



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 18 September 2013¹

Case C-425/12

Portgás - Sociedade de Produção e Distribuição de Gás, SA

v

Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território

(Request for a preliminary ruling from the Tribunal Administrativo e Fiscal do Porto (Portugal))

(Procedure for awarding public contracts in the water, energy, transport and telecommunications sectors — Directive 93/38/EEC — Directive not implemented in domestic law — Possibility for a State authority to rely on certain provisions of Directive 93/38/EEC against a body which is a public service concession-holder having the status of a contracting entity)

1. Although the Court has recently commemorated the fiftieth anniversary of its emblematic judgment in *van Gend & Loos*,² the discussions relating to the consequences of recognising the direct effect of EU law are far from closed. That is the case in particular with regard to the scope of the direct effect of directives. This is demonstrated in the present case, which presents the Court with a further opportunity to set out the requirements for being able to rely on a directive which has not been implemented in domestic law.
2. More specifically, the present case raises the question as to whether and, as the case may be, under what circumstances the State may, as against a body which is a public service concession-holder and also has the status of a contracting entity, rely on a number of provisions of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,³ as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998,⁴ where that measure has not been transposed into domestic law within the prescribed period.

1 — Original language: French.

2 — Case 26/62 [1963] ECR 1.

3 — OJ 1993 L 199, p. 84.

4 — OJ 1998 L 101, p. 1.

I – Legal framework

A – EU law

3. Article 2(1) of Directive 93/38 is worded as follows:

‘This Directive shall apply to contracting entities which:

- (a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;
- (b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.’

4. The activities referred to in Article 2(2) of Directive 93/38 include the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas.

5. Article 4(1) and (2) of that directive provides:

‘1. When awarding supply, works or service contracts, or organising design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.

2. Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.’

6. In accordance with Article 14(1)(c)(i) thereof, that directive applies to contracts awarded by contracting entities carrying out activities in connection with the transport or distribution of gas, provided that the estimated value, net of value added tax (‘VAT’), is not less than EUR 400 000.

7. Pursuant to Article 45(2) of Directive 93/38, the Portuguese Republic was required to adopt the measures necessary to comply with that directive and to apply them by 1 January 1998 at the latest. The amendments made to that directive by Directive 98/4 had, pursuant to Article 2(2) thereof, to be implemented in the Portuguese domestic legal system by no later than 16 February 2000.

B – Portuguese law

8. Decree-Law No 223/2001 of 9 August 2001⁵ implemented Directive 93/38 in Portuguese law. Under Article 53(1) thereof, Decree-Law No 223/2001 entered into force 120 days after the date of its publication.

II – The case before the referring court, the question referred and the procedure before the Court

9. Portgás – Sociedade de Produção e Distribuição de Gás, SA (‘Portgás’) is a limited liability company governed by Portuguese law which is active in the natural gas production and distribution sector.⁶

⁵ – *Diário da República* I, Series A, No 184, of 9 August 2001, p. 5002.

⁶ – According to the information provided by the applicant in the main proceedings, private shareholders have had a majority holding in Portgás since its formation.

10. On 7 July 2001, Portgás concluded with Soporgás – Sociedade Portuguesa de Gás Lda a contract relating to the supply of gas meters. The value of that contract was EUR 437 053.20 net of VAT (that is, EUR 532 736.92).

11. On 21 December 2001, Portgás submitted an application for Community co-financing under the European Regional Development Fund, which was approved. The contract awarding financial assistance to cover the eligible expenditure of Project POR/3.2/007/DREN, which included the acquisition of the gas meters, was signed on 11 October 2002.

12. On 29 October 2009, following a project audit carried out by the services of the Inspectorate General of Finance, the manager of Programa Operacional Norte (Operational Programme North) ordered recovery of the financial assistance which had been granted to Portgás in the context of Project POR/3.2/007/DREN on the ground that, since that company had failed to comply with the rules of EU law on public procurement, all the expenditure which had been co-financed through public funds had to be regarded as ineligible.

