The invalid directive: the legal authority of a union act requiring domestic law making

Vandamme, T.A.J.A.

Citation for published version (APA):
Contents

CHAPTER 1

Introduction
1 Pandora's Box 3
2 The Pivotal Question 3
3 The Directive 4
3.1 The 'Dual Nature' of the Directive 4
3.2 National Discretion 7
3.3 Regulations and Directives 9
3.4 Terminology: Implementation and Transposition 10
4 Defining the Relationship 11
4.1 What Makes the Relationship Interesting? 12
4.1.1 Practical Relevance 12
4.1.2 Theoretical Relevance: The 'Authority' of a Directive 14
5 Delimiting the Topic 15
6 The Plan 17

CHAPTER 2

Reviewing an Instrument with a 'Dual Nature'
1 Introduction 21
1.1 Annulled, Void, Invalid and Non-Existence 21
1.2 Certain Substantive Aspects of Judicial Review of Directives 23
1.2.1 Introduction 23
1.2.2 Marginal Review 25
1.2.3 Consistent Interpretation of Directives 29
1.2.3.1 Limits to Consistent Interpretation? 31
1.2.4 Partial Invalidity 34
1.2.5 Conclusions 35
2 Procedural Aspects of Judicial Review of Directives 36
2.1 Introduction 36
2.2 The Action for Annulment of a Directive 39
2.2.1 The Privileged Applicants in the Co-Decision Era 39
2.2.2 Directives and Private Plaintiffs under Article 230 EC 41
2.2.2.1 Are Directives Excluded a Priori? 41
2.2.2.2 Directives and Direct Concern 46
2.2.2.3 Directives and Individual Concern 51
2.2.2.4 Private Plaintiffs' Interests in Annulment of a Directive 52
2.2.3 Community Law Effects of an Annulment 53
2.3 The Validity of Directives in Preliminary References 56
2.3.1 Introduction 56
2.3.2 The Complementary Function of the Preliminary Reference 56
2.3.3 Article 234 EC as a Legal Remedy against Invalid Directives 60
2.3.3.1 Benevolence of the National Courts 61
2.3.3.2 Remedies against the Implementing Measure 62
2.3.3.3 European Minimum Requirements 64
THE INVALID DIRECTIVE

2.3.4 How Relevant is the Validity Question to the National Court? 66
2.3.5 The Effects of a Declaration of Invalidity 70
2.3.6 Conclusions 72
2.4 Invalid Directives and the Action for Damages 72
2.4.1 Introduction 72
2.4.2 Direct Actions for Damages 75
2.4.3 The Effect of Damages: Invalidity or ‘Invalidity’? 79
2.4.4 National Damages against National Measures 82
2.4.5 Conclusions 83
2.5 The Plea of Illegality 84
2.5.1 The Position of Individuals 84
2.5.2 The Position of Member States and Community Institutions 85
2.5.3 Inapplicability 87
2.6 Non-Existent Directives 88
3 Suspending the Application of Community Law 91
3.1 The European Court 91
3.1.1 The Anticipated Damages 92
3.1.2 The Scope of Interim Relief Against a Directive 93
3.1.3 Member State Disobedience During Cases Pending 95
3.2 The National Court 96
3.2.1 Zuckerfabrik During the Implementation Term: The UK Tobacco Cases 97
3.3 Conclusions 100
4 EU Political Consequences of Review 101
4.1 The Scope of Article 233 EC 101
4.2 Withdrawal 104
4.2.1 Lawful Directives 104
4.2.2 Unlawful Directives 107
5 Conclusions 109

CHAPTER 3

The Per Se Rule
1 Introduction 113
2 The Invalid Directive in the State of the Art 114
2.1 Legal Writing 114
2.2 The Legislator’s Opinion 116
2.3 Interim Conclusion 119
3 Systematic Aspects of European Law 119
3.1 Article 249 EC as the Basis of a Hypothesis 120
3.2 National Discretionary Powers: The Problem of ‘Extraction’ 123
3.3 Implementation Through Existing Law 124
3.4 EC Law and Conflicting National Law: A European ‘Minimum Sanction’ 125
3.4.1 Non-Existence of National Law? 126
3.4.2 Delimiting ‘Non-Applicability’ 129
<table>
<thead>
<tr>
<th>CONTENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.5</td>
</tr>
<tr>
<td>3.6</td>
</tr>
<tr>
<td>3.7</td>
</tr>
<tr>
<td>4</td>
</tr>
<tr>
<td>4.1</td>
</tr>
<tr>
<td>4.2</td>
</tr>
<tr>
<td>4.3</td>
</tr>
<tr>
<td>4.4</td>
</tr>
<tr>
<td>4.5</td>
</tr>
<tr>
<td>5</td>
</tr>
<tr>
<td>5.1</td>
</tr>
<tr>
<td>5.1.1</td>
</tr>
<tr>
<td>5.1.2</td>
</tr>
<tr>
<td>5.2</td>
</tr>
<tr>
<td>5.2.1</td>
</tr>
<tr>
<td>6</td>
</tr>
</tbody>
</table>

