The public / private divide in EU Law

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1. Introduction
The concept of ‘direct effect’ has clearly played an important role for individuals enforcing rights derived from EU law. However, the inconsistent approaches taken within different cases in this area give rise to a vast amount of legal uncertainty. Therefore, in order to create legal certainty, greater equality and democracy, this area is arguably in need of major reform. The central aim of this paper will be to demonstrate why the public/private divide in EU law, should be abolished; and to determine, if such a divide is to be maintained, what a public body is for the purposes of direct effect of an EU directive.

The analysis proceeds in three steps. Firstly, a discussion highlights where the controversy within the public/private debate lies. This is followed by an identification of ‘public body’ for the purposes of direct effect of an EU directive, including critical analysis from an EU perspective. Finally, a comparative analysis is undertaken, contrasting the Court of Justice of the European Union’s (CJEU) approach with the approach adopted by the National Courts (NCs) to public bodies in EU law. Concluding comments then determine whether it makes sense to maintain the public/private divide.

2. The public/private divide: the debate
To the discontent of many legal academics, the public/private divide exists within many legal systems and is justified by the expectation that public authorities, and those exercising public functions, will act in the public interest, whilst private parties may seek to further their personal commercial interest. Consequently, ‘those exercising public, as opposed to private, functions are subject to higher standards and must act in the public interest rather than in their own personal or private interest’ (Webley and Samuels 2009, 513).

Similarly, Lord Woolf believes that ‘the distinction between public law and private law needs to exist because public law requires the court to perform a different role from that which it has traditionally adopted in private law disputes … However … this does not mean the systems do not need to coalesce’(Woolf 1986, 238). Moreover, Oliver (1997) has suggested common values should also co-exist, as they underlie both public and private law, and refer to protecting weaker individuals from exercises of power, adverse to their interests, by powerful parties. Thus the problem lies in the exercise of private
power, or contracted out public power, as it becomes difficult to bring legal controls on abuses of private power. Therefore, despite the need for the divide, for the Court to fulfil its role it appears there may be a greater need for the protection of individuals’ rights.

The danger of preserving a public/private divide, is the difficulty in controlling abuses of power. Sir Stephen Sedley identifies that:

the law’s chief concern about the use of power is not who is exercising it but what the power is and whom it affects; and that the control of abuses of power ... is probably the most important of all tasks which will be facing the courts (Sedley 1999, 54).

The control of abuse of private power clearly conflicts with the public/private divide, partly because private law remedies are often inappropriate to deal with abuse of power, as ‘an abuse of power would go unremedied without the judicial willingness to interfere’ (Endicott 2009, 586).

However, the textual argument is often used to justify the public/private divide, that the wording of Article 288 TFEU (originally Article 189 EEC Treaty), provides that directives create obligations which are binding ‘as to the result to be achieved’, upon each Member State to which it is addressed, therefore ‘a directive may not of itself impose obligations on an individual’ (Marshall No.1 [1986] paragraph 48).

3. Public bodies: the EU dimension

3.1 The divide in EU Law

The public/private divide within EU law is based upon the set of rules, regarding the horizontal and vertical direct effect of directives, which imposes a further public/private divide in UK law. This public/private distinction was introduced by the CJEU in Marshall No.1 [1986], by way of vertical and horizontal direct effect (HDE) and defined in Foster v British Gas [1990]. Accordingly, the CJEU clarified the status of directives to have partial direct effect, allowing vertical direct effect, enforceable against the state acting in its capacity as a public or private body (Marshall No.1 [1986] paragraph 49), and not HDE, enforceable against individuals or private bodies (Marshall No.1 [1986] paragraph 48). Nevertheless, despite the distinction clarified in Marshall No.1 [1986], it is difficult to draw a clear line between public and private law, as what falls within the realms of private law in one court may not do so in another, due to the differing interpretations by NCs. Consequently, the dividing line appears to be
continuously blurred as ‘the sheer width of this formulation must undermine the utility of the horizontal/vertical direct effect distinction as a means of restricting the range of liability under EC law,’ (Leyland and Woods 1997, 149). However, some legal academics argue that Foster [1990] effectively extends the DE of directives into the horizontal dimension. Therefore, although the CJEU justify that the rationale for upholding the distinction is to ensure legal certainty, it would actually make more sense to abolish the distinction altogether.

