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

Vandamme, T.A.J.A.

Publication date
2005

[Link to publication](#)

Citation for published version (APA):

Vandamme, T. A. J. A. (2005). *The invalid directive : the legal authority of a union act requiring domestic law making*. Europa Law Publishing.

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General Conclusion

At this final stage of the study, some of the lines that were explored in the previous Chapters should be drawn together. At various instances, the relationship between the directive and its domestic implementation was explored and defined in terms of 'authority'. It was argued that the invalidation of a directive demonstrated in a clear fashion the 'authority' it enjoys in either European law or in Member State law.

Establishing that 'authority' proved to be an exercise particularly interesting for directives because of their 'dual nature': having partly an 'assignment' and partly a legislative character. Clearly, the invalidation of a directive reduces its 'assignment' element to a historic fact. However, it was less clear whether its legislative character could continue to produce effects through national implementation legislation. It was in particular the latter question that made it necessary to establish the legal 'authority' directives are attributed in law. Both in the context of their legal review and in the context of determining the consequences of their possible invalidation, two contexts that are of course inextricably intertwined, was the 'authority' question of crucial importance.

1 'Authority' and Legal Review

It appeared in Chapter 2 that the partly 'legislative character' of a directive is emphasized in the context of direct private action against the directive. Consequently, such an approach does limit the possibilities of private plaintiffs to challenge directives directly before the European Courts. Yet, these limitations are based upon the possible discretion left by directives and how that reflects on the requirement of being directly concerned. No limitations are conceived on the basis of the 'assignment' character of directives. Whereas their legislative character may considerably *limit* direct access to the European Courts, their assignment character does not *bar* such access beforehand, something argued on more than one occasion by opposing litigants before the ECJ/CFI, notably by the Council. Furthermore, citizens may access national courts and invoke the directive's invalidity under Article 234 EC, thereby even obtaining interim ('*Zuckerfabrik*') protection.

One could say in this respect that by opening up justiciability of directives (in both European and national courts) to the EU citizen one also opens the Pandora's box of the constitutional relationship between the directive and national law. The question as to how the demise of legal 'authority' of a directive affects national law appeared crucial at several stages of its legal review.

1.1 Political Motives, Political Expectations and Legal Expectations

What makes the EU citizen's access to justice intriguing is in the first place his or her *interest* in a directive's invalidation. Whereas a Member State's interest in annulment of a directive is hardly ever disputed (it is released from the duty to implement, or from the so-called *sperrwirkung* of a directive') an interest on the part of private plaintiffs may be more obscure. It would seem they expect national law to follow suit. Hence, where a Member State's annulment action mainly relies on *political motives*, a citizen's annulment action mainly relies on *political expectations* if a directive is not yet implemented and on *legal expectations* in case it already is.¹

Such legal expectations of private individuals as to the consequences of an invalidation of a directive upon national law had to be investigated further. Is the 'authority' vested in the directive so great that when it is invalidated national implementation law *must* share its fate? That question was addressed in this study from the angle of European law and from the angle of Member State law.

2 A Directive's 'Authority' in EC Law

Assessing the authority that EC law attributes to directives boiled down to the question whether or not EC law attaches *per se* consequences to the directives invalidation for national implementation law (the *per se* rule). The correlative question is whether EC law attributes to the directive the status of a legal basis in national law, a type of 'imposed delegation concept'.

Consideration of the various systematic aspects of the Community law system as well as the Court's case law which sideways addressed the issue, revealed that European law does not attribute such 'authority' to directives. Thus, their invalidation has no *per se* consequences for national implementation law. Consequently, the directive's invalidity, as a test, proved wrong any hypothesis as to a European principle of delegation imposed upon them. In European Constitutional terms, such powers must be classified as 'original' rather than 'delegated'. Thus, any consequences *per se* of the invalidation of a directive hinge upon the national legal systems and the legal authority they attribute to that directive in the course of their domestic legislative processes.

This observation may be said to betray a classical intergovernmental aspect of Community law. A directive may be an instrument embedded in a new supra-national legal order for the benefit of which Member States have limited their own sovereignty. Yet, its invalidation demonstrates that it also possesses at least

¹ If a European Institution instigated the action, it will of course also rely upon a mixture of *political* and *legal* expectations as to how the various Member States will react. "..."

one feature of a classical international treaty.² For also establishing that a treaty is invalid has no *per se* consequences for national law implementing it.³

2.1 The Directive as Part of the European Legal System

Having established that European law does not attribute to directives such an 'authority' that their invalidation automatically renders implementing measures invalid does not end the discussion on the relationship between a directive and its implementation. This topic expands well beyond the relationship between two *legal instruments* into one of two different *legal systems*. As the national legislative measure cannot be clinically detached from its 'national law environment' also the directive cannot be detached from its 'European law environment'. A directive is part of an entire legal system of norms and principles many of which are superior to the Directive within that European system. Hence, its invalidation may cause incidental consequences for national law implementing the directive. When establishing these incidental consequences that do spring from European law, the key words to use are address and, linked to that, scope of European legal norms.

