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

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CHAPTER I

Introduction
Chapter 1

Introduction

1 Pandora's Box

The object of this study is the invalidation of the EC directive and the consequences this event may have for national implementation law. As such this matter has not yet been the subject of extensive studies, although one may find the occasional reference to it. An example of such reference, acknowledging the complexity of the issues raised can be found in the dissertation of Prechal on enforcement of directives by national courts:

"Complex issues may then arise as to the status and effects of national measures implementing the directive concerned".

Indeed, unravelling the legal entanglements that the invalidation of an implemented directive may bring about is a complex exercise. Such invalidation triggers questions of both European law and national law. Furthermore, some of these legal questions can be inextricably intertwined. Should for example interim relief be available against a directive if the possible invalidation of that directive has no effect whatsoever on the implementation legislation? Can a (supreme) national court be expected to refer preliminary validity questions under Article 234 EC in case the directive's invalidity has no bearing on national law?

Questions such as these have not received much attention in legal writing or in jurisprudence. Considering the complexity of the matter and its relatively concealed character, the invalidation of an implemented directive may be the opening of Pandora's box. Avoiding the chaos that usually results from opening a Pandora's box will be one of the main goals of this study. It will therefore provide a structure in the following Chapters in which the various legal questions may be given a place.

2 The Pivotal Question

One of the main legal questions triggered by the directive's invalidation must already be mentioned at this stage for it is pivotal. That is whether or not in European law, there is a so-called per se rule from which it would follow that, as a matter of EC law, national implementation must be affected by the invalidation of the directive per se, that is to say, irrespective of other possible legal issues that may arise as a consequence of the directive's invalidation.

Prechal, S., Directives in Community Law. A Study on EC Directives and their Enforcement by National Courts, Amsterdam, 1994, p. 43, footnote 123. See for more occasional references to the problem of the invalidated directive Chapter 3.
In order to answer this question, one must establish at what level the consequences for national law are decided upon. Had the Member States, when creating this autonomous legal order endowed with legislative competences, also attributed it the authority to decide upon such consequences? To put it differently: is EC law capable of requiring national implementing legislation to lose its validity as a direct consequence of the invalidity *per se* of the directive?22

The term *per se* implies that consequences for national law may arise from other sources than from the mere invalidity of a directive. Hence, any such Community *per se* rule* will in the coming Chapters be distinguished from those consequences Community law may *incidentally* impose upon national law but which could be regarded as independent from any invalidity of an implemented directive. If, for example, a directive is invalid for infringing Article 141 EC on equal remuneration for men and women, national implementation legislation also infringes Article 141 EC. Any consequences for national law following the invalidity *per se* of the directive must be clearly distinguished from any consequences following the infringement by national law of Article 141 EC.

3 The Directive

3.1 The ‘Dual Nature’ of the Directive

The directive will probably for some time remain the one instrument that causes the greatest amount of legal entanglements in EC law. When assessing its plusses and minuses, notably set out against its great counterpart, the regulation, this may in itself be regarded as one of its disadvantages. To start with, one could struggle with the question of how to pinpoint the exact definition of the hybrid instrument that is the directive. In truth, it is hard to define this type of instrument within the frame of reference of existing national or international types of legal acts.1

Important to this study is that a directive may be regarded an instrument with a ‘dual nature’. On the one hand it is a norm whereas on the other hand it assigns the adoption of a norm. This partly ‘regulatory’ and partly ‘assignment character’ of directives was captured by the Court of Justice in its *Gibraltar* decision where it held a directive to constitute an *indirect legislative measure*.4 It is this duality of directives that will be further explored in this study.

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1 Of course, this ‘Community competence’ to decide upon the formal status of national law implementing an invalid directive could also manifest itself by dictating that national law is to remain intact. That possibility will be addressed when discussing the powers of the ECJ to limit the effects of its own judgment under Article 231 EC and when discussing the possible scope of obligations under Article 10 EC, see respectively Chapter 4, Sections 2 and 5.


