

The Struggle of the Dutch Council of State in Applying *Marks & Spencer*

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Abstract

This contribution concentrates on the Dutch Council of State's struggle in applying the Marks & Spencer case law of the Court of Justice. This case law, which fits in with the growing importance of the effectiveness of EC law, implies that directly effective provisions of a directive can be invoked before a national court after having been correctly transposed into national legislation, if this national legislation is not applied or applied incorrectly. The Dutch Council of State has been struggling with the position of European directives after their transposition into national law, and for a while stated that a directive could only be invoked before a national court in case of insufficient or incorrect transposition. It has recently changed its course and adopted a new approach, which is clearly more in line with the Marks & Spencer case.

I Introduction

The Court of Justice is paying increasing attention in its case law to the *de facto* effects of European directives. This shift in emphasis fits in with the growing importance of the effectiveness of EC law. This can be seen in infringement procedures, for example: the Commission is bringing more and more cases before the Court in which the transposition of a directive is basically correct, but where the practical application or enforcement has proven to fail.¹ A good example of this is *Commission v. Ireland*, in which the Court of Justice held that Ireland failed to comply with its obligations – although the relevant directive had been transposed correctly – because Ireland systematically failed to require existing unauthorised activities to cease while the licensing procedure was pending. The fact that the directive was correctly transposed did not change that this constituted an infringement, because the consistent practice of tolerance was harming the useful effect of the directive.² Another good example is the infringement procedure of the Commission against the United Kingdom about a directive on working hours. The United Kingdom transposed this directive correctly. In order to help employers and workers understand this legislation, the Department

¹ S. Prechal, *Directives in EC Law*, Oxford: University Press 2005, p. 52.

² Case C-494/01 *Commission v. Ireland* [2005] ECR I-3331; [2006] *M&R*, p. 41-42, with comments by Jans; *NJ* 2006, 1, with comments by Mok.

of Trade and Industry published a set of guidelines. However, these guidelines restricted some of the rights that the directive provided for employees. The Court of Justice held that such practices do not guarantee compliance with either the minimum requirements laid down by that directive or its essential objective.³ Finally, attention should be drawn to the relatively recent infringement procedure under article 226 EC against Finland, in which the Court of Justice held that:

'A failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law'.⁴

After correct transposition in national legislation, the directive itself still applies: it does not just disappear after implementation. After all, national administrative authorities or courts that fail to apply or enforce the national legislation in which the directive is transposed, may cause a breach of EC law that can result in state liability. In such cases, the underlying directive is used as a point of reference to determine the goal of the national legislation concerned, because this legislation is meant to ensure that the goals of the directive are achieved.⁵ Furthermore, even after correct transposition directives are still important as an aid to the interpretation of the national legislation in which they have been implemented, and keep functioning as a framework for future national legislation on the subject concerned.⁶ Finally, provisions of correctly transposed directives can still have direct effect, if formulated in an unconditional and sufficiently precise manner. This has been laid down in the *Marks & Spencer* case⁷ of the Court of Justice, which will be discussed in section 2. The importance of the instrument of direct effect of provisions of a correctly transposed directive will also be discussed in this section. Moreover, *Marks & Spencer* will be linked to the concept of the effectiveness of EC law, which has become increasingly important in the case law of the Court of Justice.

It is interesting to note how the *Afdeling bestuursrechtspraak van de Raad van State* (Administrative Jurisdiction Division of the Dutch Council of State; hereafter: Council of State) applies this case law of the Court of Justice in the national legal order.⁸ Although *Marks & Spencer* dates from 11 July 2002, the Council of State in its case law also for several years afterwards

³ Case C-484/04 *Commission v. United Kingdom* [2006] ECR I-7471.

⁴ Case C-342/05 *Commission v. Finland* n.y.r. in the ECR, AB 2007, 318, with comments by Backes. Cf. also Case C-441/02 *Commission v. Germany* [2006] ECR I-3449.

⁵ Prechal (2005), p. 278.

⁶ Prechal (2005), p. 188.

⁷ Case C-62/00 *Marks & Spencer* [2002] ECR I-6325.