13. Portgás brought a special administrative action before the Tribunal Administrativo e Fiscal do Porto (Porto Administrative and Customs Court), seeking a declaration of nullity or the annulment of that decision on the ground that the Portuguese State could not require it, as a private undertaking, to comply with the provisions of Directive 93/38. Since that directive had not yet been transposed into Portuguese law at the material time, those provisions could not, it argued, have direct effect for it.

14. For its part, the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território (the Ministry of Agriculture, the Sea, the Environment and Town and Country Planning, ‘the Ministry’), which is the defendant in the main proceedings, pointed out before the referring court that Directive 93/38 is addressed not only to the Member States but also to all contracting entities, as defined by that directive. According to that ministry, Portgás was, in its capacity as sole public service concession-holder in the area covered by the concession, subject to the obligations arising under that directive.

15. Since it was uncertain as to the interpretation of the provisions of EU law relied on in the main proceedings, the Tribunal Administrativo e Fiscal do Porto decided on 26 June 2012 to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Can Articles 4(1) and 14(1)(c)(i) of ... Directive 93/38 ..., as amended by Directive 98/4 ..., and the other provisions of those directives and the general principles of Community law applicable, be interpreted as meaning that they create obligations for private persons who hold public service concessions – in particular an entity covered by Article 2(1)(b) of Directive 93/38 – where that directive has not been transposed into national law by the Portuguese State, so that failure to comply with those obligations may be invoked against the entity holding the individual concession by the Portuguese State by means of an act attributable to one of its Ministries?’

16. Written observations have been submitted to the Court by the applicant in the main proceedings, by the Portuguese Government and by the Commission.

17. Written questions and a request for the focussing of oral arguments were addressed to the parties. The hearing was held on 4 July 2013.

III – Analysis

18. This request for a preliminary ruling arose from a dispute between Portgás and the Ministry concerning a decision ordering the recovery of financial assistance which had been granted to that company in the context of the European Regional Development Fund, on the ground that, at the time when it acquired gas meters from another company, Portgás had not complied with a number of rules of EU law applicable with respect to public contracts.

19. Portgás challenges that decision, pointing out that, in view of its status as a private undertaking, the provisions of Directive 93/38, which at the material time had not yet been implemented in domestic law, could not have direct vertical effect for it. Taking the view that Directive 93/38 is addressed not only to the Member States but also to any contracting entities, within the meaning of Article 2(1)(b) of that directive, the Ministry submits, for its part, that the directive contains obligations for all entities covered by that provision, in particular those operating on the basis of exclusive rights granted by a Member State. That, it submits, is precisely the case with regard to the applicant company as a public service concession-holder.

20. In essence, the referring court seeks to ascertain whether and under what circumstances the provisions of Directive 93/38 may be relied upon as against a public service concession-holder having the status of a contracting entity in circumstances where that directive has not been implemented in domestic law.

21. Although, as is clear from settled case-law, the issue of the possibility of relying on a directive as against an entity having the status of a public service concession-holder is by no means unprecedented, the case at hand presents a certain specific feature in that that possibility of relying on a directive is claimed by a State authority.

22. From the outset, I would point out that there is no dispute whatsoever as to the issue of whether the provisions of the directive for which interpretation is sought, that is to say, Articles 4(1) and 14(1)(c)(i) of Directive 93/38, fulfil the ‘technical’ requirements of being sufficiently precise, clear and unconditional so that they can be relied upon as against the State.⁷

23. Moreover, it seems to me that there can scarcely be any doubt that those provisions fulfil the necessary criteria. With regard to supply and service contracts the estimated value of which, net of VAT, is no less than EUR 400 000, those provisions impose, in particular, on contracting entities carrying out activities in the gas transport and distribution sectors a precise and unconditional obligation, according to which the award of those contracts must be in conformity with the provisions and procedures provided for by Directive 93/38 and must be carried out without discrimination between suppliers, contractors or service providers. No particular implementing measure appears to be necessary to ensure compliance with those requirements. That assessment has, in my view, firm support in the case-law on comparable provisions relating to the award of public contracts.⁸

7 — According to settled case-law, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-282/10 *Dominguez* [2012] ECR, paragraph 33 and case-law cited).