4 C-298/89 *Government of Gibraltar v. Council*, paragraph 16. It has repeated this in some other cases concerning actions of private plaintiffs against directives. See for further case law, Chapter 2.
The regulatory character of directives is most apparent in the jurisprudence on private direct challenges of directives under Article 230 EC. Directives’ general applicability is the main reason why private plaintiffs cannot directly challenge them before the Luxembourg Courts. They are deemed to lack individual concern in terms of the notorious ‘Plaumann test’. Yet, directives are not and cannot be applied to these plaintiffs. Instead, it is national implementation law that applies to them. Nevertheless, one sees the regulatory aspect of directives stressed in the many instances where the Court, Community institutions or scholars talk about the ‘application’ of a directive whereas they are, strictly speaking, referring to the application of the national implementation legislation.

At this stage, the directive’s regulatory character should be understood in a neutral way as an instrument that sets a norm. When the ECJ in its Gibraltar ruling, quoted above, designates directives as ‘legislative’ it could indeed refer to this more neutral meaning of being regulatory (setting a norm). Whether the Court could have used the term ‘legislative’ in a less neutral way, namely in the sense that a directive is to be regarded as having a certain status associated with legislative (statutory) acts, is at this stage not yet clear. Whether directives enjoy such status depends upon their ‘authority’ in European and national law (see below). Unless indicated otherwise, the term ‘legislative’ in this study will refer to the more neutral concept of regulatory measures irrespective of their constitutional status within either European or national law.

The ‘assignment’ character of directives emerges notably in the case law of the ECJ denying to directives as a matter of principle horizontal effect. Ever since its Marshall decision the ECJ has repeatedly reiterated this principle, despite criticism. Furthermore, it is equally settled case law that Member State public authorities may not impose obligations arising from the directive on their nationals, applying ‘inverse direct effect’. Thus, the non-legislative quality of a directive is reflected in its incapability to impose obligations upon individuals. Only national legislation transposing it into the domestic legal order can

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5 In fact, even though theoretically possible, there are no cases yet where the Court has held a particular directive to be directly challengeable, see Chapter 2. See also Van Ooik (1999), p. 338 and Burchard, F. van, Der Rechtsschutz natürlicher und juristischer Personen gegen EG-Richtlinien gemäß Artikel 173 Abs. 2 EWGV, Europarecht, 1991, p. 140.

6 As also Prechal points out. See Prechal (1994), p. 6.

7 See Case 152/84 Marshall, paragraph 48.

8 See Case 80/86 Kolpinghuis.

9 Whereas private plaintiffs often were denied direct access to challenge directives under Article 230 EC because of their legislative character, in certain cases the European legislator has also attempted to deny them such access by stressing the assignment character arguing that private annulment actions against directives are a priori excluded, see Chapter 2.
achieve such effect.\textsuperscript{10} Thus, national legislative measures are always needed to give the directive fully-fledged legislative effect. The Court has even gone so far as to decline, in the absence of national implementation, interpreting a directive whose implementation deadline was still running.\textsuperscript{11} The concepts of consistent interpretation (where third party effects are possible) and ‘Francovich’ state responsibility do not mitigate the fact that directives lack legislative character but may be said to further emphasize it.

The ‘dual nature’ of directives appeared unaltered in the Treaty establishing a Constitution for Europe. It re-baptizes the directive as a ‘European framework law’ which

"shall be a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods" (emphasis added).\textsuperscript{12}

At first sight, the concept as such of a directive appears the same but for the cosmetic change of its new name.\textsuperscript{13} It retains on the one hand a legislative character (arguably a bit strengthened by the term ‘framework law’) whereas, on the other hand, it also retains its indirect character.\textsuperscript{14} However, whether the explicit

