THE DIRECT EFFECT OF EU DIRECTIVES: FRESH CONTROVERSY OR A STORM IN A TEACUP?

Comment on *Portgás*

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Abstract

The judgment of the Court of Justice in Portgás v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território *can be read as adding a new twist to the drawn-out saga on the direct effect of unimplemented directives in EU law. It essentially concludes that a defaulting State can enforce a non-implemented directive against one of its own emanations. Thus, it can be construed as endorsing a new type of direct effect that might be classified as "intermediate" horizontal direct effect. However, the Court reached that conclusion using a rationale based on the duty to ensure the effective implementation of directives that binds the Member States and without explicitly recognising the existence of a new direct effect dimension. This comment evaluates the potential repercussions of the judgment.*

INTRODUCTION: DIRECT EFFECT AND THE ROAD TO *PORTGÁS*

Few areas of the case law of the Court of Justice have met with such intense criticism as its decisions on the scope of the direct effect of directives. As is well known, the principle of direct effect, one of the two pillars[2] of the Union legal order, is not set out in the Treaties but has been entirely developed by the case law. Following the seminal decision in *Van Gend en Loos*[3], it became clear that, subject to certain conditions[4], Treaty provisions could be invoked

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[2] See, for comprehensive studies of the relationship between direct effect and primacy (the other pillar of the Union legal order), B. de Witte, "Direct Effect, Primacy and the Nature of the Legal Order" in P. Craig and G. de Búrca, *The Evolution of EU law* (2nd edition, Oxford, 2011), 324 and M. Dougan, "When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy" 44 CMLRev (2007) 931.

[3] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v *Netherlands Inland Revenue Administration* [1963] ECR 1.

by private parties before national courts against the State and public authorities to enforce their rights under EU law. While the direct effect of provisions in regulations[5] proved relatively uncontroversial, significant difficulties arose when the issue of direct effect of directives was brought to the fore.

From the terse enunciation of the characteristics of directives in Article 288 TFEU, it seemed that these acts were not suitable to produce direct effect. However, promoting the effectiveness of directives, and addressing the lingering reluctance of some Member States to implement directives on time, was at the core of the line of case law inaugurated in *Van Duyn*[6], followed in other cases like *Ratti*[7] and *Becker*[8] and which culminated with the decision in *Marshall I*.[9] In the first of these cases, the Court recognised that directives that were sufficiently clear and precise could be invoked by private parties against the State if the deadline for the implementation of the directive had expired and the Member State had not implemented it.[10] This effect is what is commonly known as ascendant (or "upwards") "vertical" direct effect.[11] The punitive rationale for endorsing ascendant vertical direct effect became clear in later cases. It was based on the estoppel principle and therefore designed to

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[4] At the time, the Court explained that provisions would need to be clear, precise, containing no reservation on the part of the Member States and not pending of further implementation (Case 26/62, note 3at p. 13). Later case law reduced these conditions to the requirements that the provisions in question should be sufficiently clear and precise (see Case 2/74 *Reyners* v. *Belgium* [1974] ECR 631 at [26] and Case 8/81 *Ursula Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53 at [25]).

[5] Case 34/73 *Fratelli Variola* [1973] ECR 981 at [8]; Case C-253/00 *Antonio Muñoz y Cia SA and Superior Fruiticola SA* v *Frumar Ltd and Redbridge Produce Marketing Ltd* at [28]-[31].

[6] Case 41/74 *Yvonne van Duyn* v *Home Office* [1974] ECR 1337.

[7] Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629.

[8] Case 8/81, note 4 above.

[9] Case 152/84 *Marshall* v. *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

[10] Case 41/74, note 6 at [9]-[15]. The same rationale was later extended to cases where there had been an incorrect implementation; see Case C-62/00 *Marks and Spencer* [2002] ECR I-6325 at [25].

[11] The recognition of vertical direct effect of directives was initially controversial at national level but came to be progressively accepted. For a discussion of the evolution of the case law of the French Conseil d'Etat, charting its initial opposition to its full acceptance, see C. Charpy; "The Conseil d'Etat abandons its Cohn-Bendit case law: Conseil d'Etat, 30 October 2009, Mme Perreux" 6 *European Constitutional Law Review* (2010), 123.

prevent a Member State from relying on its own failure to implement a directive on time to deprive individuals from their rights under EU law.[12]

Having set out the parameters for the recognition of vertical direct effect, the Court drew a crucial distinction in *Marshall I*.[13] There, the Court ruled that unimplemented directives could not be invoked by a private party against another private party, as otherwise the latter would be directly subjected to the obligations laid down in the directive, a result that would be contrary to the wording of Article 288 TFEU. In other words, directives could not have "horizontal" direct effect. While this reasoning seemed consistent with the cases on vertical direct effect, it was the next stage of the evolution of the case law that earned the Court unrelenting criticism.

Following the recognition of the distinction between the possibility of ascendant vertical direct effect and the impossibility of horizontal direct effect, the Court went on to develop a series of alternative mechanisms that undermined that distinction by effectively allowing private parties to draw utmost effect from unimplemented or misimplemented directives against very broadly construed "emanations of the State" and other private parties.[14] These techniques have built an unpredictable and increasingly complex body of case law and have been extensively analysed elsewhere.[15]

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[12] See Case 148/78 (note 7 above) at [22]; Case 8/81(note 4 above) at [24] and Case 152/84 (note 9 above) at [47].