3.2 The rationale for denial of Horizontal Direct Effect
Nonetheless, Courts and legal academics alike have supported the public/private divide for various reasons. The classic rationale for this denial of HDE in Marshall No.1 [1986], being based upon the textual argument, referring to the wording of Article 288 TFEU. Furthermore, the legal certainty argument regarding which law to follow, whether pre-existing national law or the unimplemented directive, if obligations were imposed upon individuals, also justifies the denial of HDE. Moreover, it is argued that acceptance of HDE would blur the distinction between directives and regulations, as regulations are directly applicable, which means they become part of the national law without parliamentary intervention; but directives are not immediately directly applicable if implemented correctly, as EU rights are then enforceable under national law instead. Consequently, the CJEU in Faccini Dori [1994] denied HDE, as acceptance of HDE would mean ‘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’ (Faccini Dori [1994] paragraph 24). Therefore, despite the persuasive opinion of Advocate-General Lenz calling for the acceptance of HDE in Faccini Dori [1994], the CJEU refused to follow the Advocate-Generals opinion and endorsed the position in Marshall No.1 [1986], that directives can only be enforced vertically.

3.3 Criticisms of the public/private divide
Many legal academics encourage the acceptance of the HDE of Directives, as they criticise the rationale in Marshall No.1 [1986] and argue that ‘the policy behind the present rule is flawed and that the reasons given for denying HDE, whether derived from the wording of the Treaty or legal certainty, are unconvincing (Craig 2009, 350).

The textual argument put forward by the CJEU for the denial of HDE is far from accepted, as certain Advocates-General and academic commentators encourage the use of HDE, as is evident in the opinions
of AG Jacobs in *Vaneetveld v SA Le Foger* [1994] and AG Lenz in *Faccini Dori* [1994]. Furthermore, some academic commentators maintain that this interpretation of the Article in *Marshall No.1* [1986] was a misunderstanding of the Article’s actual intentions as ‘the phrase “Member State to which it is addressed” speaks to the distinction between states, and not to any distinction between a state and the individuals therein’ (Craig 1997, 521). If applied literally, a state should only be bound if the directive is addressed to it, after which it will be obliged to take the implementing measures.

Additionally, it has been argued that the potential abolishment of the distinction between directives and regulations, if directives were to be permitted HDE, does not provide a convincing reason for the denial of HDE. Craig maintains ‘the argument as stated would apply equally against vertical direct effect, and yet this has been an accepted part of Community case law for many years’ (1997, 522).

Furthermore, the *Marshall No.1* [1986] decision is criticised from a terminological perspective, for its reference to a vague conception of public authority. It is widely acknowledged that ‘The problem arises essentially from the Court’s use of the words “State authority”, “organ of the State” and “emanation of the State” interchangeably with the expression “public authority”’ (Curtin 1990, 197). Therefore, the problem for individuals when enforcing their rights against Member States lies here: in what constitutes a public body. Nevertheless, Advocate General Slynn’s opinion in *Marshall No.1* [1986] (735), provides that ‘as a matter of community law, ... the “State” must be taken broadly, as including all the organs of the state’, however he further offers the opinion that ‘the “state” in a particular national legal system must be a matter for the national court to decide ...’. This consequently gives rise to a lack of uniformity, due to differing interpretations by the different courts.

