COULD THE BROAD DEFINITION OF "STATE" FOR THE PURPOSES OF DIRECT EFFECT BE JUSTIFIABLE UNDER THE EU'S AIM OF PROMOTING A FULLY LIBERALISED INTERNAL MARKET?

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Abstract: *In general, in the case of late transposition of the EU directives, they may be invoked vertically against a State only. Therefore, it became relatively early necessary to define the State for the purposes of direct effect. The Court of Justice of the EU adopted a broad notion of the State. However, could this emanation of the State be still justifiable under the EU's aim of promoting a fully liberalized Internal Market? The Article first defines the State for the purposes of direct effect, as evolved in the decisions of the Court of Justice of the EU. Subsequently, it analyses the Advocate General Sharpston's opinion in the Farrell case. With this analysis it sets out the areas of her opinion that the author of this Article does not concur with. The Article further argues that the deeper liberalisation of the Internal Market reduces the justification for the need to distinguish between public and private undertakings in relation to the emanation of the State for the purposes of direct effect. Based on the analysis provided in the Article, the author concludes with a proposal how a State should be defined in order to achieve the desired objective whilst taking into account the ongoing liberalisation of the Internal Market.*

Keywords: *Emanation of the State, Vertical Direct Effect, Farrell, Foster, Liberalisation of the Internal Market*

I. INTRODUCTION

In the case of EU directives, they can only be invoked to have direct effect vertically upwards against the State, or against entities falling within the extended notion of the State (hereinafter referred to as the "**emanation of the State**"). In the following article I will leave aside the indicators specific to the breaking of horizontal direct effect for directives in the Unilever judgment,[1] or in the triangular situations. These were anomalous cases which involved unique situations, relating either exclusively to the notification directives,[2] or to the direct effect of a directive invoked against a State with indirect effects on another individual.[3] Academic authors generally agree that these are quite exceptional situations and the direct effect of directives has not yet been fully broken down to horizontal relations.[4] In the absence of horizontal direct effect of directives, the Court of Justice of the

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[1] Judgment of the Court of Justice of the EU of 26 September 2000, Unilever, C-443/98, EU:C:2000:496.

[2] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification); the relevant judgments of the CJEU refer to its predecessors.

[3] Judgment of the Court of Justice of the EU of 7 January 2004, Wells, C-201/02, EU:C:2004:12.

[4] See Craig, P., DE BÚRCA, G. *EU Law: Text, Cases, and Materials UK Version. 7th edition.* Oxford: Oxford University Press, 2020, p. 248; KRÁL, R. *Směrnice EU z pohledu jejich transpozice a vnitrostátních účinků. 1st edition.* Praha: C. H. Beck, 2014, p. 186; or BOBEK, M., BŘÍZA, P., HUBKOVÁ, P. *Vnitrostátní aplikace práva Evropské unie. 2nd edition.* Praha: C. H. Beck, 2022, p. 269.

European Union (hereinafter referred to as the "**CJEU**") has aimed to achieve the widest possible application of the directives by broadening the emanation of the State for the purposes of vertically ascending direct effect.

In this article, I will first set out what the current emanation of the State is for the purposes of direct effect, as established by the CJEU's case law (ad II.). Subsequently, I will analyse the emanation of the State, as proposed by Advocate General Sharpston's opinion in the Farrell case; and with this analysis I set out the areas of her opinion that I do not concur with (ad III.). The European Union, and particularly the European Commission, supports the opening up of the EU member states' markets (the EU member state hereinafter referred to as the "**Member State**") to new market entrants. In a growing number of Member States, both state-owned entities and private companies compete to win public service contracts whilst at that same time endeavour to succeed in commercial ventures. The deeper evolution and liberalisation of the Internal Market reduces the justification for the need to distinguish between public and private undertakings in relation to the emanation of the State for the purposes of direct effect (ad IV.). On the basis of the analysis in Chapters II to IV of this Article, I will indicate how a State should be rather defined for the purposes of direct effect in order to achieve the desired objective whilst taking into account the ongoing liberalisation of the Internal Market (ad V.). As an alternative to the emanation of the State, which encompasses more situations under the vertical ascending direct effect, some EU law experts have called for the horizontal direct effect of directives. I do not concur with their conclusion and believe that instead of further extending the vertical and horizontal direct effect of directives, the Francovich doctrine of damages should play a more prominent role (ad VI.). We shall not forget that the vertical direct effect of directives was established and gradually extended as a result of Member States' failure to transpose directives in a timely and effective manner. Thus, the Member State *sensu stricto* should be primarily held accountable towards individuals and penalised should it fail to adhere to obligations and commitments that arise from its membership to the European Union.