[13] Case C-152/84, note 9, at [48].

[14] These mechanism are: (1) the adoption of a broad construction of the notion of the State in *Marshall I* and *Foster* v. *British Gas* (Case C-188/89 [1990] ECR I-3313); (2) the doctrine of indirect effect or consistent interpretation (Case 14/83 *Sabine von Colson and Elisabeth Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/89 *Marleasing SA* v *La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 and Joined Cases C-397-403/01, *Bernhard Pfeiffer* v *Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835); (3) the case law on "triangular situations" or so-called "public law" directives that impose obligations on Member States to notify technical standards and regulations and which may result in a directive being indirectly enforced in a horizontal relationship (Case C-194/94 *CIA Security International SA* v *Signalson SA and Securitel SPRL* [1996] ECR I-2201) and (4) the cases implying the self-standing force of general principles of law in horizontal relationships (Case C-144/04 *Werner Mangold* v *Rüdiger Helm* [2005] ECR I-9981; Case C-555/*07 Seda Kücükdeveci* v *Swedex GmbH & Co. KG* [2010] ECR I-00365, the latter recently referred to by the Court in Case C-176/12 *Association de médiation sociale* v *Union locale des syndicats CGT and Others,* judgment of 15 January 2014 at [41]- [51]).

[15]For some examples of the many critical studies of this body of case law, see T. Tridimas, "Black, White and Shades of Grey: Horizontality Revisited" 21 YBEL (2002) 327; A. Dashwood, "From Van Duyn to Mangold

One of these mechanisms is particularly relevant for the issues discussed in this comment. After stating that directives could not produce horizontal direct effect, the Court adopted a very broad construction of the State in *Marshall I* itself. This result gave greater pliancy to the principle of ascendant vertical direct effect. Thus, the applicant in that case was ultimately able to rely on an unimplemented directive prohibiting discrimination against her employer, which was a public hospital. This conclusion was reached even though the State was not acting there in the exercise of public authority but as a private employer.[16] The outcome of the case therefore suggested that "upwards" (or ascendant) vertical direct effect could be used not only against the State in the traditional narrow sense of an entity exercising sovereign power but also against a wide range of bodies that qualified as "emanations of the State."

In *Foster* v. *British Gas*[17], the Court explained that the concept of an emanation of the State encompassed public or private bodies, "which have been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and have, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals".[18] This test, was generally - but not always[19]- understood to be made up of *cumulative* limbs and was sometimes directly applied by national courts without making a preliminary reference to the Court. In some cases where a reference was made, the Court of Justice insisted that the test be applied by the national court, normally where this court had not included sufficient information about particular bodies in

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via Marshall: reducing Direct Effect to Absurdity" 9 CYELS (2006-2007), 81; M. Dougan, *op. cit.,* note 2 above; P. Craig, "The Legal Effect of Directives: Policy, Rules and Exceptions" 34 ELRev (2009) 349; M. de Mol, "Dominguez: A Deafening Silence" 8 *European Constitutional law Review* [2012] 280. Criticism and/or calls for reform have also been levelled from the Court's own Advocates General: see Advocate General Van Gerven in Case C-271/91 *Marshall* v. *Southampton and South-West Hampshire Area Health Authority (Marshall II)* [1993] ECR I-4387 at para. 12 of his Opinion, Advocate General Jacobs in Case C-316/93 *Nicole Vaneetveld* v *Le Foyer SA and Le Foyer SA* v *Fédération des Mutualités Socialistes et Syndicales de la Province de Liège* [1994] ECR I-763 at paras. 19-36 of his Opinion, and, more recently, see Advocate General Trstenjak in Case C-282/10 *Maribel Dominguez* v *Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, (Judgment of 24 January 2012, not yet reported).

[16] See further M. Bobek, "The Effects of EU law in the National Legal Systems" in *European Union Law* (C.S Barnard and S. Peers, eds., Oxford, 2014) 140 at 149-150.

[17] Case C-188/89, note 14 above.

[18] *Ibid*. at [20].

[19] See note 70 below.

its order for reference to the Court of Justice.[20] In turn, the application of the test by national courts opened the door to variations in the standards of protection of individual rights across the Union and, on occasions, to a very broad construction of the test.[21] In other cases, however, the test was all but in name, applied by the Court of Justice in response to precise and well supported questions formulated by national courts about the status of specific national entities.[22]

The estoppel rationale at the basis of the recognition of ascendant vertical direct effect was difficult to identify in this line of case law because it seemed contrived to argue, for instance, that a public hospital could be made responsible for the failure of the State to implement a directive.[23] As Craig observed, however, the *Foster* line of case law could be interpreted as embodying an "inverse principle of state or vicarious responsibility, whereby a body that might be in some way connected with the State is held responsible for the failing of the State itself, even though it had no control over the relevant event."[24]

Finally, other cases examined the situation where the State or a public authority tried to rely on an unimplemented directive to impose obligations on an individual.[25] These cases suggested instances of vertical direct effect going "downwards" (i.e. the State against an individual) rather than "upwards" (i.e.an individual against the State). The Court deployed the estoppel argument again, but this time to reject the possibility of descendent (or "downwards") vertical direct effect by stating that, if able to use directives in this fashion, the

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[20] See e.g. Case C-356/05 *Elaine Farrell* v *Alan Whitty, Minister for the Environment, Ireland, Attorney General and Motor Insurers Bureau of Ireland (MIBI)* [2007] ECR I-3067 at [41]-[44].