\textsuperscript{10} One of the further arguments was that there was no obligation to publish EC directives in the Official Journal, even though in practice they were, see Usher, J.A., \textit{EC Institutions and legislation}, European law series, Longman, London and New York, 1998, p. 142. That is in itself not a valid argument anymore. Directives are now published in all official languages of the European Union and are therefore equally accessible as the national rule that would have transposed the directive ever since by the Treaty on the European Union (The Maastricht Treaty) Article 254 EC provides that directives, whether established by the procedure of Article 251 EC or emanating from the Council and the Commission and addressed to all Member States, are to be published in the \textit{Official Journal of the European Union} (as the Official Journal of the \textit{European Communities} was officially renamed by the Treaty of Nice). Only the directives mentioned in paragraph 3 of Article 254 EC are not officially published.

\textsuperscript{11} See C-165/98 Mazzoleni, paragraph 17. Thus, the contradictory situation arises that the ECJ is willing to \textit{review the validity} of an unimplemented directive whose deadline is still running but refuses to \textit{interpret} it under the same circumstances.

\textsuperscript{12} See Article I-33, third paragraph, TCE. See for an early description of the new constitutional provisions regarding the Union's legal instruments Lenaerts, K., \textit{A Unified Set of Instruments}, EuConst, 2004, p. 57.

\textsuperscript{13} Tertiary directives would be re-baptized as ‘regulations’ with the same ‘assignment’ character as ‘framework laws’. However, despite their ‘general application’ they are designated ‘non-legislative acts’, see Article I-33, fourth paragraph, TCE.

\textsuperscript{14} See also the proposed text for a new European Constitution stated in its version of 10 June 2003. See CONV 797/03, Article I-32 (1), third paragraph. In this earlier version of the Draft Constitution 'form and means' were said to be 'entirely' free which arguably further emphasized the indirect character of directives/framework laws.
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qualification as 'legislative' and 'framework law' must be understood as granting a different status to directives/framework laws is another matter. As will be explained later in this study, this is a question that can be framed in terms of how much 'authority' such 'framework laws' will be attributed under Union law.15

3.2 National Discretion

Under the present Article 249 EC,16 Member States are left the forms and means to ensure the directive's goals are achieved. In itself such terminology seems to leave untouched the matter whether under the heading of 'forms and means', national legislators must also enjoy any liberties in terms of content. The matter has a legal component for if 'forms and means' would indeed require the directive to leave certain substantive choices (rather than merely formal choices) to the Member States, many a directive could be said to violate the Treaty.

Such violation of the Treaty would be two-fold. First of all, if the norm of Article 249(3) EC is imperative in leaving Member States a certain amount of substantive discretion, a highly detailed directive would violate Article 249 EC. Secondly, a very detailed directive could be ultra vires its Treaty basis. It must be recalled that some Treaty bases restrict the Community legislator to using directives17 while others prescribe regulations18 or leave the choice of form to the Community legislator, for example by simply stating that 'measures' may be taken.19

Indeed, the, at times, blurred difference between directives and regulations has led some to say that highly detailed directives should be non-binding in as far as they go beyond prescribing the essential elements of the national measures to be

15 See Chapter 5, Section 1.2 and Chapter 6, Section 4.
16 This study is based upon the texts of the Community and EU Treaties as consolidated after the entry into force of the Treaty of Nice on 1 February 2003.
17 See Articles 44(1), 46(2), 47(1), 47(2), 52, 94, 96 EC.
18 See Article 89 EC for state aid.
19 See Articles 12, second sentence ('rules'); 13 ('appropriate action'); 14, third sentence ('guidelines and conditions'); 18, second paragraph: ('provisions'); 19, first and second paragraph ('detailed arrangements'); 22, second sentence ('provisions'); 37(2), third sentence ('regulations, directives or decisions'), 40 ('directives or regulations'); 42 ('measures'); 57(2) ('measures'); 83 ('appropriate regulations or directives'); 93 ('provisions'); 129 ('incentive measures'); 175(2) ('provisions' and 'measures'). The famous Article 95 EC on the internal market also refers to 'measures'. On that Article, a declaration to the Single European Act states that these 'measures' will, preferably, be directives. See also Van Ooik (1999), p. 264 and further.
adopted. However, others accept it and this seems to be the leading opinion. It is the result to be achieved by a directive that may justify it to meticulously prescribe in detail the measures to be adopted by the Member States. Thus, 'quasi regulations' may continue to play an important role in European governance.

