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

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Reviewing an Instrument with a ‘Dual Nature’
I Introduction

When adopting directives, the Community Institutions operate under the Rule of Law. A clear statement thereof is of course Article 220 EC: "The Court of Justice shall ensure that in the (...) application of this Treaty the law is observed." Furthermore, the competence of the Court of Justice is exclusive, as established in the Foto Frost case.²

In this chapter several aspects of legal review of directives will be discussed, in particular those that touch upon the relationship between the directive and its national transposition, the key question of this study. Leading theme is whether the 'dual nature' of directives leads to specific questions as to their legal review. Does the question of how the directive's invalidity affects implementation law 'cast its shadow' on the prior stage of the directive's legal review?

Before tackling that issue, it is important to make some preliminary observations on terminology (1.1). Furthermore, some comments on substantive rather than procedural aspects of legality review of directives are in place (1.2). Although not the main issue of this chapter, in that field too some specific questions may arise in relation to the directives' dual nature. Section 2 will deal with the various 'avenues' for legal review of directives namely 'annulment' (2.2), 'validity references' (2.3), 'damages' (2.4), 'plea of illegality' (2.5) and 'non-existence' (2.6). Section 3 will focus on the peculiarities of interim protection against (allegedly) invalid directives, provided either by the ECJ (3.1) or by national courts (3.2). Section 4 will deal with the political consequences of invalidity on the European plane. Conclusions will be drawn in Section 5.

1.1 Annulled, Void, Invalid and Non-Existing

In most successful annulment cases under Article 230 EC, one observes that the ECJ declares the directive 'void'.¹ In other cases, such as the Telecommunication Directive case and the Titanium Dioxide case,⁴ the Court does

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¹ Referring to the Court as a European institution, comprising both the Court of Justice as a body and the Court of First Instance whose competences have potentially further increased since the Treaty of Nice. See notably Article 225 EC opening possibilities for the CFI to deal with preliminary references.

² Case 314/85 Foto Frost v. Hauptzollamt Lübeck-Ost.

³ See for instance Case 68/86 United Kingdom v. Council ('Hormones'), paragraph 49. Case 131/86, United Kingdom v. Council ('Laying Hens'), paragraph 39. Case 131/87, Commission v. Council ('Glands and Organs'), paragraph 29. C-202/88 France v. Commission ('Terminal Equipment'), paragraph 47 and C-11/88 Commission v. Council ('Animal Nutrition'). One may observe that the Court declares an act 'null and void'. However, such statement is merely a matter of semantics and does not give rise to any further consequences other than being 'void'.

not spell out the legal effects but merely 'annuls' the directive. Indeed, such explicit statement is not necessary either for 'void' is the official Treaty term. Article 231 EC attaches it automatically to a successful annulment action: "the Court of Justice declares the act concerned void."

Preliminary references are a different matter. There the Court does not 'annul' a directive, rather, one sees that in those cases the quasi-official term used is that the Court 'declares invalid' a Community act.

Up till the closing date of this research (7 September 2004), it was still only the Angelopharm decision in which the Court has explicitly6 'declared invalid' a directive in preliminary reference proceedings.6

This different wording seems to correspond with the text of Article 234 EC on preliminary references. While Article 230 EC (annulment) uses the term 'legality', Article 234 EC refers to 'validity' of Community acts.7 The term 'declaration of invalidity' is in fact an umbrella term. Apart from preliminary references the Court also applies it as regards a plea of illegality (Article 241 EC) or a claim for damages (Article 288 EC).

In paragraph 2 this terminological difference must be revisited. Does invalidity through annulment ('void') and invalidity through other means for legal review ('declaration of invalidity') produce different legal effects? A second question that must be addressed in the coming paragraph is whether the umbrella term 'declaration of invalidity' hides any possible differences in terms of legal effect depending on its use in either Articles 234, 241 or 288 EC.

Another term one may come across is 'non-existence'. As explained later, that term must be reserved for cases where an act is so tainted with legal defects that no procedure of the Court is required to establish its invalidity. It is an exception to the presumption of validity of European law8 and to the well-known Foto Frost rule (see infra). The requirements for an act to be regarded 'non-existent' are, and must be, draconian. At this point, it suffices to state that the term is seldom used.

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5 From another preliminary reference, that of C-262/88, Barber, it could be deduced that two directives at issue in that case were implicitly declared invalid for infringing Article 141 EC.

6 C-212/91 Angelopharm GmbH v. Freie und Hansestadt Hamburg, in particular paragraphs 41 and 42.

7 In the Dutch language version of the Treaty, Article 234 EC uses the term 'geldigheid' while Article 230 EC uses 'wettigheid'.

Once, Germany had pleaded that 'validity', the term used in Article 234 EC on preliminary references, has a more strict meaning than the term 'legality' as used in Article 230 EC for annulment actions. Even more so, it claimed 'invalidity' to be the equivalent to 'non-existence' to which very strict conditions apply. Not surprisingly the Court rejected this German analysis of the Treaty. Applying the very strict conditions for non-existence in preliminary references would reduce the scope of Article 234 EC considerably for those whose direct challenges under Article 230 EC are not admissible.9

For instrumental purposes, this study will use the term 'validity' as the umbrella term. It will be used hereafter to cover all situations in which a directive is, or might be, tainted with a legal defect serious enough to justify its annulment under Article 230 EC or its declaration of invalidity under Articles 234 EC, 241 EC or 288 EC.10 Thus, a directive that has proven 'invalid' in any of these proceedings will be 'invalidated'. However, where it will benefit clarity, the more specific terms 'annullled' (for successful actions under 230 EC) or 'declaration of invalidity' (for, mainly, preliminary references under Article 234 EC and sometimes actions for damages or pleas of illegality under respectively Articles 288 EC and 241 EC) will be applied.

I.2 Certain Substantive Aspects of Judicial Review of Directives

I.2.1 Introduction

In academic writing, one may come across statements linking legal review of EC legislation to its legitimacy. Such statements argue that 'more legal review' compensates for any flaws in the Community democratic process. They may focus on procedural aspects, for instance arguing for more relaxed *locus standi* requirements11 or on the substantive aspects as Ward does in the following statement:

"it is Community and not national norms which are said to labour under the handicap of democratic deficiency. Surely then it should be the former types of rules, and not the latter, which are subject to the most rigorous form of judicial review."

9 In particular those not directly and individually concerned in terms of an action for annulment under Article 230 EC. See further Section 3.2.
10 Other umbrella terms could have been 'illegality', or being 'null' but in order to keep things simple, I will attempt not to use them.
THE INVALID DIRECTIVE

Statements as this plead for a more intensive review of EC legislation. However, as mentioned in the previous chapter, up till now the Court has not made any dramatic use of its possibilities to review EC directives. Under its exclusive jurisdiction to invalidate directives, only thirteen directives have been (partly) annulled under Article 230 EC and only one has been declared invalid under Article 234 EC. The paucity of this number is partly due to procedural considerations and factual considerations, but also results from the low intensity of legal review itself.

Statistically, the vast majority of Community legislation challenged in court is not struck down. That substantive aspect of legal review cannot be regarded as completely detached from the procedural aspects of legal review. A good example is the Opinion of Advocate General Jacobs in the UPA case in which he argued for a wider locus standi for private plaintiffs to directly challenge EC legislation. He puts the procedural aspects of legal review in the perspective of its substantive aspects. Jacobs warmly welcomed the fact that a relaxation of locus standi requirements would shift the emphasis from procedural questions of admissibility to questions of substance:

"While it may be accepted that the Community legislative process should be protected against undue judicial intervention, such protection can be more properly achieved by the application of substantive standards of review which allow the institutions an appropriate "margin of appreciation" in the exercise of their powers than by application of strict rules on admissibility which have the effect of blindly excluding applicants without consideration of the merits of the arguments they put forward."

The Advocate General points to the well-known fact that in the process of substantive review of directives, the ECJ generally respects the discretionary powers of the Community institutions to a large extent. Thus, allowing for more direct actions against normative Community acts, directives included, is not likely to obstruct the legislative process, at least not to a larger extent than the validity review in the course of a preliminary reference.