[21] See for instance, in the UK, the decision in *NUT* v. *Governing Body of St Mary's CoE Junior School* [1997] 3 CMLR 630, for a very generous interpretation of the *Foster* test.

[22] See e.g. Case C-157/02 *Rieser Internationale Transporte GmbH* v *Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag*) [2004] ECR I-01477 at [22]-[27].

[23] For an examination of the difficulties of transposing the estoppel rationale, see the Opinions of Advocate General Jacobs in Case C-316/93*,* (note 15 above) at para. 31 and Advocate General Van Gerven in Case C-271/91, (note 15 above) at para.12. See also, T. Tridimas, "Horizontal Effect of Directives: a Missed Opportunity?" 19 ELRev (1994) 621 at 626-628.

[24] See P. Craig, *op.* cit., note 15 above, 356.

[25] Case 14/86 *Pretore di Salò* v *Persons unknown* [1987] ECR 2545; Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 3969 and, more recently, Case C-387/02 *Criminal proceedings against Silvio Berlusconi and others* [2005] ECR I-03565 and Case C-227/09 *Antonino Accardo and Others* v *Comune di Torino* [2010] ECR I-10273.

State would be effectively profiting from its own wrongdoing.[26] It also alluded to the letter of Article 288 TFEU to indicate that directives cannot impose obligations directly on private parties[27], thereby implying that they can only do so through the national legislation that implements a directive correctly. Therefore, the Court consistently held in all of these cases that directives could not produce descendent vertical direct effect.

Following these case law developments, the dust settled on the doctrine of vertical direct effect and most academic criticism focused on the continuing erosion of the prohibition on horizontal direct effect.[28] However, it seemed clear that issues of direct effect concerning non-implemented directives would always fall into one of these two dichotomous categories. The decision of the Court of Justice in *Portgás* v *Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território,*[29] an inconspicuous case on public procurement, has challenged this assumption. At first sight, the case suggested a situation of descendent vertical direct effect, where the State was trying to invoke an unimplemented directive against a private undertaking, and thus seemed to involve a well-trodden scenario in the case law. Nonetheless, upon closer inspection, the case revealed potential new ground, which the Court seized to develop a different approach to the enforcement of unimplemented directives by the State.

THE FACTUAL AND LEGAL BACKGROUND TO THE CASE

The case concerned a dispute between Portgás, a private undertaking that provided a public service in the production and distribution of gas as a sole concession holder, and the Ministry of Agriculture, Sea, Environment and Town and Country Planning (henceforth "the Ministry"). The national court made a reference to the Court of Justice on the interpretation of Council Directive 93/38[30], which, at the time, coordinated the public procurement

[26] See Case 80/86, note 25 above, at [8].

[27] *Ibid.* at [9]. See also Joined Cases C-397-403/01, note 14 above, at [108].

[28] See note 15 above.

[29] Case C-425/12, Judgment of 12 December 2013, not yet reported.

[30] O.J. [1993] L 199/84, as amended by Directive 98/4/EC (O.J. [1998] L 101/1).

procedures of entities in the utilities sector.[31] In 2001, Portgás concluded a contract with another company for the supply of gas meters and was successful in obtaining financial aid under the European Regional Development Fund to cover expenditure associated with the procurement of these meters. This contract fell within the scope of application of Directive 93/38. Crucially, at the material time, the deadline for the implementation of the Directive had expired but Portugal had not implemented it. Several years later, and following an audit from the Inspectorate General of Finances, the Portuguese authorities ordered the recovery of the financial assistance that had been granted to Portgás on the grounds that the contract for the procurement of the gas meters was contrary to the EU rules on public procurement set out in Directive 93/38. Portgás brought an action before the national court seeking the annulment of the decision ordering the recovery of the financial aid.

The main issue that arose in the national proceedings and that was referred to the Court of Justice was unrelated to the substantive application of the principles in the Directive, or, in other words, to whether there had been a failure to comply with the EU rules on public procurement. Instead, it was preliminary to that assessment and concerned the question of whether the Portuguese authorities could actually rely on the provisions of the unimplemented directive against Portgás.

On the one hand - and this was Portgás' argument - the facts suggested a situation where the State was trying to rely on an unimplemented directive to impose an obligation on a private party. According to established case law, it was axiomatic that vertical direct effect could only work "upwards" but not "downwards" [32] and, hence, it seemed that the Ministry could not use the provisions of the directive against Portgás. On the other hand, the Ministry sidestepped any reference to direct effect and advanced an argument based on the idea that the Directive was not only addressed to Member States but also to the contracting entities defined in the Directive.[33] On the facts, it was undisputed that Portgás was a "contracting entity" within the meaning of Article 2(1) (b) of the Directive[34]: it was a private undertaking

[31] This directive is no longer in force. It was repealed by Directive 2004/17 (O.J. [2004] L 134/1, see Article 73 of this directive) and this was, in turn, repealed by Directive 2014/25/EU (O.J. L 94/243, see Article 107 of this directive)which now regulates this field.

