

118 See, for example, judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 70, and of 16 May 2000, *France* v *Ladbroke Racing and Commission*, C-83/98 P, EU:C:2000:248, paragraph 50.

119 See judgment of 12 December 1996, *Air France* v *Commission*, T-358/94, EU:T:1996:194, paragraphs 65 to 67, concerning an aid granted by the Caisse des Dépôts et Consignations which was financed by voluntary deposits of private citizens which could be withdrawn at any time. Because the Caisse des Dépôts et Consignations was able to use funds from the surplus produced by deposits over withdrawals as if they were permanently at its disposal, those funds were held to be State resources. See also judgment of 16 May 2000, *France* v *Ladbroke Racing and Commission*, C-83/98 P, EU:C:2000:248, paragraph 50.

120 That provision also covers undertakings 'having the character of a revenue-producing monopoly'. The latter category is, I think, not relevant to the present discussion.

121 Judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* ('*Altmark*'), C-280/00, EU:C:2003:415, paragraph 89 et seq.

an SGEI mission and the universal and compulsory nature of that mission' and that 'the Member State must indicate the reasons why it considers that the service in question, *because of its specific nature*, deserves to be characterised as an SGEI and to be *distinguished from other economic activities*'.[122]

89. That case-law, taken in conjunction with the Commission's practice in relation to undertakings claiming that they perform SGEIs,[123] shows that such services involve *activities that fall within the State's public mission that the State has decided for some reason to entrust to a third party*. To approach the point from a slightly different angle: the public authorities of the Member States (at national, regional or local level, depending on the allocation of powers under national law) classify the services to be provided as being of general interest and, therefore, make them subject to specific public service obligations. The term SGEIs covers both economic activities and the provision of non-economic services.[124]

90. The essential characteristic of an undertaking providing an SGEI is that something is supplied whose provision serves the public good but which would not be supplied (or would only be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the free market in the absence of public intervention (the so-called 'market failure test').[125] An obvious example would be running a pharmacy in a remote rural area. The Court has therefore established that SGEIs are services that exhibit special characteristics as compared with those of other economic activities.[126] According to settled case-law, the public authorities in the Member States have considerable discretion when it comes to defining what they regard as SGEIs and the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error.[127] It is noteworthy (but unsurprising) that the scope and organisation of SGEIs vary considerably from one Member State to another, depending on the history and culture of public intervention in each Member State. SGEIs are therefore very diverse. Users' needs and preferences will differ with the geographical, social and cultural surroundings. It is therefore (sensibly) for the public authorities in each Member State to determine the nature and scope of what they categorise as a service of general interest.

91. Providing the SGEI will require the supplier to accept certain constraints or specific tasks that would not apply were it to provide similar services on a commercial basis. A non-exhaustive enumeration of these might include: providing the services on a universal basis to all who request them (rather than being free to select one's customers); always having to provide those services (rather than

122 See judgment of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 172 (emphasis added). See also judgment of 10 December 1991, *Merci convenzionali Porto di Genova*, C-179/90, EU:C:1991:464, paragraph 27.

123 See Commission Staff Working Document of 29 April 2013 'Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest' (SWD(2013) 53 final/2). See also Communication from the Commission on the European Union framework for State aid in the form of public service compensation (2011) (OJ 2012 C 8, p. 15).

124 Communication of 20 December 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '*A Quality Framework for Services of General Interest in Europe*', COM(2011) 900 final, p. 3.

125 Idem, p. 3. See also Communication from the Commission on Services of general interest in Europe (OJ 2001 C 17, p. 4), point 14, which provides that 'if the public authorities consider that certain services are in the general interest and market forces may not result in a satisfactory provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations'. See more specifically, in the context of State aid in the sector of broadband networks, Communication from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (OJ 2013 C 25, p. 1), point 20, which provides that 'the Commission considers that in areas where private investors have already invested in a broadband network infrastructure (or are further expanding the network) and are already providing competitive broadband services with an adequate broadband coverage, setting up a parallel competitive and publicly funded broadband infrastructure cannot be considered as an SGEI within the meaning of Article 106(2) TFEU'. See also judgment of 16 September 2013, *Colt Télécommunications France* v *Commission*, T-79/10, not published, EU:T:2013:463, paragraph 154, where the General Court held that 'the existence of a market failure is a prerequisite for qualifying an activity as [an SGEI]'.

126 Judgments of 10 December 1991, *Merci convenzionali porto di Genova*, C-179/90, EU:C:1991:464, paragraph 27; of 17 July 1997, *GT-Link*, C-242/95, EU:C:1997:376, paragraph 53; and of 18 June 1998, *Corsica Ferries France*, C-266/96, EU:C:1998:306, paragraph 45.

