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

Vandamme, T.A.J.A.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
## Contents

### CHAPTER 1

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>Pandora’s Box</td>
<td>3</td>
</tr>
<tr>
<td>3</td>
<td>The Pivotal Question</td>
<td>3</td>
</tr>
<tr>
<td>3.1</td>
<td>The ‘Dual Nature’ of the Directive</td>
<td>4</td>
</tr>
<tr>
<td>3.2</td>
<td>National Discretion</td>
<td>7</td>
</tr>
<tr>
<td>3.3</td>
<td>Regulations and Directives</td>
<td>9</td>
</tr>
<tr>
<td>3.4</td>
<td>Terminology: Implementation and Transposition</td>
<td>10</td>
</tr>
<tr>
<td>4</td>
<td>Defining the Relationship</td>
<td>11</td>
</tr>
<tr>
<td>4.1</td>
<td>What Makes the Relationship Interesting?</td>
<td>12</td>
</tr>
<tr>
<td>4.1.1</td>
<td>Practical Relevance</td>
<td>12</td>
</tr>
<tr>
<td>4.1.2</td>
<td>Theoretical Relevance: The ‘Authority’ of a Directive</td>
<td>14</td>
</tr>
<tr>
<td>5</td>
<td>Delimiting the Topic</td>
<td>15</td>
</tr>
<tr>
<td>6</td>
<td>The Plan</td>
<td>17</td>
</tr>
</tbody>
</table>

### CHAPTER 2

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Reviewing an Instrument with a ‘Dual Nature’</td>
<td>21</td>
</tr>
<tr>
<td>1.1</td>
<td>Introduction</td>
<td>21</td>
</tr>
<tr>
<td>1.2</td>
<td>Annulled, Void, Invalid and Non-Existent</td>
<td>23</td>
</tr>
<tr>
<td>1.2.1</td>
<td>Certain Substantive Aspects of Judicial Review of Directives</td>
<td>23</td>
</tr>
<tr>
<td>1.2.2</td>
<td>Marginal Review</td>
<td>25</td>
</tr>
<tr>
<td>1.2.3</td>
<td>Consistent Interpretation of Directives</td>
<td>29</td>
</tr>
<tr>
<td>1.2.3.1</td>
<td>Limits to Consistent Interpretation?</td>
<td>31</td>
</tr>
<tr>
<td>1.2.4</td>
<td>Partial Invalidity</td>
<td>34</td>
</tr>
<tr>
<td>1.2.5</td>
<td>Conclusions</td>
<td>35</td>
</tr>
<tr>
<td>2</td>
<td>Procedural Aspects of Judicial Review of Directives</td>
<td>36</td>
</tr>
<tr>
<td>2.1</td>
<td>Introduction</td>
<td>36</td>
</tr>
<tr>
<td>2.2</td>
<td>The Action for Annulment of a Directive</td>
<td>39</td>
</tr>
<tr>
<td>2.2.1</td>
<td>The Privileged Applicants in the Co-Decision Era</td>
<td>39</td>
</tr>
<tr>
<td>2.2.2</td>
<td>Directives and Private Plaintiffs under Article 230 EC</td>
<td>41</td>
</tr>
<tr>
<td>2.2.2.1</td>
<td>Are Directives Excluded a Priori?</td>
<td>41</td>
</tr>
<tr>
<td>2.2.2.2</td>
<td>Directives and Direct Concern</td>
<td>46</td>
</tr>
<tr>
<td>2.2.2.3</td>
<td>Directives and Individual Concern</td>
<td>51</td>
</tr>
<tr>
<td>2.2.2.4</td>
<td>Private Plaintiffs’ Interests in Annulment of a Directive</td>
<td>52</td>
</tr>
<tr>
<td>2.2.3</td>
<td>Community Law Effects of an Annulment</td>
<td>53</td>
</tr>
<tr>
<td>2.3</td>
<td>The Validity of Directives in Preliminary References</td>
<td>56</td>
</tr>
<tr>
<td>2.3.1</td>
<td>Introduction</td>
<td>56</td>
</tr>
<tr>
<td>2.3.2</td>
<td>The Complementary Function of the Preliminary Reference</td>
<td>56</td>
</tr>
<tr>
<td>2.3.3</td>
<td>Article 234 EC as a Legal Remedy against Invalid Directives</td>
<td>60</td>
</tr>
<tr>
<td>2.3.3.1</td>
<td>Benevolence of the National Courts</td>
<td>61</td>
</tr>
<tr>
<td>2.3.3.2</td>
<td>Remedies against the Implementing Measure</td>
<td>62</td>
</tr>
<tr>
<td>2.3.3.3</td>
<td>European Minimum Requirements</td>
<td>64</td>
</tr>
</tbody>
</table>
3.5 The Parallel with Competition Law 131
3.6 The a Fortiori Argument 132
3.7 Interim Conclusion 134
4.1 The Fedesa Case and the Two Hormones Directives 135
4.2 The Angelopharm Case: Validity of Pre-Existing Legislation 137
4.3 The Eurotunnel Case: An Invalid Directive in a Horizontal Situation 139
4.4 The Biotechnology Order 141
4.5 Conclusion: No Per Se Consequences 143
5.1 Regulations 143
5.1.1 A Per Se Rule for Regulations? 145
5.2 Some Remarks on Union Law 150
5.2.1 Third Pillar Framework Decisions 151
6.1 Conclusion 154

