Bridging the Gap: Asserting direct Effect against the Motor Insurers' Bureau

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Abstract

This article argues the case for the application of direct vertical effect of Article 10 of the European Council Directive 2009/103/EC on motor insurance against the UK's Motor Insurers' Bureau (MIB). It discusses the European doctrine of state liability under the principles formulated by the Court of Justice of the European Union in *Becker*,[1] *Johnston*[2] and *Marshall*[3] and the proper approach to fixing liability on public authorities and other emanations of the state, considering the criteria devised by the Court of Justice in *Foster v British Gas plc*.[4] The article recommends an approach that concentrates primarily on the public service delegated to the body, rather than the organisation itself; contending that the doctrine of state responsibility, properly applied, extends to the MIB.

Preface

In *Mind the Gap!*[5], this author reviewed the minimum standard of protection imposed by the European Council Directive 2009/103/EC[6] on motor insurance (the Directive), explaining how the European insurance requirement has evolved over the years into a widely scoped free-standing principle. It then identified ten different areas of nonconformity in the UK's domestic transposition of that law and attempted to explain the underlying causes of that disparity. It considered the various obstacles to legal redress, including the evident reluctance by successive UK governments to remedy these longstanding infringements of European law.
The extensive cost, litigation risk and delay involved in presenting a *Francovich*[7] action for damages against the state for failing to fully implement the Directive can be a daunting prospect for an individual[8]. Furthermore, as we shall see from the analysis of *Byrne v MIB*[9] and the recent decision in *UK Insurance v Holden*,[10] the UK courts cannot be relied on to cure defective national law provisions through a European law consistent interpretation. This paper identifies what promises to be a more direct and certain route to redress that enables motor accident victims to access their full legal entitlement under European law. It allows individuals adversely affected by legislation or other national law provisions that fail to properly implement the Directive, to rely directly on the wording of the Directive itself against the MIB, in its capacity as the UK's authorised compensating body.

On the nature of the MIB

The issue as to whether or not the MIB is an emanation of the state is said to determine whether individuals can rely directly on the wording of the Directive in a civil action against the MIB, instead of indirectly through the national law provisions that are supposed to implement that law. The Department for Transport and the MIB

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[1] Case C-271/91.
[2] Case 222/84.
[3] Case C-188/89.
[4] Case C-188/89.
[5] British Insurance Law Association Journal, January 2016.
[6] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.
[7] *Francovich and Others* [1991] CJEU Joined Cases C-6/90 and C-9/90.
[8] *Francovich* claims can be hazardous. They are public law actions where a claimant does not enjoy the protection conferred by qualified one-way cost shifting that the Civil Procedure Rules impose in a normal personal injury claim; if pursued as a separate action, it can add years to the litigation; it usually features a significant disparity in the respective parties' resources and know-how, and the *Factortame* criteria for assessing whether a breach of European law was sufficiently serious often confers a wide discretion on the court. Another potential disadvantages is that the award is assessed on a loss of chance basis rather than the tort law *restitutio in integrum* principle, which can result in a lower award.
[9] [2007] EWHC 1268 (QB).
[10] [2016] EWHC 264 (QB).

itself both contend that the MIB is merely a private company contracting at arm's length with the State to discharge various outsourced public services. Their common position is that the MIB's responsibilities are defined by its contractual obligations to the state and no more.

It is certainly true that the MIB is a privately owned corporation limited by guarantee. From the little we know of its day to day affairs, it would appear that these are conducted and managed free from any overt state control. It is a consortium: one exclusively owned and managed by every motor insurer authorised[11] by the government to provide insurance in the UK. In this sense the MIB is indisputably an emanation of the commercial interests of what collectively could be described the motor insurance industry. It is said to discharge its role as the body appointed by the State to compensate victims of uninsured and untraced drivers by fulfilling its contractual obligations to the Secretary of State for Transport, in keeping with many other outsourced service providers. The contractual arrangements are found in a succession of private law contracts with the Secretary of State for Transport.[12]

This has led a number of senior judges to opine that the MIB is no more than a privately owned and managed contractor. Few could be more eminent or emphatic than Hobhouse LJ's *obiter* comments in the conjoined appeal in *Mighell v Reading.*[13] When considering whether the Directive was capable of direct effect against the MIB in an untraced driver claim, he said:

> "In my judgment the correct view to take of the role and status of the Bureau is that it is a private law contractor and no more and as such is not capable of being covered by any direct effect the Directive[14] may have."[15]
> ....
> "The Bureau is not constitutionally an emanation of the state: it is a private law company. It is not functionally an emanation of the state: it acts on its own behalf in the commercial interest of its members not on behalf of the state or as a delegate of the state. It enters into commercial private law contracts with inter alia the Secretary of State."

Although his colleagues, Schiemann and Swinton Thomas LJJ, were less strident in declining to classify the MIB as an emanation of state,[16] they nevertheless supported the view that the Directive's predecessors were not capable of direct effect against it.

These weighty opinions were a highly influential factor in the deliberations of an able High Court judge, experienced in public international law. Flaux J had been specifically tasked with establishing whether the MIB was an emanation of the state and thus subject to the direct effect of the Directive. In June 2007 he ruled in *Byrne v MIB*[17] that, not only was the Untraced Drivers' Agreement 1972 no more than a private law agreement, but that as such it was not subject to a *Marleasing*[18] style European law consistent construction. He also held that as the MIB was not an emanation of the state the Directive was incapable of having direct effect against it. As this decision remains the only UK authority on these points, it presents an obstacle to victims seeking to cure the numerous unlawful exclusions and restrictions in MIB liability in the two schemes it operates.

Against this orthodoxy, it is just as clear that the MIB also possesses characteristics in keeping with a public body, a state agency and even a public authority. For a start, its genesis predates its formal constitution as a

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[11] The Secretary of State for Transport is responsible for regulating every motor insurer in the UK, membership of the MIB and contributing to its compensation guarantee fund are preconditions of their authorised status
[12] Currently the Untraced Drivers' Agreement 2003 and the Uninsured Drivers' Agreements 1999 and 2015
[13] *Mighell* v *Reading and Another; Evans v Motor Insurers' Bureau; White v White and Another* [1999] Lloyd;s Rep IR 30.
[14] Hobhouse LJ is referring to the Second Council Directive on Motor Insurance (84/5/EEC), the relevant provisions of which are incorporated into article 10 of the Directive (2009/103/EC).
[15] *Mighell*, p. 1272.
[16] If only because of the ambiguity as to what constitutes an emanation of state.
[17] [2007] EWHC 1268 (QB).
[18] *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 - Case 106/89, where the CJEU ruled I4135 the CJEU ruled that: '*... in applying the national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 189* [now art 249 EC].

private limited company in 1946 and it is one that has a distinctly public service nature. The MIB owes its existence to an accommodation reached in 1945 between the state and every motor insurer then authorised by the state to conduct business in the UK. This agreement is usually referred to as the "Principal Agreement", by which the motor insurance sector collectively agreed to incept and become members of a "central body" with the express purpose of entering into a subordinate agreement with the state with the ultimate aim of funding the obligations imposed under it to compensate victims of uninsured vehicles.

The Principal Agreement requires the "central body", subsequently incorporated as the MIB, to fulfil two separate public service roles. First, to satisfy any outstanding judgment in respect of a liability which is required to be covered by a policy of insurance or security under what was then Part II of the Road Traffic Act 1930 but is now Part VI of the Road Traffic Act 1988; whether or not any insurance was in place for the vehicle responsible, whenever a relevant judgment is outstanding for seven days. Its secondary role was to compensate victims of foreign visiting motorists.

This focus of this paper is the domestic arrangements for guaranteeing the compensatory entitlement of motor accident victims other than the responsible driver. The first of these subordinate agreements was the Uninsured Drivers' Agreement of 1946. There are now two sets of agreements that set out successive compensatory regimes: currently the Untraced Drivers' Agreement 2003 and the Uninsured Drivers' Agreements of 1999[19] and 2015.[20]

The Principal Agreement anticipates the MIB's obligation to compensate third party victims as being distinct from the obligations of the contracting parties, where such a policy existed. It expressly preserves the contractual autonomy of authorised insurers to agree terms with their policyholders as well as affirming an insurer's right to recoup its outlay outside the scope of cover from a defaulting assured party[21].

Important features of the Principal Agreement are that the subordinate agreement it anticipates must be in a form approved by the Minister for War Transport[22] and that disputes about the reasonableness of a requirement imposed by the MIB that any particular step be taken to obtain judgment against other tortfeasors should be referred to the minister, whose decision will be final.[23] These provisions reserve of a high degree of potential control by the state over the way the MIB discharges its role. The Department of Transport have confirmed that the Principal Agreement is still in effect[24].

As indicated above, it is commonly perceived that the MIB's classification as an emanation of the state is a pivotal requirement. The answer is said to determine whether private individuals can rely upon the legal rights conferred on them by Article 10 of the Directive in legal proceedings against the MIB.[25] If they can then this would entitle them to invite the court to disregard much of the present non conformity with the Directive that peppers our national provision[26] that is supposed to guarantee compensatory protection of motor accident victims but which all too often serves to obstruct them from accessing their basic legal rights conferred under European law.

Part of the difficulty in making a correct attribution is due to the imprecision associated with what is meant by an "emanation of state". The term is not an autonomous European law term or principle. It is more of a means to an end – an empirically derived shorthand developed by the Court of Justice of the European Union (CJEU) to define a person or organisation that is not part of central government but which is nevertheless so closely connected with a state controlled public service as to justify extending the special rule that enables individuals to benefit from the rights conferred on them by the directive itself as though it been fully transposed into national law. This doctrine is intended to prevent member states from evading liability for failing to properly implement

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[19] Which applies to motor accidents that occurred between1st October 1999 and 31 July 2015.
[20] Which applies to motor accidents that occurred on or after 1 August 2015.
[21] See clause 3 of the Principal Agreement.
[22] Whose role is now exercised by the Secretary of State for Transport.
[23] See clause 4(2) supra.
[24] It is unclear on what basis precisely it could be enforced as many if not all of the original contracting parties have since changed. It was still mentioned in the recitals to every MIB Agreement prior to 2003 but not thereafter.
[25] See below under the heading "On the role entrusted to the Article 10 compensating body".
[26] Including the relevant primary and secondary legislation as well as the minister's private law agreements with the MIB itself.

a directive by outsourcing or otherwise delegating its obligations under that directive to a third party and then washing its hands of all responsibility. In consequence, emanation of state status has something of an elusive "'I know it when I see it" [27] quality that is easy to miss if one adopts an overly formulaic approach. This is why it is necessary to open our enquiry with a review of first principles on state liability.

This paper challenges prevailing judicial orthodoxy that the MIB is not an emanation of state. Furthermore, it also challenges the assumption that it is necessary to demonstrate that the MIB itself is under the control of the state as a precondition of the Directive having direct effect. This paper offers a modified approach to deciding the latter issue. It argues that the proper focus of any enquiry into the direct effect of the Directive against the MIB should centre on the public service devolved, as opposed to the organisation charged with its performance. There is however an obvious overlap between the two, especially in view of the MIB's origin as a body set up specifically to compensate victims of uninsured drivers, so it is important to have a basic understanding of what kind of its constitution and activities.

The MIB has a surprisingly diverse range of commercial and public service interests. Its extensive scope of operations has a chimera-like quality that makes it difficult to categorise simply. The MIB is a not for profit organisation, in keeping with its public service ethos. However its CEO is a highly innovative and the organisation is involved in a number of commercial undertakings.

The MIB's annual reports indicate that it provides training, auditing, compliance and management services. Presumably the revenues generated by these enterprises are applied to offset its operating costs, serving ultimately to reduce the amount of the levy it imposes on its members to fund the two compensatory schemes it is tasked with managing.

Against this, according to the Chairman's opening statement in its 2014 annual report, the MIB has a "strategic aim of achieving a reduction in the level and impact of uninsured driving in the UK coupled with ensuring that the victims of uninsured and 'hit and run' drivers receive fair and prompt compensation". This openly articulated public service role is also borne out by the way it works in partnership with various government departments and agencies (primarily the Department for Transport and the Ministry of Justice). These activities include anti-fraud initiatives, managing the Claims Portal, playing a significant role in developing and managing the Medco Scheme[28], managing the Employers' Liability Tracing Office, operating a helpline to assist the police identify whether vehicles are insured, developing and operating askCUE,[29] and it acts as the UK appointed body to maintain the Insurance Database[30]. From this it will be appreciated that the MIB has diversified its activities significantly since its inception nearly seventy years ago, in 1946.

The superior law governing the MIB's compensatory role now derives from Europe and is set out in the Directive. This is considered later under *"On the role entrusted to the Article 10 body"*. The MIB is a consortium owned and managed by the multi-billion pound motor insurance sector, where licence to operate is made conditional upon membership and where each member is obliged to pay a hefty contribution every year to its levy. Allied to this is the MIB's close and extensive working relationship with the government in the fields of activity identified above which allows it to act akin to, if not in actuality, as a quasi motor insurers' civil service and a very effective lobbyist of its members' interests.

The MIB has extensive and exclusive links with central government in keeping with its important role; something not enjoyed by ordinary citizens. A recent Freedom of Information Act request that sought to ascertain the extent of this relationship was declined on the ground that it would be too expensive to provide statistics even of high level contact between the government and the MIB.