127 See, for example, Opinion of Advocate General Tizzano in *Ferring*, C-53/00, EU:C:2001:253, point 51. See also judgment of 15 June 2005, *Olsen* v *Commission*, T-17/02, EU:T:2005:218, paragraph 216 and the case-law cited; see further Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ 2012 C 8, p. 4), point 46.

being free to choose whether, when and where to supply them); and having to provide the service regardless of whether it makes commercial sense to provide that service to a particular customer or in particular circumstances. In return, the undertaking providing the SGEI will usually benefit from the conferral of some type of exclusive rights and will receive from the State a payment which goes beyond the price which would be paid under normal market conditions for the service being supplied.

92. The provision of the SGEI may in some cases also include a conferral of special powers within the meaning of the *Foster* case-law (for example, the power to apply coercive measures to individuals) *but will not necessarily do so*. I shall return to this important point later. [128]

– *Public procurement*

93. In EU public procurement law, the concept of 'the State' and its emanations is coterminous with the concept of 'contracting authority'. That in turn dictates whether a contract has to be awarded according to the public procurement rules or may be awarded under some other procedure. [129]

94. Article 2(1) of Directive 2014/24 defines a 'contracting authority' as the 'State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law'. By virtue of Article 2(1)(4), 'bodies governed by public law' means 'bodies that have all the following characteristics: (a) they are established for the specific purpose of *meeting needs in the general interest, not having an industrial or commercial character*; (b) they have *legal personality*; and (c) they are *financed, for the most part, by the State*, regional or local authorities, or by other bodies governed by public law; *or are subject to management supervision by those authorities or bodies*; or have an *administrative, managerial or supervisory board*, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law'. [130]

95. These cumulative conditions [131] concern not only the body's *legal status* (legal personality) and its *organic link* with the State (through financing or control) but also the contracting authority's *public mission* (meeting needs in the general interest, not having an industrial or commercial character).

96. At first sight, it might appear that that definition is narrower than the classic test in *Foster*. In practice, however, the Court has interpreted it widely, flexibly and with regard to the specific circumstances of each case.

97. Thus, in *University of Cambridge* the Court held that, 'whilst the way in which a particular body is financed may reveal whether it is closely dependent on another contracting authority, it is clear that that criterion is not an absolute one. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as public financing'. [132] It followed that the expression 'financed ... by [one or more contracting authorities] in Article 1(b), second subparagraph, third indent, of Directives

128 See point 129 et seq. below.

129 See Article 1(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65). Article 1(4) emphasises that 'this Directive does not affect the freedom of Member States to define, in conformity with [EU] law, what they consider to be [SGEIs], how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26'.

130 Emphasis added.

131 The Court confirmed the cumulative nature of the three conditions in the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*, C-44/96, EU:C:1998:4, paragraph 21. See further, judgment of 16 October 2003, *Commission* v *Spain*, C-283/00, EU:C:2003:544, paragraph 69.

132 Judgment of 3 October 2000, *University of Cambridge*, C-380/98, EU:C:2000:529, paragraph 21.

92/50, 93/36 and 93/37, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives'. [133]

98. In *Mannesmann Anlagenbau* the Court found that an entity such as the Österreichische Staatsdruckerei, whose activities consisted of rotary heatset printing, that was established by law and pursued activities that were in the general interest but also of a commercial nature, must be regarded as a body governed by public law and thus a contracting authority: in consequence, works contracts of whatever nature entered into by that entity were to be considered to be public works contracts. [134] Essentially the Court found that from the moment that a body performs one part of its tasks in the public interest, that body falls within the scope of the public procurement directive for all its tenders.

99. In *Adolf Truley* the Court stressed that the concept of 'needs in the general interest' had to be given an autonomous and uniform interpretation throughout the European Union and was to be interpreted in the light of the context and the purpose of the directive. [135] The Court further developed its position in *Commission* v *Spain*, stating that 'in determining whether or not there exists a need in the general interest not having an industrial or commercial character account must be taken of relevant legal and factual circumstances, such as those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, inter alia, lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question'. [136]

100. In general, needs in the general interest, crucial to defining whether a body has a public mission, are 'first, those which are met otherwise than by the availability of goods or services in the market place and, secondly, those which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence'. [137]

101. Pausing for a moment to take stock and ask questions: should all bodies or undertakings vested with a public mission corresponding to the first *Altmark* condition, or entrusted with the provision of SGEI, be considered to be emanations of the State? If the answer to either proposition is 'yes' (and, arguably, irrespective of whether that is a sufficient, or merely a necessary, requirement to fall within the definition), then should a further condition be that that public mission be clearly defined as such by the relevant legislative or regulatory framework? Such an additional requirement might play a helpful role in enhancing legal certainty, both for the body or undertaking in question and for the individual seeking to rely on the principle of vertical direct effect of directives. Furthermore, once a body is an emanation of the State in respect of some activities that it performs, should it be considered to be an emanation of the State for all its activities or is that casting the net too wide?