8 — See, inter alia, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 40 to 44; Case 103/88 *Costanzo* [1989] ECR 1839, paragraphs 29 to 31; Case C-76/97 *Tögel* [1998] ECR I-5357, paragraphs 42 to 47; Case C-258/97 *HI* [1999] ECR I-1405, paragraphs 34 to 39; Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraphs 36 and 37, and Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 35 to 45.

24. By contrast, the point at issue here is whether those provisions may be relied upon as against Portgás purely in its capacity as a public service concession-holder having the status of a contracting entity within the meaning of Article 2(1) of Directive 93/38. Similarly, the question is raised as to whether, irrespective of the possibility of regarding Portgás as an emanation of the State within the meaning of the Court's case-law, it is possible for a State authority to rely directly on some of the provisions of that directive.

25. In the present case, I therefore consider that, in order to answer the question raised, it is first of all necessary to determine whether it is possible to rely on the provisions of Directive 93/38 against Portgás purely in its capacity as a public service concession-holder, and, if so, to establish whether the administrative authorities of a Member State may rely on provisions of that directive which, at the material time, had not been implemented in the national legal system.

26. In other words, after resolving the issue of *against whom* the provisions of a directive which has not been implemented or which has been improperly implemented can be invoked, it is still necessary to determine *who* may rely on those provisions and, where appropriate, *on what basis*.

A – The possibility of invoking the provisions of Directive 93/38 against Portgás purely in its capacity as a public service concession-holder and contracting entity within the meaning of Article 2 of that directive

27. In the present case, two conflicting views are represented.

28. On the one hand, the applicant in the main proceedings argues, in essence, that, since Directive 93/38 had not yet been implemented in domestic law on the date on which the supply contract at issue was entered into, the Portuguese administrative authorities could not invoke the provisions of that directive against it. It points out that, according to settled case-law, directives which have not been implemented cannot impose obligations on individuals. It claims that it has precisely the status of an individual, notwithstanding the fact that it has the status of a public service concession-holder. It points out, in that regard, that it does not have any rights or powers going beyond the general law.

29. On the other hand, the Portuguese Government and the Commission submit, in essence, that Portgás, in its capacity as sole public service concession-holder and contracting entity within the meaning of Article 2(1)(b) of Directive 93/38, was required to comply with the provisions of that directive, even though the latter had not yet been implemented in domestic law on the date on which the supply contract at issue was concluded.

30. It seems to me important to bear in mind that recognition of the direct effect of directives is based, ultimately, on two complementary objectives: the need effectively to guarantee the rights which individuals may derive from those measures and the desire to penalise national authorities which have failed to respect the binding effect of directives and to ensure their effective application.⁹

⁹ — See, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 47.

31. Considered from that point of view, and as the Court has consistently held, the binding nature of a directive, which constitutes the basis for the possibility of relying on that directive before a national court, exists only in relation to ‘each Member State to which it is addressed’. It follows that a directive cannot, 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.¹⁰ A national authority may not rely, as against an individual, on a provision of a directive the necessary implementation of which in national law has not yet taken place.¹¹

32. In other words, and notwithstanding the uncertainties which have reasonably arisen in that regard,¹² the direct effect of directives can be only ‘vertical’ and ‘upwards’, in that it can apply only in the case of an action brought by an individual against a State authority. The corollary of that rule consisting of the obligation of the national court to interpret the rules of its own national law in conformity with the provisions of a directive reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed.¹³

33. That limitation is, however, counterbalanced by the fact that the entities against which unconditional and sufficiently precise provisions of a European directive can be relied upon have many forms and qualities. It is also firmly established that the concept of ‘Member State’ against which the provisions of a directive may be relied upon is understood in a way which is both functional and extensive.