Account must also be taken of the MIB's public law status conferred under: (i) under the Green Card Scheme, incepted in 1949, where the MIB acts as the UK's handling bureau tasked with compensating victims of foreign drivers by the United Nations Economic Commission for Europe, and its membership of the Council De Bureau

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[27] Per Mr Justice Potter Stewart, in his Supreme Court judgment in *Jacobellis v Ohio* 378 U.S. 184 (1964)

[28] That regulates the commissioning and disclosure of medical reports in soft tissue injury claims introduced under the Ministry of Justice's Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

[29] This is an online service that enables claimant representatives to check the number of previous personal injury claims made by their clients.

[30] Which member states are required to maintain under the Directive.

and (ii) the additional European law roles it has assumed under the Directive. As to the latter, see below under *"On the role entrusted to the Article 10 compensating body"*.

This paper argues that any properly informed court should recognise the MIB for what it is: a public body charged with an important public service that is under the control of the state and for which purpose it is conferred with special powers; and that the current narrative that presents the MIB as no more than a private independent contractor is overly simplistic.

Yet another difficulty with classifying the MIB's proper legal status has to do with the way previous forensic enquiry has placed far too great an emphasis on the nature of the MIB itself (the legal formalities associated with the way it operates, the degree of control exerted over it by the State in its day to day affairs, its special powers and so forth), all arguably at the expense of any sufficient analysis of its public service role as a state authorised compensating body discharging the role set out in Article 10 of the Directive. The debate as to whether the MIB is an emanation of state risks obscuring a proper European consistent analysis that depends on superior European law principles being applied independently of this ambiguous labelling.

Accordingly, the author's analysis will open by identifying the relevant European law governing state liability for infringements of directives and how this has been extended to embrace certain organisations so closely connected to the state to warrant, at least for these purposes, being identified with it for the purposes of direct effect. It will review the European and national jurisprudence on the conditions necessary for direct vertical effect to apply before moving on to address the legal position of the MIB itself, both on Flaux J's own terms[31] and independently thereof.

First principles on state liability

It is a commonplace and fundamental principle of European law that directives are addressed to the member states and that it is the responsibility of each member state to implement a directive's objectives into its national law.[32] Member states have a treaty obligation "to achieve the result envisaged by a directive and their duty ....is to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation..."[33] The directive requires every member state to implement into its own law the rights it confers on individuals but it does not automatically entitle the intended beneficiaries to rely on those provisions in their home court. Consequently, a claimant's first recourse is to look to the national law implementation of the directive for his or her legal remedy. Unfortunately, the UK's transposition of the Directive is riddled with defects that detract from the minimum standard of compensatory protection prescribed by its provisions.[34] It is also well known that where a directive's objectives have not been properly implemented a claimant may be able to argue for a European law consistent interpretation of the defective national law, in so far as this is possible.[35] Failing that, an individual may in certain prescribed circumstances claim damages against the member state under *Francovich*[36] principles for the loss caused by its failure to fully implement the directive's objective. Unfortunately, as intimated above, our national courts have an inconsistent track record in delivering a purposive construction of the UK's implementation of the Directive and *Francovich* action can be fraught with difficulty.

The principle of state liability for loss and damage caused to individuals by a breach of EU law is inherent to EU Treaty law.[37] This is a fundamental doctrine of which the principles of state liability under *Francovich* and

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[31] Whose primary focus was on the nature of the MIB as opposed to the public service devolved to it.
[32] *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] CJEU Case 14/83.
[33] *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] CJEU Case 222/84, para 6.
[34] See the author's earlier article, *Mind The Gap!,* British Insurance Law Association Journal February 2016.
[35] See Aikens LJ's helpful analysis of the principles applied by the UK courts to the consistent construction in *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity and Secretary of State for Transport* [2012] EWCA Civ 1166,see Part VI of the judgment: *Principles of interpretation of national laws which are based on EU Directives*.
[36] [1991] CJEU Joined Cases C-6/90 and C-9/90; see the footnote to this case above in the *Preface* alluding to these difficulties.
[37] See *Francovich* para 35.

direct effect of directives under *Foster v British Gas*[38] are subordinate manifestations. The following extract from the CJEU ruling in *Becker v Finanzamt Münster-Innenstadt* [39] explains this:

> "21 .....that whilst under Article 189[40] regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects.
> 22 It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude in principle the possibility of the obligations imposed by them being relied on by persons concerned.
> 23 Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law[41].
> 24 Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State."

A modified principle

Accordingly, the principle by which a directive can be said to have direct effect against a state is an exception to the basic rule.[42] To be exercised, the nature of the right conferred under that directive must satisfy the following threshold criteria: first it must be a right conferred on individuals; second, it must be unconditional and sufficiently precise to enable a court to determine what rights have been conferred, and finally there must be a direct causal link between the state's failure to implement the directive and the loss sustained.[43]

The way such state liability works is analogous to the common law principle of estoppel. However in this instance, individuals gain a positive right to rely on the rights conferred on them by a directive, against the State, on the basis that a State is prevented from relying on incompatible national provisions perpetuated by its own failure to fully implement the directive conferring those rights.[44]

There can be little, if any, doubt that Articles 3 and 10 of the Directive satisfy these threshold conditions. Article 3 requires every member state "to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance."[45] The comprehensive nature of this obligation was self-evident from the language of the wording of the Directive's predecessors in 1990[46], if not earlier. Any scintilla of doubt both as to its meaning and the high importance placed on the legislative objective of protecting individuals was removed following the CJEU's ruling in *Bernaldez*[47] in 1996. A raft of CJEU rulings have since endorsed *Bernaldez*, culminating in the most recent judgment in *Vnuk v Triglav*[48] in 2014. Indeed it is hard to envisage how any serious challenge could now be raised in this regard.

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[38] [1990] CJEU Case C-188/89.
[39] [1982] CJEU (Case 8/81),followed in *Francovich* paras 11 and 12.
[40] Referring to Article 189 of the EEC Treaty, Article 198 Maastricht consolidated version.
[41] See also *Francovich* para 32 which requires national courts, where they have jurisdiction, to give full effect to EU law and to protect the rights it confers on individuals.
[42] Mustill LJ provides a clear explanation for the basic rule in *Doughty v Rolls Royce Plc* [1991] EWCA Civ 15. In para 10 he states: "It is axiomatic that an individual cannot rely on the Directive merely by asserting rights against another individual which would be secured to him if the European legislation had been domestically put into effect. It is the fact that the Member State is itself relying on the disconformity as against the individual which brings the doctrine into play."
[43] *Francovich* para 11.
[44] *Becker* para 25.
[45] Article 10 is considered below.
[46] The year in which the third European directive on motor insurance (90/232/EEC) was approved.
[47] [1996] CJEU (Case C-129/94).
[48] [Case C-162/13].

In 2006 the CJUE ruled in *Farrell*[49] that Article 1 of the Third Directive on motor insurance (90/232/EEC) satisfied the threshold criteria for direct effect.[50] That provision, now consolidated in Article 12.1 of the Directive, extends the benefit of the Article 3 insurance obligation to "passengers other than the driver, arising out of the use of a vehicle". Article 10 defines the role of the compensating body which every member state must adopt or incept with the object of compensating victims of uninsured and unidentified vehicles at least up to the limits of the Article 3 insurance obligation.[51]

An extended exception

Where many commentators and members of the judiciary are less certain is whether the MIB is subject to the doctrine of direct effect; the broad consensus is that it isn't. Before this question can be answered, it is necessary to review the way state liability for failing to properly implement a directive has been extended, so as to embrace organisations that are not part of central government.

The principle in *Becker* has been applied in a number of important CJEU judgments including, most notably, *Marshall v Southampton and South-West Hampshire Area Health Authority*[52] and *Johnston v Chief Constable of the Royal Ulster Constabulary*[53] and *Foster and others v British Gas plc*..[54] All three of these cases were referred for preliminary rulings from the UK and featured claims by individuals affected by the defective implementation of the Equal Treatment Directive.[55]

In *Marshall*, The CJEU applied the doctrine to a local health authority and ruled that once this doctrine was triggered the concept of direct effect was indivisible, so that:

> ".... where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law."[56]

Accordingly the CJEU ruled in *Marshall* that no distinction was to be drawn in this respect between the actions of a public authority in the discharge of its public service role, in this case acting as an area health authority, and its private arrangements with its employees. In the *Johnston* case the Equal Treatment Directive was adjudged capable of having direct effect against the chief constable of the Royal Ulster Constabulary, notwithstanding the fact that his office was constitutionally independent of state control. The court ruled:

> "....an official responsible for the direction of the police service. Whatever its relations may be with other organs of the state, such a public authority, charged by the state with the maintenance of public order and safety, does not act as a private individual. It may not take advantage of the failure of the state, of which it is an emanation, to comply with Community law".

The significance of *Marshall* and *Johnston* lies in the way they extended the application of this doctrine beyond what many would consider to be central government or state authorities. This development is explained by Advocate-General van Gerven in his opinion of 8 May 1990 in *Foster*. Although the court did not apply the test he recommended[57] for determining the direct effect of a directive, his legal analysis on state liability is so eloquent as to warrant repetition in full:

> "...the point of departure must be the reasoning lying behind the *Marshall* and *Johnston* cases: a Member State, but also ***any other public body charged with a particular duty*** by the Member State

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[49] *Farrell v Whitty & MIB* [Case C-356/05].
[50] *Farrell*, para 37.
[51] This equally unconditional and precise provision is considered in more detail below.
[52] [1993] CJEU Case C-271/91.
[53] [1986] CJEU Case 222/84.
[54] [1990] CJEU Case C-188/89.
[55] 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.
[56] *Marshall*, para 46.
[57] One that focused on the degree of State control influenced over the organisation.

from which it derives its authority, should not be allowed to benefit from the failure of the Member State to implement the relevant provision of a directive in national law. That, however, raises the question how far the expressions "public body", "charged with a particular duty" and "from which it derives its authority" precisely extend. Moreover, it is not entirely possible to give those expressions a precise Community meaning: whether someone forms part of the government, whether a particular duty is a public duty and whether someone derives his authority from the State (whether or not in the sense that he exercises authority delegated by the State) are difficult matters to define, and their meaning differs significantly not just from one Member State to another and within each Member State from one period to another but also in Community law, in so far as they are used there, according to the matter in issue.

In the cases I have referred to, ***the Court did not attempt to define those concepts in the abstract***, and I think it was right not to do so. Nevertheless it appears from those cases that ***the concept of a public body must be understood very broadly*** and that all bodies which pursuant to the constitutional structure of a Member State can exercise any authority over individuals fall within the concept of "the State ". In that respect ***it is immaterial how that authority*** (which I shall call public authority) ***is organized and how the various bodies which exercise that authority are related*** . In the light of the *Marshall*, *Johnston* and *Costanzo* judgments (and the judgment in *Auer* (43) which preceded them) there can be no doubt that they all fall under the concept of "the State", and ***there is no need for any criterion of delegation or control by other public authorities***. That much is certain."[58]

Emanations of the state or public bodies by another name

This then begs the question: what other organisations are caught by the *Becker* principle? As this is primarily a question of fact it is left to the national courts of each member state to make a determination[59]. It is, as we shall see, a concept that is capable of extending beyond the conventional state apparatus such as the legislature, the executive and the judiciary. It has the potential to include all the organs of state including public bodies, local authorities and agencies employed by the state.

Even so, this only takes us so far. Epithets such as "public body,"[60] "public authority,"[61] "state agency"[62] and "emanation of the state"[63] tend to be used interchangeably in this context as convenient pegs on which to hang the concept of a public entity fixed with the extended application of the *Becker* exception that confers direct effect of a directive. Furthermore, they are not free-standing precisely defined concepts. For example, whilst "public authority" is given a highly prescriptive definition in the context of the Freedom of Access to Information Directive[64] the same term is used in a different and more colloquial sense in other contexts. In *Doughty v Rolls-Royce Plc*[65] Mustill LJ noted the ambiguity associated with the concept of "emanation of state". He said that it has one meaning in public international law and he thought quite possibly another in the context of a body potentially fixed with direct effect in this context. That led him to question whether this term was helpful at all. He recommended the simple expedient of sticking to the test laid down by the CJEU in *Foster*, which incidentally makes no reference to emanations of the state.[66] However, it should be noted that an overly rigid adherence to the *Foster* test goes against the grain of European jurisprudence and in particular the way the CJEU has consistently striven to avoid a formulaic approach to this issue.[67]

The European law approach is governed by principle not form. Whilst the principle of subsidiary means that the European Union will not interfere in the way member states organise themselves,[68] this must not be at the expense of undermining the effectiveness of its legislation and the state's Treaty obligations. Thus in *Evans v*

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[58] See para 21 of Advocate General van Gerven's opinion in *Foster*. Emphasis added
[59] *Foster and others v British Gas plc.* [1990] CJEU Case C-188/89, para 15.
[60] Used interchangeably with public authority in the Opinion of Mr Advocate General Van Gerven's in *Foster*, para 21.
[61] *Foster v British Gas* [1991] 2 A.C. 306, per Templeman LJ para 1.
[62] See *Griffin v South West Water Services Ltd* [1995] IRLR 15, para 82.
[63] *Byrne v MIB & Secretary of State for Transport* [2007] EWHC 1268 (QB), paras 48 and 57.
[64] See Article 2(2) of the Freedom Of Access To Information Directive (2003/4/EC).
[65] [1992] IRLR 126 CA.
[66] *Doughty*, para 29.
[67] See the extract from Advocate-General van Gerven's opinion in *Foster*.
[68] [2003] CJEU Case C-63/01.