102. Two illustrations may assist at this point to emphasise the practical issues that arise when applying the *Foster* test as it currently stands.

133 Judgment of 3 October 2000, *University of Cambridge*, C-380/98, EU:C:2000:529, paragraph 26. The Court went on to hold that the decision as to whether a body such as the University of Cambridge is a 'contracting authority' was to be made annually and that the budgetary year in which the procurement procedure commenced was to be regarded as the most appropriate period for calculating the way in which that body was financed (paragraphs 40 and 41).

134 Judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*, C-44/96, EU:C:1998:4, paragraph 35.

135 Judgment of 27 February 2003, *Adolf Truley*, C-373/00, EU:C:2003:110, paragraphs 33 to 40.

136 Judgment of 16 October 2003, *Commission* v *Spain*, C-283/00, EU:C:2003:544, paragraph 81.

137 Judgment of 10 May 2001, *Agorà and Excelsior*, C-223/99 and C-260/99, EU:C:2001:259, paragraph 37.

103. In my first example, X is a company providing security services. It has two contracts. One is with a large private firm of lawyers which wishes to ensure that there are suitable security arrangements in place for its offices. The other is with central government, which has 'out-sourced' certain guard duties at a medium-security prison. Looked at objectively, the actual services performed in the two contexts are virtually identical. The first contract is an ordinary private law contract between two private entities. The second contract requires X to perform a public mission conferred upon it by the State. X is exercising, by delegation, the State's own authority and indeed enjoys special powers (notably, the power of detention).

104. In my second example, Y is a company providing ferry services. It operates on two routes. One route is a popular route with plenty of potential customers, both freight and passengers. Two other companies compete with Y on that route but there are still lucrative opportunities and Y can choose, depending on demand, how intensively to provide ferry services. The route is a sound commercial proposition. The other route is between the mainland and a small, remote island. The ferry service is the island's lifeline to the outside world. It used to be run under direct local government control; but the local governmental authority has now put the contract out to tender in order to nominate a (single) service provider. That route is the opposite of a sound commercial proposition. The contracting authority has stipulated that the ferry service needs to run all year round, in all weathers and irrespective of the number of passengers or quantity of freight that will be on board any particular vessel for any particular crossing. Y tenders for and is awarded the contract. When operating on the first route, Y is an ordinary commercial operator. When operating on the second route, Y is performing a public mission. The ferry services to the island clearly fall within the category of an SGEI. On the terms desired by the local authority, the contract is not really very attractive from a purely commercial perspective. Although Y may have sought some kind of preferential treatment or exclusivity or special powers, such elements are not essential to the performance of the SGEI and may not have been granted.

105. It would appear from those two illustrations that, depending on the precise circumstances, the same body may be an emanation of the State in respect of certain of its activities and not an emanation of the State in respect of other activities. It is important to stress that that distinction is *not* drawn on the basis of the *capacity* in which the body is acting. It is clear from *Marshall* and *Foster* that that is immaterial; and indeed X and Y are each acting in the same capacity in the two situations put forward in each of my two examples. Rather, the core difference in each example is that in one situation the body is acting purely commercially, whereas in the other situation the same body has a public mission. It will also be seen from these two illustrations that whereas X possesses 'special powers' when performing its public mission, Y does not.

106. Against that background, I now return to the referring court's second question.

107. First, it seems to me that the core underlying principle appears clearly from settled case-law. It is that an individual may rely on precise and unconditional provisions of a directive as against the State, irrespective of the capacity in which the State is acting, because 'it is necessary to prevent the State from taking advantage of its own failure to comply with [EU] law'. [138]

138 See, inter alia, judgments of 15 February 1986, *Marshall*, 152/84, EU:C:1986:84, paragraph 49; of 12 July 1990, *Foster*, C-188/89, EU:C:1990:313, paragraph 17; and of 14 September 2000, *Collino and Chiappero*, C-343/98, EU:C:2000:441, paragraph 23. In his Opinion of 18 September 2013 in *Portgás* (C-425/12, EU:C:2013:623) at point 30, Advocate General Wahl considered (citing *Marshall*, paragraph 47) that the '… recognition of the direct effect of directives is based, ultimately, on two complementary objectives: the need effectively to guarantee the rights which individuals may derive from those measures and the desire to penalise national authorities which have failed to respect the binding effect of directives and to ensure their effective application'. I agree wholeheartedly with the first limb of that proposition. However, to the extent that not only subsequent decisions, but *Marshall* itself, make it clear that bodies that had nothing whatsoever to do with (and no ability to influence) the State's failure to transpose the directive will still have to respect directly effective provisions of that directive under the doctrine of vertical direct effect if they are considered to be an emanation of the State, I fear that I cannot entirely endorse the second.