As such, the following situations can be identified where European law interferes with national discretion regarding the status of national implementing legislation: limitation of the effects of an annulment in time, the 'double addressing norm', and, to some extent, the exclusivity of Community powers and the principle of sincere co-operation.

Perhaps the most interesting category of situations where the directive's invalidation indirectly affects national implementation is that of a directive violating a 'double addressing norm'. Point of departure is that the 'rule of thumb' applies in situations where the norm was of a procedural nature, designed to protect Member States' interests in the legislative process or that of the European institutions themselves. In these situations Member State legislatures and executives are not addressees but, at the most, beneficiaries of such norms. Consequently, national implementation legislation is not affected by the invalidation of its underlying directive.

² It would not be the first time a Community directive is characterized as a classical international treaty, see for instance Kuijper, P.-J., Epilogue: Symbiosis?, in Prinssen, J.M. and Schrauwen, A., *Direct Effect, Rethinking a Classic of EC Legal Doctrine, Hogendorp Papers (3)*, Europa Law Publishing, Groningen, 2002, p. 251 (261).

³ However, as in European law, there may be 'incidental consequences' namely if the violated norm was one of (emerging) *ius cogens*. See Articles 53 and 71 of the Vienna Convention on the Law of Treaties. See also Dinh (1999), on p. 135: "Si la nullité découle de la violation d'une norme impérative de *ius cogens*, la *restitutio in integrum* consiste moins dans un ajustement des rapports entre les parties que dans l'obligation pour chacune d'elles de mettre sa propre situation en harmonie avec cette norme."

When discussing the European norms that are 'double addressing norms', interesting questions arise both *ante* and *post* invalidation. Intriguing questions *ante* invalidation concern the status and scope of certain norms in the European legal order. As to status, there is the question concerning the international treaties and customary law. Can they be a Community law standard for review of directives in the first place? As to scope, one must consider the question whether the European norm addresses the European legislator to the same extent as the Member States. This proved a matter of particular interest when discussing the basic freedoms governing the internal market.

The intriguing question *post* invalidation was that of the scope of the General Principles of Community Law (GPCL). It appeared that invalidation of a directive results in national implementation legislation 'leaving' that scope as it left the scope of Community law altogether.⁴ Although at first sight surprising, this phenomenon corresponds with the established rule of thumb that the Member States regain legislative discretion after invalidation of a directive. Any consequences for national legislation in that scenario fall on to the various counterparts of the violated GPCL in national constitutional law and/or in international law.

3 A Directive's 'Authority' in National Law

In the legal systems of the four Member States studied, a great deal of legal 'authority' is attributed to directives. However, as a corollary to the inherent variety of the different legal and constitutional traditions between the Member States there are also differences at this particular point. This variety is even enhanced when taking into account sub-national implementation of directives by federated entities (Belgium) or entities with devolved competences (UK) as these entities may introduce further variation in this respect. Thus, the 'authority' attributed to a directive in French law, although unmistakable, appears less great than in the Netherlands, Belgium and certainly in the United Kingdom.

One common feature of all four Member States is that directives can be a constitutive factor for executive lawmaking power or at least a factor that triggers the use of executive power. The first, more prominent, role of being a 'constitutive factor' is evidently attributed to directives by British law under the European Communities Act (ECA). To a lesser degree directives may also be attributed such a prominent role under French, Belgian and Dutch law. Yet, the different

⁴ The only connection with EC law would be the possible duty to consult with the Commission on any further steps that the Member State envisages to take (see Chapter 4, Section 5), a duty that could be construed under Article 10 EC. Yet, that does not suffice to maintain that the matter remains within the scope of EC law.

legal systems also show variation. One important point of variation regarded the possibility that the 'authority' of the directive could lead to executive lawmaking powers encroaching upon competences of the legislature (Henry VIII clauses). That technique was most used in the United Kingdom but, to a lesser extent, could also be discerned in the other Member States, showing different safeguards attached to that particular type of lawmaking (notably the existence of a requirement of parliamentary 'ratification' of the executive measure).