13 See Table 1 'Invalidated Directives'.
14 See Chapter 1, Section 4.1.1.
15 See Section 2.2.2.3.
16 See paragraph 66 of the Opinion of Advocate General Jacobs to C-50/00 UPA.
17 See also Ward (2000), p. 278: "The pattern of limited success traversing validity cases tends to indicate that a result in favour of those challenging the validity of EC rules is the exception rather than the rule."
18 One could say that the same (for private plaintiffs unsatisfactory) result is achieved as when the ECJ would review validity in a preliminary reference, often pinpointed as the route provided for the judicial protection of private plaintiffs against normative Community acts, the sole difference being that a direct annulment action is faster, involves fewer risks and is probably cheaper, see further Section 2.
When overlooking the various validity cases, not just those relating to directives, the ECJ indeed often 'saves' the Community act from invalidation. The 'techniques' the ECJ uses to achieve this include a 'marginal review', consistent interpretation, and partial invalidity. Below these substantial aspects of legal review will be addressed. The question to be answered is whether in this 'substantive' context the 'dual nature' of directives and their relationship with national law raises specific issues.

1.2.2 Marginal Review

Marginal validity review can easily be said to be the main reason why directives are not often invalidated by the ECJ. As Hartley puts it: "the grounds of review are sufficiently flexible to give the European Court a wide margin of discretion". That discretion is generally applied by the Court so as to respect as much as possible the choices made by the legislator. Especially in areas involving, in the words of the Court, 'complex economic situations' such as the Common Agricultural Policy, legal review is therefore limited. From that constitutional position of the Court it follows that invalidation of a directive is a rarity.

The Community legislator is assumed to enjoy such wide discretionary powers in many areas of law also outside the framework of CAP. However, one might expect the Court to be a bit more daring in other areas. One could think in particular of the legal review of 'tertiary' legislation such as Commission directives "which can be said to straddle the border between the creation of legal rules and the adoption of administrative measures". It may be noted that the Court has annulled only three 'tertiary' directives. Considering the large number of EC tertiary directives, this 'annulment record' is strikingly low.

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19 See Hartley (1994), on p. 448. See also Ward who writes on the comparison between the levels of protection provided against the administration in national and in European law, Ward (2000) on p. 272 and 273 and the literature referred to there.

20 See also the paragraph on Community environmental policy, involving different interests that have to be balanced in measures taken under the environment paragraph (see Article 174 EC). See for a marginal review of the compliance of Community measures with complex and imprecise rules of customary international law C-162/96 A. Racke GmbH & Co. v. Hauptzollamt Mainz.


At one point marginal review of Community acts may be of specific importance to directives. Their ‘dual nature’ is interesting when the Court seems to apply the same norm more lightly to directives than to national legislation. Perhaps the most striking example of this phenomenon is proportionality review. Several authors observed that the Court, when reviewing the proportionality of national measures derogating from the Treaty, applies that test far more strictly than when applying it to Community law itself. As for example Dehoussé stated:

"in assessing whether a Community measure was suited to the purpose of achieving the objective pursued, the Court has always shown great caution when the Treaty provided the Community legislator with a wide margin of discretion".

Such seemingly different applications of proportionality lead to the more general question to what extent the internal market’s ‘four freedoms’ apply to EC legislation. In some cases one must conclude that the European legislator enjoys more discretion than the Member State legislator. An example can be found in the Schwarzkopf decision where the Court argued that the Cosmetics Directive was not contrary to the free movement of goods. In fact, the Court gave an interpretation to the Directive that obviously restricted the free circulation of goods. However, it then took quite some effort to convince all concerned that under this interpretation the Directive did not violate Article 28 EC.

Schwarzkopf could not market its hair dies in Germany because safety warnings were only printed on an enclosed instruction leaflet, not actually on the packaging of its products. However, that was required by the Kosmetik Verordnung correctly transposing the Cosmetics Directive into German law. Both the Kosmetik Verordnung and the Cosmetics Directive accepted an exception for cases where printing safety warnings on the packaging was ‘practically impossible’. The case thus boiled down to the interpretation of what is ‘practically impossible’. Schwarzkopf argued that it could not be forced to make new packaging per country where it wanted to market its products since that would be ‘practically impossible’ in the sense of the Cosmetics Directive. Interpreting the term ‘practically impossible’ narrowly would lead, in its view, to an impediment to the free movement of goods. The ECJ disagreed, stating that the situation of Schwarzkopf did not qualify as ‘practically impossible’ in the sense of the Cosmetics Directive. It then explained why this interpretation of the Directive did not render it contrary to the free movement of goods.

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23 See Ward (2000), p. 277, see also Tridimas (1999), p. 124 and further. See for an example of the limited review of EC measures in the light of the proportionality test, C-331/88 Fedesa or C-491/01 BAT.


26 See the paragraphs 36 to 41 of C-169/99 Schwarzkopf.
The Directive at issue in Schwarzkopf was deemed a proportional Community measure to safeguard public health. Yet, it raises the intriguing question whether the Court would have accepted a similar interpretation of the German Kosmetik Verordnung if it were ‘autonomous’, not implementing the Cosmetics Directive (or any other directive). Would the ECJ in that scenario be just as understanding when reviewing the compatibility of the Verordnung with Articles 28 and 30 EC? At this point, marginal review of EC legislation may have specific significance for directives. Because they require the adoption of national legislation, the situation may arise that such legislation is allowed more under the basic Treaty norms than if it had been adopted autonomously. The relationship between the directive and its implementation can be described as the latter being the ‘umbrella’ protecting the directive it implements. This specific relationship between directives and national implementation legislation will be further addressed in Chapter 4 (‘Incidental EU Consequences for the Implementing Measure’).27

The ‘dual nature’ of directives may also lead to specific problems in the context of the (absence of) review of the legislative quality of EC acts. It may be argued that reviewing such norms only marginally may have repercussions for the national implementation legislator.

The doctoral thesis of Bracke discusses extensively the topic of the quality of European legislative drafting. It stressed in particular the drafting quality of directives, because of its repercussion for national implementation legislation.28

A Treaty norm that addresses legislative quality is Article 253 EC requiring the Community legislator to properly state its reasons. Although the Court has always stressed the importance of the statement of reasons, it has been reluctant in applying it.29 A flawed motivation of a directive may have repercussions for national legislation implementing it. The problem is of course that national legislation will in its turn be motivated by reference to the directive, and is thus tainted with the same defect.

One could argue that Member States also have their own responsibility in this regard. It may be said that when Member States choose to legislate by means of a simple reference to those unclear directives or by means of copying them as they are into their domestic legislation, they are co-responsible.30 As the techniques of copying and referral are not to be used with directives that leave the Member

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27 In particular Section 3.4.1 to 3.4.3 thereof.
28 He is not alone in doing so. See Oosterkamp, van der, Redactionele signalen, SEW, 1999, p. 181 and the sources to which he refers.
States considerable discretion they can also not be used if the discretion left to the Member States can be said to be the result of vague, ambiguous drafting of Community law.

Nevertheless, it remains a fact that when national implementation 'remedies' the unclarities in the directive, such national law remains vulnerable to interpretation problems of the parent directive. Whether an unclear directive is interpreted by the executive authorities (after 'copying' or 'referral') or by the legislator (after 'normal implementation'), there will always be the risk of someone contesting the national interpretation of the unclear directive. In that sense 'proper implementation' only postpones the issue.

If the Court were stricter in reviewing legislation on this point, the legislator would have more incentive to motivate properly. Now it may be said that the 'marginal review' of the ECJ results in the acceptance of 'bad legislative drafting' of Community acts. It seems that 'bad drafting' is recognized as a nuisance rather than a real legal problem which leads to the invalidity of a directive.\(^\text{31}\)

Whatever the importance of good legislative drafting, in many cases where the textual quality of legislation is bad, the Court will not establish invalidity.\(^\text{32}\)

The bad drafting of a directive can also have repercussions if it has to be 'implemented' by the Community institutions themselves. This may be said to have occurred in the Angelopharm case. If the Cosmetics Directive had been drafted more clearly, the Commission would have adopted the executive directive according to the proper procedure. Since it did not do so, the case has proved to be one of the few in which the Court has invalidated a 'tertiary directive'.

Fortunately, the quality of EC law drafting has over the years received more attention. Of particular importance is the declaration on the quality of EC legislative drafting, annexed to the Treaty of Amsterdam.\(^\text{33}\) This has resulted in an accord between Parliament, Council and Commission on the quality of EC legislative drafting that explicitly stresses the link between the proper drafting of EC law and its implementation into Member State legislation.\(^\text{34}\)

\(^{31}\) Causes of such bad drafting may be the compromise nature of legislation, or, typically for European legislation, the various languages. See Bronkhorst (1993), p. 29. He does not distinguish between the causes of bad legislative drafting and the actual manifestation thereof.