108. Second, I make the (perhaps obvious) point that conferring rights on individuals often comes with a price tag attached. Thus, to take only one example, the grant of protected employment rights obliges an employer to keep on the worker concerned or pay out compensation for breach of the contract of employment.

109. Third, the notion of what constitutes an emanation of the State for the purposes of vertical direct effect must be an autonomous concept of EU law. That concept directly governs who may, and who may not, claim directly effective rights conferred by a directive that has not been properly implemented in due time by a Member State. The fundamental requirement that EU law be applied in a uniform manner throughout the European Union [139] precludes the adoption of any definition whose scope is allowed to vary according to the different definitions embedded in different national legal systems as to what constitutes 'public service' or 'special powers', or what is classified as 'the State' according to national constitutional law.

110. Fourth, precisely because there is such diversity of national terminology and definitions, the EU law definition of what constitutes an emanation of the State must necessarily be couched in abstract terms.

111. Fifth, much has changed since the Court delivered its judgment in *Foster* in 1990. Many Member States have greatly increased the number of missions they no longer perform 'in house'. The nature of the entities to which they entrust those missions has also grown more diverse. While the process of privatisation of State assets and, with them, duties formerly vested in the State (as was the case in *Marshall*) has by no means ceased, it is now equally possible that those duties may be transferred to a 'public-private partnership', by way of 'contractorisation' or by concession.

112. Let us begin by clarifying what does *not* matter for the purposes of that definition.

113. To start with, it is clear from *Foster* itself and from subsequent case-law (notably *Rieser Internationale Transporte* and *Sozialhilfeverband Rohrbach*) that the legal form of the defendant is irrelevant. [140]

114. Next, it is also clear that 'the State' does not have to be in a position where it exercises day-to-day control or direction of that body's operations. [141] To that extent, the reference in the earlier test to a body being 'under the control of the State' seems to me now to have been superseded.

115. It is likewise clear that if the State *does* own or control the body in question, that body will count as an emanation of the State. [142] That seems to me fully legitimate: the State is thereby required to pay for observing the rights conferred by the directive that it ought to have transposed into national law.

116. Similarly, any part of the 'State machinery' – municipal, regional or local authorities and the like – is almost self-evidently an emanation of the State. Organically, indeed, these might simply be viewed as part of the State – they should therefore be so treated without further enquiry. [143]

139 See, inter alia, judgments of 21 May 1985, *Schul Douane-Expediteur*, 47/84, EU:C:1985:216, paragraph 17; of 3 July 2012, *UsedSoft*, C-128/11, EU:C:2012:407, paragraph 40; of 9 November 2016, *Wathelet*, C-149/15, EU:C:2016:840, paragraph 29; and of 2 March 2017, *J. D.*, C-4/16, EU:C:2017:153, paragraph 24.

140 See, in particular, points 35, 49 and 62 above.

141 See point 65 above.

142 See point 68 above.

143 The pre-*Foster* case-law cited in paragraph 19 of *Foster* already showed that certain bodies which structurally formed part of the State were to be treated as the State itself: notably tax authorities (judgments of 19 January 1982, *Becker*, 8/81, EU:C:1982:7, and of 22 February 1990, *Busseni*, C-221/88, EU:C:1990:84), and local or regional authorities (judgment of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256).

117. I regard the reference in the earlier test to 'under the authority of the State' as likewise requiring no further elucidation at this stage. It seems to me clear from the post-*Foster* case-law that that phrase should be taken to mean that the State has created the circumstances and arrangements under which that body may act.

118. Lastly, the question of funding is of no relevance. A body does not require to be funded by the State in order to be an emanation of it.[144]

119. The remaining core elements of the bundle that together comprise the test for whether a given body is, or is not, an emanation of the State for the purposes of vertical direct effect of directives approach that question from a functional perspective ('is the body in question exercising functions that are in some sense "State-like"?').[145] These elements seem to me to be – at least as far as the tests recorded in *Foster* and subsequent case-law are concerned – (i) whether the State has entrusted the body in question with the task of performing a public mission which the State itself might otherwise decide directly to perform; and (ii) whether the State has equipped that body with some form of additional powers to enable it to fulfil its mission effectively (this is merely a different way of saying, 'special powers beyond those that result from the normal rules applicable to relations between individuals'). The first encompasses many different forms of public mission, from running hospitals and educational establishments to maintaining prisons to ensuring essential services in remote parts of the national territory. The second is often the natural corollary of entrusting a public mission to such a body.