34. It covers, first, all organs of the public administration, including decentralised authorities.¹⁴ Moreover, where a person involved in legal proceedings is able to rely on a directive against the State, he may do so regardless of the capacity in which the latter is acting, whether as an employer or as a public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with EU law.¹⁵

35. That concept covers, more broadly, all persons governed by public or private law who maintain special links with the State, that is to say, to reiterate the wording enshrined in *Foster and Others*,¹⁶ and repeated many times since then,¹⁷ bodies and undertakings, whatever their legal form, 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.

36. The Court has thus held that the provisions of a directive capable of having direct effect could be relied upon against a legal person governed by private law where the State has entrusted to that legal person a particular task and where it has direct or indirect control of that legal person.¹⁸

37. However, it does not seem to me to follow from case-law that the mere fact that an entity has the status of a contracting authority, for the purposes of EU law, means that it must be regarded as forming part of the State.

10 — *Marshall*, cited above, paragraph 48; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9, and Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 36.

11 — See, inter alia, *Kolpinghuis Nijmegen*, cited above, paragraph 10.

12 — It is not possible to list here the many notes on case-law and contributions in academic legal writings dealing with the conditions under which directives may be relied on, in particular in horizontal disputes. I will, in that regard, merely cite the references made by Advocate General Cruz Villalón in point 75 (footnote 32) of his recent Opinion in Case C-176/12 *Association de médiation sociale*, at present pending before the Court.

13 — See, in particular, *Arcaro*, cited above, paragraph 42.

14 — See, inter alia, *Costanzo*, cited above, paragraph 32.

15 — See, inter alia, *Marshall*, cited above, paragraph 49.

16 — See Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 20.

17 — Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 23; Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24; Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 40, *Dominguez*, cited above, paragraph 39.

18 — See *Rieser Internationale Transporte*, cited above, paragraph 29.

38. Although, according to the case-law of the Court, the provisions of a directive may have direct effect against a body responsible for providing a public service under the control of the State, it is also necessary that that entity should have special powers going beyond those which result from the normal rules applicable in relations between individuals.

39. However, if, as the Commission stated, the status of contracting entity is, under Article 2(1)(b) of Directive 93/38, conferred only on private entities which ‘operate on the basis of special or exclusive rights granted by a competent authority of a Member State’, that status does not necessarily imply that those entities have ‘special powers’ within the meaning of the rule in *Foster and Others*, as clarified, in particular, in *Collino and Chiappero*¹⁹ and *Rieser Internationale Transporte*.²⁰

40. Moreover, I am far from convinced that it is necessary to extend the possibility of relying on directives by virtue of their direct effect as against such an entity.

41. First of all, it is necessary to point out that, in general, the fact that an entity comes within the personal scope of a directive is not a decisive factor in determining whether the provisions of that directive which have not been transposed may be relied on as against it,²¹ since what is important is that, under the third paragraph of Article 288 TFEU, only the Member States are addressees of a directive. Accordingly, although Portgás is one of the entities expressly falling within the scope of the directive at issue, in its capacity as a company holding a public service concession which was entrusted to it by the State on an exclusive basis, it is difficult to argue that it was under an obligation to comply with the provisions of Directive 93/38 before the implementing legislative measure entered into force.

42. Next, in spite of the parallels which may reasonably be drawn, the concept of ‘contracting entity’ does not have the same scope as the concept of ‘State’, in the functional sense of the term, against which an individual can invoke the direct effect of a directive.²²

43. Similarly, the fact that a private undertaking is entrusted with providing, as sole concession-holder, a service in the public interest is not sufficient for being able to invoke against it the provisions of a directive which has not been implemented in the domestic legal order. It is necessary to establish that that undertaking has special powers and is subject to the control of the public authorities.²³

19 — See *Collino and Chiappero*, cited above, paragraph 23.

20 — See paragraphs 25 to 27 of the judgment. For the purposes of concluding that Asfinag was a body against which the provisions of a directive capable of having direct effect could be relied on, the Court established beforehand that that body, in addition to having been entrusted with a service in the public interest pursuant to an act adopted by the public authorities under the supervision of those public authorities, had special powers.

21 — See, inter alia, Case C-91/92 *Faccini Dori* [1994] ECR I-3325, with regard to Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31), and Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, with regard to the persons coming within the scope of Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (Fifth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1990 L 156, p. 14).