\(^{32}\) See Bracke (1996), p. 81: "De wetgevingskwaliteit speelt immers in de rechtspraak van het Hof van Justitie slechts een bescheiden rol. Het Hof komt nagenoeg altijd tot de conclusie dat een Europese regeling, ondanks eventuele gebreken, geldig is."

\(^{33}\) Declaration No. 39 on the quality of the drafting of Community legislation adopted on 2 October 1997 and annexed to the Final Act of the Treaty of Amsterdam.

\(^{34}\) Interinstitutional Agreement of 22 December 1998 on common guidelines of drafting of Community legislation. OJEC 1999 C 73/1.
I.2.3 Consistent Interpretation of Directives

The Court often upholds the validity of a directive by interpreting it in conformity with primary EC law. As one author puts it: the Court resorts to interpretation to ‘defuse the validity bomb’. Of course, this approach is understandable and desirable. If law is higher in ranking, it follows from the logic of the system to interpret subordinate law in accordance with superior law unless that is factually impossible or if it is very clear the legislator had other intentions. In fact, the ECJ considers consistent interpretation to be an obligation that it must honour, as it stated in for example the Bristol Meyers Squibb decision.

In this case manufacturers of pharmaceuticals argued for a certain interpretation of the First Trademark Directive. However, their interpretation would have amounted to a violation by this Directive of Article 28 EC with obvious consequences for national trademark legislation implementing it. The ECJ denied their interpretation stating that “like any secondary legislation, the Directive must be interpreted in the light of the Treaty rules on the free movement of goods” (emphasis added).

The particular relevance to directives is that whenever the ECJ upholds their validity by interpreting them in consistency with the Treaty it implicitly draws the demarcation lines for national legislators. Furthermore, not only must national courts and legislators respect the Court’s interpretation they are also under a duty of consistent interpretation themselves. Such duty to consistently interpret is easily derived from the general norm of ‘sincere co-operation’ in Article 10 EC. Thus, there is a convergence of consistent interpretation: both national courts and the ECJ (should) interpret EC directives and national implementation law in consistency with the Treaty.

Besides interpreting in consistency with the Treaty, the duty applies of course also with regard to other superior rules of Community law such as agreements with third countries or General Principles of Community Law (‘GPCL’). An example of the latter is the Fedesa decision where the ECJ interpreted the

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36 See also Mortelmans (2002), on p. 1327: “the provisions of secondary law must be interpreted in the light of the Treaty” (emphasis added).
37 See Joined Cases C-427/93, C-429/93 and C-436/93 Bristol-Meyers Squibb v. Paranova, paragraph 27.
38 Although it may be questioned if a recourse to that Article is necessary if the norms concerned, for example the four freedoms or the General Principles of Community Law, address Member States directly.
Hormones Directive in consistency with the principle of non-retroactivity of penal provisions. In Directive 88/146/EEC prohibited the use of certain hormones for the fattening of livestock. In effect, it entered into force retroactively and thus also obliged the Member States to implement with retroactive effect. Before the English High Court, it was submitted that Directive 88/146/EEC was invalid inter alia for infringement of the principle that penal provisions may not be retroactive. The Court, however, interpreted the Directive in consistency with that principle. The clause that “Member States shall bring into force laws, regulations and administrative provisions” was to be interpreted as not involving penal provisions. Therefore, the directive could not be said to be invalid.

Such interpretation of the Hormones Directive in consistency with higher norms of Community law has its consequences for Member States. For obviously, if the Directive is to be interpreted as not obliging the Member States to legislate by means of retroactive penal provisions (for that would render the directive invalid), Member States may not do so in the implementing process. Advocate General Mischo has put it very clearly in his Opinion to the Booker Aquaculture case.

“A directive intrudes into the national legal order, where it becomes a rule of reference to which the transposing measures must conform. But it does not do so alone. It is inseparable from the norms to which it must, itself, conform, including the general principles of Community law.”

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40 C-311/88 Fedesa.

41 It ‘repaired’ Directive 85/649/EEC, the First Hormones Directive, that was annulled earlier in Case 68/86 United Kingdom v. Council (‘Hormones’).

42 Directive 88/146/EEC, the Second Hormones Directive repeated verbatim the content of the annulled First Hormones Directive. Hence, it also contained the same implementation deadline: 1 January 1988 although the new Directive only entered into force three months later (on 16 March 1988).

43 See paragraph 44 of C-331/88, Fedesa. As far as those national provisions with retroactive effect would not be of a penal nature, the Court held that they would not cause any invalidity of the Directive since the purpose to be achieved (avoidance of a temporary legal vacuum) required retroactive effect and the legitimate expectations of those concerned were respected. See on the retroactive effect of legislation, Case 70/83 Kloppenburg v. Finanzamt Leer and Case 30/89 Commission v. France, paragraph 23 and the case law mentioned there.

44 See paragraphs 57 and 58 of the Opinion of Advocate General Mischo to Joined Cases C-20/00 and C-64/00 Booker Aquaculture v. The Scottish Ministers.
The topic of the General Principles of Community Law in relation to the EC and national legislator will be further discussed in Chapter 4, since an invalidation of a directive for violation of such principles raises specific questions.

1.2.3.1 Limits to Consistent Interpretation?

A duty to interpret Community law in consistency with superior Community law presupposes the discretion to do so. This can be exemplified by the Sociédés case. Before a French court it was argued that two directives in effect prescribed the Member States to introduce discriminatory tax measures. The Court denied this allegation by stating that

"directives do not infringe the Treaty if they leave the Member States a sufficiently wide margin of appreciation to enable them to transpose them into national law in a manner consistent with the requirements of the Treaty" (emphasis added).45

By contrast, if a directive leaves little discretion to the Member States, one would expect the ECJ to choose a different approach: either invalidating the directive or acknowledging that the EC legislator enjoys more powers under the Treaty than Member States do (as was previously observed).

Yet, there have been cases, especially in the sphere of the internal market, where the Court's consistent interpretation of Community legislation was strained. An example of such 'overstretched' consistent interpretation is the Italian Grapefruits case. In this case, the 'consistent' interpretation amounted to an interpretation contra legem.46

An Italian ministerial decree restricted the number of access points by which grapefruits could be imported into the country. The decree implemented Directive 77/93/EEC.47 This Directive provided that "Member States may ban the introduction into their territory of the plants, plant products and other objects listed in Annex II (inter alia grapefruits)".48 In other words, the Directive provided that a

45 See C-166/98 Sociédés v. Receveur des Douanes, paragraph 19. See also the Clinique case where it was stated on the implementation of a vague provision in the Cosmetics Directive (Article 6(3)) that the national discretion created by this vagueness was to be exercised in accordance with Articles 28/30 EC. See for a good example of a regulation being consistently interpreted with the free movement of services C-158/96 Kohll.
46 C-128/89 Commission v. Italy. See also Jans, J.H., SEW, 1992, p. 204 (209): "This judgment provides an excellent example of Treaty-consistent interpretation of secondary Community law, translation TV)"
complete ban on imports of grapefruits was allowed! The Italian decree did not completely ban but ‘only’ restricted the import of foreign grapefruits to certain coastal ports, no longer allowing import over land. Since it restricted the free movement of goods less than what the Directive allowed for, Italy felt confident its decree was ‘backed’ by the Directive. The Court, however, reiterated long standing case law on the free movement of goods, requiring national measures, intended to protect plant safety, to be proportional. The Court held that the decree failed the proportionality test and declared it to be in violation of Article 28 EC. The Directive could not ‘back’ the Italian decree since it was to be interpreted as not allowing for national measures to breach the Articles on the free movement of goods.

Such an approach is regrettable for it may cause friction with the principle of transparency. In a case such as Italian Grapefruits, the ECJ should have invalidated ex officio the Directive for infringing the free movement of goods. A directive should not state in such absolute terms that Member States ‘may ban’ all imports of grapefruits, without even specifying on what grounds and under what conditions they may do so. If it is ‘so obvious’ that the European legislator cannot allow Member States to derogate from the Treaty, why draft the Directive in a manner that seems to explicitly do just that?