120. I therefore suggest that, in answer to the second question, the Court should hold that, in determining whether a particular defendant is an emanation of the State for the purposes of vertical direct effect of directives, the national court should have regard to the following criteria:

(1) The legal form of the body in question is irrelevant;

(2) It is not necessary that the State should be in a position to exercise day-to-day control or direction of that body's operations;

(3) If the State owns or controls the body in question, that body should be considered to be an emanation of the State, without it being necessary to consider whether other criteria are fulfilled;

(4) Any municipal, regional or local authorities or equivalent body is automatically to be regarded as an emanation of the State;

(5) The body in question need not be funded by the State;

(6) If the State has both entrusted the body in question with the task of performing a public service which the State itself might otherwise need directly to perform; and has equipped that body with some form of additional powers to enable it to fulfil its mission effectively, the body in question is in any event to be regarded as an emanation of the State.

In conducting its analysis, the national court should have regard to the underlying fundamental principle that an individual may rely on precise and unconditional provisions of a directive as against the State, irrespective of the capacity in which the State is acting, because it is necessary to prevent the State from taking advantage of its own failure to comply with EU law.

144 See points 61 and 62 above.

145 In paragraph 19 of *Foster*, the Court identified two bodies that were functionally emanations of the State: constitutionally independent authorities responsible for the maintenance of public order and safety (judgment of 15 May 1986, *Johnston*, 222/84, EU:C:1986:206) and public authorities providing public health care services (judgment of 26 February 1986, *Marshall*, 152/84, EU:C:1986:84).

121. I address the question whether, where the task of performing a public service has been entrusted to a body as outlined in point 120(6) above, it is *necessary* that that be accompanied by the grant of 'special powers' by the State in my answer to the third question below.

The third question

122. By its third question, the referring court asks whether the fact that a Member State has transferred a broad measure of responsibility to a body (such as the MIBI) for the ostensible purpose of meeting obligations under EU law suffices for that body to be categorised as an emanation of the State for the purposes of vertical direct effect. Alternatively, is it necessary that such a body should have been granted (i) special powers or (ii) operate under the direct control or supervision of the Member State before an individual can rely upon a directly effective provision of a directive as against that body?

123. I make the preliminary point that directives come in all shapes and sizes. Some – like the various employment directives – create rights and impose liabilities across the board for all employees and all employers, subject only to specific limited exceptions.[146] Others specify the parameters within which certain rights derived from EU law are to be exercised[147] or how certain sectors of the economy are to be regulated.[148] Still others require the Member State to charge a specific body with certain tasks that are to be performed as a result of obligations created and rights conferred by the directive.

124. That is the case here. It is clear that the obligation to ensure that drivers were insured in respect of the risk that was at the origin of Ms Farrell's accident is to be found directly in EU law, namely in Article 1 of the Third Motor Insurance Directive. The first subparagraph of Article 1(4) of the Second Motor Insurance Directive had previously required Member States to set up some mechanism to deal with the eventuality that a driver who was uninsured in respect of a risk for which he was compulsorily required to carry insurance might cause an accident. The two obligations, taken together, required Ireland to ensure that a driver's liability to a passenger in the position of Ms Farrell would be met, either by that driver's own insurer or (if the driver were unidentified or uninsured) by the body charged by Ireland with meeting such claims.

125. As a Member State, Ireland could have chosen between various possible ways of implementing that latter obligation. Thus, it could have made an arm of government itself (such as the Ministry of Transport) responsible for meeting claims involving victims of uninsured drivers. It could have set up a new, separate, public law body and conferred that responsibility on it. Or it could do as it in fact eventually did: take an existing private law body with relevant cognate responsibilities and confer the additional new responsibilities flowing from Article 1 of the Third Motor Insurance Directive upon that private law body.

146 See, for example, Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 2002 L 269, p. 15).

147 See, for example, the Professional Qualifications Directive (Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22)) as recently amended by Directive 2013/55/EC of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36 and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ 2013 L 354, p. 13). General information as to the operation of that system of mutual recognition is to be found at http://ec.europa.eu/growth/single-market/services/free-movement-professionals_en.

148 See, for example, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33), as amended by Regulation (EC) No 544/2009 and Directive 2009/140/EC.

126. Second, this is – as the Commission correctly points out – an unusual case inasmuch as the MIBI's *raison d'être* includes, precisely, dealing with claims brought by victims of uninsured drivers. It is in *that specific context* that the issue arises as to whether it is *also* liable to meet this particular claim, notwithstanding that Ireland had failed at the material time to transpose all its EU law obligations correctly into national law and had not (yet) assigned responsibility for meeting that particular liability to the MIBI. In that respect, the present case differs from situations such as that giving rise to the judgment in *Marshall*,[149] where the defendant was *for other reasons, in a completely different context*, to be considered an emanation of the State and was therefore liable to give effect to the directly effective employment law rights that Ms Marshall could derive from Article 5(1) of Directive 76/207. Here, the directly effective right that Ms Farrell seeks to assert (compensation for injuries received as a passenger travelling in a motor vehicle) under Article 1 of the Third Motor Insurance Directive is precisely the *type* of right for which Ireland had already conferred residual liability, where the driver is unidentified or uninsured, upon the MIBI.