[32] See notes 25-26 above and accompanying text.

[33] See Case C-425/12, note 29 above at [15].

[34] Article 2(1) of Directive 93/38 provided that the directive applied to contracting entities which: (a) are public authorities or public undertakings and exercise one of the activities referred to in Article 2(2); (b) when they are

which operated on the basis of exclusive rights - it was the exclusive holder of a public service concession - and, moreover, provided a public service in connection with the production and distribution of gas. It was therefore, uncontestably, the subject of the obligations imposed by the Directive. The Ministry's argument effectively equated the position of an entity that is the subject of obligations imposed by a Directive with that of an addressee of the Directive. It concluded that Portgás was thus obliged to comply with the obligations imposed by the Directive, even though the Directive had not been implemented at the time. These viewpoints give us the first taste of a case that might be either regarded as short of revolutionary or otherwise construed as an offshoot of existing legal principles.

THE OPINION OF THE ADVOCATE GENERAL AND THE JUDGMENT OF THE COURT

The Opinion of the Advocate General

At the outset, Advocate General Wahl did not shy away from what appeared to be the central legal issue in this case. Thus, the opening paragraphs of his Opinion acknowledged the difficulties that had surrounded the case law on direct effect of directives and recognised that *Portgás* presented the Court with a new opportunity to rule on this issue. Further, they identified why this case involved a different situation from that at stake in previous decisions on vertical direct effect.[35] Here, it was not a private party trying to rely on an unimplemented directive against the State or an emanation of the State[36] or the State trying to impose an obligation on an individual on the basis of such a directive,[37] but the State trying to rely on the directive as against a public service provider. Overall, however, it appeared that the potential effect of an unimplemented directive was the key issue, just as it had been in so many other cases before. After recognising that the provisions of the Directive at issue lent

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not public authorities or public undertakings, have as one of their activities any of those referred in Article 2(2) or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

[35] See the Opinion of the Advocate General in Case C-425/12 (note 29 above) at paras. 1-2.

[36] See notes 10-12 above and accompanying text.

[37] See notes 25-27 above and accompanying text.

themselves to produce direct effect – i.e. they were sufficiently clear, precise, and unconditional - the Advocate General divided the issue into two main analytical steps. He said it was necessary to consider, first, whether Portgás was an emanation of the State - and hence whether the Directive could be invoked against it – and, second, if this was the case, whether the State could then rely on an unimplemented directive against an emanation of the State.

In relation to the first point, the Advocate General examined the development of the case law following the seminal decision in *Foster*[38] as to what constituted an emanation of the State. Portgás was, as stated above, a private undertaking that provided a public service. However, the Advocate General argued that just providing a public service would not be sufficient to satisfy the *Foster* test because this test was comprised of *cumulative* criteria. Thus, it would still be necessary to show that the body was under the control of the State and that it had special powers.[39] The Advocate General therefore went on to consider whether the remaining limbs of the *Foster* test were satisfied. He intimated that it seemed unlikely that Portgás was under the control of the State, but concluded that, given the insufficient information furnished by the national court, it would ultimately be for that court to decide whether the *Foster* test was fully satisfied and therefore whether Portgás was really an emanation of the State.[40] If the conclusion was that Portgás was *not* an emanation of the State, then the outcome of the case would be straightforward: the unimplemented Directive could not be enforced against this company because this would result in a situation of descendent vertical direct effect.[41]

But what if Portgás *was* ultimately considered to be an emanation of the State? Could the State then rely on the unimplemented Directive against it? Consistent case law had recognised that clear and precise unimplemented directives could be relied upon against emanations of the State – but, crucially, thus far this reliance had only been sought by private parties.[42] This second issue allowed the Advocate General to trial a line of reasoning – largely followed later by the Court - removed from the usual assumption that this type of situation

[38] See the Opinion of the Advocate General in Case C-425/12 (note 29 above) at paras 34-35.

[39] See Case C-157/02 (note 22 above) at [27]-[29], cited by the Advocate General, where the Court examined each one of the limbs in the *Foster* test.

[40] Case C-425/12, note 29 above, at paras.43-45 of the Opinion.

[41] See notes 25-27 above and accompanying text.