Secretary of State for Transport and the MIB the CJEU described the MIB as a "public authority" and held that it did not matter that the Secretary of State had chosen to implement what is now the Article 10 obligation to compensate victims of uninsured and unidentified vehicles by means of a private law agreement. What mattered was that the compensatory guarantees conferred under Article 10's predecessor[69] could be accessed by victims from that body directly.[70] The court went on to declare that "...it is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation".

In this the CJEU relied on an earlier ruling, in *Klaus Konle v Republik Österreich*[71], to the effect that member states must ensure that individuals are able to obtain compensation caused by a failure to comply with EU law, whichever public authority is responsible.[72] That same court also declared that a "member state cannot, therefore, plead the distribution of powers and responsibilities between the bodies which exist in its national legal order in order to free itself from liability on that basis".[73] It will be recalled that the *Becker* exception is capable of applying to a body that is constitutionally independent of the State, as in *Johnston*.

The Foster guidance on direct effect

Notwithstanding the CJEU's reluctance to devise a definitive test for determining whether a defectively implemented directive has direct effect against a given organisation, it has been asked for guidance on at least three occasions.

The chief authority is the CJEU's judgment in *Foster and others v British Gas*[74] in which it sets out the factors to be considered when deciding whether a body was capable of being subject to the direct effect exception. The leading UK authority is also conveniently to be found the same case[75] where Templeman LJ elaborated on the CJEU approach to the fact-finding exercise when it returned to the House of Lords from the CJEU in 1991.
In *Foster*, the CJEU was asked by the House of Lords to provide a preliminary ruling on whether Council Directive 76/207/EEC on equal treatment was directly applicable against a publicly owned utility company like the British Gas Corporation. Although the Court left it to the national courts to make its finding of fact it provided guidance on the approach to be taken when determining the kind of public body subject to the direct effect of a directive.

Although the CJEU adopted a different test to that recommended by the Advocate General[76] it was clearly influenced by his analysis of the relevant European jurisprudence, beginning with *Becker*. The key passages in *Foster* are important enough to be recited in full:[77]

> "18 On the basis of those considerations,[78] the Court has held in a series of cases that unconditional 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.
> 19 The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments in Case 8/81 *Becker*, cited above, and in Case C-221/88 *ECSC v Acciaierie e Ferriere Busseni (in liquidation)* [1990] ECR I-495), local or regional authorities (judgment in Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839), constitutionally independent authorities responsible for the maintenance of public order and safety (judgment in Case 222/84

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[69] Article 1(4) of Directive 84/5/EEC.
[70] *Evans*, para 34, see also the CJEU's comments in *Francovich* at para 17.
[71] [1999] CJEU Case C-302/97.
[72] *Konle*, para 62.
[73] *Konle*, para 63; applied in *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] CJEU (Case 424/97), para 28.
[74] [1990] CJEU Case C-188/89.
[75] *Foster v British Gas* [1991] 2 AC 306.
[76] We have already had cause to note the opinion of Mr Advocate General Van Gerven in this case.
[77] Emphasis added
[78] i.e. of the need to prevent member states from taking advantage of their own failure to comply with Community law.

> *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651), and public authorities providing public health services (judgment in Case 152/84 *Marshall*, cited above).
> 20 It follows from the foregoing 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."
> ....
> 22 The answer to the question referred by the House of Lords must therefore be that Article 5(1) of Council Directive 76/207 of 9 February 1976 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."

It will be observed that there is an apparent discrepancy here. On the one hand, at paragraph 18 the Court summarises the earlier authorities as propounding that the *Becker* principle is capable of applying to ***organisations*** which are either (i) subject to the authority or control of the State ***or*** (ii) have special powers. The criteria are clearly presented as alternatives and there is no mention of the organisation needing to fulfil a public service. On the other hand, at paragraphs 20 and 22, the criteria feature the provision of a public service and more to the point, in what is the operative part of the judgment, we are given three seemingly cumulative components. The body subject to direct effect must: (i) perform a public service, (ii) which service is under the control of the state ***and*** (iii) for which the body possesses special powers.

These textual inconsistencies have caused a certain amount of controversy about whether this guideline criteria is to be read as offering alternative qualifying scenarios or whether they are to be applied as a composite check list. Further doubt was caused by the CJEU's judgment in *Kampelmann v Landschaftsverband Westfalen-Lippe*[79] where it applied the criteria as alternatives rather than as a composite. However, *Kamplemann* does not appear to have been followed by the CJEU elsewhere.

Schiemann LJ provides an illuminating analysis of the rationale underscoring the *Foster* criteria, one that also uses the term "emanation of the state", in *National Union of Teachers v The Governing Body of St Mary'*. At paragraph 15 he explains:

> "The ECJ has not promulgated a formula which can be applied to all situations. It has preferred to adopt the approach of the common law and of the French Conseil d'Etat of moving from case to case to establish principles and refine them as it goes along. Most of the case law has been developed on references to the ECJ under Article 177 of the EEC Treaty. The only ineluctable task of the ECJ on such a reference is to provide a ruling in sufficiently wide terms to enable the national court to reach a decision in the case in which the reference was made. There is a perpetual tension between the desirability of legal certainty which militates towards the laying down of broadly framed rules and the desire to move cautiously and to take stock of the effect of rulings. It is also important to remember that while the decision whether or not a particular body is properly regarded as an emanation of the state is a matter for the national court, the proper development of the Community requires that all national courts should proceed upon the same principles when applying Community law".

The issue as to whether all three of the *Foster* criteria must each be established as essential preconditions to direct effect is the subject of an ongoing referral to the CJEU made on 27 July 2015 by the Irish Supreme Court in *Farrell v Whitty*.[80] The Supreme Court also asked whether there is "a fundamental principle underlying the separate factors identified in that decision which a court should apply in reasoning an assessment as to whether a specified body is an emanation of the State?" This case is proving to be something of a saga.[81] It is the second referral to the CJEU in a case that has rumbled on for over a decade.

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[79] [1997] CJEU Joined cases C-253/96, C-254/96, C-255/96, C-256/96, C-257/96 and C-258/96.
[80] [2015] CJEU Case C-413/15.
[81] One of the three questions raised in *Elaine Farrell v Alan Whitty, The Minister for the Environment, Ireland and the Attorney General, Motor Insurers Bureau of Ireland* Case C-413/15 is whether the different elements listed in *Foster* are to be read conjunctively or disjunctively.

The facts of *Farrell* justify a digression from our consideration of *Foster* because of its particular relavence to the MIB.

An Irish digression

This first reference to the CJEU in *Farrell*[82] occurred back in 2006. It concerned Article 1 of the Third Directive on motor insurance[83] which provides that the compulsory insurance required by Article 3(1) of the First Directive[84] must cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle. The *Farrell* case facts are worth recounting. They featured a passenger who was seriously injured whilst travelling as a passenger in the loading bay of a small van that was only fitted with seating in the front. The driver was uninsured and furthermore, the national law provision in the Republic did not require compulsory third party cover for those parts of a vehicle not designed or equipped with seating. She presented a claim for compensation to the Irish Republic's Article 10 compensating body, the Motor Insurers Bureau of Ireland (MIBI), who rejected her claim. They relied on the fact that the MIBI's agreement with the Irish Republic only required it to compensate victims in circumstances where the statutory compulsory third party insurance requirement applied. As this appeared to conflict with the Article 3 insurance requirement the case was ultimately referred by the Irish High Court to the CJEU for a preliminary ruling on two questions in order to determine the extent of the insurance requirement imposed by the Directive.

The Court answered the first question by ruling that a national law that restricted compulsory third party cover to those parts of a vehicle that had been designed and constructed with seating accommodation for passengers did not comply with Article 1 of the Third Directive.[85] This was because member states did not have any legislative discretion to exclude persons from the protection afforded to passengers by the Directive. On the second question it ruled that the obligation in Article 1 was capable of having direct effect against the Irish State.

However, on the thorny issue as to whether this European law provision could also be relied on directly by an individual in the national courts against the MIBI, the court referred the case back to the Irish court to make the finding of fact, after restating the *Foster* formula as a cumulative test:

> "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."

When this issue was tried by Birmingham J in *Elaine Farrell v Alan Whitty*,[86] he applied the guidance in *Foster* and found that Article 1 of the Third Directive was directly effective against the MIBI as an emanation of state. The trial judge's comprehensive review of the CJEU, Irish and UK jurisprudence on direct effect deserves careful reading. Ms Farrell duly recovered her compensation without further ado.

The ongoing dispute is something of a battle of Titans over who is ultimately liable. Is the Irish Republic responsible for failing to properly implement the Directive? Alternatively, is it the MIBI, on the basis that its role is prescribed by directly effective European law, regardless of whatever private law agreements subsist between it and the Irish State? The outcome has major implications, especially following the CJEU's landmark ruling in *Damijan Vnuk v Zavarovalnica Triglav d.d*.[87] which has exposed both the Irish and UK governments' transposition of the geographic and mechanical scope[88] of the Directive's insurance requirement as being defective[89]. Not only is the remit of the Article 10 compensating bodies in each state inadequate, but millions of

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[82] *Elaine Farrell v Alan Whitty & MIB* [1996] CJEU Case C-356/05.
[83] Council Directive 90/232, now Article 12(1) of the Directive.
[84] Nor Article 3(1) of the Directive.
[85] Which expressly includes passengers within the concept of third parties intended to be protected by Article 3 cover, this is now consolidated within Article 12 of the Directive.
[86] *Elaine Farrell v Alan Whitty, the Minister for the Environment, Ireland and the Attorney General and the Motor Insurance Bureau of Ireland* [2008] IEHC 124.
[87] [2014] CJEU Case C-162/13.
[88] In both jurisdictions the primary legislation confines the scope of compulsory third party cover to public property and to vehicles intended or adapted for use on roads, which is inconsistent with *Vnuk*.
[89] Both the Irish (Road Traffic Act 1961) and UK statutory provisions permit motor insurers to qualify the cover provided for third party motor claims, save where expressly nullified. This conflicts with the unqualified free

motor policies in both jurisdictions fail to comply with the unqualified and holistic scope of the Directive in this respect.

The Foster guidance continued

Returning now to *Foster,* when that case was referred back to the House of Lords in 1991,[90] Templeman LJ provided the only reasoned opinion. It is notable that he tested the role of the respondent gas company by all three of the *Foster* criteria, namely: (i) public service, (ii) control by the state ***and*** (iii) special powers. The first characteristic was fairly self-evidently present as the defendant was a publicly owned utility company, so no determination was required there. As to the second and third criteria, he warned against a narrow or strained interpretation of either of these terms. He explained: "I decline to apply the ruling of the European Court of Justice, couched in terms of broad principle and purposive language characteristic of Community law in a manner which is, for better or worse, sometimes applied to enactments of the United Kingdom Parliament". On the issue of control, he ruled that although the defendant had day to day control over its own affairs that did not render it independent, it was under the control of the state because not only was the minister able to give the company general and even specific directions but the company was accountable to him in those respects. This approach suggests that it is important not to be misled by form but to take into account the substance of the relationship. Obscured soft power and influence can be just as potent a lever as other forms of documented control, although there could be some difficulty in establishing that in court.

On the third criteria he described the corporation's monopoly as "a special power which could not have resulted from transactions between individuals". In this he took account of the CJEU ruling in *Johnston v. Chief Constable of the Royal Ulster Constabulary*[91] which also concerned the Equal Treatment Directive[92] and whether it had direct effect against a chief constable in Northern Ireland. The court had ruled that regardless of the way in which the police service interacted with other organs of the state, "as a public authority, charged by the state with the maintenance of public order and safety, [it] does not act as a private individual". As such, it could not be allowed "to take advantage of the failure of the state, of which it is an emanation, to comply with Community law." This reveals the CJEU's consistent concern with substance over form[93] when it comes to applying the *Becker* principle. In *Foster* the House of Lords reached the unanimous decision that the directive was directly effective against the British Gas Corporation.

Incidentally it is important to note that neither the CJEU nor the House of Lords felt it necessary to categorise the defendant as an "emanation of state". This suggests that the term is no more than a convenient label that has become associated with *Foster's* non-exhaustive list of criteria (one that is itself intended merely to serve as a yardstick) when approaching the task of identifying which organisations are so closely connected with the State as to confer direct effect of a directive under the *Becker* principle.

Templeman LJ's analysis, excellent as it is, has a potentially misleading characteristic in common with the CJEU judgment in that case. It has to do with the unusually homogeneous nature of British Gas. Not only was it a state owned monopoly but to all intents and purposes it supplied one product: gas. Whilst it can be presumed that this entailed numerous individual components, such as the supply, delivery, installation, maintenance and servicing of boilers and burners, these were all subsidiary to its core business of supplying gas. Unfortunately, this led this learned judge to refer to the organisation and its public service in almost synonymous terms:

> "... I can see no justification for a narrow or strained construction of the ruling of the European Court of Justice which applies to a body "under the control of the State" ... Similarly, I can see no justification for a narrow or strained construction of the ruling of the European Court of Justice which applies to a body which has "special powers beyond those which result from the normal rules applicable in relations between individuals."