⁸ The Dutch Council of State has two different functions: on the one hand, it advises the Government and Parliament on legislation, and on the other it has an Administrative Jurisdiction Division, which is one of the country's highest administrative courts. This divi-

continued to dismiss arguments pleading for the direct effect of provisions of directives, where such directives had been transposed in national legislation in a timely manner. In the Council's view, directives ceased to have any effect after having been implemented correctly. On the 5th of September 2007 the Council of State departed from its previous case law, although it still did not literally adopt the approach taken by the Court of Justice. Only on the 5th of March 2008, it finally decided a case in which it adopted the Luxembourg case law in an entirely accurate way. This will be discussed in section 3. This contribution will be concluded with some final remarks in section 4.

2 The *Marks & Spencer* Case and the Concept of 'Effectiveness' of EC Law

In *Marks & Spencer* the Court of Justice ruled that directly effective provisions of a directive can be invoked before a national court after having been transposed correctly into national legislation, if this national legislation is not applied or not applied correctly, thus defeating the purpose of the directive. The Court held that:

'Consequently, the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.'⁹

Hence, directive provisions should have direct effect where it concerns incorrect application of national legislation in which a directive is correctly transposed. To quote Advocate-General Geelhoed in this case, 'National practice in the matter of the application of a transposed directive is of such importance because incorrect application may lead to totally different results than those contemplated by the directive. Moreover, divergencies in the application of directives have a negative effect on uniformity and equivalence within the Community legal order.'¹⁰

sion has jurisdiction in e.g. the field of town and country planning, environmental law and migration law.

⁹ Para. 27.

¹⁰ Para. 36.

Obviously, the national legislation into which a directive is transposed will have to meet all Community requirements irrespective of the question whether the directive provisions concerned have direct effect or not.¹¹ Nevertheless, the presence of directly effective provisions gives individuals the opportunity to directly invoke EC law. *Marks & Spencer* shows that the instrument of direct effect is particularly important in two respects. In the first place, the existence of direct effect of provisions of a correctly transposed directive implies the applicability of the principles of EC law. *Marks & Spencer* shows that this can be beneficial, since the principle of legitimate expectations under EC law offered more protection to individuals than its UK equivalent. Moreover, as a consequence of the fact that the relevant national legislation is based on a directive, the application of national procedural law has to meet the requirements of equivalence, effectiveness and effective judicial protection. In *Marks & Spencer*, this was expressed in the fact that the Court of Justice considered the reduction of a time limit from six to three years with retroactive effect as contrary to the principle of effectiveness, all the more so because no transitional arrangement was provided.¹² This shows that if national legislation has a basis in EC law this has advantages for individuals: if it had concerned domestic law, in a purely domestic case without any EC-law dimension, these time limits could have been applied without any problem at all.

The Court's approach in *Marks & Spencer* can be related to the broader idea that Community law, constituting an independent legal system that forms an integral part of the legal systems of the Member States,¹³ primarily needs to be effective in practice. This clearly derives from the case law in which the Court deems it necessary for individuals to be able to invoke directly effective provisions of a correctly transposed directive, if the national legislation concerned is not applied correctly or not applied at all. This fits into the framework of the concept of 'effectiveness', which has gained increasing importance in the Court of Justice's case law: the fact that a directive has been transposed correctly is not satisfactory, because the main question is whether in practice, the *de facto* effects are sufficient to meet the goals of the directive.¹⁴ Claes has recently argued in a more general

¹¹ For example, the obligation of consistent interpretation does not depend on the question whether the provisions have direct effect in the situation concerned; see Case 14/83 *Von Colson* [1984] ECR I 891.

¹² Cf. the comments by Widdershoven in Dutch Council of State 21 March 2007, AB 2007, I 39.

¹³ Case 26/62 *Van Gend & Loos* [1963] ECR 3; Case 6/64 *Costa/ENEL* [1964] ECR 1203; Case 14/68 *Walt Wilhelm* [1969] ECR I.