127. That said, the third question is one that has general relevance for the application of EU law throughout the European Union. I would therefore urge the Grand Chamber not to answer it narrowly (for example, by reference to the fact that all motor insurers in Ireland require to be members of the MIBI, which might be regarded as a variant on the theme of special powers[150]), but instead to address the (major) issue of principle raised by the referring court.

128. As I indicated in my answer to the second question, the granting of special powers or the presence of direct control or supervision on the part of the Member State will suffice to make the body in question an emanation of the State. By its third question the referring court asks whether either of those elements is a necessary part of the underlying equation. In the alternative, is it sufficient that the obligation to perform duties which would otherwise have to be carried out by the Member State itself has been entrusted to the body concerned?

129. In this context, the notion of 'special powers' becomes particularly relevant. In order to understand the function that that concept has to play, it is worth returning to the judgment in *Foster*.

130. As I noted in point 52 above, the Court's intention there was not to lay down an exhaustive and permanent test. Rather, it created a formulation out of existing case-law.

131. Thus, the Court recorded in paragraph 18 of *Foster* that it had held in a series of cases that vertical direct effect could arise where organisations or bodies were 'subject to the authority *or* control of the State *or* had special powers'.[151] It listed four cases in paragraph 19. Three of those cases involved bodies (the tax authorities, the local or regional authorities and the public hospital) that were subject to the authority or control of the State; they satisfied the test on those grounds. Whilst the first two might also have satisfied the test on the basis of the powers they self-evidently enjoyed, the same cannot be said of the public hospital. The fourth case (*Johnston*) concerned a constitutionally independent authority responsible for the maintenance of public order and safety. It had, as a matter of fact, been entrusted with special powers for that purpose.

149 Judgment of 26 February 1986, 152/84, EU:C:1986:84.

150 There are also the (somewhat unusual) arrangements permitting the MIBI to negotiate with injured parties and to conduct litigation *even where* it has no specific contract or mandate authorising it to do so. It should be noted that the fact that all motor vehicle insurers must be members of the MIBI both ensures a level playing field in competition law terms and means that the MIBI will never, in the long run, be out of pocket if it has to meet additional claims that it was not anticipating having to meet. It will merely adjust the contributions that it requires from its members; and its members will similarly adjust the additional amount that they charge on individual insurance contracts that they write in order to fund their contribution to the MIBI.

151 Judgment of 12 July 1990, C-188/89, EU:C:1990:313 (emphasis added).

132. It seems to me that, in referring to *Johnston*, the Court was selecting a case that satisfied the test that the Court had just laid down, not (like the other three examples) on the basis that the body in question was 'subject to the authority or control of the State', but on the basis that it enjoyed 'special powers'. In so doing, the Court was highlighting what was an essential element of that particular case.

133. In that context, it is interesting to note that the judgment in *Johnston* does not actually use the expression 'special powers'. Instead, the Court there referred to 'a public authority, charged by the State with the maintenance of public order and safety'.[152] It added that such a body 'may not take advantage of the failure of the State, of which it is an emanation, to comply with [EU] law'.

134. A number of further points should be noted at this stage.

135. First, there is no definition in *Foster* (or indeed in the subsequent case-law) of what 'special powers' actually means. We are merely told that such powers 'go beyond those which result from the normal rules applicable in relations between individuals'. Given that the test in *Foster* is to be applied uniformly throughout the European Union, the term – if it is to be retained as part of the test – must have an autonomous meaning in EU law. Yet, 20 years after *Foster*, a term borrowed from one national legal system[153] has still not acquired a clear, autonomous EU law meaning.

136. Second, my analysis of the post-*Foster* case-law[154] has not revealed a consistent process of checking for, and identifying, the special powers present in any particular case. Bodies responsible for highway construction or providing energy supply services,[155] the exclusive concessionaire for telecommunications services for public use,[156] the private company running a national motorway system,[157] social assistance organisations,[158] a public sector hospital,[159] a regional office dealing with social security[160] and the postal service of a Member State[161] all had public missions. It is much less clear from the available factual material as recorded in the judgments that they necessarily also enjoyed special powers. In *Portgás*,[162] the Court expressly stated that enjoying special and exclusive rights under a concession contract did *not* mean that the body concerned necessarily enjoyed special powers and remitted that specific issue to the national court for further investigation.[163]