[42] See notes 16-24 above.

involves the direct effect of an unimplemented directive. The Advocate General argued here that the legal problem at hand was unrelated to the issue of (vertical or horizontal) direct effect of directives.[43] He gave two main reasons for this. First, he explained that the traditional case law on direct effect of directives was about the interplay between two actors: an individual, *who alone can rely* on an unimplemented directive, and the State or an emanation of the State *against whom the directive may be relied upon*.[44] Secondly, he alluded to the punitive ground underlying the prohibition on descendent vertical direct effect.[45] He concluded that the estoppel rationale could not be extended where the State is trying to rely on a directive against one of its own emanations because, in such a situation, the former could not be seen as seeking to take advantage of the State's own wrongdoing.[46]

Instead, the Advocate General turned the issue on its head and presented the case as one relating to the obligation of Member States and national authorities to fulfil their duty of sincere co-operation and thus to ensure the effective implementation of directives.[47] According to the existing case law, this duty had been interpreted to apply to the State and to decentralised authorities but the Advocate General opined that it should extend further to include emanations of the State.[48] If Portgás was an emanation of the State, then it had an obligation to secure the effective implementation of the Directive by complying with the obligations set out therein. In relying on the Directive against Portgás, the Portuguese authorities would be simply discharging their own duty to police the effective implementation of that measure.[49]

The Judgment of the Court

The judgment of the Court followed the Opinion of its Advocate General fairly closely. The main analytical path and the conclusion reached were essentially the same but there were variations in the arguments supporting the *ratio decidendi*. Thus, the Court considered, first, whether Portgás could be considered an emanation of the State and hence whether Directive

[43] Case C-425/12, note 29 above, para 53 and para. 58 of the Opinion.

[44] *Ibid* at para. 54.

[45] See above, section 1.

[46] See the Opinion in Case C-425/12 (note 29 above) at para. 56.

[47] See Article 4(3) TEU and para 58 of the Opinion.

[48] See the Opinion in Case C-425/12 (note 29 above) at paras 61-62.

[49] *Ibid*. at paras. 63-64.

93/38 could be invoked against it. Like the Advocate General before it, the Court stated that the provision of a public service was not, in itself, sufficient to satisfy the *Foster* test and that the other limbs of the test also ought to be proven.[50] The Court scrutinised more closely than the Advocate General whether, on the facts, Portgás was effectively under the control of the public authorities and whether it had special powers,[51] but similarly concluded that the national court had not provided sufficient information for the Court to make a final determination and thus that it should be for that court to decide whether the *Foster* test was fully discharged.

Second, the Court went on to consider whether, supposing that Portgás *was* an emanation of the State, the State could rely on the unimplemented Directive against its own emanation. The Court, like Advocate General Wahl, sought to distance this issue from the case law on direct effect of directives and explained that this scenario arose "in a context different from the context of that case law".[52] It then held that Member States had an obligation under Article 288 TFEU to ensure the effective implementation of directives and that this obligation extended to all public authorities and emanations of the State. As a result, Member States should be able to ensure that emanations of the State comply with the obligations imposed on them by EU directives.[53] It followed, therefore, that the State should be able to rely on an unimplemented (and sufficiently clear and precise) directive against an entity considered as an emanation of the State.

The judgment moved away from the Opinion in the reasoning used to support this conclusion. Thus, where the Advocate General had simply used the duty of loyal co-operation as the applicable rationale, the Court provided three justifications to bolster its main finding. First, it held that it would be contradictory if the State or emanations of the State - which are obliged to comply with a directive - were not able to ensure compliance with the directive by another emanation of the State when this body is, by implication, also under an

[50] Case C-425/12, note 29 above, at [25] – [31].

[51] *Ibid*. at [29]-[30]. The Court observed that the Portuguese Government was not a majority shareholder in Portgás and could neither appoint members to its management and supervisory bodies nor issue instructions concerning the operation of its public service activity. It was equally doubtful that Portgás had special powers within the meaning of the *Foster* test. The Count therefore concluded that it was highly questionable that Portgás could be classified as an emanation of the State.

[52] Case C-425/12, note 29 above, at [33].

[53] *Ibid*. at [34].

obligation to comply with the directive.[54] Second, and working on the premise that Member States should ensure the implementation of EU directives, the Court drew in the estoppel rationale and argued that States that have not implemented a directive on time would be able to profit from their own wrongdoing if they could not secure the compliance with the directive by their own emanations.[55] Finally, the Court used an argument based on the need to ensure the uniform application of directives in the national legal systems, explaining that, unless the State could rely on the directive against its own emanations, the enforceability of the obligation to comply with the directive that falls on an emanation of the State would depend on whether reliance was being sought by a private body (i.e. a private competitor) or a public entity.[56] Overall, the Court concluded that Directive 93/38/EEC could not be relied upon by a defaulting State against a private undertaking solely on the basis that this provided a public service but that the State could rely on the Directive against such an undertaking if this *also* fulfilled all the other limbs of the *Foster* test.

COMMENT

The decision in *Portgás* merits a careful examination on a number of counts related both to the reasoning of the Court and to the implications of the judgment. These will be considered in turn and include the emergence of a new type of direct effect geometry, the significance of this ruling on the application of the *Foster* test and the impact of *Portgás* on the evolution of the case law on direct effect of unimplemented directives. These will be considered in turn.

Direct Effect: The Elephant in the Room?

As seen above, the approach followed by the Court in the second part of the ruling in *Portgás* appeared to be based on the assumption that this case stood apart from cases on direct effect and, therefore, that it should be adjudicated under different conditions. But was this dissociation justified? Seen from the perspective of Portgás, this case was about the State trying to invoke an unimplemented directive against a private company and hence it evoked a straightforward situation of descendent vertical direct effect. The Court accepted that this would be the case if Portgás were indeed a private party. However, the Court went on to hold

[54] *Ibid* at [35].

