

FARRELL II AND THE CONCEPT OF AN 'EMANATION OF THE STATE'

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Summary: The Court of Justice of the EU (CJEU) has established that directives cannot produce horizontal direct effect and thus may only be invoked against the State or its emanations. In the recent *Farrell 2* judgement, the Court has clarified the concept of an 'emanation of the State' which is crucial for the purposes of applying vertical direct effect. The aim of this paper is to analyse the concept of an 'emanation of the State' presented in *Farrell 2* ruling. Further, the article highlights that the judgement is a positive development as it brings consistency to the EU case law and corresponds to the present realities when new 'emanations' are emerging with the special powers attributed by the State.

Keywords: directives, European Union law, direct effect, emanation of the state

1 Introduction

The direct effect may be considered as one of the greatest accomplishments of the European Court of Justice being an important tool through which EU law enters into national legal systems. The principle can be defined as the capacity of Community norms to be invoked by individuals in national courts which are bound to apply them.¹

Since *Van Gend en Loos*², the doctrine of direct effect has developed to a large extent; the principle has been also extended to EU secondary legislation. The topic became quite controversial with regard to directives. Article 288 of Treaty on the Functioning of the European Union³ says that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and

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- 1 See more on the evolution of the concept of direct effect PRECHAL, Sacha. Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union. In BAR-NARD, Catherine (ed). *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate*. Oxford: Oxford University Press, 2007, p.37
 - 2 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1
 - 3 Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2008 C 115/47

methods.' So, directives can be considered as goal-oriented acts which explicitly require their implementation. Looking at the nature of a directive it may be concluded that it cannot be regarded as a source of law which has direct effect.⁴ Nevertheless, the CJEU has acknowledged the possibility for directives to produce the direct effect. The Court insisted, however, that provisions of directives can be only invoked vertically, and therefore, can be only applied against the State or its emanations. That is why the definition of the concept of an 'emanation of the State' constitutes a major importance for the purposes of applying the doctrine of direct effect of directives.

After many years of uncertainty in the CJEU case law, on 10 October 2017 in *Farrell 2*⁵ ruling the Court has finally clarified on what exactly constitutes an 'emanation of the State'. The present article analyses the development of the direct effect of directives in the light of the recent *Farrell 2* judgement. Further, the paper highlights that the judgement is a positive development as it brings consistency to the EU case law and corresponds to the present realities when new 'emanations' are emerging with the special powers attributed by the State.

2 Facts in Farrell

In January 1996, Ms Farrell was injured in a road traffic accident when travelling in a van that was not fitted for the carriage of passengers. As it appeared that Mr Whitty, the driver of the vehicle was not insured, Ms Farrell claimed the compensation from the Motor Insurers' Bureau of Ireland (MIBI). MIBI is a company limited by guarantee that is entirely funded by its members, who are the insurers operating in the motor vehicle insurance market in Ireland. The claim was based on an agreement of 1988 concluded between MIBI and the Minister for the Environment. According to that agreement, the MIBI had to compensate victims of road accidents involving drivers who had not taken out the compulsory insurance required by the 1961 Act. The MIBI refused to compensate Ms Farrell because liability for the personal injuries sustained by the plaintiff was not a liability for which insurance was compulsory under the 1961 Act. The bill did not cover injury or damage sustained by persons who travel in parts of vehicles not equipped to carry passengers.

Ms Farrell claimed that the national implementing measures in force at the time of the accident did not properly implement the relevant provisions of directives regulating insurance matters. The case was brought before the High Court in Ireland which referred the questions to the CJEU regarding the interpretation of the Article 1 of the Third Insurance Directive 90/232/EEC⁶ which provided:

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- 4 HAMULÁK, Ondrej, STEHLÍK Václav. European Union Constitutional Law: Revealing the Complex Constitutional System of the European Union. First edition. Olomouc : Palacký University Olomouc, 2013, p. 80
 - 5 C-413/15 Elaine Farrell v Alan Whitty and Others, EU:C:2017:745 (Farrell 2)
 - 6 Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of

Without prejudice to the second subparagraph of Article 2 (1) of Directive 84/5/EEC, the insurance referred to in Article 3 (1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.

In *Farrell 1*,⁷ the CJEU had to consider if the Article 1 of the Third Directive requires that compulsory insurance covers injuries to persons travelling in a part of a motor vehicle not designed for the carriage of passengers or fitted with sitting accommodation. The CJEU highlighted that the Article 1 clearly extends insurance cover to all the passengers. It stated that it would be contrary to the Community law 'to exclude from the concept of the 'passenger', and thus from insurance cover, injured parties seated in a vehicle which was not designed for their carriage or equipped for that purpose'.⁸

Further, the Court had to decide whether individuals may, before the national courts, rely directly on the rights conferred on them by Article 1 of the Third Directive. The CJEU has recalled the previous cases and reminded that the provision of a Directive can have direct effect in case it is unconditional and sufficiently precise⁹, the criteria which were satisfied by the Article 1 of the Third Directive. The Court stated:

It must be held in the present case that, as the Commission argues, those criteria are satisfied by Article 1 of the Third Directive. That article allows both the obligation of the Member State and the beneficiaries to be identified, and its provisions are unconditional and precise. Article 1 of the Third Directive may accordingly be relied upon in order to set aside provisions of national law which exclude from the benefit of the guarantee provided by compulsory insurance cover persons travelling in any part of a vehicle which is not designed and constructed with seating accommodation for passengers.¹⁰

After establishing that Article 1 of the Directive satisfies the conditions for the direct effect, the Court raised a question of whether it may be relied on specifically against the MIBI. It reminded that a directive cannot produce 'horizontal' direct effect on individuals, but only 'vertical' and thus can be only relied on against the State. Due to the lack of the sufficient information, the CJEU left it to the national court to determine the status of the MIBI and its relationship with the Irish State.¹¹

the Member States relating to insurance against civil liability in respect of the use of motor vehicles, OJ 1990 L 129/33 (the Third Directive)

7 C-356/05 *Elaine Farrell v Alan Whitty and Others*, ECLI:EU:C:2007:229

8 *ibid*, para.24

9 *ibid*, para. 37

10 *ibid*, para.38

11 *ibid*, paras 40–41

On 31 January 2008, the High Court of Ireland ruled that the MIBI was an emanation of the State and that, consequently, Ms Farrell had a right to obtain compensation from the MIBI. However, the Farrell story did not finish here, as the MIBI appealed against that judgement to the Supreme Court of Ireland. This court stopped the proceedings and asked the CJEU to provide more clarity on what constitutes an ‘emanation of the state’.

3 What is an ‘emanation of the State’?

In its earlier decisions the CJEU has provided the wide definition regarding what can be considered as the ‘State’. Already in *Marshall*, the CJEU stated that an individual could rely on a directive against the State ‘regardless of the capacity in which the latter is acting, whether as employer or as public authority’.¹² In this case, the applicant was able to rely on an unimplemented directive prohibiting discrimination against her employer, which was a public hospital.

In later cases, the Court presented further clarification ruling that:

It follows that 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.¹³

One of the most important formulations on how to determine if a particular legal body is an ‘emanation of the State’ was provided in *Foster*¹⁴. In order to define an ‘emanation of the State’, the Court in *Foster*, in paragraph 20, formulated the test as follows:

...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.¹⁵

Also, in the same case in paragraph 18 the CJEU stated:

...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

12 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority*, ECLI:EU:C:1986:84, para. 49

13 103/88 *Costanzo SpA v. Comune di Milano*, ECLI:EU:C:1989:256, para.31

14 C-188/89 *Foster and others v British Gas plc*, ECLI:EU:C:1990:313

15 *ibid*, para.20

powers beyond those which result from the normal rules applicable to relations between individuals.¹⁶

The CJEU has provided a wide definition of the 'State' which may also include private bodies equipped with public functions. In fact, the legal form of an emanation of the state is irrelevant as long as it satisfies the conditions mentioned in *Foster*. However, the *Foster* test caused some uncertainties regarding the exact application of the set of criteria established by the Court. On the one hand, the test has referred to three criteria for defining the concept of an 'emanation of the State'. First, a public service requirement; second, State control requirement: a body has to be 'subject to the authority or control of the State'; and third, the special powers requirement. On the other hand, it was still not clear how these elements have to be applied. In the body of the ruling in *Foster*, in paragraph 18 the Court has indicated that the criteria for defining an 'emanation of the State' have to be read disjunctively, while the *Foster* test formulated in paragraph 20 indicated that all three requirements have to be present for an undertaking to be regarded as an 'emanation of the State'.

Legal scholarship did not share the same view regarding the interpretation of the *Foster* test. One of the opinions was that the *Foster* test provided two non-cumulative conditions and a notion of the 'State' referred to anybody which is subject to the authority or control of the State or has special powers beyond those which result from the normal rules applicable to the relations between individuals.¹⁷ Other scholars stated that in order to be considered as a 'State' an organisation has to provide a public service under the control of the State and has to have special powers for that purpose¹⁸, meaning that the conditions of the test are cumulative.

The post-*Foster* case law was also not clear about how the conditions of the test must be applied. In *Kampelmann and Others*,¹⁹ the CJEU demonstrated its unwillingness to choose the strict application of the *Foster* test and set out the criteria of State control and requirement to have special powers as alternatives. Also, the similar approach of the Court has been presented in the recent cases such as *Marrosu & Sardino* and *Vassallo* where the CJEU when defining the concept of an 'emanation of the State' made a reference to 'organisations or bodies which are subject to the authority or control of the State or have special powers'...²⁰

16 *ibid*, para. 18

17 BARNARD, Catherine, PEERS, Steve (eds.) *European Union law*. Oxford: Oxford University Press, 2014, p. 151

18 SCHÜTZTE, Robert, *European Union law*. Cambridge: Cambridge University press, 2015, p. 100

19 Joined Cases C-253/96 to C-258/96 *Helmut Kampelmann and Others v Landschaftsverband Westfalen-Lippe*, ECLI:EU:C:1997:585

20 C-53/04 *Cristiano Marrosu and Gianluca Sardino v. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, ECLI:EU:C:2006:517, para 29;

