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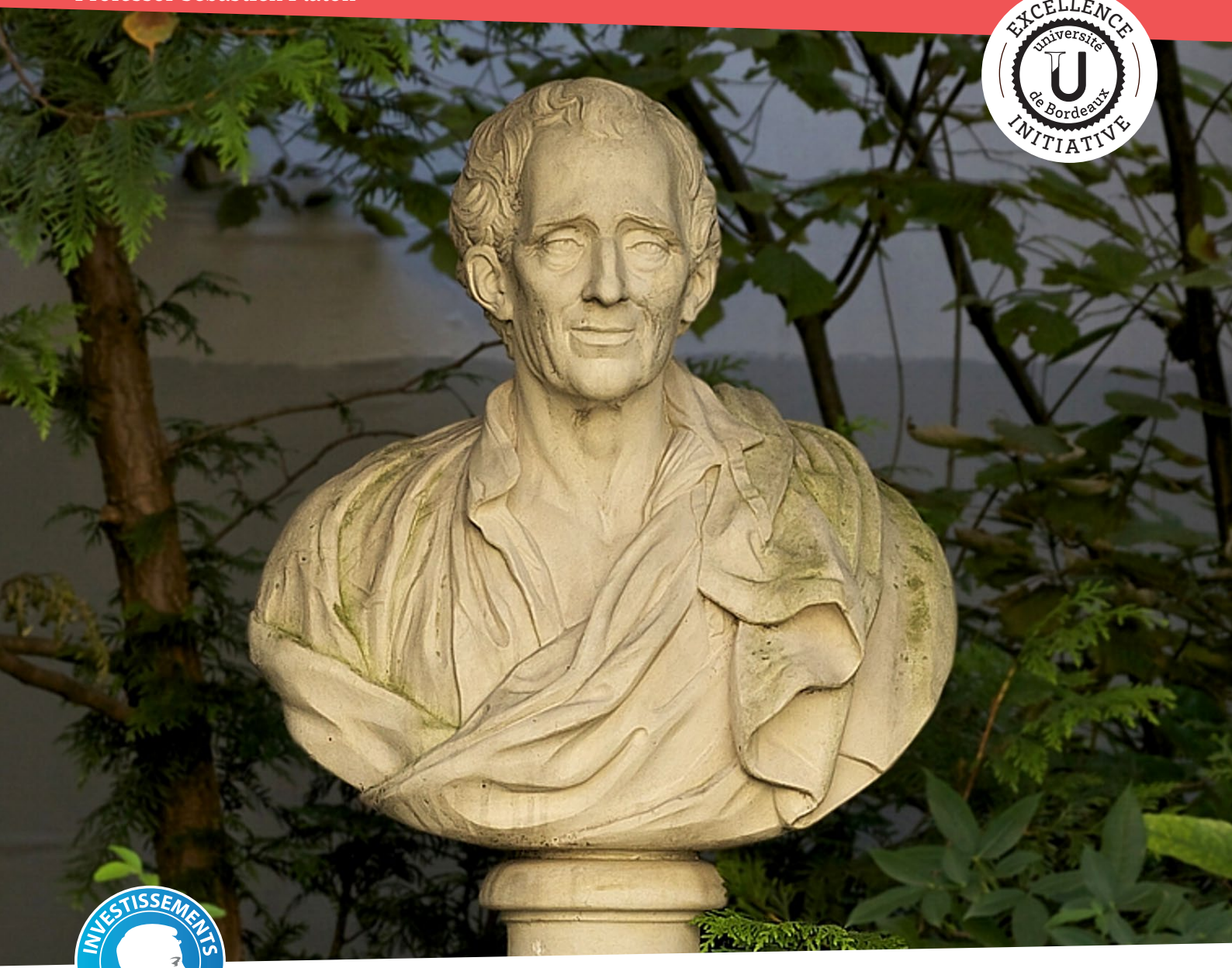

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European law (EU):

The notion of "public authority" in the recent case law of the European Court of Justice and its impact on French administrative law

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The distinction between public and private entities, which is an important distinction in French public law, has been affected by the recent case law of the European Court of Justice, and in particular by the decisions in *Portgás* of 12 December 2013 (1) and *Fish Legal e.a.* of 19 December 2013 (2).