[55] *Ibid* at [36].

[56] *Ibid*. at [37]

that *in the event* that Portgás was not a private party and turned out to be an emanation of the State, it would then be possible for the State to rely on the unimplemented directive against its own emanation. It is suggested that the Court made a crucial analytical leap at this point. It failed to acknowledge that this would constitute a new form of direct effect and, consequently, that it might create fresh difficulties in the understanding of an already complex body of case law.

It could be argued that the principle of direct effect-in the context of directives- has always focused on the reliance, or on the attempts to rely, on unimplemented and misimplemented directives by private parties or by the State. Seen from this angle, it is unavoidable to conclude that the *Portgás* scenario examined in the second part of the judgment did concern the potential direct effect of a non-implemented directive. Only if one takes the narrowest interpretation of the case law on direct effect of directives, according to which this issue is limited squarely to situations of ascendant vertical direct effect,[57] can it be argued that the hypothetical situation considered by the Court fell outside the realm of direct effect. However, this seems contrived because the Court has often referred to the principles developed in the case law on ascendant vertical direct effect when deciding cases on descendent vertical direct effect and horizontal direct effect,[58] and has ruled on the latter set of cases on the basis of the parameters set out by the former.[59] This implies a natural connection between them even if one type of direct effect (ascendant vertical) is permitted while the others (descendent vertical and horizontal) are not. It all seems part and parcel of the same rationale and of the same body of case law. It is also significant that the reasoning used by the Court was partially enmeshed in the analytical framework used in the case law on direct effect. Thus, the first part of the judgment in *Portgás* was devoted to determining whether the applicant was really an "emanation of State", a concept that has arisen and been mostly discussed in the case law on vertical direct effect of directives;[60] furthermore, the Court examined whether the provisions in the Directive at issue were sufficiently clear and precise.[61]

[57] In this sense, see the Opinion of the Advocate General, above at notes 43-44, and accompanying text.

[58] See notes 13-15 and 25-27 above and accompanying text.

[59] See e.g. Case 80/86, note 25 above at [6]-[9].

[60] See notes 16-24 above and accompanying text.

[61] See Case C-425/12 (note 29, above) at [18]-[20].

A different question is whether the conjectural scenario examined in the second part of the *Portgás* decision can be assimilated into one of the existing situations of direct effect or whether we have before us a new modality of direct effect. On the one hand, the relationship between the State and an emanation of the State could be characterised, in some specific situations where the *Foster* test has been broadly applied, as quasi-vertical and descending. This would be the case where, for example, the State is seeking to enforce obligations imposed by a directive against a body that has a rather tenuous connection with the State but which has been classified as an emanation of the State through a generous application of the *Foster* test.[62] In this type of case, we could argue that *Portgás* would allow for a "halfway" vertical descendent direct effect scenario that would resemble closely situations where the State is seeking to impose obligations on private parties on the basis of unimplemented directives. However, it would be much more difficult to sustain this "verticality" argument in the many other cases where the body in question is *clearly* a subdivision of the State (e.g. a local or regional authority).

On the other hand, perhaps a more convincing approach would reason that the scenario at hand was a new form of "intermediate" horizontal direct effect, where the State is enforcing a directive horizontally against one of its emanations. This model would uphold the theoretical foundations of the *Foster* line of case law, which effectively equate an "emanation of the State" with the State itself. It would not be a "classical" situation of horizontal direct effect because it does not concern an action between two private parties but one that applies instead one level up *between two State entities*. In this sense, therefore, there is an element of "horizontality." Furthermore, the message in *Portgás* is that the new form of "intermediate" horizontal effect is permitted – as opposed to the prohibition on "classical" horizontal direct effect. Indeed, neither of the key reasons at the core of this prohibition–i.e. the letter of Article 288 TFEU or the argument that private parties cannot be made responsible for the failure of the State to implement a directive-[63] would be applicable since, technically, it is the State itself, or an emanation thereof, that is subject to the obligations imposed by the directive and made liable, in turn, for the failure to comply. The next step is to ascertain the rationale that drives this new form of direct effect.

A Reasoning Based on the Duty to Implement Directives Effectively

[62] See notes 17-22 above.

[63] See notes 12-15 above and accompanying text.

At the core of the Court's reasoning was the notion that the duty to ensure the effective implementation of directives imposed on Member States by Article 288 TFEU extended to all State authorities[64] and also to emanations of the State. It then followed that these authorities and bodies must comply with the obligations imposed by the directive – even if the directive has not been implemented – *and,* vitally, that the State should be in a position to ensure that they fulfil these obligations by being able to enforce the directive against them.

Ostensibly, this approach conflates the general obligation to transpose the directive with the obligations imposed by the directive itself. However, this is a result that already flowed from the *Foster* line of case law. The State has a duty to implement the directive and, of course, the subjects of obligations set out in directives must comply with them, whether they are the State, an emanation of the State, or a private party. If the subject of one of these obligations is a private party, then this obligation does not come into effect until the directive has been properly implemented in national law and it arises only through the national implementing legislation.[65] However, if the subject is an emanation of the State, it seems, as Craig explains,[66] that the "price to pay" for the special powers that this body has been granted is to be directly subject to the obligations in the directive once the deadline for implementation has expired and the Member State has not implemented it. According to the *Foster* line of case law, after that date, *private parties* can therefore rely on sufficiently clear and precise directives against emanations of the State.