II. HOW IS THE EMANATION OF THE STATE DEFINED BY THE CJEU

A comprehensive emanation of the State was first enshrined in the Foster judgment in the late 1980s.[5] In that case, the CJEU dealt with the recently privatised British Gas Company and held 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**"* (emphasis added).[6] It has long been unclear whether the criteria of control by the Member State and the conferral of exceptional powers apply cumulatively or separately. In the Foster case, the CJEU acknowledged, in paragraph 18, that *"the uncon-*

[5] Judgment of the Court of Justice of the EU of 12 July 1990, Foster, C-188/89, EU:C:1990:313.
[6] Judgment of the Court of the EU of 12 July 1990, Foster, C/188/89, EU:C:1990:313, para 20.

*ditional and sufficiently precise provisions of a directive could be relied on against organizations 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"* (emphasis added). However, in the operative part of the judgment the CJEU combined those criteria and used the conjunction *"and"*.[7]

Greater certainty was only recently provided in 2017 by the CJEU's judgment in Farrell,[8] which concerned the Motor Insurers Bureau of Ireland (hereinafter referred to as the "**MIBI**").[9] In paragraph 27 thereof, the CJEU cited Foster, stating that *"[p]aragraph 20 of that judgment* [i.e. Foster] *must be read in the light of paragraph 18 of the same judgment, where the Court stated that such provisions can be relied on by an individual against organisations or bodies which are subject to the authority or **control of the State or have special powers** beyond those which result from the normal rules applicable to relations between individuals*" (emphasis added). The CJEU held that directives can be invoked against the MIBI, because the MIBI, although a private law body, has the emanation of the State status due to its special powers related to motor insurance which is a task in the public interest and which Ireland has conferred on it.[10] The CJEU ruled that despite the failure of the Irish authorities to transpose part of a directive on mandatory insurance for drivers into Irish law, the MIBI is in effect an arm of the State in its role related to the obligations of motor insurance and for compensation to victims of uninsured drivers. The CJEU has, therefore, clearly confirmed that the criteria are not cumulative.[11]

III. WHY THE EMANATION OF THE STATE NEEDS TO BE RECONSIDERED

In Farrell case, the CJEU and Advocate General Sharpston came to the same conclusion in relation to MIBI to be considered a State for the purposes of direct effect. However, as the CJEU was primarily interpreting a situation of an entity concerned in the case, i.e. entrusted with a public service obligation and conferred powers, it had not explicitly ruled that state-owned enterprises must always be defined as a State for the purposes of direct

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[7] "Article 5(1) of Council Directive 76/207/EEC 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 may be relied upon in a claim for damages against 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" (emphasis added).

[8] Judgment of the Court of Justice of the EU of 10 October 2017, Farrell, C-413/15, EU:C:2017:745.

[9] MIBI is a company with no share capital fully funded by its members, who are insurers offering the motor insurance in Ireland. Insurers carrying on motor insurance business in Ireland must be members of MIBI. The MIBI was established in November 1954 by agreement between the Department of Local Government of Ireland and insurers providing motor insurance in Ireland.

[10] Judgment of the Court of Justice of the EU of 10 October 2017, Farrell, C-413/15, EU:C:2017:745, para 42.

[11] Judgment of the Court of Justice of the EU of 10 October 2017, Farrell, C-413/15, EU:C:2017:745, para 29: "…the answer to the first question is that Article 288 TFEU must be interpreted as meaning that **it does not, in itself, preclude the possibility that provisions of a directive that are capable of having direct effect may be relied on against a body that does not display all the characteristics** listed in paragraph 20 of the judgment of 12 July 1990, Foster and Others (C-188/89, EU:C:1990:313), read together with those mentioned in paragraph 18 of that judgment" (emphasis added).

effect.[12] In contrast, Advocate General Sharpston left no doubt as to how state-owned enterprises should be perceived for direct effect purposes. Advocate General Sharpston first provided a detailed analysis of the CJEU's previous case law on the emanation of the State for the purposes of direct effect, acknowledging that the emanation of the State had not yet been comprehensively defined.[13] As a result, Sharpston proposed the following entities to be considered as emanations of the State: [14]

i) if the Member State owns or controls the entity, where it is not necessary for the Member State to have the ability to exercise day-to-day control or direction of the operation of the entity, the entity should be considered an emanation of the State, without the need to address the other criteria (i.e. the commission of public services and special powers);

ii) any municipal, regional or local authorities or equivalent bodies should be regarded as a emanation of the State without further ado;

iii) where the Member State has entrusted the body in question with the provision of a public service which could otherwise be provided directly by the member State itself and has conferred on it some additional powers which enable it to carry out its tasks effectively, the body in question must in any event be regarded as an arm of the State.

