

M.J.M. Verhoeven, *The Costanzo Obligation. The Obligations of National Administrative Authorities in the Case of Incompatibility between National Law and European Law* (Antwerp: Intersentia 2011), ISBN 978-94-0000-194-7, xiv + 369 p.

European law functioning and taking effect in the national legal order may often appear as obvious and self-evident. However, for national authorities it can be very difficult to render European law effective in a national case. The legal order of the European Union is a shared legal order in which the functioning and effects of European law have to be maintained mainly by national institutions. In this sense the obligations for national administrative authorities to guarantee the effect of European law are very important. According to the European Court of Justice (ECJ), administrative authorities are under the obligation to respect the primacy of European law. In *Costanzo* and subsequent cases, the ECJ stated that when a conflict arises between a national provision and a directly effective provision of European law and where consistent interpretation is not possible, national administrative bodies are obliged to set aside national law.¹ This obligation put on administrative authorities is important to guarantee the primacy and full effect of European law. Thus, these authorities play a major role in ensuring the full effectiveness of European law in the national legal orders of the Member States. Irrespective of their position and powers under national law, administrative authorities have to comply with European law. Therefore, the *Costanzo* obligation raises important questions regarding European law and national constitutional law, especially with regard to the principle of legality as this principle provides which powers national administrations have and to which restrictions are placed upon those powers.

In her dissertation, Verhoeven explores the consequences of the *Costanzo* obligation for the administrative authorities in The Netherlands, Germany and France. The central question of the book is: 'Which European obligations apply to national administrative authorities with regard to provisions of national law that are incompatible with directly effective provisions of European law, and which national constitutional obstacles do they come across when giving effect to these obligations? And how should the tensions between the European obligations and the national constitutional obstacles be solved?' As becomes clear from the central question, the book explores three different issues. First, which European obligations exist in cases of conflict between national and European law? Second, which national constitutional obstacles do administrative authorities come across in complying with these obligations? Third, the book addresses the question of how Member States can organise their internal structure to remove the above mentioned constitutional obstacles and, at the same time, ensure

¹ *Inter alia*, Case 103/88 *Costanzo* [1989] ECR 1839, para. 32, and Case C-224/97 *Giola* [1999] ECR I-2517, para. 30.

they meet their obligations under European law. In short, the book is a thorough and critical analysis of the *Costanzo* obligation. The first two chapters, which explore the European obligations in the case of conflict between European and national law, depart from a European perspective. Chapters 4-7 focus on the different national perspectives from the point of view of The Netherlands, Germany and France.

Chapter 2 outlines the general principles and concepts of European law and their effect of European law in the different national legal orders to create a background for the book. With regard to the principle of direct effect, the author opts for a broad definition. In this definition, the key element is justiciability (p. 21). The implication is that when a provision *can* be applied by national courts (and administrative authorities) they are *obliged* to do so. The chapter also explores how European law takes effect in the legal orders of the three discussed Member States. With regard to the effects of European law, Verhoeven shows that, although the primacy of European law is accepted in all three Member States, only The Netherlands seems to accept the primacy of European law over national constitutional law. The tension between the Court of Justice and the constitutional courts of Germany and France with regard to the question of primacy is analysed thoroughly. She points out there is one distinction between Germany and France on the one hand and a different one with The Netherlands on the other. Both the German and the French Constitutional Court argue that the effects of primacy of European law follow from national sources of law; whereas The Netherlands accepts that primacy follows from European law.

Chapter 3 focuses on the case law of the European Court of Justice on the existing obligations for national administrative bodies in the case of a national and European norms conflict. A distinction is made between direct and indirect collisions, although this distinction between the two types of collision is sometimes vague, it is very helpful in organising the case law. Due to the fact that Verhoeven uses a broad definition of the principle of direct effect, which does not require a European provision to have direct consequences for a particular individual interest, the consequences of the *Costanzo* obligation can be considered *in extenso*. This chapter also pays attention to the circumstances under which national administrative authorities have to comply with European law. Verhoeven makes clear, time after time that the European Court of Justice imposes the same obligations on national administrative bodies as on national courts in case of a conflict between national and European rules. The consequences of principles such as direct effect, primacy and consistent interpretation were first established for national courts, but apply analogously to national administrative bodies. Verhoeven argues that this comparison of administrative bodies with courts is rather weak because the European Court of Justice also established differences between these institutions. In this regard, Verhoeven

suggests that administrative bodies lack both a preliminary procedure and the power to examine the validity of secondary European law.

Chapter 4 discusses the principle of legality and the place and importance of this principle in the three different Member States. Although the content of the principle of legality is not the same in the different Member States, Verhoeven builds on the two perspectives of the principle of legality distinguished in German doctrine: the precedence of statutory law and the requirement of a statutory basis. The role of these two interpretations of the principle of legality in The Netherlands, Germany and France are discussed. The different elements of the legality principle with regard to the *Costanzo* obligation are discussed in chapters 5 and 6 respectively.