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standing nature of the insurance requirement, see section 62(c) RTA 1961 and Ward LJ's judgment in *EUI v Bristol Alliance Partnership Ltd* [2012] EWCA Civ 1267 on the necessary implication of sections, 148, 151(2)(b) and 151(3) of the Road Traffic Act 1988, which this author critiqued in "Marking The Boundary" JPIL issue 3 of 2013.

[90] *Foster v British Gas plc* [1991] 2 A.C. 306.

[91] *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1987] CJEU Case 222/84.

[92] Council Directive (76/207/EEC).

[93] See the first sentence in para 20 of the CJEU's judgment in *Foster*.

The problem with this passage is twofold. First, there are very few organisations possessing the monolithic monoculture of the kind to be found in pre-privatised British Gas, which arguably militates against the unqualified application of this House of Lords' ruling in today's less centralised economy. This is particularly relevant if we are to apply the criteria to a diverse and multifaceted entity such as the MIB. Secondly, as we have seen above the CJEU's emphasis in paragraphs 20 and 22 is on the public service role as opposed to the organisation delivering it.

Other UK authorities

The next UK authority is a Court of Appeal decision which featured, yet again, the Equal Treatment Directive but this time the defendant was Rolls Royce, a privately owned commercial enterprise, which was accused of running a discriminatory pension policy that infringed the directive. In *Doughty v Rolls-Royce Plc*[94] the only reasoned judgment is provided by Mustill LJ which provides further helpful insight into the approach to be taken when applying the *Foster* criteria. All three criteria were considered. He was prepared to accept a prima facie case for the company being subject to a degree of state control. However, he was unable to accept that this commercial enterprise discharged a public service or had special powers. Consequently, although the directive satisfied the threshold criteria for direct effect against the State, that doctrine did not apply to a commercial entity like Rolls Royce. He rejected the appellant's assertion that the control test alone was sufficient to trigger the doctrine.

Mustill LJ's judgment is also of interest because he also expressed doubts as to the reliability of terms such as "emanation of the state".[95] Furthermore, in applying the *Foster* criteria it was clearly the function discharged by the company that was the focus of his attention, as the following excerpt reveals:

> "... it must follow that the doctrine can be relied upon in a case such as the present only if the acts of the entity against which the individual proceeds are in some sense to be regarded as the acts of the Member State"[96].

Even more significant are Mustill LJ's observations about the status of the criteria laid down by the CJEU in *Foster*. His view (one endorsed by his fellow Lord Justices) was that the *Foster* test was not intended to provide the answer to every category of case. He cited the phrase *"...is included among..."* in paragraph 20 its judgment to denote that other factors may be relevant. He then ruled that although the *Foster* criteria must always be a starting point and it will often be a finishing point of any analysis, the absence of one of the three factors is not automatically fatal to a positive diagnosis. However, where one of the factors is missing, then it will be necessary to identify some other suitable characteristic not contemplated by the formula before the *Marshall* principle can be brought into play.

Two further UK authorities provide a useful gloss on our national law approach to applying the *Foster* criteria, extending the *Becker* doctrine of direct effect.

In *Griffin v South West Water Services Ltd* [97] Blackburne J found that the Collective Redundancies Directive[98] 75/129 had direct effect against a privatised public utility company despite his finding that it was not subject to the direct control by the state. It was nevertheless responsible for providing a public service under the supervision of the state where it had special powers not enjoyed by ordinary individuals, such as to impose hosepipe bans. On the control condition, he applied a teleological approach that focused on the function discharged by the organisation as opposed to the legal formalities involved. In doing so he made the following helpful observations:

> "1. 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.

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[94] [1992] IRLR 126.
[95] "...although the concept of an 'emanation of the state' is an important feature of public international law, I am not wholly satisfied that it has the same meaning in the field with which we are here concerned." Per Mustill LJ, *Doughty*, para 29.
[96] *Doughty*, para 10.
[97] [1995] IRLR 15.
[98] The Collective Redundancies Directive 75/129 (as amended by Directive 92/56).

2. The legal form of the body is irrelevant.
3. The fact that the body is a commercial concern is also irrelevant.
4. It is also irrelevant that the body does not carry out any of the traditional functions of the State and is not an agent of the State.
5. It is irrelevant too that the State does not possess day-to-day control over the activities of the body."

In this author's view this analysis is faultless, based as it is on the primary doctrine to be found in *Becker* and *Marshall* and from a proper, policy driven, appreciation of the CJEU's judgment in *Foster*.

NUT v St Mary's[99] casts additional light on the approach to be taken when applying what was described as a tri-partite test. It turns on two of the criteria: state control and special powers. The case arose out of the dismissal of three teachers where the employer's board of governors had failed to consult, contrary to The Business Transfers Directive.[100] The claimant appealed against the Employment Appeals Tribunal (EAT)'s decision dismissing the claim. The tribunal took the view that the *Becker* doctrine of direct effect did not extend to a board of governors as: (i) they were too remotely connected with the State to be deemed to be under its control, notwithstanding that the supervising local education authority could properly be regarded as an emanation of the state and (ii) it possessed no special powers. In doing so, the tribunal made the error of applying the kind of literal or checklist approach to the three criteria in *Foster* that the CJEU has been at pains to avoid.

Schiemann LJ delivered the leading judgment in the Court of Appeal which overturned the EAT decision. He held that the tribunal had been wrong to apply the triple test in *Foster* as though it were a statutory definition.[101] The school was part of the State system, the governors were a public body charged by the State with running the school in keeping with the national curriculum and it was subject to the voluntary funding scheme. The governors derived their powers from the authority of an executive order issued by the minister in the exercise of his statutory powers. It was not necessary for the governors to be under the control of central government for them to satisfy *Foster's* control criterion. Even more noteworthy is the Court of Appeal's unanimous disregard of the absence of any special powers. It ruled that it was wrong to apply the tripartite *Foster* test as though it were a statutory definition.

The *NUT* case confirms that when it comes to applying "the *Foster* criteria" it is important not to treat them as though they are inflexible statutory preconditions of direct effect, to be rigidly conformed to without regard to the underlying EU law principles in *Becker* from which they derive. It should be borne in mind that the *Foster* criteria were formlated in the context of case featuring a state owned public utility company. The core operating principle remains one of preventing the injustice caused to individuals by member states taking advantage of their own failure to comply with EU law as a defence.[102]

The law in this area is fluid and probably still evolving. As indicated above, a second reference has been made to the CJEU in *Farrell*[103] by the Irish Supreme Court which asked the following questions: First, are the three factors in the *Foster* test to be applied conjunctively or disjunctively? Second, is there a fundamental principle underscoring the *Foster* test which courts should also take into account? Finally, is it sufficient that a broad measure of responsibility has been transferred to a body by a member state for the ostensible purpose of meeting obligations under European law for that body to be an emanation of the member state or is it necessary, that such a body additionally have (a) special powers or (b) operate under direct control or supervision of the member state?[104]

In this author's view the CJEU ruling is likely to continue to resist devising a rigid formula. It is hoped and expected that the CJEU will refer to the *Becker*, *Marshall* and *Johnston* cases which refined the overlying

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[99] [1997] IRLR 242.
[100] The Business Transfers Directive 77/187.
[101] Para 41.
[102] See para 49, *Marshall v Southampton AHA* [1986] Case C 152/84. See also Case 14/83 *Von Colson and Kamann V Land Nordrhein-Westfalen* [1984] ECR 1891 and *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* (Case 424/97) [2000] E.C.R. I-5123, paras 25 to 28.
[103] *Elaine Farrell v Alan Whitty, The Minister for the Environment, Ireland and the Attorney General, Motor Insurers Bureau of Ireland* Case C-413/15.
[104] Professor Robert Merkin QC recently commented to the author that in his view it might have been better to have asked the CJEU to rule on whether emanation of the state status is a necessary characteristic of any authorised body discharging the role of compensating victims under Article 10 of the Directive.

principle and that it will emphasise the overriding importance of analysing the public service role as distinct from the organisation responsible for its discharge. It seems unlikely to concur with the final proposition as a broad statement of principle as that would appear to go against the grain of its ruling in *Foster*.

Conclusions on the correct principles

Before we move on to consider the available evidence, it might be helpful to summarise these European law principles. The approach to determining whether an organisation is caught by the *Becker* exception, so as to make a directive directly effective against it, is a two stage enquiry. Stage one looks to the nature of the directive under consideration. It examines whether the obligation imposed by the directive is sufficiently clear, precise and unconditional to trigger the *Becker* principle of direct effect against the state. Only if that test is satisfied is it appropriate to move on. Stage two is to determine whether a particular organisation (not obviously part of central government) is subject to the direct effect of the directive, because either (i) the body is itself subject to the control or the state or has special powers or, (ii) where (as in the case of the MIB) it has been made responsible by the state for discharging a public service that is under the control of the state and for which it has special powers. In the latter scenario, the nature of that entity itself is not actually the fulcrum of the enquiry. In *Foster*, both the Advocate General and the CJEU were in agreement in saying that it is the public service discharged by the organisation that was the primary consideration.

As to the second stage, Mustill LJ's instruction in *Doughty* that it is always necessary to commence any analysis by considering the *Foster* criteria arguably places too much emphasis on guidance that is subordinate to the governing principles set out in the Advocate General Van Gerven's helpful summary repeated above.[105] Furthermore, whilst the CJEU in *Foster* is very authoritative, we are instructed by the Court of Appeal[106] that *Foster* offers guidance that should not be applied strictly as though it were a statutory precondition. *Foster* is merely an indicator as to how to apply a superior principle in practice and it is one devised in response to the special facts of a case featuring a state owned public utility. It is certainly true that if all three factors listed in *Foster* apply, then it is highly likely that the direct effect exception in *Becker* will extend to the body under consideration. If one of the factors does not apply then it will be necessary to look to some other characteristic or circumstance that justifies extending *Becker*.

It is important to avoid being distracted by formalities as this might jeopardise the teleological approach that is integral to the *Becker* exception. Any construction which places too much emphasis on factors such as the constitutional set up of an organisation, its contractual arrangements and the degree of state control over the organisation (as opposed to the public service it performs) risks obscuring the true purpose of the exercise which is to prevent the state, including its emanations, from taking advantage of its failure to properly implement a directive. Such considerations may well be relevant but they are not determinative. The *Becker* exception, as extended by *Konle*, *Marshall* and *Foster*, is partly about ensuring administrative probity by discouraging executive malfeasance[107] and partly about ensuring that individual citizens receive fair treatment and redress under European law.

It is also important not to attach too great a significance to legal jargon. Terms such as "emanation of state", "public body" or "public authority" can be elusively amorphous when employed as a generally applicable term. It is noteworthy the CJEU avoided this kind of restrictive labelling in *Foster*.

The focus of the enquiry prescribed by *Foster* is on the public role or function entrusted to the organ, body or individual by the state; not the body itself. The court should enquire: (i) whether the role or function devolved amounts to a public service; (ii) whether the state has the ability to control or influence the discharge of that service in any significant respect and (iii) whether the discharge of that function necessitates or otherwise involves the exercise of special powers beyond those ordinarily enjoyed by individuals.

Where some of the *Foster* criteria are not present (as in the *Griffin* and the *NUT* cases) this is not fatal to direct effect but it will be necessary to consider whether any other factors make it expedient to apply the *Becker* exception. One such factor could be the importance attached to the Directive's protective purpose (as shown by

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[105] See under The *Foster* guidance continued.
[106] In the *NUT* case, supra.
[107] In the sense that it is intended to deny member states the ability to divest themselves of responsibility for complying with European law by devising ever more complicated circumlocutory devices to obstruct or otherwise frustrate access to rights conferred under European law on individuals. See *Haim*, para 28

the CJEU in its ruling in *Damijan Vnuk*[108] in 2014. In any event, the enquiry should be undertaken in a purposive or teleological manner, reflecting the underlying principle applied in *Becker*, *Marshall* and *Johnston*. The MIB's public service role has already been considered at under *"On the nature of the Motor Insurers Bureau"*. It has also been observed that it is not necessary to establish that the MIB itself or that its activities as a whole conform strictly to the thumb rule criteria devised in *Foster*. Even so, it is instructive to test the MIB's role under article 10 against the *Foster* criteria.

On the role entrusted to the Article 10 compensating body

Article 10 provides, inter alia:

> "3.1. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.
> ….."

Unlike the Equal Treatment Directive, this provision is very specific in the way it imposes an obligation on every member state first to adopt or incept an institution to serve as the authorised compensating body and second in the prescriptive terms defining its role. This puts this particular Directive in a distinctly different category to the directive featured in *Foster, Doughty, Johnston* and others, which (i) feature provisions in a directive that had general effect[109] and (ii) concerned the potential liability of organisations not directly anticipated by that legislation. There seems to be at least an arguable case to put Article 10 is in a distinctly different class to these other directives, because of the precision and specificity of the legislative objective. In which case, this factor alone ought to be a highly significant and persuasive indicator of direct effect, independently of the *Foster* criteria. *Becker's* imperative of preventing member states from relying on their own failure to implement European law is made that much more compelling in the context of Article 10.
Even so, the *Foster* criteria are not to be discounted and so each of its components need to be addressed in turn. As the Article 10 role involves a public body providing a compensatory guarantee to motor accident victims, it is self evident that it properly categorized as a public service.[110] Accordingly the public service nature of the Article 10 compensating body will not be considered further here.