For the above entities, their legal form is irrelevant, and they do not need to be funded by the Member State.

I agree with Sharpston's definitions as set out in points (ii) and (iii), and that is essentially how the definition could be conceived in its totality. However, I do not share her conclusion as set out in point ad (i).

In the case of the outsourcing of public services that should otherwise be performed by the Member State itself, it seems sensible to subsume those entities under the emanation of the State for the purposes of direct effect. Otherwise, the Member State could exclude itself from obligations that arise from non-transposed directives. So that if a Member

[12] Despite the decision in Farrell case, Bobek, Bříza and Hubková "… are therefore inclined to the conclusion that the case law of the Court of Justice does not support the argument that any private law company controlled by the State should automatically be regarded as an emanation of State unless it is also entrusted with some tasks or responsibilities in the public interest" (translated from Czech); See BOBEK, M., BŘÍZA, P., HUBKOVÁ, P. *Vnitrostátní aplikace práva Evropské unie. 2nd edition.* p. 254.

[13] Opinion of Advocate General Sharpston delivered on 22 June 2017, Farrell, C-413/15, EU:C:2017:492. In paras 58 to 76 Sharpston provided a complex and detailed analysis of decisions of the CJEU which dealt with the emanation of the State. She concluded in paras 77 and 78, that "…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. 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".

[14] See paragraph 151 of the opinion of Advocate General Sharpston delivered on 22 June 2017, Farrell, C-413/15, EU:C:2017:492.

State uses extensive outsourcing it could circumvent the basic premise that Member States cannot profit from their own wrongdoing, related to late or undue transposition of directives. However, as I view the direct effect of the directive against the State as a punitive measure to compel Member States to transpose directives in a timely and proper manner,[15] whether an entity is under quasi state control (e.g. Airbus S.A.S.) or full state ownership, this should not suffice in and of itself for an entity to be regarded an emanation of the State. State-owned enterprises, which are subject to state control through their ownership structure, are not always the only companies providing public interest services and, on the contrary, often compete on the market with other purely commercial and private undertakings. As strictly defined in Farrell, a mere different ownership structure would put the state-owned enterprises at a disadvantage in terms of the obligations under the non-transposed directives and thus distort the market's level playing field. If the vertical ascending direct effect of directives shall serve as a punitive measure, while cumulatively adhering to the principle that the directives cannot impose obligations on individuals,[16] then the Member State's ownership of an entity does not provide a sufficient and adequate reason to bring such undertakings under the emanation of the State and invoke a full direct effect against them.

Sharpston begins her analysis by stating 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"*.[17] Not only do I agree with this basic premise, but it illustrates why the Member State's ownership of an entity is not the only characteristic which suffices for the application of direct effect. In other words, if individuals fail to obtain rights brought about by an EU directive through its direct or indirect effect, they are left with the possibility to seek damages against the Member State, which by its late or defective transposition, has caused damage to the individual. The vertical ascending direct effect thus merely ensures that the obligation in question is enforced against the Member State directly by application of the respective directive, rather than indirectly through

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[15] In its judgment in Marshall the CJEU set out that a Member State should not be able to take advantage of its own failure to transpose a directive into national law, irrespective of whether it is acting as a public authority or as an employer in the particular case, and that an individual may therefore invoke a clear, precise and unconditional provision of the directive directly against the Member State (see judgment of the Court of Justice of the EU of 26 February 1986, Marshall, 152/84, EU:C:1986:84, para 49). The principle of estoppel has been further developed as one of the main reasons for the direct effect of a directive. See for example the judgment of the Court of Justice of the EU of 14 July 1994, Faccina Dori, C-91/92, EU:C:1994:292, paras 22 and 23: "…the case-law on the possibility of relying on directives against State entities is based on the fact that under Article 189 a directive is binding only in relation to "each Member State to which it is addressed". That case-law seeks to prevent "the State from taking advantage of its own failure to comply with Community law". **It would be unacceptable if a State, when required by the Community legislature to adopt certain rules** intended to govern the State's relations or those of State entities with individuals and to confer certain rights on individuals, **were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights.** Thus the Court has recognized that certain provisions of directives on conclusion of public works contracts and of directives on harmonization of turnover taxes may be relied on against the State (or State entities)" (emphasis added).