Furthermore, 'authority' is attributed to directives in terms of procedural safeguards that are deemed not necessary (or less necessary) in an implementation context (such as mandatory consultation requirements). Belgium (no or reduced consultation of the Council of State) and The Netherlands (no mandatory consultation of any kind, *except* consultation of the Council of State) provided clear examples thereof.

Further proof of the 'authority' attributed to directives appeared in the UK where directives may justify re-centralisation of lawmaking powers. By contrast, in Belgium, the only truly federal state studied here, such 'authority' is not attributed to directives except in very rare and extreme cases.

A common point of interest when assessing *how much* 'authority' is attributed to directives in national law is establishing any 'democratic leakage' that may occur at the stage of implementation. Quantifying 'discretion' in European law is mainly of interest in determining the status of a directive (its direct effect), its justiciability (direct concern, damages) or its validity (is there room for consistent interpretation?).⁵ Quantifying discretion in Member State law is mainly important for determining the amount of 'authority' that should be vested in the directive. In the UK the possibilities for such 'leakage' to occur seemed the greatest. Of course, 'leakage' can only be established by reference to 'autonomous' legislative procedures and it is a fact that in the UK the executive enjoys vast competences by tradition. Yet, also for British standards the executive powers under the ECA seemed greater than what would be customary in an 'autonomous' context, in particular when taking in account the extensive 'Henry VIII powers'.

As a general rule, it can be stated that the more 'authority' is attributed to directives in the various legal systems, the more implementation law proved 'vulnerable' to invalidity of directives. As such, all British implementation law adopted under powers that were constituted by the two-fold basis of a directive and the ECA become *ultra vires* the ECA. This fact in combination with the reasonably accessible procedure of 'application for judicial review' may account for the observation that most of the preliminary references on validity of directives come from UK courts. Thus, of the legal systems studied here, the British legal system comes closest to establishing the *per se* rule, that could not be found in European law.

⁵ See notably Chapter 2, Section 1.2.3 'Consistent interpretation of directives'.

4 Future Developments: From 'Sovereignty' to 'Autonomy'?

European law is a dynamic legal system. In that sense also the conclusions drawn from this study are not carved in stone. In particular, the question may be raised whether the 'authority' attributed to the directive under the present European Constitution may become greater in the future. That could result in a directive gaining as a matter of European law the status of a legal basis from which national implementing law draws its legality. Invalidity of a directive would thus result in invalidity *per se* of national law being deprived of its legal basis.

The Treaty establishing a Constitution for Europe for the first time identifies directives as 'legislative acts' and gives them the more prestigious name of 'framework laws'. Possibly the question of 'authority' re-emerges. Could the ECJ in future cases be expected to attribute to such Union *legislative* acts a pseudo-statutory status *within* the national legal systems of the Member States? The term 'legislative' seems to go beyond a neutral meaning of the word under which it would simply cover all normative acts. For the Treaty establishing a Constitution for Europe (TCE) also introduces their counterpart: 'non-legislative acts' (comprising 'decisions' and, confusing for present day EU lawyers, 'regulations').⁶ Are national lawmaking powers for the implementation of 'framework laws' still to be regarded as original Member State powers, or will this concept be replaced by a European imposed delegation concept, resulting in a European *per se* rule?

In any event, the mere fact that one accepts that concepts of the source of legal 'authority' *could* undergo future changes is in itself significant. It suggests in itself a possible departure from a concept of absolute Member State *sovereignty* in this regard (that could be argued after the findings in this study) towards one of Member State *autonomy*. Whereas sovereignty is rigid, autonomy is a flexible concept. Under a concept of Member State legislative autonomy the question of who attributes how much 'authority' to a directive/'framework law' *could* shift towards Union law. All in all, there are good reasons to remain alert on any indications in literature, EU (primary) legislation and EU case law that could betray new conceptual thinking on a directive's 'authority' and, consequently, on its constitutional relationship with Member State implementation law. This study has shown that it will in particular be future case law on *the invalid directive* (or 'framework law') that will have to remain under close observation.

⁶ See Article 1-35 TCE. These 'regulations' break down in two sub-categories: 'Delegated European Regulations' (1-36) and 'European Implementing Regulations' (1-37). The latter Article is interesting in as far as it also designates a Member States law to be an 'implementing act' if its adoption was 'necessary' to implement a binding Union Act. Here one sees an interesting resemblance between Article 1-37 (1) TCE and Article 21 of the French Constitution and Article 108 of the Belgian Constitution.