Whilst the arguments for the denial of HDE appear weak, forceful arguments have been advanced to abolish the public/private distinction. It is widely acknowledged that denial of HDE can be side-stepped, by using the von Colson [1991] principle of indirect effect, whereby directives can be enforced horizontally by placing NCs under the duty of ‘sympathetic interpretation’. Therefore, there appears no reason to protect private parties from the enforcement of directives. Furthermore, it is argued that:

> it is more constructive to focus on what public law and private law have in common than on what are supposed to be the differences between them ... Both ... are concerned ... with the control of power and protecting individuals against abuses of power ... (Oliver 1999, 11).
There clearly appears to be a degree of force in this argument, as one would wish all those who wield power to be held accountable, so why should this not be extended to acceptance of HDE, as an approach focusing on protecting individuals against abuses of power, is clearly inconsistent with the denial of HDE.

Additionally, opinions of Advocates-General in cases following Marshall No.1 [1986] also support the need for HDE, in order to create legal certainty and promote uniformity throughout the EU legal system.

3.4 Public bodies in EU Law: the scope of Foster

The distinction between public and private bodies holds vast importance, as only public bodies fall within the scope of vertical direct effect of directives. However, whether this approach is workable in practice is questionable, as many private bodies appear to be caught by the vertical direct effect of an EU directive.

This is partly due to the CJEU’s broad definition of ‘emanation of the state’ in its decision in Foster v British Gas [1990] at paragraph [18] which includes ‘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’, which seems to dilute the strength of the restriction established in Marshall No.1 [1986]. Although the CJEU intended to formulate a test which would dispel any future uncertainty, subsequent case-law illustrates that this test has, instead, created much legal uncertainty, due to different interpretations of the Judgment in different cases.

The ‘general argument against HDE has been undermined ... by the wide range of bodies which the Court of Justice is prepared to count as “emanations of the state”’ (Leyland and Woods 1997, 150). Therefore, in theory, the wide scope of the definition in Foster [1990] has the potential to merge the public/private boundaries. Furthermore, the flexibility of this broad approach based upon the ‘special power’ element demonstrates the CJEU’s willingness to look at the nature, rather than the source, of the power being exercised, to determine public body status. This liberal approach clearly suggests a possible acceptance that the public/private divide is not a useful one to delineate, as looking to the nature of the power being exercised would broaden the scope of direct effect to
cover bodies which provide a public service and exercise power, special in nature, due to the significant impact it has on the public, regardless of the source from which the power derived, whether public or private. Therefore, a liberal interpretation of this definition moves away from the public/private divide, placing attention on abuse of power, by focusing on the nature of the power wielded.

This decision in Foster [1990] is reinforced in Kampelmann [1997] where the CJEU confirmed that, despite a directive being incapable of imposing obligations on an individual, thus incapable of being relied upon against an individual, the directive in question may be relied on against organizations 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 the relations between individuals ... such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility, by the public authorities ... for providing a public service (Kampelmann 1997, paragraph 46).

This demonstrates the Court’s willingness to look at the nature of the power, and not just the source of the power, to determine public body status.

Furthermore, the CJEU have illustrated in the recent cases of Marrosu & Sardino [2006] paragraph [29] and Vassallo [2006] paragraph [26] that:

It has consistently been held that a directive may be relied on not only against State authorities, but also against organisations or bodies which are subject to the authority or control of the State or have special powers ...

Therefore, the Court clearly appears to refer to the alternative test laid down in Foster [1990] paragraph [18], to determine public body status. The CJEU, therefore, illustrates a consistent approach when referring to such bodies ‘irrespective of their legal form’, indicating the courts’ inclination to look at the nature of the power and not the source of the power when determining whether a body may be deemed ‘emanation of the state’. Consequently Foster [1990] illustrates an attempt to move away from the public/private divide.
3.5 Steps towards an acceptance of Horizontal Direct Effect