[16] Judgment of the Court of Justice of the EU of 26 February 1986, Marshall, 152/84, EU:C:1986:84, para 48, according to which "a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person".

[17] Opinion of Advocate General Sharpston delivered on 22 June 2017, Farell, C-413/15, EU:C:2017:492, para 31.

damages.[18] However, in both cases it is always the Member State that is obliged to fulfil its EU membership obligations, which includes, inter alia, the timely and proper transposition of directives and the payment of damages should it fail to meet its obligations.

If one of the main reasons for enshrining the vertical direct effect of the directives was to ensure that a Member State does not profit from its own misconduct, how is such misconduct directly linked to undertakings that have no involvement in the transposition of the directives?[19] The whole premise and rationale for establishing the vertical ascending direct effect of the directives ceases to work in the case of undertakings established for profit and which perform services of a commercial nature, where their only connection to the Member State is through its ownership structure (e.g. as its sole or major shareholder).

If we think about the practical consequences of the emanation of the State as proposed by Sharpston, both individuals and private companies could invoke rights from the majority of non-transposed directives against state-owned companies regardless of those entities actual involvement in and ability to speed up the transposition process in the respective Member State.[20] In contrast, if we follow strictly and to *ad absurdum* consequences the emanation of the State, state-owned companies, by being subsumed under the emanation of the State, relinquish almost any means to invoke rights conferred upon them by EU law unless the respective source is enshrined with a vertical descending direct effect. Under the current emanation of the State, it is unclear whether a state-company that should be defined as an extension of a State, can invoke EU law against another individual or even against a Member State *sensu stricto*. In these cases, is the state-owned company invoking either vertical descending direct effect or horizontal direct effect against an individual, and which direct effect is it invoking against a Member State? If we take the position that such a company is a State for the purposes of direct effect, then in theory, the direct effect of directives, regardless whether vertical or horizontal, should never be allowed in its favour due to the principle of estoppel (i.e. Member States should not benefit from their mismanagement of the regulatory process which has led to the late or undue transposition of directives).[21] But how can a company be held liable for

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[18] One of the reasons for this may be that damages often do not work very well in practice due to the complexity of quantifying a sufficiently serious breach and the damage suffered. For a closer look see FRANTZIOU, E. The Horizontal Effect of Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle. *Cambridge Yearbook of European Legal Studies*. 2020, Vol. 22, pp. 208–232; or CONDON, R., VAN LEEUWEN, B. Bottom up or Rock Bottom Harmonization? Francovich State Liability in National Courts. *EUI Department of Law Research Paper.* 2015, No. LAW 2015/03, p. 54.

[19] For a closer look see DASHWOOD, A. From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity? *The Cambridge Yearbook of European Legal Studies*. 2006–2007, Vol. 9, pp. 81–109, arguing that state-owned companies are often in the same position as private companies trying to understand and apply complex legislation.

[20] Conditional upon whether the respective provision of the directive is clear, precise, and unconditional.

[21] The distinction does not play much of a role in case of invoking directives against individuals, where neither vertical descending direct effect nor horizontal direct effect are fully allowed. However, a combination with other sources of EU Law, such as general principles or the Charter of Fundamental Rights that are being increasingly recognized as having the horizontal direct effect, could lead to different outcomes for the state-owned company dependent on whether it is considered a State or an individual. Due to the growing trend of applying EU directives together with general principles of law or the Charter of Fundamental Rights, and thus invoking rights enshrined therein in horizontal situations through those "extra vehicles", Bobek proposes to be "prudent to treat every provision of a directive as a horizontally effective one". See BOBEK, M. Why Is It Better to Treat Every Provision of a Directive as a (Horizontally) Directly Effective One. *International Journal of Comparative Labour Law and Industrial Relations*. 2023, Vol. 39, No. 2, pp. 211–220.

a Member State's failure to transpose a directive, with the resulting irony that it cannot invoke the rights that the directive actually confers on it as a legal person, remains a puzzle.