A public service under the control of the state

The UK has a treaty obligation "to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising under Community law."[111] As such, it is clear that in order to fully implement Article 10, the UK must retain the ability to supervise, control and influence the way the MIB fulfils its contractual obligations under the two schemes it has devised to discharge the Article 10 role. State control is applied through the terms of the MIB agreements themselves. Furthermore, there is abundant evidence that the UK government regularly exercises its prerogative to impose changes to both MIB agreements in its (inconsistently applied[112]) attempt to keep them in line with European law developments.

A couple of examples will suffice. In 2001 the House of Lords ruled in *White v White & MIB*[113] that the MIB's exclusion of passenger liability in clause 6 of the Uninsured Drivers' Agreement 1988 was unlawful. The MIB were then persuaded to amend its notes for guidance that accompanied the agreement to correct this illegality,

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[108] Case C-162/13.
[109] Eg, the Equal Treatment Directives 76/207/EEC & 2000/78/EC.
[110] However it should be noted that the MIB has disputed this in the past, see "*Byrne a case in point*" below.
[111] see *Francovich and Others* [1991] CJEU Joined Cases C-6/90 and C-9/90, para 35.
[112] One example of many instances will suffice: when the Department for Transport found it necessary to amend the inflexible three year time limit for victims of untraced drivers to apply for compensation (see *Byrne a case in point*, below), it achieved this by making the necessary revision to clause 4 (3) of the Untraced Drivers Agreement 2003 to its provision into line with the Limitation Act 1980 in a supplemental agreement in 2008 and once more in a differently phrased revision in 2013. However it failed then or later to remove its unlawful exclusion in clause 4(3)(c) of any liability where the victim fails to report the incident to the police within 14 days or as soon as reasonably convenient, when such term makes no allowances for minors or mentally incapacitated victims and operates as an alternative limitation period by proxy.
[113] [2001] 1 WLR 481.

despite having trenchantly defended the legal challenge that precipitated this revision. Again, when on 22 May 2008 the Court of Appeal upheld Flaux J's first instance finding in *Byrne*[114] that the MIB's inflexible three year limitation period for bringing a claim under the Untraced Drivers' Agreement was unlawful (because it did not take proper account of the dispensation allowed in a equivalent civil action for minors and protected parties[115]) the agreement was duly amended by a supplemental agreement (dated 30 December 2008). As the commentary below indicates, the MIB had mounted a vigorous, if misguided, defence and so was clearly opposed to this revision.

In both cases, these amendments work against the mutualised interests of the motor insurers who comprise the MIB's management and membership. It is therefore a reasonable assumption that these revisions were imposed on an unwilling MIB, in the same way as we are likely to see significant alterations to the Untraced Drivers' Agreement 2003 and the Uninsured Drivers' Agreement 2015 as a result of an ongoing judicial review. Against this the Department for Transport has informed this author that it neither controls nor supervises the way the MIB implements these agreements.

However, as has already been noted above, control over the MIB's day to day activities is not required by the *Foster* test; it is control over the relevant public service that matters and it is hard to see how it could be argued that this is not achieved through the through the Principal Agreement with the MIB's membership and the MIB Agreements themselves. Furthermore, the minister also exerts a peripheral degree of operational control over the MIB in its appointment of arbitrators[116] to hear appeals against certain decisions and in determining disputes as to the reasonableness of any request for information by the MIB under clause 19 of the Uninsured Drivers' Agreement 1999.

There is also clause 4(2) of the Principal Agreement of 1945 which provides:

> "In the event of any dispute as to the reasonableness of a requirement by the M.I.A[117] that any particular step should be taken to obtain judgment against other torfeasors it shall be referred to the Minister whose decision shall be final."

The Department also exercises extensive indirect influence over the MIB by virtue of its executive power to regulate all the motor insurers whom it authorises to conduct business in this jurisdiction. An interesting insight into the holistic way the CJEU is likely to view this discrete ability to control and influence the MIB can be found in its recent judgment in *Fish Legal v Information Commissioner and ors.*[118]

Fish Legal featured a reference to the CJEU arising out of a legal challenge by environmental activists who sought to rely *inter alia*, on the Aarhus Convention[119] and Article 2(2) of the 2003 Directive on access to environmental information[120] to obtain data on pollution levels from various water utility companies. In particular the CJEU was asked to determine what was meant by a person being "under the control of a body or person falling within Article 2(2)(a) or (b)" of that Directive and whether a body that satisfies the CJEU's criteria in *Foster* for "emanation of the state" status is caught by the duty it imposes to provide environmental information.

Article 2(2) of Directive 2003/4 defines a 'public authority' as follows:

> (a) government or other public administration, including public advisory bodies, at national, regional or local level;

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[114] *Byrne v MIB & Secretary of State for Transport* [2007] EWHC 1268 (QB), considered at greater length below

[115] See the reference to Section 28 Limitation Act 1980 and the comments under *Byrne, a case in point* below.

[116] See for example clauses 20 and 21 of the Untraced Drivers' Agreement 2003.

[117] The reference to MIA in this agreement refers to the nominal title of the company intended to manage the mutualised compensatory fund that ultimately was constituted as the MIB in 1946.

[118] [2013] Case C-279/12.

[119] The European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ("the Aarhus Convention").

[120] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

The reader will readily appreciate the close affinity between Article (2)(2)(c) and the *Foster* tripartite test. In *Fish Legal* the court ruled that Article 2(2) was intended to cover "a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State". It went on to elucidate:

> "The manner in which such a public authority may exert decisive influence ... is irrelevant in this regard. It may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence."[121]

Accordingly we can deduce from *Fish Legal* that the concept of State control over the MIB includes the ability, now or at some time in the future, to vary, terminate or annul the MIB Agreements[122] and the potential power to act or omit to take action to enforce the levy that the MIB depends on to discharge its roles under Articles 10 and 25.

In short, this evidence indicates that in the discharge of its compensatory role under the Directive, the MIB lacks any genuine autonomy to act in its own exclusive interests free from state control. It is bound by the terms of its various agreements with the state (which are themselves subject to variation at the behest of the state) as much as it is bound by the strictly circumscribed role imposed on it by European law. Whist the MIB agreements are to a certain extent consensual arrangements, it is also just as clear that the state has a strong hand in any negotiations.

The European jurisprudence is clear - all that is required is the potential for control or influence, not evidence of their manifestation[123].

Special powers

It is perhaps convenient to repeat here the CJEU's thumb rule criteria set out in *Foster* (considered above) for determining whether an organisation is potentially subject to the direct vertical effect of a directive. We have seen that this applies to:

> " 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"[124]

Special powers conferred under European law

Where many jurists and commentators appear to have encountered difficulty is in seeking to establish whether the MIB has special powers connected with the discharge of its role as the Article 10 compensating body. The MIB does in fact enjoy extensive special powers that can be said to derive independently of the UK State and which result from its supranational legal status as the authorised compensating body under Article 10 of the Directive. It should be emphasised that these European devolved powers are not peculiar to the MIB as a

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[121] *Fish Legal*, para 68.
[122] Expressly provided for in the notice provisions that apply to all the MIB agreements.
[123] "I have already said, the possibility of exercising influence must exist inter alia (or in particular) in connection with the matter to which the provision of a directive which has not yet been implemented relates or can relate." per Advocate General Van Gerven's opinion in *Foster*, para 21.
[124] *Foster*, para 22, emphasis added.

corporation, indeed they are not intended to be conferred on any organisation in its own right. They are instead integral to whichever organisation is charged with fulfilling the role of the Article 10 compensating body[125]. When the MIB acts as the Article 10 body it acts as a public law body whose role is defined by European law. It also discharges additional roles under the Directive, for example, where it acts as a compensating body of last resort for victims of accidents occurring in a foreign member state under Articles 20 to 26 of the Directive. Article 25 confers on the compensating body the right to recoup its outlay from foreign insurers and the foreign compensating body. The latter roles featuring foreign third parties are also inextricably connected with its role as the Article 23 Information Centre. All of this requires funding.

Additional special powers are conferred on the MIB under Article 24 of the Directive. This entitles the compensating body to recoup its outlay incurred as an Article 20 body when compensating a victim of an uninsured or untraced driver in a foreign member state.[126]

As the UK national law is supposed to fully transpose the Directive, this means that both the Directive and the CJEU's interpretation of that law have precedence over any inconsistent national law provision. Because Articles 10 and 20 through to 26 are so comprehensively prescriptive, they furnish the superior law defining this aspect of the MIB's role, lending it a truly supranational or international status in the discharge of these specific European law derived obligations.

It is also worth noting that where a UK insurer provides cover specifically intended for use in a foreign member state's territory,[127] then the UK is obliged by the Solvency II Directive of 2009 to ensure that every foreign motor insurer providing such cover in this jurisdiction becomes a member of its guarantee fund, to wit the MIB, and that they contribute to its levy.[128] This highly prescriptive requirement effectively confers a special power under European law on the MIB as it is the MIB and not the UK State that is the direct beneficiary of those funds. These foreign accident provisions, although distinct from the MIB's domestic Article 10 role, remain a relevant factor due to the indivisible nature of *Becker* principle.[129]

It stands to reason that any individual or organisation set up or authorised by the Secretary of State to discharge the Article 10 role must be provided with the wherewithal with which to fund its compensatory role. Although Article 10 confers a wide discretion on individual states as to how this is to be achieved, the inescapable corollary of its provisions is that a body discharging the Article 10 role must have some recourse at law by which to ensure that it has sufficient means to undertake its responsibilities. Such a right must necessarily transcend any limitations that might be imposed under domestic law.

In 2005 in *Candolin*[130] the CJEU delivered the following broad statement of principle concerning the basic Article 3 insurance requirement:

> "27 The Member States must exercise their powers in compliance with Community law …..
> 28 The national provisions which govern compensation for road accidents cannot, therefore, deprive those provisions of their effectiveness."

This statement of law applied a well established European law precept - the principle of effectiveness[131] - to the motor insurance directives. Accordingly, were the UK to take action to prevent or otherwise, through inaction, obstruct the MIB's ability to enforce an appropriate levy on its members, thereby undermining its ability to fund the compensation of victims of uninsured and untraced drivers, then the UK would be acting unlawfully.

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[125] And by the same token, whichever organisation discharging the role of compensator of foreign EEA accidents under Articles 24.1 and 25 and the custodian of the motor insurance database under Articles 23 and 26 of the Directive.
[126] See Article 24(2) of the Directive.
[127] As distinct from the provision in Article 14 that requires a domestic policy to cover use abroad in the European Union.
[128] See Article 150 of the Solvency II Directive, aka Directive2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).
[129] Per *Marshall*, supra.
[130] *Katja Candolin and Others. v Vahinkovakuutusosakeyhtiö Pohjola and Others* Case C-537/03.
[131] *Upjohn* [1999] E Case C-120/97, paragraph 32.

Given that the UK is treaty bound to fully implement the Directive and that the wording used in Article 10[132] is unconditional and precise in what it is required to do, it would appear that any action or omission by the state which jeopardises the MIB's ability to discharge that role is something that the MIB could challenge. The MIB presumably has the ability to take the following steps: an action for specific performance of one or other of its contractual arrangements (either with the Secretary of State for Transport or its own members), judicial review of the minister's act or omission or an infringement action or complaint to the European Commission. This European derived status is peculiar to the authorised body discharging the role of the Article 10 compensating body; not one capable of being exercised by ordinary private individuals.

Special powers conferred by the executive

As it happens, the MIB does not need to resort exclusively to public international law for its special powers because its entitlement to enforce a levy from its members is guaranteed through a combination of statutory provision and private contract law. Section 143(6) Road Traffic Act 1988 imposes a precondition to authorised insurer status that every motor insurer be a member of the MIB. The MIB's Articles of Association require its members to contribute to its levy. Even if the MIB's Articles of Association, properly construed, do not confer on it an express power to initiate formal proceedings to enforce its levy or to expel a member for failing to contribute does nothing to detract from, or diminish the potency of, its ability to call on the Secretary of State to enforce this special power on its behalf.

The fact remains that the MIB, to remain operationally effective, needs to know that, one way or another, it has the power to call upon the Secretary of State to ensure it continues to receive the levy. Looked at another way, the UK national provision, obscurely devised as it may be, nevertheless effectively confers on the MIB a licence to impose an indirect form of taxation on all law abiding motor insurance premium paying members of the public. A constant refrain of the MIB in recent years has been that the cost of uninsured driving results in an average surcharge on each policy of £30. The ability to impose and enforce such a levy on the public, indirectly through its members, is a special power beyond that exercised by ordinary individuals.[133]

The MIB also enjoys considerable power to influence government policy though its close and preferential relationship with the Secretary of State. The MIB's influence is so strong that it sometimes seems as though it is in the driving seat (metaphorically speaking), not the minister. Take for example the Department for Transport's apology in July 2013 for failing to address the serious issues raised in its February 2013 consultation on the MIB agreements. The announcement stated: "We must ensure we balance reducing the Department's exposure to risk with agreements that are workable for the MIB to implement. ...The agreements cannot be changed unless both parties agree". It should be noted that the UK's obligation to fully implement the Directive is not conditional on its administrative convenience.[134] These difficulties are largely of the minister's own making. He was advised, in response this consultation on the MIB Agreements, to abandon their anachronistic private agreement format by substituting them with a properly drafted codified scheme, he chose to ignore that advice. Instead it looks very much as though it is the MIB who draft the agreements, which are then signed off by the ministers.