¹⁴ M. Dougan *National Remedies before the Court of Justice*, Oxford: Hart Publishing, p. 56. Cf. F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, Nijmegen: WLP 2004, p. 81. See also the comments in this case by Ruffert in [2003] *CMLRev*, pp. 729-738 and Drake in [2003] *ELRev*, pp. 418-429.

context that ‘effectiveness’ has become the key word in Luxembourg case law.¹⁵ The importance of effectiveness is not related to the doctrine of direct effect, whereas for example the obligation of consistent interpretation,¹⁶ the competence and sometimes even the obligation of national courts to seek a preliminary ruling,¹⁷ the liability of Member States for violation of Community law¹⁸ and the principle of primacy¹⁹ do not require the relevant EC law to be directly effective. Interestingly, it actually was the Council of State that found, in the Metten ruling, that provisions of EC law which are not directly effective still have primacy over national law.²⁰

3 The Application of the *Marks & Spencer* Case by the Dutch Council of State

3.1 Old Approach

For a while, in its case law, the Council of State systematically rejected the argument pleading that a directive is not applied correctly, if such directive had been transposed into national legislation in a timely manner, and no reason existed to consider this transposition as inadequate or incorrect.²¹ A good example to illustrate this is the ruling of 4 April 2007, which concerned the grant of an environmental permit by the Provincial Executive to a certain company with regard to the generation of sustainable energy. Several appellants lodged an appeal against this permit with the Council of State. They referred to the IPPC Directive, and stated that a particular part of the application for the permit could not be accepted because it was contrary to both the directive and the provisions of national law into

¹⁵ M. Claes, *The National Courts' Mandate in the European Constitution*, Oxford: Hart Publishing 2006, p. 142 ff and p. 126 ff including references.

¹⁶ Case 14/83 *Von Colson* [1984] ECR 1891. Cf. J.M. Prinssen, *Doorwerking van Europees recht*, Deventer: Kluwer 2004, p. 78 ff including references.

¹⁷ Case 111/75 *Mazzalai* [1976] ECR 657.

¹⁸ Joined cases C-6/90 and C-9/90 *Francoovich* [1991] ECR I-5357. Cf. Dougan (2004), pp. 58-59 and pp. 239-240, and Prinssen (2004), p. 84 ff including references.

¹⁹ Case 106/77 *Simmenthal* [1978] ECR 629.

²⁰ Dutch Council of State 7 July 1995, AB 1997, 117, with comments by Beers.

²¹ Dutch Council of State 30 May 2007, case no. 200604950/1; Dutch Council of State 16 May 2007, case no. 200607772/1; Dutch Council of State 9 May 2007, AB 2007, 182, with comments by Widdershoven; Dutch Council of State 4 April 2007, [2007] *SEW*, p. 360-362, with comments by Ortlep and Verhoeven; Dutch Council of State 21 March 2007, AB 2007, 139, with comments by Widdershoven; Dutch Council of State 28 February 2007, case no. 200601421/1. See also Dutch Council of State 31 March 2000, AB 2000, 302, with comments by Backes; JB 2000/138, with comments by HLJ and Dutch Council of State 7 April 2004, AB 2004, 460, with comments by Jongma; JB 2004/187, with comments by Peeters.

which this directive had been transposed. In this regard, the decision of the Council stated:

‘To the extent that appellants refer to the IPPC Directive, the Council finds that a direct appeal to the IPPC Directive is not under discussion, now that it has been transposed into national legislation [...]. The Council has no reason to consider that this has been done insufficiently, or otherwise inadequately.’²²

This finding shows that the Council of State believed that a directive can only be invoked before a national court in case of insufficient or incorrect transposition. In other cases, only the national transposing legislation is relevant. This view may have been in line with earlier case law on direct effect, in which incorrect implementation was one of the requirements for provisions of directives to have direct effect.²³ Nevertheless, it ignores the fact that in current case law, directives do not only require transposition into national legislation, but also effective and correct application and enforcement of that particular legislation.

Therefore, this finding of the Council was very broadly formulated, and was to some extent contrary to the Court of Justice’s current case law. Generally speaking, the Council’s ruling impaired the concept of ‘effectiveness’ of EC law, and more in particular it thwarted the rule that can be derived from *Marks & Spencer*. It was even more alarming that the ruling lacked motivation: this kept the background of this Council finding very vague, not to say that one could wonder whether the Council was familiar with *Marks & Spencer* at all.