Although the CJEU has not yet applied HDE overtly, recent cases illustrate the CJEU’s softened approach towards HDE, which demonstrates the public/private divide is unworkable in practice. A tentative step towards the acceptance of HDE was taken by Advocate-General Jacob in his opinion on Vaneetveld [1994] paragraph [18], whereby he expressly disagreed with the public/private distinction drawn in Marshall No.1 [1986] on the basis that ‘[i]t is well known that case-law has given rise to anomalies’. The opinion of Advocate-General Jacobs, that directives should be capable of HDE, was based on a number of factors: that directives are capable of horizontal effect using indirect effect, it would promote uniformity and he further suggested that ‘it might well be conducive to greater legal certainty, and to a more coherent system, if the provisions of a directive were held in appropriate circumstances to be directly enforceable against individuals’ (Vaneetveld [1994] paragraph [18], per AG Jacob). This is clearly a logical approach, as the very broad interpretation of the notion of Member State (MS) undoubtedly gives rise to uncertainty. However, the CJEU disregarded the Advocate-Generals opinion on this issue.

Nevertheless, the CJEU had the opportunity to allow HDE in the case of Faccini Dori [1994] whereby Advocate-General Lenz suggested that HDE was essential in certain circumstances and that denial of HDE would not promote equality. Moreover, Advocate-General Lenz Faccini Dori [1994] paragraph [48], justified that:

Considerations favouring the horizontal effect of directives reflect a drive to do justice by the beneficiary of a provision which the Community legislator intended to be binding and not to abandon his situation … to the whim of a Member State in default of its obligations.

This clearly appears to indicate similar notions of what Oliver (1997) calls ‘common values’ which refer to the need to control the exercise of power by the more powerful parties and protecting the autonomy of weak individuals. Moreover, Advocate-General Lenz further justified the need for HDE on two grounds:

First, it is unsatisfactory that individuals should be subject to different rules, depending on … [their] … legal relations with a body connected with the State or with a private individual.
Secondly, it is contrary to the requirements of an internal market for individuals to be subject to different laws in the various Member States (Faccini Dori 1994, paragraph 51).

Nevertheless, the CJEU again refused to value the Advocate-Generals opinion and endorsed the position in Marshall No.1 [1986].

However, despite the denial of HDE in Faccini Dori [1994] the CJEU appears to allow HDE, in a form of disguised vertical direct effect referred to as the ‘incidental horizontal direct effect’. Accordingly, ‘the cases involve a directive that has influenced the outcome of the cases involving private parties, but in an incidental rather than a direct way and without imposing a strict obligation’ (Foster 2009, 179). The leading case in this line CIA Security [1996] demonstrates the attempts made to abolish the public/private distinction, by allowing Directive 83/189 to be enforced horizontally, between private parties, by way of defence. However, this approach is justified as a defence, to be used as a ‘shield’ and not a ‘sword’. Furthermore, subsequent case-law demonstrates that CIA Security [1996] is merely an exception to the denial of HDE, as the CJEU in Lemmens [1998], involving the same directive, retreated from the position that directives should be given HDE. The decision in Lemmens [1998] was justified on the basis that the CJEU’s measures taken in CIA Security [1996] should only apply in relation to the free movement of goods, as one of the EU’s fundamental principles, to promote trade within the internal market and not in relation to direct effect. However, it is more than likely that the CJEU’s retreat from allowing HDE is based on the resistance by some MSs and the subsequent accusations by such MSs that the CJEU is attempting to abolish the public/private divide. Nevertheless, given that many directives cover the free movement of goods, CIA Security [1996] as an exception to the denial of HDE may still have significant impact for individuals enforcing their EU law rights.