The latest version of the Uninsured Drivers' Agreement 2015 is replete with exclusions and limitation of liability, and reductions of the proper compensatory entitlement that blatantly conflict with the minimum standard of compensation required by the Directive[135] and the original social policy aim of the Road Traffic Act 1930 that initiated the concept of mutualising the risk posed by motor vehicle risk. It is difficult to conceive of a properly qualified statutory draftsman blithely ignoring the European law it is supposed to implement in the same way and to the same degree as exists here.

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[132] An extract from Article 10 is set out above under *"On the role entrusted to the Article 10 compensating body"*.

[133] Whether realised through an action for specific performance, judicial review or on an alternative basis applying the tri-partite test in *Caparo Industries plc v Dickman* [1990] UKHL 2.

[134] The Secretary of State was advised by this author in his response to the Department for Transport's 2013 consultation in the MIB Agreements to abandon the anachronistic MIB Agreement in favour of a properly drafted codified system.

[135] Currently the subject of a judicial review.

Special powers conferred under the MIB agreements

The Uninsured Drivers' Agreements 1999 and 2015

The following are some of the special powers that can be said to have been conferred on the MIB by the UK Government which are clearly intended to enable it to discharge its role as the Article 10 compensating body. These observations are restricted to the Uninsured Drivers' Agreement 1999[136] and they are not listed in order of importance, nor are they intended to be a comprehensive account.

First there are the curious provisions that bind the applicant to anything said and done by their solicitor or agent[137] that have no parallel under the Civil Procedure Rules and which appear to be intended to replicate the common law. However, this is then augmented in the way it purports to bind minors and persons acting under a mental incapacity to things said or done on their behalf. This conflicts with Part 21 of the Civil Procedure Rules and the common law position considered recently by the Supreme Court in *Dunhill v Burgin.*[138] Ordinary defendants have no right to take advantage of a party's incapacity in this way.

There is also the special evidential presumption that clause 6.3 purports to impose on the applicant,[139] whom it will be remembered is a non contracting party. Once again this has no parallel under the Civil Procedure Rules and sets a worrying precedent by seeming to confer a special preferential legal status on the MIB not enjoyed by any other litigant under our national law.

There is the power conferred on the MIB to recoup its outlay incurred in settling an uninsured driver claim from a responsible driver, notwithstanding the fact that in most cases the MIB does not receive any co-operation from the defendant driver let alone a signed authority to act on his behalf.

The exclusions of liability in clauses 6(1)(c)(ii),[140] 6(1)(e)[141] and 17[142] in the 1999 Agreement purport to confer on the MIB the ability to impose exclusions or to make deductions from the victims' compensatory entitlement that are not permitted under the normal common law rules for assessing damages. Whilst these provisions appear to breach the European law equivalence principle, they can also be viewed as constituting special powers not enjoyed by other defendants.

Clauses 7 to 12 confer extraordinary powers on the MIB to reject genuine claims in their entirety for seemingly the most trivial of procedural infractions.[143] No such draconian powers exist under the Civil Procedure Rules. The disproportionately unjust nature of these provisions are well illustrated by the requirement that applicants must complete the MIB claim form which contains a disclosure mandate so offensively intrusive and excessively extensive as to conflict with the victim's Human Right Convention to privacy.[144]

Clause 13 purports to entitle the MIB to reject any claim, however genuine or extensive, simply because the victim has failed to report a defendant's failure to provide their insurance details as soon as reasonably practical (which term is not defined). No such defence extends to insured defendants or indeed to any other party, and rightly so.

These provisions transcend the procedural and substantive law rights of individual citizens.

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[136] Which remains in force, nothwithstanding its numerous illegalities, for all claims featuring accidents that predate 1 August 2015; which in all probability still accounts for the majority of uninsured driver claims at the time this paper was prepared.
[137] Clause 2.3.
[138] *Dunhill v Burgin* [2014] UKSC 18.
[139] As to the passenger's state of mind when entering an uninsured vehicle.
[140] Relating to subrogated claims.
[141] Guilty passenger knowledge.
[142] Relating to sums received as a result of the accident
[143] After years of campaigning by this author, since 2007, the procedural preconditions to any liability have been removed from the Uninsured Drivers' Agreement 2015.
[144] See section 12 of the obligatory MIB application form and clause 7 of the Agreement, which breaches Article 8 of the HRC.

The Untraced Drivers' Agreement 2003

The MIB enjoys extensive quasi-inquisitorial and judicial powers to investigate claims and to require the co-operation of the applicant which go far beyond anything that an ordinary insurer would be entitled to impose in a comparable action issued under the direct right conferred by Article 18 of the Directive and Articles 9 and 11 of the Brussels I Regulation[145].

The Untraced Drivers' Agreement 2003 is an unsatisfactory, unjust scheme that places innocent victims at a considerable disadvantage in comparison to a normal civil action. Take for example the complete absence of any safeguards for children and the mentally handicapped. Every other litigant must conform to the triple protection imposed under Part 21 of the Civil Procedure Rules.[146]

Byrne, a case in point

Byrne v MIB & Secretary of State for Transport[147] provides a useful and vivid illustration of the reluctance by some judges to cure a defective provision through a European law consistent construction. It is also important as it is the only English authority on whether the Directive is capable of direct effect against the MIB. The case featured a 3 year old child injured by an untraced driver whose claim was submitted to the MIB during his minority. Liability was not disputed. However the MIB rejected the claim, relying on the 1972 version of the Untraced Drivers' Agreement that imposed an inflexible 3 year time limit for submitting applications. Section 28 of the Limitation Act 1980 suspends the limitation period in a civil personal injury action where, at the time the cause of action arose, the claimant was under a disability: a term that embraces both minors and the mentally handicapped.

However the claimant's lawyers were alive to the fact that this strict three year time limit was unlawful because it breached the European equivalency principle.[148] The Secretary of State took the MIB's side. The MIB argued that, as a private contractor who had negotiated its agreement with the Secretary of State in good faith, it was only obliged to adhere to the terms of its contract. In reality it is very likely that this provision was insisted upon by the MIB when it submitted its draft proposals to the minister for approval.[149] Both the minister and the MIB contended that the Untraced Drivers' Agreement was no more than a private law agreement and as such that any European law inconsistency in the agreement could not be cured by a *Marleasing* style purposive interpretation.[150] Flaux J was required to determine four issues. First, whether the MIB's 3 year time limit was permitted under the European law that the Untraced Drivers' Agreement was supposed to implement. Secondly, if not, whether the agreement could be given a purposive construction that was capable of rectifying the defect identified. Thirdly, if the term was defective but incapable of being rectified through a European law consistent interpretation, whether the terms of the Directive could be relied on by the claimant directly against the MIB so as to allow the court to reach a determination that was in conformity with the Directive. Finally, if neither the second nor third remedies were available, whether the UK State was liable to compensate the claimant for its failure to implement the Directive properly under *Francovich/Factortame*[151] principles.

The first and fourth issues were determined in the claimant's favour. The judge found that the imposition of a strict three year time limit against a child was inconsistent with the rights conferred under European law and in particular by the Directive. On the fourth issue he also held that the breach of European law was sufficiently serious to warrant damages because it was clear from the little correspondence disclosed that "...in December 1988, that the Department did appreciate that a three year time limit which was less than the corresponding

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[145] Council Regulation (EC) No 44/2001of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[146] Namely the appointment of personal representatives, the commission of a barrister's written opinion on the suitability of the proposed settlement and the court's formal approval of the settlement. See *Dunhill v Burgin,*
[147] *Byrne v MIB & Secretary of State for Transport* [2007] EWHC 1268 (QB).
[148] That requires any national law implementation of rights conferred under European law to be equivalent to and as effective as those conferred under comparable proceedings.
[149] However, without proper public scrutiny or proper disclosure of the Department's records, we shall never know for certain.
[150] This is now often referred to as a European law consistent interpretation.
[151] *Francovich and Others* [1991] Joined Cases C-6/90 and C-9/90; *Brasserie du Pêcheur and Factortame* [1996] Joined Cases C-46/93 and C-48/93.

limitation period for a claim against an insured driver in court would be precluded by art 1(4)."[152] So the Department of Transport was aware of the gap in protection for children and the mentally handicapped, that this was unlawful but chose to support the MIB in its unjustified defence.

The claimant received his compensation and the MIB was later obliged to concede a revision[153] to the Untraced Drivers' Agreement that conferred a limitation period no less favourable than conferred in other tort actions against identified defendants.

Where Byrne v MIB went wrong

However learned and experienced a judge might be, no judge is omnipotent. Just outcomes depend on a degree of collaboration between professional representatives and the court; our adversarial civil justice system notwithstanding. Our civil courts depend on the legal representatives identifying the issues in dispute, and then presenting these along with the relevant law and evidence to the court for the judge to arrive at a just outcome. This in turn depends on the protagonists themselves providing full and proper instructions to their legal representatives just as much as on the legal professionals identifying the correct law. It is regrettable the learned judge's findings on the second and third issues were based on misconceived law and inadequate disclosure of evidence and as such they are erroneous. Their unfortunate legacy has remained unchallenged as a misleading precedent for nearly nine years.

Whilst it is not the author's intention to wag an admonishing finger from an ivory tower or to attempt an exhaustive autopsy of a long interred trial, it is necessary to point out where the judgment is unsafe and why.

On the European consistent interpretation of the MIB agreements

On the second issue, the judge ruled that the Uninsured Drivers' Agreement 1972 was not capable of being "construed so as to give effect to Article 1(4) of Directive 84/5/EEC[154] and/or the European Community principle of equivalence". Unfortunately, although the judge's attention was drawn to the CJEU judgments in *Evans*[155] and *Commission v Greece*[156] that same court's seminal judgment in *Pfeiffer*[157] is conspicuous by its absence. After all this time it is impossible to say what law was laid before the judge but it seems almost inconceivable that Flaux J would have ignored such an important authority had he been made aware of it. Instead, the court seems to have been referred to a number of old chestnuts, largely rendered obtiose by *Pfeiffer*, such as Schiemann and Hobhouse LLJ's observations in *Mighell v Reading*[158] to the effect that the MIB's agreements are no more than a private law contracts and as such are not subject to a *Marleasing* style purposive construction.

Although this jurisprudence faithfully applies Nicholls LJ dicta in the House of Lords in *White v White & MIB*,[159] one suspects that no one appears to have actually read the judgment. Had they done so, they would have appreciated that the *Marleasing* or no, the House of Lords was still able to apply a purposive construction of the agreement by applying conventional rules of construction, to give effect to the presumed intention of the contracting parties[160]. It is notable that there is no mention in *Byrne* of the fact that the House of Lords had, six years previously, cured a defect in an MIB agreement in this way by striking out an offending exclusion of liability that conflicted with European law, on the sound basis that it was presumed that the minister had not intended to flout European law.
Pfeiffer has extended the compass of purposive or European law consistent interpretation into every aspect of a member state's transposition and it has transformed the process of consistent construction in the process.

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[152] Referring here to to Article 1(4) of the Second Directive on motor insurance which is now consolidated in the Directive as Article 10 and which defines the role of the MIB.
[153] See the MIB's Supplemental Agreement dated 2008.
[154] Now Article 10 of the Directive.
[155] Supra, under *"Emanations of the state or public bodies by another name"*.
[156] Supra, under *Special powers conferred under the MIB Uninsured Drivers' Agreements.*
[157] *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* Case C-397/01 to C-403/01, see in particular paras 114 to 119.
[158] *Mighell* v *Reading and Another; Evans v Motor Insurers' Bureau; White v White and Another* (1998) Times, 12 [1999] 1 LLR 30.
[159] [2001] UKHL 9, see paras 21 & 22.
[160] See *White v White* at paras 23 to 27.

Paragraphs 110 to 119 of the *Pfeiffer* judgment should be compulsory reading for every judge and practitioner in this field. What Nicholls LJ's common sense and intelligence inferred in *White* v *White & MIIB* in 2001, *Pfeiffer* made explicit three years later by ruling that national courts, when undertaking this exercise, must presume that the state intended to fulfil entirely the obligations arising from the directive concerned when implementing it[161]. Furthermore, it ruled that the national courts must, when applying national laws and rules intended to give effect to a directive, "ensure that the legal protection which individuals derive from the rules of Community law … are fully effective"[162]. Paragraphs 116 to 118 are particularly instructive from the view point of the MIB Agreements and so they are quoted in full here:[163]

> "116 In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, ***a provision of domestic law*** to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive. "
> 117 In such circumstances, the national court, when hearing cases which…. derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C 456/98 *Centrosteel* [2000] ECR I 6007, paragraphs 16 and 17).
> 118 In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, ***having regard to the whole body of rules of national law***, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, *Marleasing*, paragraphs 7 and 13).

It is clear from this passage that *Pfeiffer* does not restrict these principles to legislation, in contrast to what was commonly inferred from *Marleasing*.

The MIB Agreements are part of our national law. We have already seen above[164] that unless the UK is prepared to risk wholesale liability for failing to implement article 10 at all, the present MIB Agreements must be viewed as part and parcel of the UK's national law implementation of the directive, and as such capable of conferring justifiable rights[165]. Common sense also dictates as much.