The problem is the difference between ‘following the Community law system’ and ‘fixing’ a legislative flaw. How far can the Court go in its ‘remedial’ interpretation? Clearly, one situation that should be avoided is when ‘consistent interpretation’ amounts to contra legem interpretation. Then the proper approach would be for the Court to invalidate the directive. For ‘fixing’ flaws through consistent interpretation disregards the transparency that may be expected from Community legislation.

At this point an analogy could be drawn between national law and directives. It may be recalled that if national courts interpret national law contra legem but in consistency with the directive, Member States cannot be said to have fulfilled their obligation to implement that directive properly. Also then, transparency would be too much disregarded. In both cases there should be no discrepancy between the law ‘in the books’ and the law applied in court.

Not only is an invalidation more transparent, it is also an incentive for the Community legislature to keep up the quality of its legislative drafting, a problem referred to earlier. The occasional annulment in cases where reme-

49 See the Council Resolution on the Quality of Drafting of Community Legislation, which also emphasizes the importance of transparency, OJEC 1993, C 166/1. See also the Commission White Paper on European Governance, OJEC 2001, C 287/1. See for a legal review of the principle of transparency C-149/96 Portugal v. Council.

drial interpretation is no longer possible (for it would result in interpretation contra legem) contributes to improving such drafting. Fortunately, the ECJ has also been known to annul legislation rather than 'save it' by an over stretch ed interpretation. An example is the Ramel decision which contrasts sharply with Italian Grapefruits.

Ramel concerned Regulation 816/70 on a common organization of the wine market. It contained the provision that: "producer Member States shall be authorized in order to avoid disturbances on their markets to take measures that may limit imports from another Member State". Obviously in breach with Article 28 EC, the provision was annulled by the Court. If one looks again at the wording of the directive the Court 'saved' in Italian Grapefruits ("Member States may ban the introduction into their territory of the plants, plant products and other objects"). it is hard to reconcile these two decisions.

When overlooking several more cases where the Court has interpreted provisions of Community directives in the light of the Treaty (mostly Article 28 EC), it (luckily) seems that a case such as Italian Grapefruits is an exception. Or at least the Court does not interpret contra legem. What it usually does is narrowing down Member State discretion in the light of superior Community law (mostly the Treaty or the GPCL) where the directive's wording does not oppose such reading.

In one case, the Commission wanted the Court to follow again the line of reasoning adopted in Italian Grapefruits. In the Ouzo case, the Commission hoped the ECJ would interpret Directive 92/83/EEC so as to not allow Greece to impose favourable levies on its domestic ouzo production, even though this Directive explicitly authorized Greece to do just that. In effect, the Commission challenged Greek implementation legislation of that Directive as the former (and not the latter!) would violate Article 90 (1) EC on discriminating domestic tax measures. However, the Court, following Advocate General Tizzano's Opinion dismissed such reading of the Directive. Consequently, the Greek implementation legislation had to be deemed in accordance with Article 90 (1) EC.

51 Joined Cases 80/77 and 81/77 Ramel v. Receveur des Douanes.
52 Article 31(2) of Regulation 816/70, now repealed.
53 See for a further description of the Ramel case Chapter 4, Section 3.4.1.
54 As is apparent from several cases concerning the interpretation of the Cosmetics Directive: C-315/92 Clinique (concerning the Cosmetics Directive and the German prohibition to market products under the name 'Clinique'), C-77/97 Unilever, C-220/98 Estée Lauder and C-169/99 Schwarzkopf. See also Case 172/82 Interhuiles and Case 240/83 ADBHU.
55 See C-475/01 Commission v. Greece ('Ouzo'). Obviously that seems to suggest that the Directive at issue is an 'umbrella directive' as discussed in Chapter 4, Section 3.4.2. 'The Community Legislator exempted from Treaty Obligations?
1.2.4 Partial Invalidity

The established invalidity of a directive can be restricted in terms of time and in terms of substance. Temporal limitations that may follow from Article 231 EC will be discussed below. The substantive limitations follow from Court decisions that only partially invalidate a directive. It frequently happens that the ECJ only partially annuls an act under Article 230 EC, leaving intact its remainder. The specific relevance to directives of such partiality is evident. National legislation implementing the 'valid part' of the directive must remain in force. But as to the invalid part of the directive, the core question of this study re-emerges. For when assuming that national law would be affected by the directive's partial invalidity, difficult legislative operations may be expected in order to disentangle 'valid' from 'invalid' implementation.

The issue is not hypothetical since the Court has partially annulled directives under Article 230 EC in a few cases, amongst which one can find the Working Time case.

In the Working Time case the UK contested the validity of the Working Time Directive on the organization of working time in the Community. Eventually, the ECJ only annulled one single section, namely the second sentence of Article 5 providing that the weekly minimum rest period of workers "shall in principle include the Sunday".

There are limits to the Court's possibilities for resorting to partial annulment. Interesting is the Tobacco Advertising case in which the ECJ made some interesting statements on partial annulment in relation to its own constitutional position.

The Tobacco Advertising Directive banned all sorts of Tobacco advertising and was founded upon Article 95 EC (Internal Market). The Court admitted that

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56 Even though the ability to do that is not apparent at first glance from the text of Articles 230 and 231 EC. It may be safely assumed that also a directive may be partially declared invalid in the context of a preliminary reference proceeding under Article 234 EC as has already happened with regulations.


59 See C-84/94 United Kingdom v. Council ('Working Time'). On this particular 'Sunday rest clause' the ECJ stated that "the Council has failed to explain why Sunday, as weekly rest day, is more closely connected with the health and safety of workers than any other day of the week".
certain elements of the Directive could have been based upon Article 95 EC but not the envisaged entire ban on tobacco advertising.

The ECJ denied the request to leave in force at least those elements of the Tobacco Advertising Directive that could have been validly adopted. It held itself incompetent to ‘save’ those parts of the Directive, for a partial annulment “would entail amendment by the Court of provisions of the Directive. Such amendments are a matter for the Community legislator.”

Thus, partial annulment is not always possible. From the Court’s reasoning in Tobacco Advertising, one would think the decisive criterion is whether partial annulment leads to an ‘amendment’ of EC legislation. However, that criterion seems unworkable. Annulling only one or several sections of an act, ipso facto amends that act. For example the Working Time Directive was not the same after the Court had, only, struck out its ‘Sunday Rest Clause’.

Part of the answer to this question may be found in severability. When partial annulment results in striking out provisions that are not severable from the valid remainder of the act, it should be deemed not to be possible. Such an approach was taken in the Working Time case. The ECJ eventually annulled only the ‘Sunday Rest Clause’ of the Working Time Directive stating that “the second sentence of Article 5 (the Sunday Rest Clause), which is severable from the other provisions of the directive, must be annulled” (emphasis added).

However, such a ‘severability rule’ only provides part of the answer. In Tobacco Advertising the Court did not refer to it and rightly so. Also with severable provisions the question remains whether partial annulment would amount to a considerable amendment of the act. Therefore, a double test is suggested. Only if a directive’s valid and invalid provisions are severable and if upholding the valid provisions would not substantially amend the original act, can the ECJ annul partially. One problem under this proposed test is the definition of a ‘substantial amendment’. On this open issue, the ECJ is of course bound to have considerable discretion.

1.2.5 Conclusions

The Court has taken on the constitutional position of respecting to a large degree the discretionary powers enjoyed by the Community legis-

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60 See paragraph 117 of the Court’s ruling in C-376/98 Germany v. European Parliament and Council. A new directive has been adopted in which the legislator has indeed confirmed to the Court’s judgment in the Tobacco Advertising case, see Directive 2003/33/EC, the Second Tobacco Advertising Directive.

61 See also the discussion on partial annulment of contracts when some of their provisions are void under Article 81 (2) EC. The issue of severability is then left to the national legal systems to consider. See further Chapter 3.

62 See C-84/94, Working Time, paragraph 37.
lature. Directives are of course no exception and very few have been invalidated by the ECJ. This is of particular significance for directives in the sense that even though they often escape stringent judicial control they may still represent what one could call poor legislative drafting. An example thereof is poor motivation, be it not poor enough so as to conclude to a violation of Article 253 EC. In that regard the marginal review by the ECJ may result in problems for the national legislator who is under a duty to implement the directives.