3.2 New Approach

In its ruling of 5 September 2007, the Council changed its course.²⁴ In the relevant case, the Provincial Executive granted an environ-

²² Dutch Council of State 4 April 2007, [2007] *SEW*, p. 360-362, with comments by Ortlep and Verhoeven; translation ours.

²³ See for example Case 8/81 *Becker* [1982] ECR 53.

²⁴ Dutch Council of State 5 September 2007, AB 2007, 319, with comments by Widder-shoven; [2008] *SEW*, pp. 33-34 with comments by Ortlep and Verhoeven. Also Dutch Council of State 21 December 2007, case no. 200700981/1; Dutch Council of State 21 December 2007, case no. 200701265/1; Dutch Council of State 12 December 2007, case nos. 200608934/1, 200609052/1, 200609061/1, 200609075/1, 200609137/1, 200609159/1 and 200609376/1; Dutch Council of State 12 December 2007, case nos. 200609142/1, 200609035/1, 200609383/1; Dutch Council of State 5 December 2007, case no. 200607948/1; Dutch Council of State 14 November 2007, case no. 200608547/1; Dutch Council of State 7 November 2007, case no. 200609021/1; Dutch Council of State 31 October 2007, case no. 200607320/1; Dutch Council of State 10 October 2007, case no. 200608176/1.

mental permit to a company, for the storage and processing of various waste products and wrecks and for transport activities. After the Council of State had revoked this permit, the Provincial Executive granted another permit in reaction to a change in the application of the company concerned. The appellants in the case again appealed to the Council of State, and argued among other things that the permit was incompatible with the IPPC Directive. The Council of State found in this regard:

‘According to established case law of the Court of Justice, a distinction should be made between the correct and the incorrect transposition of directives, to determine the effects of the directive. In case of correct transposition, private parties perceive the effects of a directive in the application of the national legislation into which the Member State has transposed the directive. Only if a directive, after the prescribed deadline, has not been transposed into national law at all, or not in time, or not correctly, can a private party directly rely on that directive, and even then only on those provisions that are unconditional and sufficiently precise. (Case 8/81 *Becker* [1982] ECR 53). The same is true when complete application of the directive is not actually ensured. (Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, par. 26-27).

According to the Court’s established case law, it is up to the Member States’ national courts to ensure the legal protection that individuals derive from the direct effect of Community law. (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, par. 12).

The foregoing shows, that the directly effective provisions of directives can only be relied upon in case of incorrect transposition or when complete application of the directive concerned is not actually ensured.

It has not been found that the IPPC Directive, insofar as relevant in this case, has been incorrectly transposed into the Dutch Environmental Management Act. Moreover, the arguments brought forward by the appellants provide insufficient reasons to find that full application of the directive is not actually ensured. Therefore, a direct appeal on the provisions of the IPPC Directive is not appropriate in this case.²⁵

It is abundantly clear that in this finding, the Council is trying to adapt to the Court of Justice’s case law. This should be considered a positive development, where the only marginal criticism is that the Council of State – still – opts for a more restricted formulation, which does not entirely match *Marks & Spencer*, as will be discussed below. The Council’s change of course in this judgment seems to constitute a response to the criticism in Dutch literature, which said that earlier case law did not reveal any knowledge of the *Marks & Spencer* case.²⁶ It is remarkable that this departure of previous

²⁵ Translation ours.

²⁶ Cf. the comments by Widdershoven under Dutch Council of State 9 May 2007, AB 2007, 182, and Dutch Council of State 21 March 2007, AB 2007, 139; also see Dutch Council of

case law was not made explicit. The Council of State usually uses very clear wording when it changes course in its case law. It is unclear why it has not done so in the present case; it might be because it does not regard this judgment as a departure from its previous case law, or just to prevent attracting too much attention to the case? Moreover, although the Council of State's new approach is clearly more in line with *Marks & Spencer* than previous case law, it still is not entirely accurate. As mentioned above, in *Marks & Spencer*, the Court of Justice held that individuals are entitled to rely before national courts, against the State, on the directly effective provisions of a directive

‘whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.’