22 — As Advocate General Alber stated in his Opinion in *Rieser Internationale Transporte*, cited above, at point 35, ‘[i]t is true that the term “contracting authority” does not necessarily have the same meaning as the term “State” in the functional sense against which an individual can rely on the direct effect of a directive’.

23 — As Advocate General van Gerven pointed out in his Opinion in *Foster and Others*, cited above, at point 22, an undertaking against which an unconditional and sufficiently precise provision may be relied upon is one in respect of which the State ‘has assumed responsibilities which put it in a position to decisively influence the conduct of that person or body in any manner whatsoever (other than by means of general legislation) with regard to the matter in respect of which the relevant provision of a directive imposes an obligation which the Member State has failed to implement in national law’.

44. Returning to the case before the referring court, it appears at first sight from the evidence presented to the Court²⁴ that the relationship between Portgás and the Portuguese State authorities is not as close as that which existed in *Foster and Others*, between the entity at issue and the British authorities. The powers of control which the Portuguese authorities have in relation to Portgás are, it seems to me, much more limited.²⁵

45. However, since the referring court has not provided sufficient information concerning Portgás to determine whether, at the material time, that undertaking had special powers and was subject to the control of the public authorities, in accordance with the rule established in *Foster and Others*²⁶ and the approach traditionally adopted by the Court in similar cases,²⁷ it is for the referring court to examine whether those requirements were fulfilled as regards the situation of Portgás at the material time.

46. In the absence of evidence that Portgás should be placed on the same footing as the State, the possibility of relying on the directive ought to be excluded, since, as is clear from the settled case-law of the Court referred to above, the provisions of a directive which has not been implemented cannot impose obligations on an individual or be relied upon as against that individual.

47. To decide otherwise would be tantamount to conferring a downward direct effect on the provisions of Directive 93/38 and, furthermore, to allowing the State, understood in a unitary manner, to rely, as against individuals, on its own failure to comply with EU law.

48. However, in the event that Portgás is to be treated as an undertaking having public-authority powers and therefore as falling within the functional concept of the State – or an emanation thereof – referred to above, it is still necessary to determine whether the ministry concerned in the present case is in a position to rely on the application of the unimplemented directive.

B – The question whether the provisions of the directive at issue may be invoked by a State authority against an entity regarded as an ‘emanation of the State’

49. As I stated above, there scarcely appears to be any doubt that the provisions of directives cannot be relied on by virtue of their direct effect as against individuals, since directives impose obligations only on the Member States to which they are addressed.

50. Having clarified that point, one question remains. Is a State prevented in any case from being able to rely on the provisions of a directive which has not been implemented or does that limitation cover only cases in which the possibility of invoking the provisions of a directive which has not been implemented is relied upon as against an individual? In the present case, in the event that Portgás should be regarded as being an ‘emanation of the State’ against which the provisions of the directive may be invoked, is it none the less necessary to prevent the Ministry from being able to rely on that directive?

51. I am of the view that that question must be answered in the negative.

24 — That evidence consists of, inter alia, Decree-Law No 33/91 (*Diário da República* I, Series A – No 13, of 16 January 1991, p. 235) and the gas distribution award contract concluded in December 1993 between Portgás and the Portuguese State.

25 — In that regard, it appears that the State has neither the power to appoint the managers of the company nor the ability to issue general guidelines – and in certain cases binding directions – on various matters or even the power to determine the purpose to which certain funds are to be put, which would have placed it in a position to exert pressure on the management of the undertaking at issue.

26 — As is clear from paragraph 15 of the judgment in *Foster and Others*, cited above, although the Court has jurisdiction in proceedings for a preliminary ruling to determine the categories of persons against whom the provisions of a directive may be relied on, it is for the national courts, by contrast, to decide whether a party to the proceedings before them falls within one of the categories so defined.

27 — See, inter alia, *Collino and Chiappero*, paragraph 24; *Farrell*, paragraph 41; and *Dominguez*, paragraph 40.