Also the Court's consistent interpretation with superior norms of EC law is of particular relevance to the legal review of directives. In as far as those norms also address Member States, the Court's interpretation also sets the limits for discretion of the national implementation legislator. Thus, a substantive aspect of legal review, particularly relevant for directives, is when a Community norm is applied more leniently to a directive than to national law. Under such an 'umbrella' directive, implementation legislation holds a position different from 'autonomous' legislation.61

Thirdly, the Court may invalidate a directive only partially. Whatever the consequences of invalidity, national implementation law must remain intact as a matter of Community law in as far as it implements the valid part of the directive. As the ECJ generally refrains from involving itself much with the legislative activities it is likewise careful in not overstepping its powers when applying the concept of partial invalidity. In that regard it is suggested here that it should restrict itself to pronouncing partial annulment only when the invalid sections can be severed from the valid sections and that it would not amount to a substantial amendment.

2 Procedural Aspects of Judicial Review of Directives

2.1 Introduction

There are several ways in which the validity of a European Directive can be reviewed within the EC legal system. Access to justice has been accepted as a General Principle of Community Law. Where it deemed this to be possible, the Court has been known to interpret the Treaty favourably so as to broaden the scope of legal review of Community acts.

Probably the most famous example of such favourable interpretation is to be found in the Chernobyl decision. The ECJ interpreted Article 230 EC so as to grant European Parliament access to justice if its 'prerogatives' were said to be affected. In other cases also private citizens have benefited from such favourable interpretation of the Treaty and had gained direct access to the Community Courts under Article 230 EC.

61 See Chapter 4.
Up till now directives have only been invalidated in the course of either an annulment action (Article 230 EC) or in a preliminary reference (Article 234 EC). As yet, no directives have been invalidated in the course of the other possible ‘avenues’ for legal review: an action for damages (Article 235 in conjunction with Article 288 EC), the plea for illegality (Article 241 EC) and non-existence. Nevertheless, in the following sections, legality review under all these procedures must be discussed. It will appear that in all of them, specific questions arise due to the ‘dual nature’ of directives.

Of general relevance for legal review of directives under all these procedures is of course the time factor. The main question is whether the directive is invalidated before or after its implementation into Member State law. At this stage it must be emphasized that directives are usually reviewed after their implementation into national law or at least after the deadline for such implementation had lapsed.

Also the second scenario just mentioned is not uncommon. It is striking that when procedures were pending for the annulment of the Tobacco Advertising Directive, only one Member State, Luxembourg, had implemented it at the expiry of its implementation deadline.

Furthermore, when the annulment proceedings for the Biotechnology Directive were pending, the Netherlands tried to freeze the duty to implement it in interim proceedings. Even though the President of the Court denied that request, the Directive was not implemented in the Netherlands (nor in quite a few other Member States) after expiry of the deadline.

The main factor why directives are only reviewed after the deadline for implementation had lapsed and after a possible implementation into national law, is the length of annulment proceedings. Such proceedings usually take a longer period of time than the implementation term. When validity review takes

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64 In particular the Codorniu and Timex case law, see Case 264/82 Timex v. Council and Commission and C-309/89 Codorniu v. Council.
65 See for example Bronkhorst (1993) who also mentions the action for damages but omits the plea for illegality.
66 Although ‘non-existence’ is not a ‘procedure’ in the proper sense of the word, as will be explained hereafter.
67 Which obviously concerned pre-existing legislation, see the Law of 24/03/1989 on restriction of publicity for tobacco products and the prohibition to smoke in certain areas (Loi portant restriction de la publicité en faveur du tabac et de ses produits, et interdiction de fumer dans certains lieux).
68 This effect is further strengthened by the fact that implementation deadlines may be short. Extreme examples are the Second Hormones Directive which required implementation with retroactive effect or Directive 98/99/EC on health problems affecting intra-Community trade in bovine animals and swine (OJEC 1998, L 358/107) imposing (probably by mistake) an implementation term of only a few days.
place in the context of a preliminary reference, the chances that the review takes place after expiry of the deadline and/or national implementation is even greater still. Such legal review is not constrained by the two-month term that applies in annulment proceedings under Article 230 EC. A third factor for late review may be that the ECJ usually does not address validity questions *ex officio*, although its case law on this matter is not very consistent.

In practice, the ECJ has performed validity review *ex officio* in two distinct situations, first, where it was questionable that the Community legislator had fulfilled its duty to state reasons (Article 253 EC) and, second, where the Commission may have exceeded the limits of its competence. It is difficult to see why the Court should draw the line between these two specific legal defects and other possible sources for invalidity. For example, in its *Daimler Chrysler* decision, the ECJ could have addressed *ex officio* the, arguable, issue of compatibility of the Waste Regulation with Article 28 EC (free movement of goods). Surely, Article 28 EC does not represent a norm of lesser importance than an adequate statement of reasons or Commission competences? The inconsistency is enhanced when one compares such cases with the *Lenoir* case in which the Court was only asked to interpret a provision of Regulation 1408/71 even though that provision was arguably contrary to Articles 39 and 42 EC. The point was addressed by Advocate General Gordon Slynn in his Opinion to this case who argued that "it cannot be right for the Court, if wholly satisfied (...) that the provision to be interpreted is invalid, to be confined to interpreting that invalid provision which the national court must then apply". The ECJ consequently reviewed the validity of the Regulation's provision it was asked to 'interpret'.

Thus, there is only a small chance that validity review of directives is completed before the end of their implementation deadline. As review has no legal suspensory effect, implementation legislation must therefore be expected to have been adopted before invalidation of the directive.

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69 See for the latter, C-210/98 *P. Saltzgitter v. Commission*, paragraph 56: "Since that is a finding which touches on the competence of the Commission, it must be raised by the Court of its own motion even though none of the parties has asked it to do so". The Court referred back to Case 19/58 *Germany v High Authority*, at 233. See also point 97 of the Opinion of Advocate General Geelhoed in C-321/99 *ARAP*.

70 It was only in the *Oliehandel Koeweit* case that this point was settled: see Gronden, van de, J.W. and Mortelmans, K.J.M., *Afvale een vruchtbare voedingsstof voor de ontwikkeling van het Europese recht*, AAE, 2002, p. 180, arguing for a validity review *ex officio* in this case.

71 *Case 313/86 Lenoir v. Caisse d'allocations familiales*.

72 Opinion of Advocate General Gordon Slynn, at 5410. He added that, if in such a case doubt is possible as regards the validity, the ECJ could choose to only "indicate the possibility of invalidity without ruling on it", thereby referring back to earlier case law of the Court: Case 16/65 *Schwarze v. Einfuhr- und Vorratss-telle für die Getreide und Futtermittel*, at 886.
2.2 The Action for Annulment of a Directive

2.2.1 The Privileged Applicants in the Co-Decision Era

Article 230 EC\(^7\) provides the possibility to challenge directly the validity of EC-measures, including EC directives, before the ECJ. For Member States, the Council, the European Parliament and the Commission, it is the last resort to challenge the outcome of the political process in case they are displeased with it. With the co-decision procedure being now the most commonly used procedure for lawmaking, the Member States see their position weakened in a Council that votes by qualified majority.\(^7\) Against that background, Member States may be expected to resort more to legal review than before co-decision was so widely introduced.\(^7\) In that context, their objections will normally already be known the moment they start '230 proceedings' for they will most likely have expressed them in the course of the legislative procedure leading to the adoption of the directive. This 'constitutional review' of directives under Article 230 EC is facilitated by the fact that Member States, as well as the Council, the Commission and the European Parliament, form a privileged class of judiciaries.\(^7\) They do not have to prove any interest when instituting proceedings before the Court against a directive.\(^7\) Furthermore, even if Member States have voted in favor of a directive, they can still institute an annulment action against it.\(^7\)

\(^7\) Formerly Article 173 EEC.

\(^7\) See Article 251 EC. In the current Treaty texts, unanimity voting in the council still is the rule in 48 cases. After the entry into force of the Treaty of Nice co-decision became applicable in Articles 13 (2), 62, 63, 65, 157 and 191 EC.


\(^7\) Van Ooik argues in the context of legal basis disputes that in cases where a privileged applicant has no interest in annulment (because the legal basis it advocates provides the same legislative procedure as the one that was actually used), the Court should declare them admissible but then deny to render judgment for lack of interest. See Van Ooik (1999), p. 365.

\(^7\) As demonstrated by Case 166/78 Italy v. Council, paragraphs 5-6.
The Court of Auditors and the European Central Bank hold a special position. Their position is better than that of private individuals since they only have to prove the act affects their 'prerogatives'. Once that is established, they too have *locus standi* before the Court in their action for annulment of a directive.