Additionally, the case of Unilever Italia *2000+ also demonstrates the CJEU’s blurring of the public/private boundaries where, despite intending to distance itself from a vertical/horizontal distinction, the CJEU ruled that a Member State’s failure to implement Directive 83/189, allowed the same directive to be relied upon against a private party. The rationale for this decision was to prevent any party benefitting from a MS’s failure to comply with the notification requirements of a directive. Consequently, it appears the CJEU in Lemmens [1998] extended the ‘incidental horizontal direct effect’ in CIA Security [1996], to contractual relations between two individual parties. The ‘incidental horizontal direct effect’ of directives effectively allows provisions of an unimplemented directive to produce some
degree of legal effects in a dispute between two private parties, which does not seem to sit comfortably with the rule in *Faccini Dori* [1994]. On this basis (Senyucel 2005) identifies the Court’s reasoning (in distinguishing *CIA* from *Dori* and *Lemmens* from *CIA*), as dependent upon the aims of the directives, rather than providing a clear explanation of the application of the direct effect of directives. Nevertheless, although the cases do not establish the HDE of directives, the CJEU clearly appears to allow ‘incidental horizontal direct effect’. Therefore it may be concluded that:

directives are being interpreted to determine the validity of national law. This may affect the legal position of private parties involved in cases; but any such effect only amounts to preventing reliance on national law which does not conform with Community law – hence the view that the effect, as far as the private parties are concerned, is incidental only (Foster 2009, 181).

Furthermore, the CJEU in the case of *Werner Mangold v Rudiger Helm* [2005] appears to indicate a further merging of the public/private boundaries in relation to breaches of fundamental general principles of the TFEU regarding age discrimination. Accordingly, a contract which was in breach of a directive but lawful under national law, enabled the directive to be relied upon against private parties even before the time limit for implementation had expired. However, the judgment itself contains no reference to the scope of direct effect, whether vertical or horizontal. Accordingly it has been suggested that the CJEU maintains that ‘a directive – or rather a constitutional principle upon which a directive is framed – having direct effect on a legislative activity that impacts on horizontal relations is not the same as a directive having horizontal effect itself’ (Schiek 2006, 337). Consequently the CJEU may justify this decision on the basis that a distinction between vertical and HDE would be abolished in circumstances where there is a breach of a fundamental general principle of the TFEU. However, the CJEU may potentially justify this decision, based on reluctance to allow private parties to benefit from a MS’s failure to fulfil the notification requirements under the directive, similar to the approach taken in *CIA Security* [1996] and *Unilever Italia* [2000].

Moreover, the CJEU has handed down another major judgment on the horizontal direct effect of directives, on age discrimination yet again, in the recent case of *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010]. This decision has far reaching implications, as the CJEU allowed a national horizontal situation to fall within the scope of EU law, by encouraging the NC to seek to achieve the same result as
if the directive had HDE when a non-implemented directive ‘gives expression’ to a general principle of EU law, by disapplying provisions contrary to the fundamental principle, to ensure the NC provides the legal protection which individuals derive from EU law. This therefore demonstrates that the CJEU is ill at ease with maintaining the public/private divide in relation to the enforceability of EU directives.

4. National Court approach: a comparative analysis

Whilst the case law on national enforcement of directives has undoubtedly introduced complexity within EU law, it arguably appears the problem lies with NC’s interpretation of the Foster [1990] paragraph [20] judgment, which is inconsistent with the CJEU’s approach, and consequently causes many difficulties in drawing a clear dividing line between public and private bodies. Furthermore, along with NCs it seems many legal academics (including J. Eady and C.D. Campbell) have also interpreted that, although the body of the CJEU’s reasoning in Foster [1990] paragraph [20] appears to indicate the requirements should be read disjunctively, the operative part of the judgment – that is the actual answer – in response to the question relating to British Gas, is cumulative. Therefore NCs and certain academics perceive the definition to consist of cumulative requirements. Accordingly,

a body … providing a public service under the control of the State and has for that purpose special powers … is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon. (Foster [1990] paragraph 20).