IV. WHY THE GRADUAL LIBERALISATION OF INTERNAL MARKET PLAYS A ROLE IN THE NEED TO RECONSIDER THE EMANATION OF THE STATE

Increasingly, state-owned companies no longer fulfil the explicit role for which they were created and are no longer the fully *public enterprises* that EU law continues to perceive them as being.[22] State-owned companies have often been inherently associated with the provision of services of general economic interest within the meaning of Article 106 Treaty on the Functioning of the European Union (hereinafter referred to as the "**TFEU**") and have therefore usually had the character of state monopolies. By default, these were services that the Member State saw as its duty to provide for its citizens, such as transport, energy, postal services, etc. However, with the liberalisation of the EU's Internal Market, which has been facilitated by the European Union's extensive and unceasing legislative activity, the link between a state-owned enterprise and the service of general economic (or public) interest has weakened. Thanks to the opening up of competition in EU markets, many state-owned enterprises have ventured into commercial services, and in contrast purely private companies are active in the market through public service contracts.[23] State ownership of a company and the company's public service remit are no longer connected vessels. Quite the reverse, with the growing liberalisation of the EU's Internal Market, state monopolies are being abandoned across the EU and both state and non-state companies compete with each other on and for specific markets and their customers. In doing so, both types of companies have to comply with many of the regulatory obligations of the market in question. Even privately owned *"commercial"* companies are now awarded public service contracts that were previously reserved for state-owned companies. As a result of this market phenomenon there is less justification that a state-owned company should be considered a State for the purposes of the full direct effect of all EU law.

[22] For example, the directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information obliges public undertakings to disclose documents and information if they are active in the areas of public procurements or acting as public service operators in the transport field. The respective directive explains the reason to subsume the public undertakings under the mandatory disclosure's obligation enshrined therein by the argument that "Member States often entrust the provision of services in the general interest with entities outside of the public sector while maintaining a high degree of control over such entities. Directive 2003/98/EC should therefore be amended in order to ensure that it can be applied to the re-use of existing documents produced in the performance of services in the general interest by public undertakings…" (see Recitals 24 and 25). However, as explained in this Article it is not any longer the case that only public undertakings are entrusted with the provision of services in the general interest. Unfortunately, the private companies do not automatically bear the same obligation under the directive (EU) 2019/1024 even if they do act as public service operators.

[23] A distinction is sometimes made in this respect between the competition for a market and the competition on a market. In the case of public service contracts, there is a competition for the market, i.e. who gets the contract with the respective awarding authority, in which the scope and other parameters of such an obligation are determined by the awarding authority. Whoever is awarded with the contract is merely fulfilling the relevant public service orders, over whose parameters it has little control and is not endowed with much commercial discretion or ability to respond to market fluctuations and consumer demands. In the case of commercial services, on the other hand, providers compete on the market, at their own risk and with a much greater degree of entrepreneurial freedom, i.e. including the possibility to respond to consumer demand, market fluctuations, innovation and other competitors' services.

The insistence on the original distinction between state and private entities for the purposes of direct effect ignores the actual and real-world developments in the provision of public services. If the European Union, particularly through the European Commission, is proactively taking steps to liberalise the Internal Market and encourage as much access as possible for new entrants, it can no longer fall behind an emanation of the State that does not correspond to the market it is actively encouraging. I believe that the main distinguishing criterion should not be the ownership of the entity in question, but the mandate to provide a public service.

V. HOW THE EMANATION OF THE STATE COULD BE RECONSIDERED

Based on the above, I encourage the CJEU to reconsider the emanation of the State. In my opinion a State, for the purpose of direct effect, should be regarded as (i) any municipal, regional or local authority or equivalent body; and also (ii) any entity, regardless of its legal form, which the Member State has entrusted with the provision of a public service that could otherwise be provided directly by the Member State itself and the Member State has conferred on it some additional powers that enable it to carry out its tasks effectively. As a result, any undertaking, either state-owned or private, will be encompassed under the emanation of the State only if it is entrusted with the provision of public service and conferred with special powers to carry out the public service. Furthermore, any company, regardless of if state-controlled or private, entrusted with the performance of a public service and conferred with special powers to carry it out should, in my view, not be fully subsumed under the emanation of the State for all directives that a Member State fails to transpose, but only those that relate to the performance of an entrusted public service.[24] As a result, individuals would be able to invoke their rights from non-transposed directives against both privately and state-owned entities, but only in areas where the entity substitues for the State in the provision of a public service for which it was conferred with additional powers. Although there will undoubtedly be cases of uncertainty as to whether or not such an obligation is linked to the provision of a public service, I consider that such a distinction could help to minimise the extension of the emanation of the State to unjustifiable extremes and to maintain a level playing field between private and public undertakings.