In case Article 249 were indeed imperative in relation to directives, one could, apart from validity issues, also ponder on possible 're-qualification' issues. Interesting opportunities could open for individuals. Could they argue before national courts that a directive should in truth be regarded as a regulation under Article 249 EC with as a the consequence that such re-qualification triggers 'horizontal direct effect'?

Not surprisingly, many of such detailed directives can therefore be found in the 'tertiary layer' of the EC legislative complex. These subordinate directives are amongst the most technical and detailed directives usually not leaving Member States much discretion. Nevertheless, pursuant to their dual nature they too require domestic lawmaking. National discretion as to 'forms and means' is in those cases restricted to 'copying' the directive verbatim into its domestic legislation.

An indirect acceptance of highly detailed directives may also be inferred from the term 'framework directives' used in the Member States' Declaration at the Edinburgh Summit. Member States proclaimed that, pursuant to the proportionality principle, where appropriate, 'framework directives' should be the instrument adopted by the Community legislature.

The concept itself of a directive continues to be re-assessed as was apparent from the Laeken Declaration of 15 December 2001, the kick-off signal for the European Convention for a future European Constitution. The Declaration suggested that Regulations...

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20 See Smit and Herzog (1993), p. 31. Arnulf even suggested that a regulation requiring implementation by the Member States might be deprived of its character as a regulation, see Arnulf (1998), on p. 108.

21 See Oldenkop (1972), p. 35 having criticised this opinion. See also Van Ooik (2003), p. 168.

22 See on detailed directives in the sphere of the Customs Union. Case 38/77 ENKA. Bracke argues that this case-law can be transposed to other areas, see Bracke (1996) on p. 104-105.

23 In some cases, directives are later replaced by regulations, such as Directive 92/102/EEC, which was partially replaced by Regulation 820/97. See also Regulation 259/93. OJEC L 30/1 replacing Directive 84/601/EEC.

24 The Treaty establishing a Constitution for Europe has designated them to be 'European regulations', see Article 1-33, fourth paragraph, TCE.

a return to the ‘true nature’ of the concept: directives were (again) to leave Member States with discretionary powers in the implementing process:

“directives have gradually evolved towards more and more detailed legislation. The key question is therefore whether the Union’s various instruments should not be better defined.”

In this study, the (amount of) discretion left by directives to Member States is a recurring theme. It plays a role in the context of legal challenges of directives by individuals (Chapter 2),26 in the context of establishing whether EC law imposes any per se rule (Chapter 3),27 in the context of whether or not directives impose upon Member States the duty to violate certain norms (Chapters 2 and 4),28 and in the context of establishing how much ‘authority’ directives are attributed in the national legal orders (Chapter 5).29

3.3 Regulations and Directives

Mirroring the situation of directives appearing as ‘quasi regulations’ is that of regulations being ‘quasi directives’. It is in fact quite common for regulations to require the adoption of national legislative measures.10

Bonnes even devoted a doctoral thesis exclusively to the ‘implementation’ of regulations into national law. Yet, that study did not as such address the issue of the blurred distinction between the two legislative instruments but rather took it as point of departure.11

With regulations the principle remains that Member States are prohibited to transpose them into national law.12 In that sense Article 249 EC appears to be more of an imperative norm in the context of regulations as compared to directives. Yet, in case a regulation needs national implementation for its operation, the