Consequently, this three-stage cumulative test requires a higher threshold to be met before determining public body status, as a body would need to satisfy all three requirements, as opposed to one of two requirements laid down by the CJEU in Foster [1990] paragraph [18]. Consequently, the availability of direct effect, as a means of enforcing rights, is severely limited.4

The ruling in Foster [1990] paragraph [18], as well as in previous judgments, ‘is not a matter for the Court of Justice [now CJEU] but for the national courts to determine, in the context of the national legal system, whether the provisions of a directive may be relied upon against a body …’ (Foster [1990] paragraph 13). However, according to the Foster [1990] paragraph [15], NCs should decide in accordance with the definition laid down by the CJEU. This appears to produce a lack of uniformity due to differing interpretations by different courts.
Nevertheless, the UK court’s initial approach to identifying an ‘emanation of the state’ can be seen in *Doughty v Rolls Royce Plc* [1992], where the facts were not dissimilar to those which gave rise to the applications in *Foster* [1991, HL]. However the Court of Appeal (CA) ruled that Rolls Royce could not be deemed an ‘emanation of the state’, as it did not provide a public service, thus did not satisfy the tripartite cumulative formula. Therefore, despite the similarities between the two cases, it is apparent that a cumulative test would be much more difficult to satisfy. Furthermore, even academic commentators who consider the cumulative test to be the correct formula, criticise the definition as ‘it is suggested that the formulation is of minimal assistance, not least because the formulation cannot coherently be applied by English courts’ (Campbell 2009, 113). This view appears logical, as the CA in *Doughty* [1992] went on to emphasise that even in cases of the same type as *Foster* [1990] ‘the absence of a factor will not necessarily be fatal, it will need the addition of something else, not contemplated by the formula, before the Marshall principle has a prospect of being brought into play’ (*Doughty* [1992], per Mustill L.J). However, although this additional ‘requirement appears ambiguous, and the court’s failure to give any indication whatsoever as to what would constitute such an additional requirement would therefore cause incoherence as to when the tripartite definition is applied by NC’s, the Court may take a flexible approach towards such an interpretation, as is evident in the CA case *National Union of Teachers v Governing Body of St Mary’s C of E Junior School* [1997].

Furthermore, the UK case of *Griffin v South West Water Services Ltd* [1995] also demonstrates the NC’s willingness to adopt the tripartite test, whereby the High Court (HC) held, that:

> In determining whether a body provides a public service ‘under the control of the State’, the question is not whether the body in question is under the control of the State, but whether the public service in question is under the control of the State.

Nevertheless, Blackburne J. concluded that the Water Act 1991 indicated that South West Water did perform a public service under the control of the state, thus satisfying the control requirement. Moreover, it is suggested that ‘The judgment in *Griffin*, indicating that regulatory control over an industry is a sufficient element of control for direct effect to apply, clearly takes a very wide view of the direct effect doctrine’ (Arrowsmith and Greene 1995, CS11). This demonstrates that private bodies whose activities include a public element would fall within the scope of direct effect, which reveals the merging of the public/private boundaries. In contrast a far narrower approach is taken to the control
element where a body carries out commercial functions, as seen in *Byrne v Motor Insurers Bureau* [2007]. However, it is incorrect in principle to apply the three-stage cumulative test, which evidently has very limited availability and remains difficult to satisfy.