52. However, for the reasons which I will set out below, in such a hypothetical situation, the possibility for a State authority to rely on a failure to comply with the provisions of a directive as against another subdivision of the State is, it seems to me, a problem which is unrelated to the traditional discussion concerning the vertical – and *a fortiori* horizontal – direct effect of directives, but has its origins in the obligation imposed on all State authorities to comply with the provisions of directives (third paragraph of third paragraph of Article 288 TFEU) as well as to adhere to the duty of sincere cooperation and to ensure complete fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions (Article 4(3) TEU).

53. In the first place, the problem does not in my view appear to have any direct connection with the case-law on the kind of direct effect which must be accorded to the provisions of directives.

54. It follows from the terms used in the case-law and indeed from the reading of it which has been provided in the legal literature that the ‘deux pôles du rapport vertical caractéristique de l’effet direct des directives’ (two poles of the vertical relationship characteristic of the direct effect of directives)²⁸ consist, as I stated previously, in the existence, on the one hand, of a ‘Member State’ – or of one of its subdivisions or emanations – against which the provisions of a directive which has not been implemented, or has been improperly implemented, may be relied on and, on the other hand, of ‘an individual’, who alone is allowed to rely on such provisions, once the period set for implementation has expired.²⁹

55. Although it is true that the Court has accepted that public authorities, which a priori may be treated as subdivisions of the State, could possibly, by virtue of the direct effect of directives, rely on the precise and unconditional provisions of a directive which was not implemented, those authorities or entities would have to be regarded as specific individuals in relation to the directive at issue. Thus, in *Comune di Carpaneto Piacentino and Others*, the Court pointed out that ‘[b]odies governed by public law, which, in this context, must be assimilated to individuals, are therefore entitled to rely on that rule in respect of activities engaged in as public authorities but not listed in Annex D to the directive’.³⁰

56. Secondly, it seems to me important to point out that the argument based on the principle of estoppel or on the *nemo auditur propriam turpitudinem allegans* rule cannot have the same effect where it is a State entity which relies on the provisions of a directive as against another State entity or another subdivision of the State. Although that argument has some validity where the State wishes to bring an action against individuals for failure to fulfil obligations set out in a European directive, in that it seeks to prevent the State from being able to derive any advantage from its obligation of implementation, the same does not apply in the case where the dispute is between two subdivisions of the State.

57. Accordingly, to return to the case before the referring court, if it is assumed that Portgás must be regarded as being an emanation of the State within the meaning of the rule in *Foster and Others*, the Court is ultimately addressing two failings: on the one hand, the State has failed to fulfil its obligation under Article 288 TFEU to implement Directive 93/38 but, on the other hand, Portgás may be criticised, as a contracting authority, for failing to comply with the provisions of that directive.

28 — See Simon, D., *La directive européenne*, Dalloz, 1997, p. 73.

29 — Indeed, to reproduce the words originally used by the EU courts, direct effect was established on the basis of ‘[t]he vigilance of individuals concerned to protect their rights’ (See *van Gend en Loos*, p. 13).

30 — Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 31.

58. In such a situation, I am of the view that that problem is not related to any discussion concerning the scope and intensity of the direct effect which must be attributed to the precise and unconditional provisions of directives, but arises within the context of the obligations imposed on State authorities by virtue of their duty of sincere cooperation and their obligation to ensure complete fulfilment of the obligations arising out of EU law.

59. It seems to me important to point out in this regard that, although the prime obligation imposed on the Member States in relation to the implementation of directives undeniably consists in ensuring that national law complies with the instruments through the adoption, within the prescribed period, of implementing measures which are in conformity in terms of both wording and purposes, their obligation is not limited to this. The binding effect conferred on directives requires that, quite apart from the obligation to transpose, all authorities and subdivisions of the State must guarantee the effective implementation of those measures.

60. Pursuant to the principle of sincere cooperation, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of their obligations under EU law. As the Court has pointed out, the obligation on Member States arising from a directive to achieve the result envisaged by the directive and their duty under the Treaties to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of Member States.³¹

61. The Court accordingly held that not only central State authorities, but also decentralised authorities, whatever their degree of autonomy, and the courts are subject to the obligation to take all appropriate measures to ensure the implementation of directives.