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26 See in particular Chapter 2, Section 2.2.2.2 on direct concern in the context of Article 230 EC.
27 See in particular Chapter 3, Section 3.2 dealing with the problem of ‘extraction’ that a European per se rule would entail.
28 Or whether the directive leaves sufficient discretion to avoid such violation by Member State law.
29 In particular if attributing authority to directives would lead to ‘democratic leakage’, see Chapter 5, Section 1.5.
10 Bracke wrote on the problems resulting from the deficient quality of EC legislation for national authorities. He explicitly included regulations in his research for they too had to be ‘implemented’ regularly. See Bracke (1996), p. 7-8.
Member State is obliged to provide it, a legislative practice accepted by the Court in its *Eridiana* decision:

"The fact that a regulation is directly applicable does not prevent the provisions of that regulation from empowering (...) a Member State to take implementing measures."\textsuperscript{33}

As with 'quasi regulations' these 'quasi directives' must therefore be deemed an accepted form of European legislation. Thus, it can be said that in general the ECJ does not review the form of EC acts. The one important exception is of course the 're-labelling' that the ECJ is prepared to do in order to determine whether private plaintiffs have a right to directly challenge a regulation or directive before the Community Judicature.\textsuperscript{34}

Regulations requiring some degree of 'implementation' are also important to this study. In comparison to directives, regulations are more often annulled or declared invalid by the Court. Whereas until the closure of this study only fourteen directives have been invalidated, over forty regulations have been invalidated in the same period of time. Consequences of their invalidity for national law may prove to be helpful when discussing similar problems posed by the invalidity of directives. This will be especially demonstrated in Chapters 3 and 4. In both Chapters invalid regulations will be regarded in so far as they were 'implemented' in domestic law. However, at the same time one must be careful in drawing such 'inspiration' from 'implemented' invalid regulations for the instrument still appears to be fundamentally different from a directive. Whether the two instruments indeed differ in terms of their constitutional relationship with national legislative provisions that implement them will be discussed in Chapter 3.

3.4 Terminology: Implementation and Transposition

There is some terminological confusion between 'transposition' and 'implementation'. This confusion may be explained by the fact that both terms are regarded as referring to Member States 'complying with' the directive. However, the term 'transposition' may be understood as having a more limited meaning. For the purposes of this study, 'transposition' must be described as 'implementation in the narrow sense', meaning only compliance with the first step to be taken by the Member States: that of adopting national legislation *transposing* the material provisions of the directive.\textsuperscript{35}

\textsuperscript{33} See paragraphs 33 and 34 of Case 230/78 *Eridiana v. Minister for Agriculture and Forestry*.

\textsuperscript{34} See Hartley (2003), p. 104.

\textsuperscript{35} See also Prechel (1994), p. 6.
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However, depending on the context, ‘implementation’ can have a broader meaning, namely when it also encompasses Member State action relating to the enforcement and application of the national measures correctly transposing the directive (the second step). Implementation in this sense of the word, referring also to non-legislative Member State actions could best be designated as ‘implementation in the broad sense’. However, this study will focus mainly on implementation in the narrow sense/transposition. Therefore, unless explicitly indicated otherwise, whenever the term ‘implementation’ is used, it must be understood as referring to the legislative steps undertaken by the Member State.

Furthermore, in order to avoid terminological confusion with directives, national measures ‘implementing a regulation’, shall be addressed as ‘flanking’, ‘executing’ or ‘operational’ whereas the term ‘implementation’ will be strictly reserved for the transposition of directives.16

4 Defining the Relationship

The overarching theme of this study is the constitutional relationship between the hybrid instrument that is the directive and its national implementation law. The invalidity of a directive serves as a good ‘test’ for exposing that relationship.

Clearly, this relationship goes beyond the actual ‘assignment’ the directive imposes upon Member States (see supra). When the ‘assignment’ is fulfilled and the Member State has correctly implemented the directive, the latter remains in a continuing relationship with national law. It retains the role of point of reference for national legislators, national public authorities as well as citizens. That necessarily implies that the directive will continue to raise questions concerning its interpretation.