137. Third, whilst some kind of additional powers may often be required in order to perform a public mission, it is not clear that they will always be required. The presence of such powers is perhaps seen most clearly in the SGEI context. In many sectors of the economy (such as, for example, telecommunications, water, gas, and electricity) the State may nowadays grant special or exclusive rights.[164]

152 Judgment of 15 May 1986, 222/84, EU:C:1986:206, paragraph 56.

153 See point 54 above.

154 See point 58 et seq. above.

155 See judgment of 4 December 1997, *Kampelmann and Others*, C-253/96 to C-258/96, EU:C:1997:585, and point 58 above.

156 See judgment of 14 September 2000, *Collino and Chiappero*, C-343/98, EU:C:2000:441, and points 59 and 60 above.

157 See judgment of 5 February 2004, *Rieser Internationale Transporte*, C-157/02, EU:C:2004:76, and points 61 to 63 above. Paragraph 12 of the judgment indicates that Asfinag was authorised under the agreement between itself and the Austrian State (described variously as a 'licence' and as a 'contact') 'to levy, in its own name and on its own account, tolls and user charges in order to recoup its expenses'. The Court's subsequent analysis focussed on State control (paragraph 25) and on the fact that Asfinag 'is not entitled of its own authority to fix the amount of the tolls to be levied. That amount is fixed by law' (paragraph 26). The Court immediately concluded that Asfinag was an emanation of the State, *without* identifying what special powers it held (paragraph 27).

158 See order of 26 May 2005, *Sozialhilfeverband Rohrbach*, C-297/03, EU:C:2005:315, and point 64 above.

159 See judgment of 7 September 2006, *Vassallo*, C-180/04, EU:C:2006:518, and point 65 above.

160 See judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, and point 67 above.

161 See judgment of 12 December 2013, *Carratú*, C-361/12, EU:C:2013:830, and point 68 above.

162 Judgment of 12 December 2013, *Portgás*, C-425/12, EU:C:2013:829. See further points 69 to 76 above.

163 Judgment of 12 December 2013, *Portgás*, C-425/12, EU:C:2013:829, paragraphs 30 and 31.

164 See point 112 above.

138. I conclude that to require the body in question also to have 'special powers' in order to be an emanation of the State is not necessary and therefore unjustified.

139. It is important, though, to be clear that it is not every person or body carrying out activities in the public interest that will be an emanation of the State. I would make the following points in that regard.

140. First, there must be a 'body', by which I mean a legal person. A natural person cannot be an emanation of the State.

141. Second, where a body carries out a variety of functions, some of which represent a mission which has been entrusted to it by the State and others of which do not, it is only in respect of the first category of activities that it can be an emanation of the State. Here, the approach that I advocate therefore differs from that adopted by the Court in public procurement cases.[165] Whereas a body that is a 'contracting authority' for the purpose of the public procurement rules has, in consequence, always to monitor and comply with that specific area of EU law,[166] a body that is an emanation of the State for the purposes of vertical direct effect of directives has, potentially, a much vaster and less clearly defined quantity of EU law that can be enforced against it by a private individual. It therefore seems inappropriate to take a 'once caught, always caught' approach here.

142. Third, the mission so entrusted must be the core activity of the body in question or, if relevant, the part of the body in question.

143. Fourth, the body in question must be carrying out an activity which is undertaken in the public interest. It must represent a mission which has been entrusted to it by the Member State in question and which, were it not to be performed by that body, would instead be undertaken by the State itself.

144. In that regard, the notion of 'mission' covers activities which are undertaken for something other than a purely commercial purpose. There must, in other words, be some public service element. Thus, the provision of a national postal service, with an obligation to deliver mail to every national address, would fall within that category. The making available of a local delivery service with a view purely to profit would not.

145. I should add that what may constitute a mission carried out in the public interest may vary from one Member State to another.[167] Thus, for example, one Member State may deem it its duty to ensure that all of its citizens are connected to a fibre-optic broadband network while another might decide that that is entirely a matter for market forces. In the former case, a body entrusted with that mission will be an emanation of the State. In the latter, the private-sector undertaking making the same provision will not be.

146. It seems to me that, in the interests of legal certainty both for the body concerned and for individuals that may wish to bring proceedings against it, the public mission must be clearly defined as such by the relevant legislative or regulatory framework.

147. Accordingly I suggest that the Court answer the third question to the effect that the criteria laid down in the answer to Question 2 also apply where a Member State has transferred a broad measure of responsibility to a body for the ostensible purpose of meeting obligations under EU law. It is not necessary that that body should possess special powers going beyond those which result from the normal rules applicable in relations between individuals.