Nonetheless, the main question that follows after *Portgás* is whether a defaulting State can *also* seek compliance with these obligations against its own emanations. The reasoning used by the Court was certainly an ingenious way of dealing with a vexed issue. If the intricacies of the case law on vertical and horizontal effect of directives could really be set aside, then the outcome drawn by the Court follows logically from the principle that *all* State authorities are under an obligation to take appropriate measures to ensure the implementation of directives and hence it could be concluded that it is irrelevant whether enforcement is sought by a private party or by the State itself. However, a number of observations seem pertinent in relation to the supporting reasoning used by the Court.

[64] See notes 47-49 above and accompanying text.

[65] But see all the qualifications created by the case law, note 14 above.

[66] Op. cit. note 15 above at 357.

First, to suggest that the State should be able to secure the compliance by its own emanation with the obligations set out in the directive might seem, at first sight, unnatural here because the State *itself* has not complied with the essential duty to transpose the directive. However, it can be assumed that the Court adopted a teleological approach by concluding that in enforcing the directive against its own emanation, the State is, at least, "de facto" implementing part of the directive within itself and that this pursuit legitimises the action brought by the defaulting State.

Second, the Court's usage of the estoppel principle in *Portgás* seems inherently justified in cases where a body or authority is uncontestably within the narrow, cumulative terms of the *Foster* test (i.e. a State-owned monopoly) because, otherwise, the State could patently benefit from its own wrongdoing if it were unable to enforce the directive against a body or authority that has failed to comply with it. However, it could be posited that such an argument might be less compelling where a body or authority is not so obviously connected with the State i.e. a privatised company that falls within a broad interpretation of the *Foster* test.

Finally, the suggestion that a different conclusion would lead to a lack of uniformity in the effect of directives because a private party could rely on the unimplemented directive against an emanation of the State but the State would not be able to do the same is unconvincing. From the moment that the Court created the distinction between vertical and horizontal direct effect in *Marshall I*[67], and regardless of the reasons for this distinction, the potential for a divergent application of unimplemented directives had already permeated the Union legal order. For example, while Ms Marshall was able to rely on the directive against her employer – which was construed as an emanation of the State – she would not have been able to do the same had she been working for a private hospital. The lack of uniformity in the application of directives was precisely one of the main consequences that flowed from the case law on horizontal direct effect.[68]

The Implications of the Judgment

Leaving aside the reasoning used by the Court, it is clear that the ruling in *Portgás* may have far reaching implications on a number of counts related to the enforcement of unimplemented directives. First, the judgment may bring the *Foster* test sharply into focus and have an impact on how it is applied. As explained earlier, this test was construed loosely to

[67] Case 152/84, note 9 above.

[68] See the Opinion of Advocate General Jacobs in *Vaneetveld* (Case C-316/93, note 15 above) at para. 29.

encompass a great variety of bodies and authorities, sometimes with rather tenuous links with the State.[69] Moreover, and despite the emphasis placed by the Court in *Portgás* on the point that the test is made up of cumulative elements, the case law is not entirely consistent on this point and some decisions have implicitly suggested an alternative use of the limbs in that test.[70] This creates a degree of uncertainty as to which bodies fall within the *Foster* test. Primarily, the function of this mechanism was to provide a wider umbrella for the use of ascendant vertical direct effect and, critically, to enhance the possibilities of private parties wishing to rely on unimplemented directives. However, following *Portgás*, those same bodies and authorities may now *also* find themselves the subject of actions brought by the State based on provisions in unimplemented directives. In other words, these bodies are now open to challenges from a second front and on the basis of a different rationale. In *Portgás*, the Court strongly pointed towards a narrow interpretation of the *Foster* test but, if the test is applied expansively in other cases, then the "price to pay"[71] for the special powers enjoyed by these bodies may be high. It will certainly be in their interest that the parameters for the interpretation of the *Foster* test are clarified so that it is easier to ascertain whether or not they constitute emanations of the State. Finally, as seen earlier, despite the guidance provided by the Court in some specific cases, national courts have frequently applied the *Foster* test.[72] Consequently, diverse national interpretations of the test might entrench further the differences in the levels of responsibility of these bodies across the Member States, which already exist as a result of the case law concerning actions brought by private parties against emanations of the State.

Second, the approach followed in *Portgás,* grounded on the duty falling on the State to ensure the effective implementation of directives, suggests that the State can rely on an unimplemented directive against one of its own emanations. But could this line of reasoning be taken further? For example, could the emanations of the State, by the same token, rely on

[69] Thus, the term has been held to encompass privatised industries, healthcare bodies, etc. See further, D. Curtin, "The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context" 15 ELRev (1990), 195, 197-204.