First of all, national legislators must remain focused on the directive also after its correct implementation. Because of the directive’s continuous ‘Sperrwirkung’ they cannot unilaterally withdraw or amend at a later stage implementation legislation. Furthermore, they continue to be under an obligation to interpret the correct implementation in consistency with the directive at issue.

At sanctioning and enforcement level, directives also remain a point of reference after correct implementation. National public authorities have to keep an eye on whether or not the practical enforcement and sanctioning of correct implementation law continues to achieve the directive’s objectives. In this respect, directives remain also relevant for citizens as the ECJ has stated that a directive’s possible direct effect is not ‘exhausted’ by its implementation. Citizens may continue to invoke its provisions against authorities that do not adequately enforce or sanction the correct implementation legislation.17

17 See C-62/00 Marks & Spencer, par. 27-28.
Furthermore, all national public activity relating to the enforcement and sanctioning of implementation legislation is within the 'scope of Community law'. The correctly implemented directive ensures therefore the applicability of the 'General Principles of Community Law'.

In the situations described above, the constitutional relationship between directives and implementation law is still governed beyond any doubt by the Community constitution. Yet, in case a directive is invalidated that is not so evident anymore. At that point the pivotal question arises as to which constitution(s) govern(s) this relationship.

### 4.1 What Makes the Relationship Interesting?

#### 4.1.1 Practical Relevance

In the first place, this study has undeniably a practical relevance. The legal question as to the consequences of a directive's invalidation for national law has proven important in the past and will continue to prove interesting in the future. Directives have been invalidated in the past and in the years to come this will beyond any doubt occur again. Hence, it may prove useful for future cases to have certain questions regarding this relationship clarified or at least identified for the benefit of lawyers, European and national legal draftsmen and private citizens.

In 1988, the ECJ annulled for the first time an EC directive. The Hormones Directive was deemed to be vitiated by grave procedural defects. This Directive contained restrictions on cattle breeder to administer hormones to their livestock for fattening purposes. The moment the Directive was annulled, questions arose such as: is the administration of these hormones still forbidden? Was it, in view of the fact that a directive's annulment is retroactive, in the past illegal to forbid the use of these hormonal substances? What is to happen to enforcement actions, both completed or still pending, which national authorities undertook pursuant to the ban on hormones as envisaged in the Directive? Who is responsible for any financial losses suffered by cattle breeders for not being able to use the prohibited hormones? In order to begin answering any of these questions, one shall have to establish what the formal status is of the national legislation implementing the annulled directive upon which citizens and national authorities have acted.

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38 See Chapter 4, Section 3.5.2.1.
39 Of course, terms as 'constitution' and 'constitutional' refer in this context to a substantive concept of a constitution rather than to a more formal concept thereof.
40 Case 68/86 United Kingdom v. Council.
Although the practical relevance of this legal question cannot be denied, it should not be exaggerated either. It is a rare occurrence that an EC directive is invalidated by the ECJ. As said earlier, at the time of closing this study a mere fourteen directives have been invalidated. This does not necessarily mean that those are the only invalid directives ever to have been adopted by the Community. After all, there are various possible reasons why a directive may escape judicial control.

For instance, older directives that still date from the days of unanimity voting in the Council are not likely to be challenged in court by Member States. It may be expected that if they were unsatisfied with the outcome of the political process they would veto the directive rather than challenge it in court. The EC institutions, other than the Council, and private citizens might then still be interested to attack the legal validity of a directive, but no longer the Member States.

Likewise, directives that were (probably) invalid may have been withdrawn or amended before their invalidity was officially established. For instance, several directives that were tainted with the same legal defect as the directive declared invalid in the Angelopharm case were later withdrawn by a new Directive. Until that time they were 'sitting ducks' for validity review since a mere reference to the Angelopharm decision would suffice for their invalidation.

Therefore, despite the availability of various legal procedures as described hereafter in Chapter 2, the invalidity of a directive may never be displayed. This could be due to a lack of interest in having it annulled or due to the fact that its invalidity has simply never been pinpointed. In any case, it is clear that invalid Community directives may be in force and implemented in national legislation even at this time.