62. I take the view that it is not necessary to limit the imposition of that implementation obligation solely to those authorities and that it is appropriate, in the interest of consistency, to extend it to all bodies and entities which fulfil the conditions for classification as emanations of the State within the functional meaning of the term, the precise meaning of this classification having been laid down in *Foster and Others*.

63. Accordingly, to return to the case presently before the Court, if it is held that an entity, such as Portgás, which is a public service concession-holder and also has the status of contracting authority, may be treated in the same way as the State, I see no obstacle to the possibility of invoking the provisions of Directive 93/38 against such an entity. Quite to the contrary: not only may those provisions be invoked against the entity, but it would also be subject, in its capacity as a subdivision of the State, to the obligation to take all the measures necessary for the implementation of those provisions, irrespective, moreover, of whether they fulfil the technical requirements for being relied upon by virtue of direct effect. In these circumstances, it must be concluded that Portgás was subject to the obligations laid down by that directive from 1 January 1998 and it could also have been penalised for infringing those obligations either by decision of the competent supervisory authority or by decision of the national courts upon application by third parties harmed as a result of that infringement. Such penalties would constitute appropriate measures for implementing the directive in question, since they have the specific objective of favouring the adoption of decisions or procedures in accordance with that directive.

64. Moreover, by invoking the infringement of certain provisions of Directive 93/38 by Portgás, the Ministry, in its capacity as the supervisory authority, is merely complying with its implementation obligation and duty to sincere cooperation, regardless of whether that directive has been implemented. From that perspective, the Ministry cannot be criticised on the ground that it has secured any advantage from the failure to transpose.

31 — See, inter alia, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, and *Kolpinghuis Nijmegen*, cited above, paragraph 12.

65. That cooperation and compliance obligation appears to me, furthermore, to be strengthened where, as in the main proceedings, the State authority at issue is, as a supervisory authority, responsible for ensuring the proper functioning and conformity of operations financed by the Structural Funds. As the Commission pointed out in its written observations, the management authorities which were appointed by the Member States to manage the activities of those funds have a particular responsibility inasmuch as they must expressly ensure that those activities are in conformity with the provisions of the Treaty and with the instruments of secondary law, which include those instruments applicable to the award of public contracts.³²

66. Accordingly, if the Court were to conclude that Portgás is to be considered a part of the State, I see no reason why it should not be possible to rely on the provisions of Directive 93/38 as against it, even if the directive is relied upon by another State authority. It is true that the case-law confers direct effect on directives which have not been transposed only where they are invoked by an individual against the State or a body which may be assimilated thereto, expressly excluding such direct effect where it is relied upon by the State as against an individual. However, this does not imply that the provisions of a directive cannot be relied upon in a dispute between the State and a body in which it is implicated. The issue is no longer one of direct effect, but of the requirement to implement a directive in view of the duty to fulfil the obligations arising from EU law and of sincere cooperation which is imposed on all authorities and emanations of the State.

IV – Conclusion

67. In light of the foregoing considerations, I propose that the Court of Justice reply to the question submitted by the Tribunal Administrativo e Fiscal do Porto as follows:

Articles 4(1) and 14(1)(c)(i) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998, cannot be relied upon by the authorities of a Member State against a private undertaking solely on the ground that that undertaking is the exclusive holder of a public-interest service concession falling within the personal scope of that directive, in circumstances where that directive has not yet been implemented in the domestic legal system of that Member State. It is for the national court to identify whether, in addition to its status as a public service concession-holder, the undertaking at issue has special powers.

32 — See, *inter alia*, Articles 12 and 38 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1), applicable to the facts in the main proceedings. In the present case, it may seem surprising that the discussion has focussed on the question of the possibility of relying on Directive 93/38, whereas, in any event, the competent national authorities were required to ensure full compliance with the provisions of the European regulation, which refers to the rules applicable to public contracts, the binding and directly applicable nature of which is not the subject of any doubt.