Therefore, the phrase ‘whenever the full application of the directive is not in fact secured’ includes both correct and incorrect transposition of directives.

With reference to – among other cases – *Marks & Spencer*, the Council held in its decision of 5 September 2007 ‘that the directly effective provisions of directives can only be relied upon in case of incorrect transposition or when complete application of the directive concerned is not actually ensured.’

The Council's choice to use ‘or’ in this finding is rather unfortunate, because a case of incorrect transposition also falls within the scope of cases ‘in which the full application of the directive is not in fact secured’. Moreover, no reference is made to cases in which ‘the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it’, as mentioned in *Marks & Spencer*. To that extent, the phrasing of the Council of State relates to a more limited group of cases than the Court of Justice's ruling in *Marks & Spencer* does. The Council may have meant to refer to problems with regard to the application in practice of national implementation measures when using the phrase ‘when complete application of the directive concerned is not actually ensured’. Nevertheless, and as indicated above, this is not entirely accurate, because this phrase is the most general definition in the wordings of the Court of Justice, also including cases in which the directive has been implemented incorrectly or has not been implemented at all.

In a decision of 5 March 2008, the Council of State took the last step to bring its case law in line with *Marks & Spencer*.²⁷ This case concerned the Dutch resolution on the control of electrical and electronic equipment, in which the directive on waste electrical and electronic equipment. The appli-

State 26 January 2005, [2005] BR, p. 894, with comments by Nijmeijer and Soppe.

²⁷ Dutch Council of State 5 March 2008; case no. 200701761/1.

cant argued that the State Secretary interpreted a provision in the resolution too narrowly, as a result of which the Resolution applied to a more restricted scope than the directive initially intended to. For the first time, the Council of State then literally refers to the *Marks & Spencer* doctrine:

‘According to established case law of the Court of Justice, the implementation of a directive must be such as to ensure its application in full. The Court has considered that the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive, since Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it. (Case C-62/00, *Marks & Spencer*, [2002] ECR I-6325, par. 26-27).’²⁸

The Council of State then – considers that application of the resolution – which is as such a correct implementation of the directive concerned – limits the results as sought by the directive. The restrictive interpretation by the State Secretary should therefore not be applied.

This decision, which finally literally adopts the wordings of the Court of Justice in *Marks & Spencer*, should be welcomed. The reasons for this final change of course are neither explicitly motivated nor easily explicable. Nevertheless, it is clear that this accurate adaptation to the phrasings of the Luxembourg case law is not only the consequence of the fact that the *Marks & Spencer* argumentation was accepted in this case, since later case law of the Council of State shows that it now also adopts these phrasings in case of dismissal of the application.²⁹

4 Concluding Remarks

The decision of 5 March 2008 shows that the Council of State at present allows private parties to rely on the directly effective provisions of directives that have been correctly transposed, but for which the application of the national implementation measures fails to ensure achievement of the result sought. This is the first case in which the Council literally

²⁸ Translation ours.

²⁹ See for example Dutch Council of State 2 April 2008, case no. 200703386/1 and Dutch Council of State 9 April 2008, case. no. 200706406/1.

adopts the approach of the Court of Justice. Its case law is now in line with *Marks & Spencer*, which is in line with the growing importance of the effectiveness of EC law as explained in Section 1.

It is clear that the Council of State has been struggling with the position of European directives after their transposition into national law. We are wondering whether the Dutch Council of State is alone in this regard, or whether other national judicial bodies might have experienced the same sort of problems. For several decades it has been obvious that direct effect is an important instrument where it concerns incorrectly transposed directives or directives that are not transposed in a timely manner. Moreover, the Court's earlier case law seemed to suggest that directives simply ceased to apply after correct transposition, not leaving any room for direct effect.³⁰ *Marks & Spencer* has shown that this is no longer a tenable point of view. It is not just about correct transposition, but correct and effective application of national law in everyday life may be even more important. This is the only way to guarantee effectiveness of directives in practice.

³⁰ See for example Case 8/81 *Becker* [1982] ECR 53.