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42 At least explicitly, see C-262/88 Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group where this has been done implicitly.

43 At least in their original form. Generally, they are amended several times after their original date of adoption.

44 Legally, however, they remain in a position to start annulment proceedings against legislation they voted in favour of, see Case 166/78 Italy v. Council.

45 See also Van Ooik (1999). Furthermore, Member States that accede to the EU after the adoption of a directive are precluded from challenging it, at least that was argued by Advocate General Léger in his Opinion to C-194/01 Commission v. Austria (Pending), points 50 and 56.


47 See for instance C-51/93, Mehyui, discussed in Chapter 4, dealing with the Crystal Directive. Academic writing may of course be a good forum for pinpointing any invalidity. See for example Hugenholtz (2000), p. 499.
4.1.2 Theoretical Relevance: The ‘Authority’ of a Directive

Further justification for this study is of a more theoretical and academic nature. On a theoretical level, the invalidation of a directive that is implemented permits one to look carefully at the relationship between EC directives and national law. It is that relationship which is, in truth, the main theme of this study. The relationship between Community directives and national law implementing them is interesting for it raises questions of what one could call ‘authority’. The ‘authority’ emanating from the directive can be regarded from two perspectives: the Community and the domestic perspective.

From the Community perspective, it is clear that EC law attributes in legal terms a great deal of ‘authority’ to directives within the national legal order. Under a directive’s ‘authority’, national courts and national administrations can ignore national legislation as was established by classic cases such as *Becker* and *Fratelli Costanzo*. Yet, those lines of case law concern the courts and the executives. What is its authority in relation to the national legislator? Does it confer upon it the power to adopt implementing legislation? If directives would indeed have such authority, would their invalidity not automatically result in national implementation law being invalid as a consequence thereof?

That is the underlying idea when in Chapter 3 the question will be addressed whether Community law imposes any *per se* consequences for national law implementing an invalid directive. Any such ‘*per se* rule’ stemming from the Community level and directly penetrating the sphere of national law in determining the status of implementation measures implies that EC law imposes such a European concept of ‘authority’ upon national law.

One can also regard the ‘authority’ of a directive from the perspective of the Member States. This national attribution of ‘authority’ to a directive, at least in legal terms, is mainly reflected in various aspects of the national legislative process. As will be demonstrated in Chapter 5, possible adjustments of the national legislative process in the context of directive implementation is not a mere pragmatic issue but also an issue of the ‘authority’ national law attributes to the Community directive.

When accepting his chair in European Constitutional law at the University of Amsterdam, Eijswouts has specifically mentioned the relevance of topics such as the one studied in this thesis: “A fundamental part of the research on reception concerns the *basis of authority* of national legislation implementing international

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48 Which must be distinguished from authority in political terms, see for further notions on that Chapter 5, Section 1.6.

49 See Case 103/88 *Fratelli Costanzo* and Case 8/81 *Becker*. 

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treaty obligations as well as obligations under secondary Community law, notably directives" (translation and emphasis TV).\(^5\)

In sum, the added value of the topic of the invalid directive rises above the mere practical interests of knowing 'what to do next'. It may prove a valuable testing ground for defining the constitutional relationship between the directive and its national implementing law.

5 Delimiting the Topic

This study focuses on the peculiarities of the constitutional relationship between a directive and national public law adopted pursuant to that obligation. Consequently, delimitations of this study can be grouped in three categories: European delimitations, national delimitations and temporal delimitations.

As to European delimitations, it must be emphasized in the first place that directives and, to some extent, regulations are not the only instruments that may require domestic legislative activities. One can easily think of certain decisions or acts sui generis that may require so. However, the focus will be on the directive as it is by far the most interesting type of Community act in terms of the constitutional topic of this study. Its 'dual nature' as described above and the fact that it is by far the best documented of all Community legal instruments makes it the 'richest' instrument to discuss in terms of constitutional relationships and invalidity consequences.