[70] See Case C-297/03 *Sozialhilfeverband Rohrbach* v *Arbeiterkammer Oberösterreich and Österreichischer Gewerkschaftsbund* ECR [2005] I-4305, at [27], where the Court placed the main emphasis on the fact that the body or organisation in question should be under the supervision of the State but did not refer to the fact that it should also have special powers.

[71] See Craig, *op. cit.,* note 15 at 357.

[72] See notes 20-21 above and accompanying text.

unimplemented directives against the State or against *another* emanation of the State? The existing case law suggests that this is only possible where those bodies and authorities are "assimilated to individuals"[73] in the particular circumstances of the case and hence effectively where a classical situation of ascendant vertical direct effect can be recreated. However, a ramification of the *Portgás* decision could be that the duty to secure the effective implementation of directives falling on the emanations of the State implies that these entities should *also* be able to enforce unimplemented directives to secure compliance by the State or by other emanations of the State with the obligations placed on them by the directive.[74] In other words, it could yield new situations of "halfway" ascendant vertical direct effect (i.e. emanation of the State against the State) or more forms of "intermediate" horizontal direct effect (emanation of the State against emanation of the State).

Third, looking at the outcome in *Portgás*, it is unavoidable to wonder whether this decision is yet another attempt to give greater effect to unimplemented directives that comes at the expense of legal certainty. The technique of using a novel type of reasoning in cases that arguably involve issues of direct effect is not new. For instance, in *Mangold*[75], one of the most controversial cases concerning the effect of directives, the Court did not allude to the existence of a straightforward horizontal situation between two private parties in the national proceedings or to the fact that the deadline for implementation of the directive in question had not even expired. Either of these circumstances would have prevented the enforceability of the directive in the light of the traditional rules of the case law on direct effect of directives. However, the Court skirted these issues and developed a new approach based on the idea that the directive in question embodied a general principle of law that could be invoked by the applicant in the national proceedings against its employer, which was also a private party. This effectively resulted in the enforceability of the directive in a horizontal situation.[76] The parallels with the decision in *Portgás* are evident. There, an approach based on the State's duty to ensure the implementation of directives was used to promote the effectiveness of a directive but with no clear recognition that the outcome of the reasoning produced a new type of direct effect geometry. At one level, the conclusion reached in the

[73] Joined Cases 231/87 and 129/88 *Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and others* v *Comune di Carpaneto Piacentino and others* [1989] ECR 3233 at [31] and also para. 55 of the Opinion of the Advocate General in *Portgás*.

[74] In fact, this is implicit in para. 35 of the judgment of the Court.

[75] Case 144/04, note 14 above.

[76] See further, Dashwood, *op. cit,* note 15 at 106-108 and Bobek, *op. cit.,* note 16 at 152.

second part of the judgment in *Portgás* provides an additional mechanism, this time in the hands of the State itself, to enhance the effectiveness of directives after the deadline for implementation has expired. It also buttresses the conclusion, already reached by the case law that emanations of the State should comply with the obligations set out in the directive even if the State has not implemented the directive on time.[77]

However, the risk to legal certainty arises because the Court seems to be creating yet another qualification to the primary – and never explicitly revoked - assertion that directives can *only* produce ascendant vertical direct effect which joins the host of exceptions that have been generated in the cases concerning "classical" horizontal situations.[78] There is, of course, a well-rehearsed argument that the lack of legal certainty and the complexity generated by vicissitudes of the case law involving actions between private parties militates for the abolition of the distinction between vertical and horizontal direct effect.[79] The *Portgás* decision could be construed as introducing another layer of enforcement where a form of intermediate horizontal direct effect is possible. Ultimately, it would seem that unimplemented directives that are sufficiently clear and precise can be enforced in EU law not only by private parties against the State or emanations of the State but also, in many cases, by private parties against other private parties and, now, by the State itself against its own emanations. It is therefore questionable whether the parameters of the case law on direct effect of directives can sustain the rising tide of this systematic erosion.

CONCLUDING REMARKS

As the title of this comment indicates, there might be two different ways of looking at the decision of the Court in *Portgás*. On the one hand, exacting compliance from emanations of the State with the obligations set out in unimplemented directives from the time that the deadline for implementation has expired is nothing new. It follows from the decisions of the Court in *Marshall I* and *Foster* and, more broadly, from the duty of sincere co-operation embedded in the Union legal order. On the other, the scenario reviewed by the Court in the

[77] See the discussion on *Foster*, notes 17-24 above and accompanying text.

[78] See note 14 above.

[79] See note 15 above.

second part of the judgment in *Portgás* cannot be instantaneously removed from issues of direct effect. Seen in this light, the case ignites fresh controversy by diluting further the basic principle that unimplemented directives can *only* produce direct effect as a result of actions brought by private parties against the State or emanations of the State and by adding uncertainty to an already complex body of case law.

It would have been helpful if the Court had explicitly recognised that this was indeed a new form of permitted direct effect for non-implemented directives and had tried to integrate it within the existing body of case law on direct effect rather than separating it from it. However, whichever view one takes on *Portgás,* its consequences are likely to be significant, not least the finding that a defaulting State could enforce obligations found in unimplemented directives against a range of bodies that fall within a loosely defined category of emanations of the State and expose them to a "double whammy" of challenges from the State and from private parties.