VI. CONCLUSION

Without a doubt, the CJEU by extending the emanation of the State seeks to assure, as much as possible, the desired uniform application of EU law in Member States, while simultaneously preserving the specific character of directives intended for transposition by Member States.[25] However, both objectives cannot be achieved at the same time. Undoubtedly, as long as different sources of EU law are endowed with different direct effects,

[24] The company will need to implement the requirements of those directives that are related to operation of entrusted public services in its internal system regardless the timing of the national transposition, provided that they are clear, precise and unconditional. On the contrary, the company should no longer be obliged to implement and apply the whole range of other non-transposed EU directives that do not relate to the entrusted public service, e.g. accounting and HR requirements.

[25] Dashwood refers to these two objectives as the *"effectiveness objective"* and the *"specific identity objective"*. See DASHWOOD, A. *From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?* pp. 81–109.

the emanation of the State will always continue to cause difficulties. It is one of the reasons why some Advocates General and academics suggested that the CJEU should reconsider the impossibility of horizontal direct effect of directives.[26] Even though I fully understand the rationale, I do not favour accepting horizontal direct effect in relation to directives. Such a breakthrough would in my view go completely against the spirit of the nature of directives as an EU act addressed to a Member States. Moreover, it would blur the distinction between a regulation and a directive, whereby a directive, would become, in effect, fully directly applicable and enforceable against individuals regardless of their transposition.[27] An expansive concept of horizontal direct effect would contradict the nature of Article 288 TFEU and undermine the basic concept that the European Union is limited in its conferred powers by the Treaties.[28] Having said that, I still find the CJEU's approach in broadening the emanation of the State even more unfortunate and detrimental than if horizontal direct effect of the directives was enshrined.[29] Although it would bring an unjustifiably increased administrative and legal burden for individuals,[30] at least all undertakings would be on an equal footing, regardless of their ownership.

Rather than broadening the emanation of the State, and disproportionately shifting the burden of application of non-transposed directives onto undertakings that were not involved in their adoption and transposition, the preferred approach should be to use more the Member State's liability for the damage caused by the late and incorrect transposition of directives. However, it still seems to be the least favoured option which, in fact, often only comes into play when it is not possible to remedy the situation by extensively broadened means of direct and indirect effect.

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[26] See Opinion of Advocate General Sharpston delivered on 22 June 2017, Farrell, C-413/15, EU:C:2017:492, paras 149 and 150: "the Court has in fact already accepted the existence of a limited form of horizontal direct effect. Three different approaches can be (and are) - in principle - used to fill the gap related to the absence of a general horizontal direct effect: (i) a broad conception of the concept of 'arm of the State'; (ii) taking the principle of consistent interpretation to the extreme; and (iii) the fallback solution of State liability for damages. This situation is unsatisfactory in terms of providing effective protection for individual rights. It complicates the applicants' situation and does not provide the defendants with the necessary certainty". See Opinion of Advocate General Bobek delivered on 25 July 2018, Cresco Investigation, C-193/17, EU:C:2018:614, para 145: "it would perhaps be advisable to revisit the issue of horizontal direct effect of directives. The persistence in formally denying horizontal direct effect to directives while moving heaven and earth to ensure that that restriction has no practical consequences whatsoever, such as importing the content of a directive into a Charter provision, appears increasingly questionable". For an academic point of view see DASHWOOD, A. *From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?* pp. 81–109.

[27] It is true that even regulations often have deferred application, where the addressees are provided with a time to implement the new obligations thereof or require Member States to adapt to the EU regulations. See KRÁL, R. National normative implementation of EC regulations. An exceptional or rather common matter? *European Law Review.* 2008, Vol. 33, No. 2, pp. 243–256.

[28] The CJEU seems to have been aware of this. See, for example, the judgment of the Court of Justice of the EU of 14 July 1994, Faccina Dori, C-91/92, EU:C:1994:292, para 24: "[t]he effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations".

[29] Still provided that the directive is clear, precise, and unconditional.

[30] The obligation to monitor not only the adoption of EU regulations but also all EU directives and to evaluate the obligations enshrined in them, regardless of transposition in the Member States.