Also framework decisions, the Third Pillar counterparts of directives will not be the primary focus of attention.\(^5\) At present, the Community legal order is still unique in that it is an autonomous legal order, distinct from that of the Member States and distinct from the international legal order in which it has its origin. It is not yet certain whether such quality can also be attributed to the Union legal order.\(^5\) As there is not (yet) much clarity on the primacy of Union law, it is less interesting to regard the constitutional relationship between framework


\(^{51}\) However, this unclarity may in the future be eliminated by the entry into force of the Treaty establishing a Constitution for Europe (CTE), see Article 1-6 of the TCE attributing 'primacy' to all segments of EU law.

decisions and the Member States' legal orders. What is clear, however, is that
direct effect of Third Pillar framework decisions is, at least as far as EU law is
concerned, explicitly ruled out.

By not focusing on EU framework decisions, this study consequently is (still)
mainly concerned with Community law. Terms as 'Community' and 'Commun-
ity law' are therefore widely used in the following chapters even though to
some they may start to sound outdated in the light of imminent changes of
the European Constitution. The Treaty establishing a Constitution for Europe,
signed in Rome on 29 October 2004, proposes to abolish the EC as a separate
legal entity. Yet, Community law is what this thesis focuses on since, at the time
of writing, it reflects still the state of the law and it is by no means certain if and
when the new Constitutional Treaty will enter into force.

As far as national delimitations are concerned, it must be stated that the
topic comes out best when national public lawmaking is focused upon. Hence,
alternative means of implementation such as collective agreements, environ-
mental covenants and national case law are not discussed.

A second national delimitation concerns implementation in the broad sense
(see supra). Apart from transposition, Member States must also ensure that
such national laws are effectively applied by the national authorities. Thus, the
invalidity of a directive could possibly have repercussions in individual situa-
tions: the possible 'micro' consequences of a directive's invalidity on the national
plane. These 'micro consequences' in the aftermath of an invalidation of an
implemented directive will only be discussed hereafter if they are instructive on
the relationship between the directive and national law. If national law would be
affected by the invalidity of the directive, the 'further digestion' of that legal fact
is not as such the topic of this study.

As to geographical delimitations, Chapter 5, dealing with the (potential)
consequences of a directive's invalidity within the national legal sphere will
cover four Member States: the United Kingdom, the Kingdom of Belgium, the
French Republic and the Kingdom of The Netherlands.

As to temporal delimitations: this study was closed on 29 October 2004.

51 The ECJ did not address the issue in Joined Cases C-187/01 and C-385/01 Gözütok and Brügge, the first
preliminary reference, based on Article 35 EU, concerning the interpretation of 'Third Pillar' law.
54 See Article 34 (2) (b) EU.
55 Of the 25 required ratifications a good number will require a referendum.
56 In as far as these alternative means would be allowed.
57 See Prechal (1995), p. 58-60 where she describes the tendency of the Court and the Commission to lay
more emphasis on the 'factual' effects of implementation rather than on the implementation itself.
6 The Plan

In the coming chapters the directive, its (in)validity and its relationship with national law will be discussed. First, Chapter 2 will focus on the various aspects of validity review that are 'directive specific'. It will appear that the 'dual nature' of the directive gives rise to several legal questions in the context of their review. After Chapter 2 has made clear the necessity to define the legal consequences of a directive's invalidation for its transposition, Chapters 3 and 4 will discuss that question in two phases. First, Chapter 3 will address the issue of a per se rule in Community law. Is national law invalid as a consequence per se of the invalidity of a directive? Chapter 4 will identify the possible consequences for national law that do not result directly (= per se) from a directive's invalidity: the European incidental consequences. After these chapters have given the full picture of EC law consequences for national law, Chapter 5 will do the same from the perspective of the UK, Belgian, French and Dutch legal systems. Chapter 6 will draw some general conclusions.