Accordingly, every MIB agreement, being part of the UK law implementation of the Directive, must be construed in a European consistent manner.[166] Any lingering doubts in the mind of the reader as to the wide ranging and cogent nature of the duty to apply a European consistent interpretation of national provisions implementing a directive, or indeed legislation, will be promptly dispelled by reading the Aikens LJ's analysis of the UK authorities on consistent construction techniques in his Court of Appeal judgment in *Churchill v Wilkinson*[167] in conjunction with Waller LJ's Court of Appeal appraisal of *Pfeiffer's* significance in *McCall v Poulton*.[168] Given the crucial importance of *Pfeiffer*, the court's finding in *Byrne* is not only wrong in law but can safely be disregarded as one made *per incuriam.*

HHJ Waksman QC's judgment in *UK Insurance Ltd v Holden and R&S Pilling*[169] provides a timely reminder that Flaux J is not alone. The judgment exhibits the same reluctance to amend a national law provision through

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[161] *Pfeiffer*, para 114, referring to even earlier European jurisprudence in *Wagner Miret* [1993] Case C 334/92 paragraph 20.
[162] *Pfeiffer*, para 111.
[163] Emphasis added.
[164] Supra, under *Special powers conferred under the MIB Uninsured Drivers Agreements*
[165] Non contracting third parties were given a statutory right to sue under a contract made for their benefit under the Contracts (Rights of Third Parties) Act 1999, although section 1(3) and 1(4) conflict with the free standing nature of the European protective principle and so require a European law consistent interpretation
[166] I.e. and so be construed in a manner that gives effect to the Directive's legislative aim, in so far as possible
[167] *Churchill Insurance Company Ltd v Benjamin Wilkinson and Tracy Evans v Equity and Secretary of State for Transport* [2012] EWCA Civ 1166, see Part VI of the judgment: *Principles of interpretation of national laws which are based on EU Directives.*
[168] [2008] EWCA Civ 1263, paras 35 to 40.
[169] [2016] EWHC 264 (QB).

a European law constructive interpretation where this would appear to go against the clear wording and 'presumed intention'[170] of the domestic provision. Although there was no need to determine the implications of the *Vnuk* judgment on the statutory geographic scope of the UK's transposition within the Road Traffic Act 1988 of the Article 3 third party insurance requirement, the judge nevertheless offered his *obiter* view that it would not be possible to construe Section 145 (3) of the Road Traffic Act 1988 consistently with the Article 3(1) insurance requirement as this would be going against the grain of the Act.

Neither *Pfeiffer* nor the legal presumption he is supposed to apply (in effect that Parliament intended by the wording in Section 145 of the 1988 Act to fully implement Article 3) receives a mention. It is also unfortunate that the judge does not appear to have been referred to Waller LJ's excellent analysis of *Pfeiffer's* impact on the way a European law consistent interpretation applies in the context of the Directive, in *McCall v Poulton*.[171] Although HHJ Waksman's views in the *UK Insurance* case on this point are clearly open to criticism[172] they nevertheless reflect a widespread reluctance in the judiciary to intervene in this way to correct non-compliant national law provision. Furthermore, if the UK referendum results in the UK ceding from the European Union, the judiciary are likely to exhibit an even greater reticence to cure non-compliant national provisions in this way, even where the accident circumstances pre date the legal date effect of the UK's exit. These difficulties make the case for arguing the direct effect of the Directive against the MIB even more relevant, urgent and necessary.

On direct vertical effect of the Directive against the MIB

On the third issue in *Byrne*, Flaux J ruled that the MIB was not subject to the direct vertical effect of the Directive. This erroneous finding can be readily dispatched in the light of the European law considered under the preceding headings: "*First principles on state liability"* and "*A modified principle"*. Once again, it would seem that the court appears to have been misinformed on the correct law and there also seems to have been a serious failure to provide full and proper disclosure of the facts relevant to Department's close working relationship with the MIB and its members.

As to the threshold criteria, Flaux J deftly dismissed the defendant's arguments to the effect that as the Directive left a wide discretion to member states to determine the identity of the compensating body, the directive lacked sufficient precision. He found that Schiemann LJ's *obiter* views to this effect in the Court of Appeal hearing of the *Evans* case,[173] which views were supported by Swinton Thomas LJ and Hobhouse LJ,[174] were made obsolete following the CJEU ruling in *Gharehveran.*[175] According to *Gharehveran*, once a member state exercises its discretion to appoint such a body, any uncertainty or imprecision relating to its identity is thereby removed. The judge was clearly right to rule that the Directive itself was capable of direct effect; so far so good.
Where the judgment comes unstuck is in second limb of the analysis: in establishing whether the Directive has direct effect against the MIB as opposed to central government. Nowhere does the judgment even acknowledge the first principles of state liability and the European case law that lays the foundation for *Foster*. One lesson we can take from *Byrne* is that the CJEU's judgment in *Foster* cannot be properly understood in isolation. *Foster* was never intended to stand on its own, it is incremental to and not independent of the principle of state liability formulated in *Becker*[176] and *Marshall*[177] as augmented by *Konle.*[178] None of these cases are mentioned in *Byrne*.

Instead the judgment offers a misleading analysis of the *Foster* criteria that led the judge to erroneously apply the tripartite test on the MIB, as opposed to the public service devolved to it. Arguably, the judgment is also

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[170] Meaning the intention to be gleaned from the natural meaning of the words used and without reference to *Pfeiffer's* presumptive injunction.
[171] *McCall v Poulton* [2008] EWCA Civ 1263, see paras 35 to 40.
[172] If only for the simple but compelling reason that the gravamen of Part VI Road Traffic Act 1988 is to prevent accident victims from being unable to recover their compensatory entitlement by providing a compensatory guarantee scheme that is different in kind to the rights of the contracting parties. In which case, any *lacunae* in protection, being an exception to that basic principle, should be subject to considerable circumspection.
[173] *Mighell v Reading, Evans v Motor Insurers' Bureau, White v White* [1999] 1 CMLR 1251
[174] Although less stridently so by Hobhouse LJ.
[175] [2001] Case C-441/99
[176] *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] CJEU (Case 8/81)
[177] *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] CJEU Case C-271/91
[178] See also *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] CJEU (Case 424/97)

overly reliant on the *Foster*, *Doughty*[179] and *Griffin*[180] cases, all of which feature large monolithic entities, not well suited to the facts of *Byrne*. It makes no reference to the CJEU ruling in *Johnston*[181] nor, even more to the point, Schiemann LJ's influential Court of Appeal's judgment in the *NUT case*.

Of the three criteria in *Foster*, Flaux J rightly dismissed the defendant's contention that the MIB's role did not fulfil a public service. Where he errs is in the application of the second and third criteria. He concluded that the MIB was neither under the control of the state nor vested with special powers. Quite apart from being arguably the wrong questions[182], any properly informed court would have found an embarrassing wealth of evidence[183] to the contrary, sufficient to establish the case even on those terms.

On the second criterion, although the judgment makes a passing reference to Blackburne J's judgment in *Griffin*, it appears that this may only have been given superficial consideration; what else could explain this learned judge's failure to address Blackburne J's succinct and helpful analysis at paragraph 94? It is so pertinent to this particular case as to merit its repetition in full:

> "The plaintiffs contend, and SWW disputes, that the second of the three conditions, the so-called 'control condition', is fulfilled. In considering that condition it is necessary, in my view, to appreciate several points:
>
> 1. 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.
> 2. The legal form of the body is irrelevant.
> 3. The fact that the body is a commercial concern is also irrelevant.
> 4. It is also irrelevant that the body does not carry out any of the traditional functions of the State and is not an agent of the State.
> 5. It is irrelevant too that the State does not possess day-to-day control over the activities of the body.
>
> See paragraph 20 of the European Court's judgment in *Foster* [1990] IRLR 353 (*set* out above) and Lord Templeman in *Foster* [1991] IRLR 268 at pp.270–271."

More unfortunate yet, the judgment fails to make any mention of the CJEU ruling in *Farrell v Whitty*.[184] which was delivered the preceding year, whose case facts are to all intents and purposes on all fours with *Byrne*. As indicted above, *Farrell* featured a near identical candidate for direct effect, namely the Irish Republic's compensating body and it involved almost exactly the same civil law and social policy imperatives. The CJEU was constrained to rule in *Farrell* that it was the prerogative of the national court, not the CJEU, to make the factual determination as to whether an institution in its jurisdiction was an emanation of the state; applying the relevant European jurisprudence. The fact that it did not dismiss outright the notion that the MIBI might be an emanation of state was surely something that should have been noted and considered. *A fortiori* the view of Advocate General Stix-Hackl at paragraph 72 of his 5th October 2006 opinion in that case:

> "In conclusion, it seems to me that the MIBI may, as a body authorised for the purposes of Article 1(4) of the Second Directive[185] responsible for the function entrusted to those bodies by that directive, be put on the same footing as the State, with the result that Article 1 of the Third Directive[186] may be directly relied upon by individuals before the national courts."

Any properly informed court should have been aware of the relevance of the *Farrell* case, the fact that it had been referred back to the national court and the fact that Birmingham J's judgment,[187] on this very issue the year

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[179] *Doughty v Rolls-Royce Plc* [1992] IRLR 126 CA
[180] *Griffin v South West Water Services Ltd* [1995] IRLR 15
[181] *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1987] CJEU Case 222/84.
[182] As to the correct enquiry, see the concluding paragraphs under the *Conclusions* subheading beneath *A modified principle*.
[183] Considered above under the heading *On the role entrusted to the Article 10 compensating body*
[184] [2006] CJEU Case C-356/05.
[185] Now Article 10 of the Directive, body responsible for compensation.
[186] Now Article 12 of the Directive, special categories of victim.
[187] *Elaine Farrell v Alan Whitty, the Minister for the Environment, Ireland and the Attorney General and the Motor Insurance Bureau of Ireland* [2008] IEHC 124

before, had just been published.[188] What is interesting about this Irish judgment is that it makes the same syntactical error as *Byrne* in the way it construes para 20 of the CJEU's ruling in *Foster*[189] as requiring an analysis of state control over the body in whom the public service is vested as opposed to control over the service *per se*. Properly construed in the light of the superior European law principle set out in *Becker* and other European jurisprudence, whether or not a state happens to exerts control over the body is incidental to, not determinative of, the test. It is the public service that must be subject to state control and the public service that must involve collateral special powers beyond those enjoyed by ordinary individuals. Notwithstanding this semantic confusion, Birmingham J still ruled that the MIBI was an emanation of the state. He was able to make this finding because he was not only aware of the guiding principle in *Becker* but had also been provided with sufficient evidence to come to a just conclusion, all in sharp contrast to *Byrne*.

One of *Byrne's* more astonishing characteristics is the dearth of evidence disclosed to the court when, as with any government department, one would have anticipated an abundance of material. After all, the laying of 'paper'[190] trails is what some consider to be a bureaucracy's chief product. What seems particularly inexplicable is the absence of any reference to the 1945 Agreement[191] which proves beyond doubt that the authorised motor insurers who comprise and manage the MIB are subject to state control, a control that includes ultimate sanction of divesting any non-compliant member of its authorised status.

It is apparent from Flaux J's judgment and from comments made in the Court of Appeal[192] in *Byrne* that the Department for Transport claimed that it had very little documentary evidence that was capable of casting light on the way it regulates the motor insurance sector and its relations with the MIB in particular.[193] In this author's view it is likely that a properly conducted search would reveal an abundance of internal memoranda, correspondence, diary entries and minutes retained at the ministry.[194]

As to the final *Foster* criterion (that requires the body tasked with the public duty to possess special powers beyond those which result from the normal rules applicable to relations between individuals), Flaux J concluded that the MIB had none.

This finding strikes the author as being counter-intuitive, given what we have already noted above.
The judgment does at least consider section 145(6) Road Traffic Act 1988 which imposes membership of the MIB as a condition precedent to authorised status but it concluded that this did not confer any special power on the MIB. This strikes the reader as surprisingly naive, especially in view of the matters considered above under the heading *On the role entrusted to the Article 10 compensating body*. In the writer's view it stands to reason that the MIB must have the power to require the Government to ensure that it is properly funded.[195]

The judgment does not consider the MIB's ability to call on the Government to compel insurers to provide it with their insurance information to enable it to discharge its role under Article 23, nor to consider the implications of this data being interrupted. Neither does it makes any reference to the right of the compensating body to claim a reimbursement from a foreign compensating body under Article 24.2 of the Directive, nor its rights under Article 25. Neither was any consideration given to the extensive substantive and procedural powers conferred on the MIB within the MIB Agreements themselves.

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[188] According to Waller LJ, in *McCall v Poulton & MIB* [2008] EWCA Civ 1263, Birmigham J's judgment was posted on the internet a matter of days before the trial in Byrne, see para 47.
[189] Supra, under the heading: *The Foster guidance on direct effect*.
[190] Increasingly superseded by emails and electronic documents.
[191] See above under *On the nature of the Motor Insurers Bureau*.
[192] See Carnwarth LJ's comment in *Byrne v MIB & Secretary of State for Transport* [2008] EWCA Civ 574at para 41.
[193] This is a phenomenon repeated in another more recent *Francovich* action against the Secretary of State for Transport, which Jay J commented on in the *Delaney* case, supra, at para 89 and 95 – 101.
[194] The author's recent Freedom of Information Act request for data on the relationship between the MIB and the Department has been declined on the ground that it would be too expensive to provide statistics as to senior management level meetings; this is hardly consistent with the almost complete absence of records disclosed to the court in *Byrne*.
[195] See above under, "*A public service under the control of the state*" and the reference to the CJEU ruling in *Fish Legal v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd* [2013] Case C-279/12.