On the other hand, in a large number of cases, such as *Collino and Chiappero*²¹, *Rieser Internationale Transporte*²², *Foster 1*, *Dominguez*²³, *Portgás*²⁴ the CJEU has referred to the criteria defined in paragraph 20 of *Foster* case, which can imply that the conditions of the *Foster* test are cumulative. Still, in most judgements, such as *Portgás* it was for the national court to decide if the criteria of the test were satisfied.²⁵

In *Farrell 2* the CJEU has provided clarification of its earlier ruling in *Foster* and how it should be applied. Referring to *Foster*, the CJEU stated that ‘the Court was not attempting to formulate a general test designed to cover all situations in which a body might be one against which the provisions of a directive capable of having direct effect might be relied upon.’²⁶ Continuing the reasoning, the CJEU said that the paragraph 20 in *Foster* is to be read in the light of paragraph 18 of the *Foster* judgement.²⁷ Then, the CJEU has clarified that the two conditions, State control and presence of special powers, that confirm whether a body is an ‘emanation of the State’, have to be considered alternatively but not accumulatively.²⁸ Thus, the actual *Foster* test for determining if a body is considered as ‘emanation of the State’ is to be found in paragraph 18 of *Foster* judgement. The CJEU has further stated that a body is regarded as an ‘emanation of the State’ when it meets one of the three criteria:

1. It is governed by public law and is part of the State.
2. It is subject to the authority or control of a public body.
3. It performs a task in the public interest and for that purpose has been given special powers.²⁹

Finalising the judgement, the Court confirmed that the Directive could be invoked against MIBI, even if it is an organisation governed by the private law, as it possesses special powers in connection to the performance of the task in the public interest delegated by the Irish State.³⁰

Case C-180/04 *Andrea Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, ECLI:EU:C:2006:518, para.26

21 C-343/98 *Collino and Chiappero v Telecom Italia SpA*, ECLI:EU:C:2000:441

22 C-157/02 *Rieser Internationale Transporte GmbH v Autobahnen – und Schnellstraßen-Finanzierungs – AG*, ECLI:EU:C:2004:76

23 C282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique*, ECLI:EU:C:2012:33

24 Case C-425/12 *Portgás – Sociedade de Produção e Distribuição de Gás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território*, ECLI:EU:C:2013:829

25 *ibid*, para. 31

26 *Farrell 2*, para.26

27 *ibid*, para.27

28 *ibid*, para. 28

29 *ibid*, para. 34

30 *ibid*, para. 40

4 Conclusion

The *Farrell 2* ruling extended the doctrine of vertical direct effect of directives by allowing to invoke directives against broad range of bodies. This can be even a private organisation, not necessarily subjected to State authority or control, which has been delegated the performance of a task in the public interest by a Member State and possesses for that purpose special powers. Such maximisation of vertical direct effect can be subject to criticism, putting forward the argument that *Farrell 2* fades the distinction between horizontal and vertical direct effect of directives. Especially, since the ideas supporting the recognition of horizontal direct effect of directives have been already discussed.³¹ In her opinion in *Farrell 2* AG Sharpston has clearly proposed ‘to revisit and review critically the justifications advanced in *Faccini Dori*’³² for rejecting horizontal direct effect.³³ However, it is submitted that the judgement in *Farrell 2* is a positive and logical development for at least two reasons. First, *Farrell 2* is an important decision as the Court has brought an end to the inconsistencies in the EU case law and provided substantial clarity regarding what can be considered as the State. After many years of uncertainty on the exact interpretation of Foster test the *Farrell 2* finally spelled out on how to establish if a legal body is an ‘emanation of the State’ and thus covered by vertical direct effect. Now it is clear that the broad approach has to be applied. An organisation is considered as an ‘emanation of the State’ if it is governed by public law and is part of the State or if it is subject to the authority or control of a public body or, alternatively, if it performs a task in the public interest and for that purpose has been given special powers. Second, in the present days the new ‘emanations’ are appearing, in order to guarantee the efficient provision of public services Member States often delegate some of their functions to private organisations. Thus, such a broad approach to the concept of ‘emanation of the State’ presented in *Farrell 2* can be considered as a response to today’s realities.

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- 31 See C-91/92 *Faccini Dori v. Recreb*, ECLI:EU:C:1994:45, Opinion of Advocate General Lenz, para. 48; C-316/93 *Nicole Vaneetveld v Le Foyer SA and Le Foyer*, ECLI:EU:C:1994:32, Opinion of Advocate General Jacobs, para. 31; BECKER, Florian, CAMPBELL, Angus. *The direct effect of European directives: towards the final act? Columbia Journal of European Law*, 2007, vol.13, issue 1, pp. 415–426 ; CRAIG, Paul. *The Legal Effect of Directives: Policy, Rules and Exceptions*, *European Law Review*, 2009, issue 3, p. 376
- 32 Case C-91/92 *Faccini Dori v. Recreb*, ECLI:EU:C:1994:292
- 33 Case C-413/15 *Elaine Farrell v Alan Whitty and Others*, ECLI:EU:C:2017:492, Opinion of AG Sharpston, para. 150

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