165 See point 98 above.

166 See, in that regard, judgment of 3 October 2000, *University of Cambridge*, C-380/98, EU:C:2000:529, paragraph 40.

167 See point 90 above.

Postscript

148. The process of preparing this Opinion and suggesting an answer to the three questions referred has inevitably been conducted against the background of the (vexed) question of whether the Court was right in *Faccini Dori*[168] to decide not to accept horizontal direct effect,[169] against the recommendation of Advocate General Lenz in that case[170] and the reasoning advanced by two other Advocates General in previous cases.[171] My working assumption has been that the Court will not consider this to be the appropriate place to reopen that debate.

149. However, I feel it necessary to observe that, to the extent that the *legal form* of the defendant has been irrelevant – and that, since *Foster* itself – to the question whether that defendant is an emanation of the State, the Court has already accepted 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. In so doing, the Court has in reality itself already countenanced a limited form of horizontal direct effect.

150. There are – essentially – three approaches that can be (and have been) used to fill the lacuna created by the absence of general horizontal direct effect: (i) a broad approach to what is an emanation of the State; (ii) taking the principle of 'interprétation conforme' to its limits and (iii) as a fall-back, State liability in damages. From the perspective of giving effective protection to individual rights, the present situation is less than satisfactory. It creates complexity for plaintiffs and uncertainty for defendants. I should like to join earlier Advocates General in inviting the Court to revisit and review critically the justifications advanced in *Faccini Dori*[172] for rejecting horizontal direct effect.[173]

Conclusion

151. In the light of all the foregoing considerations, I suggest that the Court should answer the questions raised by the Supreme Court of Ireland as follows:

(1) The test in *Foster and Others*[174] as to what constitutes an emanation of the State for the purposes of vertical direct effect of directives is to be found in paragraph 18, not paragraph 20, of the judgment in that case. The test there formulated is to be read neither conjunctively nor disjunctively. Rather, it contains a non-exhaustive listing of the elements that may be relevant to such an assessment.

(2) In determining whether a particular defendant is an emanation of the State for the purposes of vertical direct effect of directives, the national court should have regard to the following criteria:

   (i) the legal form of the body in question is irrelevant;

168 Judgment of 14 July 1994, C-91/92, EU:C:1994:292.

169 For some examples of the many critical studies of this body of case-law, see Tridimas, T., 'Black, White and Shades of Grey: Horizontality Revisited' (2002) 21 Y.B.E.L., p. 327; Dashwood, A., 'From Van Duyn to Mangold via Marshall: reducing Direct Effect to Absurdity' (2006-7) 9 C.Y.E.L.S., p. 81; Dougan, M., 'When worlds collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 C.M.L.Rev., p. 931; Craig, P., 'The Legal Effects of Directives: Policy, Rules and Exceptions' (2009) 34 E.L.Rev, p. 349; and de Moi, M., 'Dominguez: A Deafening Silence' (2012) 8 *European Constitutional Law Review*, p. 280.

170 Opinion of 9 February 1994, C-91/92, EU:C:1994:45, point 47.

171 See Opinion of Advocate General Van Gerven in *Marshall II*, C-271/91, EU:C:1993:30, point 12, and Opinion of Advocate General Jacobs in *Vaneetveld*, C-316/93, EU:C:1994:32, point 15 et seq. More recently, Advocate General Trstenjak revisited the underlying issues at various places in her Opinion in *Dominguez*, C-282/10, EU:C:2011:559.

172 Judgment of 14 July 1994, C-91/92, EU:C:1994:292.

173 In that regard, I would adopt in their entirety the observations of Advocate General Jacobs at points 30 and 31 of his Opinion in *Vaneetveld*, C-316/93, EU:C:1994:32, cited in full in footnote 33 above.

174 Judgment of 12 July 1990, C-188/89, EU:C:1990:313.

(ii) it is not necessary that the State should be in a position to exercise day to day control or direction of that body's operations;

(iii) if the State owns or controls the body in question, that body should be considered to be an emanation of the State, without it being necessary to consider whether other criteria are fulfilled;

(iv) any municipal, regional or local authorities or equivalent body is automatically to be regarded as an emanation of the State;

(v) the body in question need not be funded by the State;

(vi) if the State has both entrusted the body in question with the task of performing a public service which the State itself might otherwise need directly to perform and has equipped that body with some form of additional powers to enable it to fulfil its mission effectively, the body in question is in any event to be regarded as an emanation of the State.

In conducting its analysis, the national court should have regard to the underlying fundamental principle that an individual may rely on precise and unconditional provisions of a directive as against the State, irrespective of the capacity in which the State is acting, because it is necessary to prevent the State from taking advantage of its own failure to comply with EU law.

(3) The criteria laid down in the answer to Question 2 also apply where a Member State has transferred a broad measure of responsibility to a body for the ostensible purpose of meeting obligations under EU law. It is not necessary that that body should possess special powers going beyond those which result from the normal rules applicable in relations between individuals.