The notion of "public entity" in French public law

In French public law, the notion of "public entity" is of central importance. Public entities can be defined as being legal persons governed by public law. There are usually three categories of public entity: the State, local authorities, and public establishments.

The State is, in a sense, the "leading" public entity from which all others are derived. Local authorities are off-shoots of the State: it is through the State that those authorities exist; it is the State that decides on their organization and has sovereignly transferred part of its powers and areas of responsibility. As can been seen, this is a very French approach to decentralization, which is diametrically opposed to the American-style federalism which considers that federal government draws its powers from the federated States. At most, it may be observed that some scholars in the 19th and early 20th centuries defended the idea that the communes are the "original" subjects of public law. Thus Pierre-Joseph Proudhon asserted that *"the Commune is, by its essence, like man, like the family, like any individuality and any intelligent, moral and free community, a sovereign being"* (3). The same idea can be found in the writings of Raymond Carré de Malberg, who takes the view that the commune has *"its own tasks, functions and rights, being rights that are not delegated to it by the State, but which answer to the administration of its own interests and affairs"* (4).

As for public establishments, these are entities governed by public law, specially created with a view to managing a specific public service. They are created either by the State (we then speak of the *établissement public national* or national public establishment) or by local authorities (*établissement public local* or local public establishments). Although legally distinct from their "creator", public establishments remain within the latter's fairly tight administrative purview. This administrative purview is currently known in France as *tutelle*.

The exhaustive nature of this tripartite classification is unclear. Some public entities do not seem to fit into any one of the three categories, such as the Banque de France (the independence of which contradicts the notion of *tutelle* or administrative purview) or even those known as *groupements d'intérêt public* or public interest groups. More recently, new specialist public establishments have emerged which do not seem to fit into any of the categories either: *autorités publiques indépendantes* or independent public authorities, which are administrative

establishments responsible for the protection of certain rights or freedoms or for the regulation of some sectors of the economy (5).

Public entities are not alone in their involvement in public action. In some instances, private entities may be awarded a public service contract. This award can take the form of a contract with a public entity (public service delegation agreement, even a public procurement contract in some cases). It may also be a "unilateral" delegation. This generally occurs in a scenario whereby a public entity creates a body to run a public service and chooses to incorporate it under private law. This is the case, for example, of *caisses primaires d'assurance maladie* (local sickness insurance funds), which are responsible for community relations with sickness insurance users.

While a public service may be operated as much by a public entity as by a private one, the distinction between the two remains nonetheless significant. The public or private nature of a given entity will, for instance, have an impact on its internal organisation, the law applicable to the contracts it may enter into, the accounting rules that apply, etc. This distinction between public and private entities must, in a sense, compete with the definition of "public authorities" established in ECJ case law, and in particular the abovementioned *Portgás* and *Fish Legal* decisions.

The European Court of Justice's decision in *Portgás*

In *Portgás*, the issue brought before the European Court of Justice was whether a Member State which has not transposed a Direction could invoke said Directive against a public service concession-holder before a national court. Under ECJ case law, a Directive cannot impose a duty on a private individual. It therefore cannot being invoked in legal proceedings against a private individual before a national court (6), particularly where the State has omitted to transpose the same.

However, by virtue of the *Foster* judgment of 12 July 1990 (7), a network concession holder may in some cases can be considered as a "public authority" rather than a private entity. In that decision, the Court took the view 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"* (point 20). In the *Portgás* decision, the Court adopted the same criteria. However, owing to a lack of information in the file, the Court did not rule on the question as to whether Portgás could, in this case, be considered as a "public authority" within the meaning of the case law in *Foster*; instead, it left that assessment to the national court.