Chapter 5 explores the consequences of the *Costanzo* obligation with respect to the principle of the precedence of statutory law. The author stresses that this important principle, which establishes the priority of acts adopted by Parliament, does not mean administrative authorities automatically have the power to examine whether provisions of law are in line with higher ranking sources of law. In this chapter, she sets out what administrative authorities in the Member States under discussion have to do in three specific situations in which norms conflict with higher-ranking norms. First, the question of what administrative bodies have to do in cases of incompatibility between secondary legislation with higher ranking laws is posed. Thereafter, Verhoeven outlines the powers and obligations of administrative authorities in case of conflicts between provisions of statutory law and the national Constitution. Third, what powers the administrative authorities have to set aside statutory law that is incompatible with European law is examined. Most attention is given to the latter question. The author makes clear that the *Costanzo* obligation is readily accepted in all three Member States. However, she argues that because national administrative authorities have to decide on a case-by-case basis whether national statutory law is compatible with European law, *Costanzo* can lead to threats to the principle of legal certainty and equality before the law and also places a big burden on administrative authorities. This is because the administrative authorities have to set aside national statutory law in case of incompatibility with European law thereby leading to uncertainty. In this chapter, Verhoeven points out that the requirement of a statutory basis causes problems when the statute on which the competence of the administrative body is based, is contrary to European law. This violation of EU law has to be resolved by setting aside national law. Thus, there is no rule on which the competence of an administrative body can be based. The author also comes up with solutions for this problem, however, she could have given more attention to the possible solution of conform interpretation. When administrative bodies have to interpret national law in line with European law, the chance of clashes between national and European law are reduced. As a consequence, conform interpretation can deal with cases

where administrative bodies lack a statutory basis to act. The fact that extensive national case law on the *Costanzo* obligation does not exist, seems to indicate that administrative authorities are reluctant to set aside statutory provisions. According to the author, the tension caused by *Costanzo* is mainly due to the fact the European Court of Justice bases the obligation on a comparison with the obligation for national courts to set aside rules which are incompatible with European law. As mentioned above, she maintains this comparison falls short because administrative authorities do not have the same power, they lack for instance a preliminary procedure, nor do they have the same position in the *trias politica*. Because administrative authorities are obliged to ascertain the compatibility of legislation with European law, the *Costanzo* obligation also leads to tension with the separation of powers. In The Netherlands, Germany and France, administrative authorities lack the power to set aside statutory law which is deemed incompatible with the Constitution, therefore, the *Costanzo* obligation extends their powers and changes their position (p. 214). The author also discusses the issue of administrative bodies being unable to request a preliminary ruling. According to her, a preliminary procedure for administrative bodies is not desirable because of the separation of powers. This is certainly true, however, it is possible to begin a preliminary procedure for administrative bodies where they pose questions to the highest administrative body of the European Union, the Commission. Although the Commission is not responsible for the explanation of European law, the European Court of Justice is, the Commission can provide guidelines on the interpretation of European Law and does so in a number of other cases where it delivers interpretative notices. This could also enhance the uniform interpretation of European law by administrative bodies.

Chapter 6 discusses to what extent a provision of European law can substitute the required statutory basis when this basis is lost because of non-application of national law. The requirement of a statutory basis is most important in The Netherlands and Germany but is also present in France. Inspired by French doctrine, Verhoeven distinguishes two parts in the requirement of a statutory basis: competence and the legal basis. With regard to the first element of a statutory basis, the principle of national institutional autonomy implies that European law does not decide which national administrative authority is competent. Verhoeven argues this means that even in exceptional cases where European law decides which administrative authority is competent, a national basis is still required. Once it is clear which authority is competent, the question remains whether a provision of European law can produce a statutory legal basis for administrative action. Verhoeven answers this question differently for the varying instruments of European law. According to her, the answer to that question depends on the nature of the legislative instrument. She considers regulations, by their very nature directly applicable, suitable to produce all legal

bases for action. She is less clear about the question whether treaties, decisions and directives can serve as a legal basis for administrative action.

Chapter 7 focuses on the paradox of the *Costanzo* obligation, being addressed to the administrative authorities but the state being responsible for compliance. The question in this chapter is: can supervision by the central government solve this paradox? First, it is stressed that often supervision by the central government means supervision by the prime violator of European law. In cases of incompatibility between European law and national law it is mainly the central government that is at fault as it did not bring legislation in line with European law. The chapter deals with the distribution of powers in the different legal orders and discusses the possibilities that exist for supervision by the central government. Also the methods of supervision, by different central governments, of administrative authorities are outlined, these include federalism, decentralisation and independent administrative authorities. She notes that several methods of supervision exist within the three investigated systems with regard to federal, municipal and independent administrative authorities and argues that so far the gap, between the *Costanzo* obligation for administrative authorities and state responsibility for compliance has been bridged. She shows that more supervisory instruments are introduced to oversee the application of European law by administrative authorities. In practice those instruments are seldom used however, Verhoeven argues the supervisory instruments are still useful because their deterrent effect may prevent administrative bodies violating European law.

In her conclusion Verhoeven argues for mitigation of the *Costanzo* obligation. It appears that *Costanzo* is rarely applied in practice and compliance with the obligation is very difficult for administrative authorities. Therefore, Verhoeven argues for an adaptation of this obligation to suit reality. She advocates a system in which the *Cilfit*-criteria apply in an analogous manner to the *Costanzo* obligation. In this system there is only an obligation to set aside national law for administrative authorities in cases in where an *acte clair* or *acte éclairé* exists. Thus, only when a conflict of norms is obvious or this conflict is clear from a previously decided case do national administrative authorities have to set aside national law. According to Verhoeven, this system would soften the tensions between the *Costanzo* obligation and the *trias politica*.

This book provides a clear insight into the *Costanzo* obligation, something that has not been explored very often and certainly not to the level of detail that this book does. The focus on administrative bodies is very refreshing as normally the focus in this kind of research is on the courts. Also, it is certainly valuable that the book not only discusses the European perspective, but also compares the perspectives of three different Member States. Using this combined approach, the author succeeds in creating a complete picture of what the *Costanzo* obligation is and what the difficulties with this obligation are. It appears that

in the shared legal order of the European Union the European obligation is accepted, but due to national objections, cannot always be guaranteed. This signifies that a European obligation to ensure the effect of European law in national legal orders is simply not enough. In this shared legal order it is of paramount importance that both European and national interests and circumstances are taken into account.

*Jan ten Hoor**

*Gert Jan Geertjes***

* University of Groningen.

** University of Groningen.