### CHAPTER 4

**Incidental EU Consequences for the Implementing Measure**

| 1 | Introduction | 159 |
| 2 | Limiting in Time the Effect of Annulment | 159 |
| 2.1 | Policy Continuity or Legal Certainty? | 163 |
| 2.2 | Conclusion | 165 |
| 3 | The Nature of the Invalidity: The Addressees of the Violated Norm | 165 |
| 3.1 | Introduction | 165 |
| 3.2 | Protecting or Addressing the Member States? | 166 |
| 3.3 | Subsidiarity and Proportionality | 171 |
| 3.3.1 | Subsidiarity | 172 |
| 3.3.2 | Proportionality: One Principle, Three Norms | 175 |
| 3.4 | ‘Double Addressing Norms’ | 177 |
| 3.4.1 | The Position of the Internal Market under the European Constitution | 178 |
| 3.4.2 | The Community Legislator Exempted From Treaty Obligations? | 181 |
| 3.4.3 | Notification | 187 |
| 3.4.4 | International Treaties and Customary International Law | 189 |
| 3.4.4.1 | ‘Concluded by the Community’ | 191 |
| 3.4.4.2 | Invocability and the *Nakajima* Exception | 192 |
| 3.4.4.3 | Customary International Law | 196 |
| 3.5 | General Principles of Community Law | 197 |
| 3.5.1 | Introduction | 197 |
| 3.5.2 | Inside or Outside the Scope of Community Law? | 199 |
### 3.5.2.1 Measures Implementing Community Acts

### 3.5.2.2 A Wider Community Context?

### 3.5.3 Some Remarks on Human Rights

### 4 Exclusivity of Community Competences

#### 4.1 Exclusivity a Priori and the British Fisheries Cases

#### 4.2 Exclusivity by 'Occupation of the Field'

#### 4.3 Is the Field Still Occupied?

#### 4.4 Conclusion

---

### 5.1 The Principle of Sincere Co-Operation

#### 5.2 The Scope of Article 10 EC

#### 5.3 Limits to an Open-Ended Article?

#### 5.4 The Concrete Duties of the Member States

#### 5.5 Conclusion: No Duty to Maintain

---

### 6 Conclusions

---

### CHAPTER 5

**Invalid Directives and National Implementation**

1.1 Introduction

1.2 The 'Authority' of Directives as Expressed in National Law

1.3 Pressure to Implement

1.4 Efficiency

1.5 'Democratic Leakage'

1.6 National Politics Regain Power

1.7 National Courts Regain Power

1.8 'Shifting' National Democratic Safeguards

1.9 EC Requirements as to National Legislation

1.10 Valid Directives and Invalid Implementation

1.11 Intermezzo

2 The Invalid Directive and the Legal Systems of Four Member States

2.1 The United Kingdom of Great Britain and Northern Ireland

2.1.1 The European Communities Act 1972

2.1.2 UK Courts and Implementation

2.1.3 *Ultra Vires*

2.1.4 Indirect Challenge

2.1.5 Invalid Directives and British Preliminary References

2.1.6 Tobacco Advertising Revisited

2.1.7 Devolution Issues

2.1.7.1 Scotland

2.1.7.2 Northern Ireland

2.1.7.3 Wales

2.1.8 Conclusions as to UK Law

2.2 The Kingdom of Belgium

2.2.1 Federal Implementation: Article 108 B.Const.

2.2.2 Federal Implementation: Enabling Acts
CONTENTS

2.2.3 Other Procedural Requirements 270
2.2.4 'Re-Centralization' under EU Pressure? 272
2.2.5 Belgian Courts and Implementation 274
2.2.5.1 The Francorchamps Cases Revisited 275
2.2.5.2 The Annulled Federal Law on Tobacco Advertising 275
2.2.5.3 The Annulled Walloon Decree on Tobacco Advertising 277
2.2.5.4 Review of Executive Legislation 279
2.2.6 Conclusions as to Belgian Law 281
2.3 The French Republic 281
2.3.1 A Vertical Division of Competences 282
2.3.2 Execution and operationalization of 'rules' and 'principles' 285
2.3.3 Implementation by Arrêté 288
2.3.4 Facilitating Implementation: The Ordonnance 289
2.3.5 French Courts and Implementation 292
2.3.5.1 Review of French Statutes: The Conseil Constitutionnel 292
2.3.5.2 Review of Executive Legislation: The Conseil d'État 295
2.3.5.3 Some Remarks on Locus Standi 300
2.3.5.4 Lower Administrative Courts and Ordinary Courts: The Exception of Illegality 301
2.3.6 Conclusions as to French Law 303
2.4 The Kingdom of The Netherlands 304
2.4.1 Implementation in The Netherlands 305
2.4.2 The Dutch 'Henry VIII Clause' 310
2.4.3 Dutch Courts and Implementation 313
2.4.4 Conclusions as to Dutch Law 320
3 Conclusions as to National Law 320

CHAPTER 6

General Conclusion
1 'Authority' and Legal Review 325
1.1 Political Motives, Political Expectations and Legal Expectations 326
2 A Directive's 'Authority' in EC Law 326
2.1 The Directive as Part of the European Legal System 327
3 A Directive's 'Authority' in National Law 328
4 Future Developments: From 'Sovereignty' to 'Autonomy'? 330

Invalidated Directives 332
Tables of Cases 336
Tables of Legislation 350
Bibliography 360
Abbreviations 374
Index 378
Samenvatting 384