There remained the matter of determining whether the potential qualification of Portgás as a "public authority" could allow the State a Directive against it before the national courts, when the State had omitted to transpose it. On this point, the Court based its reasoning on the duty to take all necessary general and particular measures in order to achieve the result prescribed by a Directive. This duty is incumbent not only on the State but also on all its authorities (8). However, only central government is liable *in fine,* before European Union institutions, for the fulfilment of that duty. It would consequently be paradoxical if European Union law were to deprive the State of those means allowing it guarantee the fulfilment, on the part of its authorities, of a duty for which

it alone would be liable, where applicable, before the Court of Justice. This is precisely the consequence that would result were it impossible for the State to invoke a Directive against its own authorities before the national courts.

The European Court of Justice's decision in *Fish Legal*

In the *Fish Legal* judgment, the Court of Justice again used the definition of "public authority" established in *Foster*, only this time in an altogether different context. It was a matter in the second case of interpreting Directive 2003/4 of 28 January 2003 (9) on public access to environmental information which implemented the Aarhus Convention in European Union law.

Pursuant to Article 3 (1) of said Directive, *"Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest"*. Article 2 (2) of the same Directive defines the notion of "public authority" as follows:

"[...] a) government or other public administration, including public advisory bodies, at national, regional or local level;

(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). Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

In this context, the Court of Justice was asked to rule on the question of whether commercial companies responsible in the United Kingdom for water supply and sanitation services, in the framework for the privatisation of the sector in 1989, were likely to constitute public authorities within the meaning of the Directive and, if so, on the scope of their duty to issue the environmental information in their possession.

Proceeding with a systematic reading of the Directive, the Court took the view that a distinction ought to be made between, on the one hand, public authorities in the organic sense i.e. those enumerated under subparagraph a), namely *"government or other public administration, including public advisory bodies, at national, regional or local level"*; and, on the other hand, public authorities in the operational sense, i.e. any public or private entity performing a public administrative function. It was at this stage that the Court broke new ground in terms of definitions, by taking the view that this means "*entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law*" (para. 52).

This definition is reminiscent of that given in the *Foster* decision. The Court did not, however, mention it at this point in its reasoning to justify its definition of “public authority”. Conversely, Advocate General Cruz Villalon explicitly used *Foster* in his conclusions in order to formulate the same definition as the Court. It will be noted, however, that the "control by a public authority" condition, which can be found in *Foster*, was not taken up in the definition of “public authorities” put forward by the Court. This is another consequence of the systematic approach, as that condition features at point c) of Art. 2 (2), i.e. the third category of public authorities within the meaning of the Directive.

Point c) was also the subject of other preliminary questions that the Court handled together, precisely with a view to determining which criteria would serve to establish whether an entity finds itself "under the control" of a public authority within the meaning of either point a) or point b). It was only at this stage of its reasoning that the Court finally explicitly mentioned the judgment in *Foster*, and this because the national court wished to know whether the notion of "supervision" within the meaning of the Directive was to be interpreted in the same way as in the *Foster* case law. However, having drawn inspiration from that decision in order to identify the criteria for “service of public interest” and "special powers", the Court then moved away from it. Admittedly, according to the Court, “*[w]here a situation of control is found when applying the criteria adopted in Foster and Others, paragraph 20, that may be considered to constitute an indication that the control condition in Article 2(2)(c) of Directive 2003/4 is satisfied, since in both of those contexts the concept of control is designed to cover manifestations of the concept of ‘State’ in the broad sense best suited to achieving the objectives of the legislation concerned”* (para. 64). Nevertheless, it specified immediately afterwards that *“[t]he precise meaning of the concept of control in Article 2(2)(c) of Directive 2003/4 must, however, be sought by taking account also of that directive’s own objectives”*.

The Court then proceeded with an interpretation of "public authority" based on the notion of public powers: *“in defining three categories of public authorities, Article 2(2) of Directive 2003/4 is 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”* (para. 67). It went on: *“Those factors lead to the adoption of an interpretation of ‘control’, within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity’s action in that field”* (para. 68).