Conclusions on Byrne

It seems highly unlikely that had Flaux J been appraised of key authorities such as *Peiffer*, *Becker* and *NUT;* the reference to the CJEU in *Farrell*, the detailed workings of the MIB Agreements; the European law rights conferred on the MIB by virtue of its role in discharging its responsibilities under Articles 10 and elsewhere in the Directive that he would not at least have taken them into account in his otherwise meticulous judgment. One is forced to conclude, applying the Occam's razor principle[196] that these matters were not raised. As indicated above, this author considers the judge's finding on the second and third issues were both made *per incuriam*.

Main Conclusions

The central theme of this paper is that Article 10 of the Directive has direct effect against the MIB. Furthermore, that this issue is not decided by establishing whether or not the MIB is an emanation of state[197] in its own right. The proposition is governed by the principle of state liability in *Becker* as elucidated by the judgment in *Foster* but in the knowledge that the case facts are distinguishable. Even so, applying the *Foster* criteria to the MIB it is necessary to decide (i) whether the various responsibilities the MIB discharges constitute a public service and in particular whether its role as the Article 10 compensating body is a public service, (ii) whether those roles have been devolved to it by the state, (iii) whether the State has the ability to control or influence those public services and (iv) whether these roles, in particular its Article 10 role, involve the conferral of special powers not enjoyed by ordinary individuals.

The fact that an outsourced service provider, such as the MIB, when discharging those functions happens also to be acting as an emanation of state is a consequence of its role in discharging that public service; no more. The overwhelming preponderance of the evidence considered above leads to the conclusion that the public service discharged by the MIB, as the appointed Article 10 compensating body, satisfies to the criteria formulated by the CJEU in *Foster* that tests the applicability of direct effect where certain European law derived responsibilities are devolved to third party organisations. It has also been argued on an *a priori* basis that the MIB is necessarily, by implication of its Article 10 role, subject to the direct effect of the Directive, independently of the test in *Foster*. The MIB is clearly an emanation of the motor insurance sector but when it acting in its capacity as an Article 10 compensator, it is discharging a public service imposed on the State defined by European law and as such it is acting as an emanation of the state, and accountable as such. However it should be remembered that the CJEU is the final arbiter on the *Becker* principle and *Foster's* test and on the jurisprudence as to the correct attribution of emanation of state status. Its latest judgment in *Farrell* (no 2)[198] is awaited with interest. Subject to this important caveat, if one assumes for a moment that the Directive does have direct effect against the MIB, then that begs the question: with what result?

Wider Implications

The MIB's potential liability under the *Becker* principle is a large and controversial theme, one whose boundaries have not begun to be explored. It is also one complicated first, by emerging pressure from some member states, including the UK, for the Directive to be modified, and secondly, by the current uncertainty associated with the UK's continued membership of the European Union and the way this is likely to affect the way courts construe non-compliant national provision.

It follows that if the direct effect exception in *Becker* applies to organisations like the MIBI and the MIB, then it also applies to each and every Article 10 authorised body across the European Union. This will have beneficial consequences for United Kingdom residents injured in foreign EU member states where the foreign applicable law fails to fully implement Articles 3 and 10 of the Directive. In the United Kingdom there are two main areas where direct effect will be felt most.

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[196] Namely that where there are several competing hypotheses, the one with the fewest assumptions should be preferred.

[197] Although this is certainly a relevant factor and one that is capable of triggering direct effect, see *Foster* para 18 above.

[198] As indicated above, this is the second reference to the CJEU on this issue in this case.

The MIB Agreements as a subordinate source of law

The first of these concerns the way direct effect will alter individual victims' rights under the two compensatory schemes set out within the Uninsured and Untraced Drivers' Agreements. Although this author has argued that they are to be construed purposefully so at to give effect, in so far as is possible, to the legislative aims of the Directive, the extent to which this is capable of curing flaws that seem to go against the grain of these schemes has yet to be fully tested. Take for example the way both agreements dove tail their geographic and mechanical scope to the Road Traffic Act 1988 definitions imposing the duty to insure. In *Mind The Gap!* the author argued that those provisions are incompatible with the wider scoped geographic and mechanical scope of the Article 3 insurance requirement. Yet it is conceivable, even in a post *Pfeiffer* world, that a court might still take the view that to impose a European law consistent interpretation that complies with the much wider ambit indicated by *Vnuk*, would conflict with the *contra legem*[199] principle and thus lie beyond the power of the court to confer. Alternatively, it is possible that a court might be persuaded to the view that to apply a wider geographic and mechanical scope to the MIB Agreements than has been contemplated by the statute[200] would effectively be imposing an unacceptable degree of retrospection.

Putting such fundamental incompatibilities to one side, a European law consistent interpretation is still capable of proving very effective in excising the various unlawful exclusions and qualifications to liability within the MIB Agreements. This is because *Pfieffer* requires every court to take a proactive stance. The conventional passivity rule[201] is displaced in this context. The court's mandatory constitutional duty, as an organ of the State, is to "... interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive "[202]. Furthermore, when undertaking this task it must "...presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned…"[203]

However, the *Byrne* and *UK Insurance* cases still confront us, *per incuriam* though they may be. Notwithstanding Lord Aikens helpful guidance in *Churchill*, this is still a relatively grey area where the judicial discretion makes it difficult to predict outcomes. This is precisely where the ability to rely on the direct effect of the Directive against the MIB comes into its own.

Direct effect does not render the MIB Agreements obsolescent. Clearly, to the extent that they conform with EU law, they will remain the primary source of law, under the well-established European subsidiarity principle.[204] Even where that domestic provision is defective[205], a court's first recourse is likely to be to attempt a European law consistent interpretation. However, it will no longer be confined to the constraints imposed by that artificial exercise: of second-guessing what a properly informed legislature or minister ought to have intended by words whose natural meaning fails to conform to the European law they are supposed to implement. Instead, once a non-conformity is established the court will be able to determine an individual claimant's rights by resorting directly to the wording of the Directive itself, as though it were part of the national law, relegating the relevance of the actual national law implementation to a subordinate level of significance. Direct effect confers a much greater ability on judges to uphold rights on individuals conferred under superior European law, even where they go against the grain of the national law.

MIB liability for non compliant statutory provision

The second area in which the direct effect of the Directive will be most felt is in the way it impacts on the UK's statutory provision, where that law fails to comply with the minimum standard of compensatory protection required under the Directive. In *Mind The Gap!* the following, non exhaustive, list of legislation was identified

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[199] See for example the way the House of Lords felt constrained in what they could do to cure the unamended version of section 143 Road Traffic Act 1988 in *Clarke v Kato and Cutter v Eagle Star Insurance Ltd* [1998] All ER (D) 481.
[200] Which the scheme is designed to augment; not supplant.
[201] By which the court leaves it to the parties to define the issues it is required to consider. The Civil Procedure Rules 1989 have made considerable inroads into this convention.
[202] *Pfeiffer*, para 113.
[203] *Pfeiffer*, para 112.
[204] By way of example, see the CJEU ruling in *Evans*, para 34.
[205] In the sense that it is incompatible with the Directive.

as conflicting with the more generous, wider scoped and free-standing compensatory guarantee imposed under European law: Part VI of the Road Traffic Act 1988, the Third Party Rights Acts 1930 and 2010 and the (European Community) Rights Against Insurers Regulations 2002.[206] Although the UK Parliament is primarily responsible for statutes and statutory instruments that infringe the Directive, and through it the UK government, the doctrine of direct effect will also have a profound impact on the MIB's ultimate liability and through it, the motor insurers who contribute to its levy. As indicated above, the geographic and mechanical scope of the MIB's contractual obligation to compensate victims under its two schemes is defined by Part VI of the Road Traffic Act 1988 to which both sets of MIB agreements specifically refer.[207] Unfortunately these statutory provisions do not extend to use of motor vehicles on private property nor to vehicles other than those intended or adapted for general road use, even where they are actually used on roads. The CJEU ruling in *Vnuk* has made explicit what was previously clear and obvious, namely that the European law obligation imposed under Article 3 of the Directive permits no such restrictions to its geographic and mechanical scope.

The significance of direct effect against the MIB in this context is that it is capable of pinning the MIB with liability for the UK government's legislative failings.

The MIB, as the Article 10 compensating body, is charged with compensating victims of "uninsured vehicles". The proper scope of that role is ultimately determined by the wording of the Directive; not the UK's statutory provisions nor the minister's contractual arrangements with the MIB. Accordingly, regardless of whatever redress the MIB may have from the state, it is liable to compensate victims of motor vehicles not caught by the Road Traffic Act definitions and of motor accidents on private property, notwithstanding that these events clearly fall outside the natural meaning of the words used to define the scope of the MIB's contractual arrangements with the State. Put another way the European principle of direct effect pins the MIB with liability for the State's incompetence, for which it is not responsible.

As Advocate General Gereven explained at para 5 of his opinion in *Foster*:[208]

> "In *Marshall*[209] the possibility of relying on an unconditional and sufficiently precise provision of a directive against a Member State was thus clearly linked to the failure of the Member State to implement the directive in national law correctly and at the proper time. Accordingly, the principle "the State cannot plead its own wrong" (15) or the principle *nemo auditur propriam turpitudinem allegans*[210] were held to constitute the basis for vertical direct effect . At the same time, however, the principle was interpreted broadly : the failure to act can be relied on by individuals against the Member State regardless of the capacity in which the State acts - as "employer or public authority"; moreover, as also appears from later judgments which will be discussed below***, the failure to act can be relied on by individuals against independent and/or local authorities which are not themselves responsible for the failure to implement the directive in national law***."

Applying this principle to the MIB, as opposed to the MIB agreements *per se*, it is axiomatic that any vehicle which under European law ought to be covered by the Article 3 insurance requirement but is not due to the UK's failure to fully transpose that obligation into the Road Traffic Act 1988 falls within the Article 10 definition of "a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied". The European jurisprudence is clear that there should be no gaps in cover. Recital 14 of the Directive explains this imperative: "It is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified".

It follows therefore that if Article 10 has direct effect then the MIB will also be liable not just for its contractual obligations agreed with the minister but also for any situation in which a vehicle requiring civil liability cover under Article 3 is in fact uninsured.

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[206] To which one might add the Contracts (Rights of Third Parties) Act 1999, see earlier footnote and Section 1(5) thereof.
[207] These confine the two compensatory schemes to events that require comprehensive third party motor insurance, as defined by sections 143, 145, 195 and 192 of the Road Traffic Act 1988.
[208] Emphasis added.
[209] *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] CJEU Case C-271/91.
[210] i.e. no one shall be heard, who invokes his own guilt.

As indicated in *Mind The Gap!* this makes the MIB liable, and through it every authorised levy paying motor insurer, to compensate a plethora of exotic off road motor vehicles that do not fall within the highly specific definition within Section 185 of the 1988 Act. The MIB is also liable to compensate victims of motor accidents on private property, which under our national law does not require third party motor cover as it is not a public place. Furthermore many of difficulties encountered by accident victims due to the numerous other substantive law defects in the statutory and extra-statutory implementation of the Directive, effectively fall away.

The scale of the problem

The scale and nature of the UK's non conformity is a shambles of near epic proportions: our national law provision in this area is so profoundly flawed that it cannot be taken at face value. Millions of motor policies contain exclusions and restrictions in cover that are not permitted by the Directive. The *UK Insurance* case reveals that some motor policies do not even conform with s 145 of the Road Traffic Act 1988 which sets out the minimum third party cover requirements.

The widespread nature of the infringements by the UK in its statutory and extra-statutory transposition of the Directive have already been mentioned above. All these conflicts of law undermine the principle of legal certainty which is a pre requisite of a state's full and proper implementation of the Directive. No well educated and reasonably informed citizen could be expected to identify the true extent of their entitlement to the compensatory guaranteed required under European law from even a close and careful study of our national law provision; especially if some of our judiciary appear to be unequal to the same task.[211]

Legal certainty is vital, not just for the victims who depend on the UK's proper implementation of their legal entitlement under European law but it arguably even more acute for the motor insurers operating in this market, as the pricing of premiums depends on accurate predictions of the financial risks they underwrite. It almost goes without saying that the MIB must now prepare itself for much greater scrutiny of the regimes they operate and for a tide of new claims for incidents that fall outside the scope of their contractual arrangements with the state.

Years of ministerial inaction are responsible. The Department for Transport were an intervening party in *Bernaldez* and so should have known, back in 1996, that the European insurance requirement was highly prescriptive, leaving no room for individual member states to permit their own idiosyncratic exclusions or restrictions in cover – but they did nothing. The *Vnuk* ruling has been with us since September 2014. The implications of that judgment could not have been clearer. The amendments necessary to bring the geographic and mechanical scope of the compulsory third party motor insurance requirement provided for under the Road Traffic Act 1988 could hardly be simpler or more obvious. Yet the Department for Transport's only response, so far, is to indicate in vague terms that the minister is contemplating yet another round of consultation; sometime soon. Consultation is no answer to decades of inaction and illegality. Meanwhile, lawyers, judges, insurers and the public must cope as best they can in the entirely avoidable hiatus caused by this ministry's longstanding failure to properly discharge its legal responsibility to fully transpose the Directive.

[211] See for example the unanimous but nevertheless erroneous decisions in *EUI v Bristol Alliance Partnership Ltd* [2012] EWCA Civ 1267 and *Delaney v Pickett and Tradewise* [2011] EWCA Civ 1532.