CHAPTER 4

Incidental EU Consequences for the Implementing Measure

1.1 Introduction 159
2.1 Limiting in Time the Effect of Annulment 159
2.2 Policy Continuity or Legal Certainty? 163
2.3 Conclusion 165
3.1 The Nature of the Invalidity: The Addressees of the Violated Norm 165
3.2 Protecting or Addressing the Member States? 166
3.2.1 Subsidiarity and Proportionality 171
3.2.2 Subsidiarity 172
3.3 Proportionality: One Principle, Three Norms 175
3.3.1 ‘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 \textit{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 The Principle of Sincere Co-Operation
5.1 The Scope of Article 10 EC
5.2 Limits to an Open-Ended Article?
5.3 The Concrete Duties of the Member States
5.4 Conclusion: No Duty to Maintain
6 Conclusions

CHAPTE RR 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 \textit{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
2.2.4 'Re-Centralization' under EU Pressure?
2.2.5 Belgian Courts and Implementation
2.2.5.1 The Francorchamps Cases Revisited
2.2.5.2 The Annulléd Federal Law on Tobacco Advertising
2.2.5.3 The Annulléd Walloon Decree on Tobacco Advertising
2.2.5.4 Review of Executive Legislation
2.2.6 Conclusions as to Belgian Law
2.3 The French Republic
2.3.1 A Vertical Division of Competences
2.3.2 Execution and operationalization of 'rules' and 'principles'
2.3.3 Implementation by Arrêté
2.3.4 Facilitating Implementation: The Ordonnance
2.3.5 French Courts and Implementation
2.3.5.1 Review of French Statutes: The Conseil Constitutionnel
2.3.5.2 Review of Executive Legislation: The Conseil d'État
2.3.5.3 Some Remarks on Locus Standi
2.3.5.4 Lower Administrative Courts and Ordinary Courts: The Exception of Illegality
2.3.6 Conclusions as to French Law
2.4 The Kingdom of The Netherlands
2.4.1 Implementation in The Netherlands
2.4.2 The Dutch 'Henry VIII Clause'
2.4.3 Dutch Courts and Implementation
2.4.4 Conclusions as to Dutch Law
3 Conclusions as to National Law

CHAPTER 6

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

Invalidated Directives
Tables of Cases
Tables of Legislation
Bibliography
Abbreviations
Index
Samenvatting

xiii