At the entry into force of the Treaty of Nice, the European Parliament acquired the same privileged status as the Council, the Commission and the Member States. This improved procedural position is flanked by an improved position in the legislative process. Particularly since the Treaty of Amsterdam the EP has gained the role of co-legislator in many areas to which co-decision (Article 251 EC) has become applicable. At first sight that seems to diminish its interest in having *locus standi* under Article 230 EC, for it has a veto in the co-decision procedure. Nevertheless, there are still sensitive legislative fields such as agriculture where it only enjoys a consultative role, or no role at all, as is the case in trade policy matters. Furthermore, there is the bulk of 'tertiary legislation' as regards which Parliament will want to have the full possibility of legal review since its position there is much weaker. The *Pesticides* case provides an example of the European Parliament successfully attacking legislation of such type.

Under Directive 91/414 (the Basic Directive), the Council had reserved to itself the competence to further elaborate certain 'uniform principles' that were to be taken into account when authorising the use of pesticides. Parliament could not prevent this since the Basic Directive was adopted under Article 37 EC (Agriculture), giving it only a consultative role in the legislative process. Based on this power that the Council had reserved to itself in the Basic Directive, executive Directive 94/93/EEC was adopted. However, this Directive changed the scope of the much stricter conditions as laid down in the Basic Directive. The EP successfully challenged this executive Council Directive, stating that the scope of the Basic Directive could only be altered under the procedure of Article 37 EC, implying that Parliament had to be consulted on the matter.

In *Pesticides* Parliament protected its right to be consulted, the violation of which obviously being adequate reason for annulment of the Directive. Formally, it had no other means of protecting that right than by instituting an annulment action. It was not involved in the making of the executive Directive. Furthermore, its consultative role under Article 37 EC cannot prevent the Council from reserving for itself executive lawmaking powers in the first place.

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79 See Article 37 (2) EC (agriculture) and Articles 133 and 300 EC (trade policy).
82 Although it must be said that Parliament did not use its consultative right to protest against it.
In the comitology debate, the question of protecting the powers of Parliament in the legislative process itself is also addressed. The new Comitology decision improves to some extent the powers of Parliament in that respect. Nevertheless, its increased influence will not necessarily diminish legal proceedings against such executive legislation before the Court. Under the new Comitology Decision the European Parliament has more rights as to information and a strong advisory role in the legislative process itself. Yet, Parliament has no decisive voice under this new procedure. If it does not like what the Commission is doing under its delegated powers, it can only disapprove by issuing a non-binding resolution. Furthermore, this new approach only relates to areas where Parliament is the co-legislator under Article 251 EC, not to other areas.

In any event, direct annulment actions instituted by the privileged applicants do not give rise to questions that are specific to directives. That is, however, different if one examines the peculiarities of direct annulment actions instituted by private plaintiffs.

2.2.2 Directives and Private Plaintiffs under Article 230 EC

It is a well-known fact that individuals have a hard time attacking directly before the Court Community acts of general application, including directives. The problems that individual plaintiffs have to face under Article 230 EC will not be addressed in full. They have been extensively dealt with elsewhere. Below, these problems of restricted admissibility will only be discussed in as far as they relate specifically to directives.

2.2.2.1 Are Directives Excluded a Priori?

Private citizens have the most troublesome position in case they want to have a general act of the Community annulled under the fourth paragraph of Article 230 EC. A normative act of the EC can only be contested directly before the Court in case it is

81 Until now, there are not yet any examples known of Parliament successfully attacking executive directives that were established under a form of comitology. Only in the Angelopharm case, such a directive was declared invalid in the course of a preliminary reference.

82 See respectively Articles 7 and 8 of the Comitology Decision.

83 The new Comitology Decision is discussed in Lenaerts, K. and Verhoeven, A., Comitologie en scheidingsder macht, SEW, 1999, p. 394.

84 At this point, Lenaerts and Verhoeven argue for a 'code of conduct' between Parliament, Council and Commission, see Lenaerts and Verhoeven (1999) on p. 412.

"a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former".

One may notice that this phrase is silent on directives. Indeed, there has been some debate on whether directives should be susceptible to legal review under the fourth paragraph.\(^8\) In particular the Council has defended in several cases that, irrespective of considerations of direct or individual concern, directives are *a priori* excluded from direct private action under Article 230 EC. A closer look at the case law of the ECJ and the CFI dealing with the argument that directives are excluded *a priori* gives a somewhat ambivalent impression. In some cases where the 'a priori argument' is raised, the ECJ does not address the issue at all, an example being the *Gibraltar* case.

In *Gibraltar* the Council submitted that the Gibraltar Government did not have *locus standi* to directly challenge Directive 89/463.\(^9\) This Directive, liberalising access to the market of air services, contained a provision that suspended its application to Gibraltar airport until such time as the British and Spanish governments had completely resolved their differences concerning the sovereignty over the territory of Gibraltar.\(^9\) The Council argued the Gibraltar government had *no locus standi* by putting forward the argument that "a directive cannot be the subject of proceedings for annulment brought by a legal or natural person under the fourth paragraph of Article 230 of the EEC Treaty".\(^9\)

The ECJ, however, disregarded this *a priori* argument and denied the Gibraltar government *locus standi* for lack of individual concern.

From a ruling such as the one in *Gibraltar*, one could deduce that the ECJ interprets Article 230 EC broadly since it dismisses admissibility on the basis of the directive's general applicability, not because Article 230 excludes *a priori* directives. In line with the *Gibraltar* decision, the President of the Court also did not regard the *a priori*-argument in the *Fedesa Order* case either although there too it was raised explicitly.

In this case private plaintiff Fedesa applied for interim measures against the Second Hormones Directive. Normally the issue of *locus standi* in the main proceedings is not examined in proceedings for interim relief. However, the President made an exception for cases where the application for annulment is *mani*

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\(^8\) See Albors-Llorens (1996), p. 170 and the literature there mentioned.


\(^9\) See Council Directive 89/463/EEC concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States, in particular Article 2(2) suspending its application to Gibraltar airport.

festly inadmissible in the main proceedings. In his opinion, that was the case since Fedesa obviously was not individually concerned. Thus, he dismissed the application for interim measures under reference to the directive's general applicability.92

However, in the subsequent GUNA case the jurisprudence becomes confusing. In this case the Court of First Instance, that had in the mean time become the competent court to address direct annulment actions by individuals, was more cautious.93

GUNA contested the validity of Articles 7 and 9 of Directive 92/73/EEC concerning homeopathic medicinal products. Article 9 provided for a more heavy market approval procedure including the proof of therapeutic efficacy where these products could not be administered orally. GUNA markets injectable medicinal products and therefore suffered heavily under this new Directive. Just as in the Gibraltar case, the Council's first argument to contest GUNA's admissibility, was that the wording of Article 230, fourth paragraph, EC only refers to decisions taken in the form of a regulation and decisions addressed to someone other than the applicant, hence excluding a priori a private direct action against directives.

The CFI in this case was so convinced the Directive was of no individual concern to the applicant that it dismissed the annulment action on material grounds "without it being necessary to consider all of the points raised between the parties concerning whether or not an individual may bring an action for the annulment of a directive".94 Furthermore, the CFI judged a year later in Asocarne that the exclusion of directives from the wording of Article 230, fourth paragraph, is justified because:

"in the case of directives, the judicial protection of individuals is duly and sufficiently assured by the national courts which review the transposition of directives into the domestic law of the various Member States".

By referring to the legal protection offered to individuals by the preliminary reference procedure (see infra), the CFI seems sympathetic to the a priori argument. Nevertheless, it then continued in what one would call an obiter dictum, that the complaint was in any case inadmissible for lack of individual concern.95

93 T-463/93 GUNA.
94 See T-463/93 GUNA, paragraph 14.
95 See T-99/94 Asocarne v. Council, paragraph 22: "It follows that the application is manifestly inadmissible, without there being any need for the Court to consider whether the directive at issue is of direct concern." The phrasing of manifest inadmissibility was copied from the ECJ in Case 160/88 R Fedesa v. Council.
In the appeal against this case the ECJ too seemed to leave the a priori issue explicitly open, but, again, investigated nevertheless extensively whether the private plaintiff was individually concerned by the Directive.

