



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-413/15
Elaine Farrell v Alan Whitty, The Minister for the Environment, Ireland and
the Attorney General, Motor Insurers Bureau of Ireland (MIBI)

Advocate General Sharpston clarifies the criteria for determining what is an 'emanation of the State' for the purposes of establishing the bodies against which an individual may bring a claim based on rights under an EU directive which has not been transposed correctly into national law

The concept of an 'emanation of the State' must be construed purposively. It is not essential that such a body should possess 'special powers' in every case.

Ever since the Court developed the doctrine of the direct effect of directives and rendered it applicable to 'vertical' disputes between the individual and the State, but declined to extend that doctrine 'horizontally' to cover disputes between private parties, it has been essential to know what are the boundaries of 'the State' for the purposes of applying that doctrine. In its judgment in *Foster*,¹ the Court set out a series of tests for determining the types of bodies that might be treated as 'the State' or, although it did not use that expression in its judgment, 'an emanation of the State' in that context. It did so by reference to existing case-law, which included a reference to the body in question having 'special powers'.²

In today's Opinion, Advocate General Eleanor Sharpston notes that the concept that EU law is not just about inter-State relations but confers rights on individuals goes back to the Court's judgment in *Van Gend & Loos*.³ The same logic applies to the reasoning behind the vertical direct effect of directives. A clear, precise and unconditional provision in a directive encapsulates a right that the Member States, in promulgating the directive, agreed should be conferred on individuals. Where national law contains nothing that can be regarded as an implementation of the right granted in the directive then an applicant can rely directly on the rights under the directive against the body concerned if it can be characterised as 'the State' or 'an emanation of the State'. If it cannot be characterised as such, then the remedy lies against the Member State.

First, the Advocate General considers that **the list of factors to be taken into account when determining whether a defendant is an emanation of the State (the Foster test) is not exhaustive and simply provides the elements that may be relevant to such an assessment.** In her view, in *Foster* the Court was not attempting to formulate any type of general test or to cover all eventualities for the future.

Second, the Advocate General takes the view that there is not a fundamental principle underlying the separate elements to be considered in determining whether a defendant is an emanation of the State. However, having reviewed the Court's post-*Foster* case law, and drawing on examples in the areas of State aid, public procurement and the provision of services of general economic interest, the **Advocate General considers that, in determining whether a particular defendant is an emanation of the State, the national court should have regard to the following criteria:**

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

¹ Case [C-188/89](#) *Foster and others v British Gas*

² See paragraphs 18 to 20 of that judgment.

³ Case [C-26/62](#) *Van Gend & Loos v Administratie der Belastingen*

2. It is not necessary that the State should be in a position to exercise day-to-day control or direction of that body's operations;
3. If the State owns or controls the body in question, that body should be considered to be an emanation of the State, without it being necessary to consider whether other criteria are fulfilled;
4. Any municipal, regional or local authorities or equivalent body is automatically to be regarded as an emanation of the State;
5. The body in question need not be funded by the State;
6. If the State has both entrusted the body in question with the task of performing a public service which the State itself might otherwise perform; and has equipped that body with some form of additional powers to enable it to fulfil its mission effectively, the body in question is in any event to be regarded as an emanation of the State.

Finally, the Advocate General concludes that where a Member State has transferred a broad measure of responsibility to a body to meet obligations under EU law, **it is not necessary for that body to have 'special powers' going beyond those which result from the normal rules applicable in relations between individuals in order to be an emanation of the State.** In her view, such a requirement would be unjustified. However, a body can only be an emanation of the State in respect of its activities which represent a mission entrusted to it by the State and that mission must be the core activity of that body. The public mission must also be clearly defined as such in the relevant Member States' legislation.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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