Nonetheless, the UK courts have shown some leniency in their approach to determining public body status, by adopting a flexible interpretation of the additional requirement introduced in *Doughty* [1992]. This can be seen in *National Union of Teachers v Governing Body of St Mary’s C of E Junior School* [1997], whereby the CA indicated it would not be necessary to adopt the tripartite test in relation to a body carrying out traditional state functions. However, the CA indicated that the *Foster* [1990] test was not intended to be taken as a statutory definition, and suggested that the starting point for determining public body status should be the cumulative test set out in *Foster* [1990]; however, it should not be confined to this. Accordingly, Schieman LJ, in *NUT* [1997] emphasised that the CJEU merely suggested one potential way of identifying a ‘state’ or ‘emanation of the state’, in its judgment in *Foster* [1990], as the definition ‘included…’ certain types of bodies, thus derived the implication that the definition is not conclusive. Consequently, the court in *NUT* [1997] referred to the CJEU’s previous judgment in *Fratelli Costanzo v Milano* [1989], where the concept of ‘emanation of the state’ was deemed to be very broad, as it referred to ‘all organs of the administration, including decentralized authorities such as municipalities’. Furthermore, Schieman LJ suggested ‘[i]t is clear from the wording of paragraph [20] and in particular the words “is included among” that the formula there used was not intended to be an exclusive formula’ *NUT* [1997]. As far as paragraph [20] is concerned this is certainly a true statement; however, as ‘included in any event’ refers to paragraph [18], therein lies the problem. It appears more appropriate to ascertain that the test derived from the *Foster* [1990] judgment is alternative, deriving from paragraph [18], which would not require the NCs to apply the cumulative test on an *ad hoc* basis. However, even under the alternative test in paragraph [18], the NC would be left with some discretion over the extent of control required or the nature of power. Therefore, this liberal approach adopted in *NUT* [1997] clearly demonstrates an attempt to move away from the public/private divide where traditional state functions are concerned, as similar to the CJEU’s approach the UK court indicates that public body status may be established based upon the nature of the functions carried out by the body in question, rather than the source of the power.

Therefore, it is self-explanatory that the definition derives from *Foster* [1990] paragraph [18] and that paragraph [20] is merely an application of the definition, which the CJEU has clarified in subsequent case
law. However, whether the alternative test in Foster [1990] can achieve uniformity, has been subjected to criticism by Advocate-General Jacobs in Vaneetveld [1994] as

directives can be enforced even against commercial enterprises in which there is a particular element of State participation or control ... notwithstanding that those enterprises have no responsibility for the default of the Member States, and notwithstanding that they might be in direct competition with private sector undertakings against which the same directives are not enforceable (Vaneetveld 1994, per AG Jacob).

Accordingly, Advocate-General Jacobs believes the public/private divide should be abolished and Directives should be given HDE, to create legal certainty and promote uniformity.

5. Conclusion
It can be identified, despite the confusion emanating from the public/private divide, that public body is defined in paragraph [18] of the Foster [1990] judgment, to include bodies either subject to state control or those which have special power, as is evident in subsequent CJEU case-law. Furthermore despite the UK Courts’ persistency in applying a strict interpretation of Foster [1990] deriving from paragraph [20], as is evident in Doughty [1992], the leniency adopted by the NC in NUT [1997] and Griffin [1995] indicates Foster [1990] paragraph [20] is unworkable in practice and subsequently supports the view that the definition derives from Foster [1990] paragraph [18].

However, although historically courts have been adamant in maintaining the distinction between public/private bodies, a gradual acceptance of abolishing the divide is evident in CJEU and NC case-law. This has been highlighted by the attempts made to erode the distinction by Advocates-General in Vaneetveld [1994] and Faccini Dori [1994], favouring HDE, as well as the tentative steps taken by the CJEU to move away from the divide and focus on abuse of power, by ‘incidental’ HDE, demonstrated in CIA Security [1996]. Additionally, the broad scope of the definition laid down by the CJEU itself, has the potential to catch private parties, thus illustrating the Court’s attempt to move away from the divide. Furthermore UK Courts also appear to be moving away from the public/private divide in favour of placing attention on the abuse of power, as National law enforcement of directives, demonstrates the UK Court has adopted a lenient approach to establishing public body status in NUT [1997].
Therefore, the unavoidable truth is that the public/private divide is not an easy one to draw. However, recent CJEU case law clearly demonstrates a trend towards a shift away from the public/private divide, in favour of placing attention on abuse of power; therefore, if the Courts continue in such a fashion, the divide may in the future become of little importance.

Notes

This article is extracted from a final year dissertation (2010) and has since been amended slightly to incorporate recent research and developing case law in this area.


5. See CJEU cases *Foster, Kempelmann, Marrusso and Vassallo*.


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