The ambivalence of this case law that seems to keep the door open for a possible exclusion a priori of directives from direct challenge by private plaintiffs appeared to have ended by the later UEAPME ruling of the CFI. It stated that UEAPME, a representative organization of small and medium sized businesses that challenged a directive, could not be denied the right to start proceedings under Article 230, fourth paragraph, EC against a directive for the mere reason that this Article does not mention directives. Yet, that conclusion was premature for in the following Salamander case the CFI made explicitly clear that the ‘a priori discussion’ was not closed by the UEAPME decision.

Salamander c.s. started an annulment action against the Tobacco Advertising Directive. They claimed they were all going to be affected by this Directive for they were all, directly or indirectly, in the tobacco advertising business. Again the Council raised the a priori argument which Salamander challenged by referring to the UEAPME decision. The CFI, however, did not address that point but simply reiterated the text of Article 230 EC, fourth paragraph, EC, not providing for private action against directives. Nevertheless, just as in all the other cases, it then investigated whether the Directive affected the applicants directly and individually.

In conclusion, the CFI and the ECJ both pointed out more than once that they kept the door open for the argument that directives were a priori excluded from review under Article 230, fourth paragraph, EC. Nevertheless, they consistently investigated whether private plaintiffs were individually or directly concerned by the challenged directives. What results is confusing case law. If both Community Courts have no problem in materially investigating locus standi requirements, they should formalize this by explicitly rejecting the a priori argument. Fortunately, this seems now to have been done, at least by the CFI, in its last decision on direct private action against a directive. In its Japan Tobacco ruling, it has explicitly ruled out the a priori argument.

96 See C-10/95 P Asocarne v. Council, paragraph 32.
97 See T-135/96 UEAPME v. Council, paragraph 63 where the CFI states that the earlier case law has to be interpreted as such. In the same line argued also Advocate General Lenz in the Gibraltar case, see paragraph 96 of his Opinion to that case.
98 See Joined Cases T-172/98, T-175/98 to T-177/98 Salamander AG And Others v. European Parliament and Council, respectively paragraphs 26, 27 and 28: “Even if it were possible (...) for directives to be assimilated to regulations”, etcetera.
Japan Tobacco, producer of the cigarette brand 'MILD SEVEN' had started direct annulment proceedings against Article 7 of Directive 2001/37/EC, the Tobacco Directive. The Article prohibited trademarks for cigarettes 'suggesting a particular tobacco product is less harmful than others'. The Council and Parliament, before stating there was no direct concern, reiterated the usual *a priori* argument. The CFI does away with this argument stating that "Although the fourth paragraph of Article 230 EC makes no express provision regarding the admissibility of actions brought by private persons for annulment of a directive, it is clear from the case law of the Court of Justice and of First Instance that that fact itself is not sufficient to render such actions inadmissible" (emphasis added).\(^\text{100}\)

As demonstrated here, that case law to which the ECJ refers is not at all as clear as it wants us to believe. Yet, fact remains that the *a priori* argument was denied *expressis verbis*.\(^\text{101}\) The CFI has attached the logical conclusion to the earlier case law in which both Courts had always, systematically, investigated the *locus standi* of private applicants in terms of either direct or individual concern, treating the case in the same way as if it concerned a regulation or a decision not addressed to them.\(^\text{102}\)

This decision of the CFI must of course be welcomed. Not only because it puts an end to earlier confusion but obviously also from the perspective of legal protection, even if the latter is in this sense more symbolic that practical. The banning *a priori* of directives from legal review because the Treaty does not mention them next to regulations in Article 230 (4) EC would be contrary to the overriding principle of access to justice as expressed in Articles 6 and 13 of the European Convention and recognized as General Principle of Community Law.\(^\text{103}\) The individual may not be deprived of his right to a legal remedy simply because of the 'label' chosen by Brussels.\(^\text{104}\) Dismissing *locus standi* for absence of direct and/or individual concern, painful as it may be, gives a far better impression than dismissing it because the act attacked happened to be a directive. If a directive is indeed a quasi-decision, it should be open to legal review for the sake of those who are directly and individually concerned by it.

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\(^\text{100}\) See paragraph 28 of the ruling of the CFI in T-223/01 *Japan Tobacco*.

\(^\text{101}\) Later reiterated by the CFI in T-167/02 *Toulorge*, par. 24.

\(^\text{102}\) It is not the only occasion where the Court has interpreted Treaty articles extensively so as to encompass directives where they only mention regulations. The Court has done so too with regard to the second paragraph of Article 231 EC regarding the preservation of effects of an annulled 'regulation' as demonstrated by the *Students Residence* case and the *Transport Policy* case. The same has happened in relation to Article 241 EC on the plea for illegality.

\(^\text{103}\) See also the *Jégo-Quéré* case where the CFI also referred in this respect to Article 47 of the Charter of Fundamental Rights of the Union.

\(^\text{104}\) As the CFI had once again firmly stated in paragraph 63 of the *UEAPME* case. See also Case 101/76 *Koninklijke Scholten Honig v. Council and Commission*, paragraph 6.
It is already difficult enough as it is to contest the validity of directives directly before the Court as is proven by the fact that up till now not a single private action against a directive has ever proven to be successful due to lack of either individual or direct concern.

### 2.2.2.2 Directives and Direct Concern

As is well known, the admissibility standards of direct and individual concern (the so-called ‘Plaumann test’) are hard to meet for individuals. Despite this case law being not very encouraging, attempts have been made by individuals to attack directives directly under Article 230, fourth paragraph, EC. These ‘individuals’ could be quite extraordinary such as large pan-European associations of enterprises or even the Gibraltar Government. At this point, the ‘dual nature’ of the directive becomes interesting again for one could think that, since individuals are normally only directly concerned by the implementing legislation, the requirement of direct concern under Article 230 EC could be problematic. At first sight the direct concern test seems to clash with the inherent ‘dual nature’ of directives.

That said, it is all the more striking that the Court’s case law on admissibility of private applicants against directives under Article 230 EC does not address the question of direct concern at all. Locus standi is often denied on the grounds of lack of individual concern rather than direct concern. The Second Hormones Directive, for instance, was attacked twice by individuals under Article 230 EC and in both cases the Court has denied admissibility for lack of individual concern.

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105 Especially since the Jégo-Qué report of the CFI has not proven to be good law, see infra.
106 As also the European Parliament observed in paragraph 33 of the Japan Tobacco case.
108 See the two Asocarne cases, the Fedesa case or the UEAPME case and the Gibraltar case.
109 Except for one case, where an individual tried to have a directive annulled under Article 230, fourth paragraph, EC, but was denied access on the grounds that the two month time limit had lapsed: see case 352/87 Farzoo and Kortmann v. Commission. It concerned an annulment action launched against Commission Directive 87/137/EEC adapting to technical progress Annexes II, II, IV, V and VI to Cosmetics Directive 76/768/EEC.
111 See Case 160/88 R Fedesa v. Council, paragraph 13: “without there being any need to examine all the matters argued by the parties, it must be held that the contested directive is manifestly not of individual concern”. The identical phrase is used in Case 133/88 Joseph Flourez and Others v. Council, paragraph 11. Both cases date 7 December 1988.
Illustrative in this respect is the Gibraltar case in which the ECJ explicitly mentioned the ‘dual nature’ of directives stating that “even though a directive is in principle binding only on the parties to whom it is addressed, namely the Member States, it is normally a form of indirect regulatory or legislative measure”. One notices that the Court recognises the indirect operation of directives as being addressed to the Member States, yet it then denies the Gibraltar Government locus standi for not being individually concerned. In the Asocarne case too, the CFI mentioned the ‘dual nature’ of directives whereby again locus standi to directly challenge a directive was denied for failure to meet the individuality test.\(^\text{112}\)

One could conclude that the ‘dual nature’ of directives a such does not bar access to Article 230 EC, at least not beforehand. The Court has never denied private plaintiffs access to Article 230 EC under reference to the directive’s need for implementing legislation. That argument has, however, been raised on several occasions, for example by the European Parliament in Japan Tobacco

“since a genuine directive can never in itself impose legal obligations upon individuals, it is equally incapable of being of direct concern to an individual for the purposes of Article 230 EC. (...) It is therefore irrelevant, for the purpose of assessing whether or not an action for the annulment of the directive is admissible, that the directive leaves no discretion to the Member States” (emphasis added).\(^\text{113}\)

Opinions such as the one expressed by the European Parliament in the Japan Tobacco case are closely interlinked with the a priori argument discussed earlier. The reasoning is that directives are not mentioned in Article 230 (4) EC and thus a priori excluded from private annulment actions, because, being addressed to the Member States, they cannot concern private individuals directly.