Finally, there remained one last important question as to the scope of the right of access to information held, in the scenario where an entity cannot only qualified as a public authority for part of its activities. In such cases, does the public have a right of access to all information held by that entity, or only that information held in the context of the supply of public services? On this point, the Court made a distinction between public authorities within the meaning of, on the one hand, Art. 2 (2) b) and, on the other, Art. 2 (2) c). According to the Court, *"Article 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, such as the water companies concerned, which are capable of being a*

public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services" (para. 83 and operative part).

Interference with French public law

The "public authority" qualification within the meaning of the decision in *Foster* therefore has several significant and onerous consequences. It must be noted that the notion of "public authority", within the meaning of European Union law, does not correspond with the notion of "public entity" within the meaning of French law.

Indeed, a private entity entrusted with a public service task, within the meaning of French law, may meet all the criteria for public authorities established in *Foster*. The definition of private entities entrusted with public service tasks is currently set by the *Conseil d'Etat*'s decision in *A.P.R.E.I.* (10). The following are now considered to be private entities entrusted with public service tasks:

- any private entity entrusted with tasks of general interest, monitored by the Administration AND having *prérogatives de puissance publiques* (the equivalent under French law of "special powers")
- OR, in the absence of such powers, any private entity *"where, in light of the general interest of its activity, the circumstances of its creation, its organisation or its operation, the duties imposed on it as well as the measures adopted in order to verify whether the aims assigned to it have been achieved, it appears that the Administration intended to entrust such tasks to it"*.

Entities that match the criteria in the first scenario may be qualified as being public authorities under European Union law, while they remain private entities within the meaning of French law. The result is that it is possible for any entity, including the State, to invoke a Directive against them before the national courts. They therefore do not benefit from the ECJ's case law, which forbids the use of a Directive against a private entity before the national courts. Moreover, they are bound by a duty to disclose the environmental information in their possession to anyone requesting the same. Still further, insofar as they are the holders of *prérogatives de puissance publique* (public-authority powers), they may be considered as public authorities within the meaning of Article 2 (2) b) of Directive 2003/4. Therefore, pursuant to the decision in *Fish Legal*, they constitute public authorities *"as regards all environmental information [that they hold]"* and must therefore disclose all environmental information in their possession, even "*where there is no doubt that these do not relate to the provision [of public services related to the environment]"*.

These decisions of the European Court of Justice (and there are many others) further illustrate that European Union public law develops independently of the national public law of Member States, which can be disruptive for the latter, and particularly in a body of law as developed as French public law.

Notes:

(1) ECJ, Case C-425/12, *Portgás - Sociedade de Produção e Distribuição de Gás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território* [2013] ECR xxxx.

(2) ECJ, Case C-279/12, *Fish Legal, Emily Shirley v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd, Southern Water Services Ltd* [2013] ECR xxxx.

(3) Proudhon P. J., *De la capacité politique des classes ouvrières*, in Œuvres complètes, Paris, éditions Rivière, 1924, IV, p. 285.

(4) Carré de Malberg R., *Contribution à la théorie générale de l'Etat*, 1922, réimp. Dalloz 2003, pp. 65 s.

(5) On all of these "new" public entities, see *Rapport d'étude du Conseil d'Etat sur les établissements publics* (Conseil d'Etat Report on public establishments), adopted on 15 October 2009.

(6) ECJ, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 03969, point 9; ECJ, Case C-91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-03325, point 20.

(7) ECJ, Case C-188/89, *Foster and others v British Gas plc* [1990] ECR I-03313.

(8) ECJ, Case C-129/96, *Inter-Environnement Wallonie v Région wallonne* [1997] ECR I-07411, point 40.

(9) Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Directive 90/313/EEC of the Council, *OJEU* n° L 41, 14 February 2003, p. 26.

(10) Conseil d'Etat (CE), Sect., 22 January 2007, *Association du Personnel Relevant des Etablissements pour Inadaptés (A.P.R.E.I.)*, application n° 264541.