Yet, in later case law both the ECJ and the CFI started to address expressly the issue of direct concern in relation to directives. In that sense private plaintiffs are not prevented from having locus standi against a directive simply because it requires implementation, but because of how much implementation it requires.

\(^{112}\) See T-99/94 Asocarne And Others v. Council, paragraph 21. Interestingly, the CFI did not deny individual concern by referring to the legislative nature of the directive (as the EC did in Gibraltar) but rather, to the legislative nature of the national measures implementing it! This case was appealed in C-10/95 P Asocarne Appeal, where the Council, as defending party, made an explicit point of the direct concern test, stating that “the discretion left to the Member States regarding the application of the directive means that national measures are needed. Asocarne is not therefore entitled to consider that it is directly concerned by Directive 93/118.” The Court, however, did not address this point and, again, denied access on the basis of lack of individual concern. See C-10/95 P Asocarne v. Council, paragraph 24.

\(^{113}\) See T-223/01, Japan Tobacco. A similar opinion was expressed by Advocate General Geelhoed in paragraph 49 of his Opinion for Case C-491/01 BAT.
To be more precise: meeting the direct concern test depends on the amount of discretion a directive leaves to the Member States. Advocate General Lenz, for instance, investigated this issue in his Opinion for the Gibraltar case.

As mentioned earlier, the Gibraltar government contested the validity of Directive 89/463/EEC that liberate access to the market of scheduled air services. Gibraltar airport was, at least temporarily, excluded from the scope of that Directive. Gibraltar, expecting from such liberalization an increase in air traffic on its airport and all the benefits connected to that, contested under Article 230, fourth paragraph, the Directive's provision exempting Gibraltar from liberalization. Advocate General Lenz addressed the direct concern issue and concluded Gibraltar was directly concerned since the Directive did not provide any discretion in as far as it exempted Gibraltar from its scope.  

The Court did not address the direct concern test in Gibraltar but, rather, as in most cases of this kind, denied locus standi for lack of individual concern. However, in later jurisprudence the CFI did address direct concern in relation to directives, first of all in the GUNA case. It held that, since Member States enjoyed discretion as to the implementation of the disputed provision of the Directive, private plaintiff GUNA was not directly concerned.

The direct concern test was also addressed in relation to directives in the Salamander decision. Again, the CFI held that the directive at issue, the Tobacco Advertising Directive, did not directly concern the private plaintiffs because of the discretionary powers it granted to the Member States.

The companies challenged specifically the provision on 'diversification products'. The Directive granted the Member States the option to derogate from the general ban on products bearing tobacco brand names (for instance 'CAMEL' boots). Their marketing could be allowed to continue as long as the trademark was used "in a manner clearly distinct from that used for the tobacco product". The CFI observed that the Member States had both discretion as to whether or not to use

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44 He admitted that the wording of the Directive provided the possibility to exempt Gibraltar from the scope of the Directive and hence did not prohibit the Member States to apply it voluntarily to Gibraltar. However he stated that this possibility must be rejected for being merely theoretical in the light of the political sensibilities regarding Gibraltar sovereignty. See paragraphs 68 to 71 and paragraph 93 of his Opinion.

45 Also in other cases the direct concern test was brought up, but the Court did not address the issue, see T-99/94 Asocarne, paragraph 13, C-10/95 P Asocarne Appeal, paragraph 24 and Case 160/88 R Fedesa v. Council, paragraph 7.

46 See paragraphs 15 and 16 of T-463/93 GUNA. The specific provision in the directive that GUNA wanted the CFI to annul gave Member States discretion as to which type of tests they would apply to injectable homeopathic products.
this derogation and, if they did, a further discretion in determining what was a use of brands "in a manner clearly distinct from that used for the tobacco product".17

In one respect the 'dual nature' of directives is a more prominent issue in Salamander than in other cases. It is the first case in which private action is instituted under Article 230 EC against a directive that was, at the time of the proceedings, not yet transposed into national law. The CFI indeed stressed that, even if the Directive would have left Member States no discretion whatsoever, the fact remains that it was not yet implemented and the applicants were all private individuals. According to long-standing case law,18 directives cannot impose any obligations upon them, hence these tobacco businesses could not possibly have been directly concerned by the Tobacco Advertising Directive.19 Yet, the CFI nevertheless addressed the direct concern issue in terms of assessing the amount of discretion left to the Member States. The case does not stand on its own for in the following Japan Tobacco case,20 the CFI again assessed in a direct private annulment action the amount of discretion left by an unimplemented directive.

The CFI, instead of simply referring to the fact of non-implementation, extensively addressed the issue of direct (future) concern in terms of the discretion that the contested provision left the Member States. Japan Tobacco, marketing the cigarette brand 'MILD SEVEN', argued that, when implemented, Article 7 of the Directive, read in conjunction with the preamble, was bound to result in national legislation banning this trade mark. However, the provision and the preamble were not as clear as Japan Tobacco argued.21 Due to this unclarity the Member States enjoyed discretionary powers under the Directive as to the acceptance of a brand name such as 'MILD SEVEN' and hence any future direct concern was rejected.

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17 See Article 3(2) of the Tobacco Advertising Directive.
18 See C-91/92 Faccini Dori and Case 80/86 Kolpinghuis.
19 They argued that, following the judgment in C-129/96 Wallonie, they were to refrain from taking any measures that could be liable to seriously compromise the objective of the Tobacco Advertising Directive. The CFI rejected that this was to be regarded a general principle of law which also addressed the private individuals. One of the undertakings, UNA Film City Revue GmbH, actually tried to be qualified as a 'public undertaking' in the sense of the Foster case law. The CFI dismissed this argument stating that UNA Films did not have special powers beyond those which result from the normal rules between individuals (paragraph 60). They also argued the Directive affected them factually before its implementation since, in 'the real world' economic operators would anticipate the imminent transposition of the Directive into national law. The CFI, however, holds on to the requirement that the undertakings must be directly affected in their legal, not their factual, situation (paragraphs 39-42 and 62 of the Salamander case).
21 One of the factors being the different language versions of the contested provision.
Thus, the good news for private plaintiffs is that they can be said to be directly concerned by a directive. In case the directive is not implemented into national legislation, future direct concern may suffice. Nevertheless, when Member States enjoy a lot of discretion under the terms of a directive, private applicants will not meet the direct concern test. The reasoning is that they then have to await national implementation and subsequently challenge that.

Referring private plaintiffs to national courts and the possibilities offered there presupposes two conditions. First, that national procedures are available for challenging the implementing legislation. This point will be addressed later in the sub-chapters on indirect challenges of directives in preliminary reference proceedings and in actions for damages. Secondly, one can question the assumption that directives leaving Member States discretionary powers never are of direct concern to private plaintiffs. First of all, it should be the exact provision the private applicant complains about that leaves the Member States latitude. But even if it does leave latitude, it could nevertheless oblige Member States to violate that particular norm, irrespective of how they implement the directive. If so, the direct concern test should not bar beforehand private applicants from legal review by the Community Court. The discretion left by the directive should be regarded in the light of the superior norm that is said to be violated.

In conclusion, it is clear that, in order to meet the test of direct concern, the ‘dual nature’ of the directive, being indirect per se on the basis of Article 249 EC, poses no difficulties. This can be regarded as a logical consequence of the fact that directives are not excluded a priori from direct private challenges, as concluded in the previous paragraph. Yet, as is clear from the GUNA and Salamander cases, the ‘dual nature’ of directives does become problematic in terms of direct concern the moment they provide Member States with a certain degree of latitude.

122 As was also argued by the applicants in Joined Cases T-172/98, T-176/98 and T-177/98 Salamander, paragraphs 72-80. See also C-10/95 P Asocarne Appeal, in which it was submitted that Spanish national procedural law was not functioning properly.
123 See also the Court’s ruling in Eurotunnel where it denied direct concern of the plaintiffs since “the exemption arrangements introduced by those provisions constitute no more than an option open to the Member States”; see Case C-408/95 Eurotunnel, paragraph 30.
124 Indeed, in Joined Cases T-172/98, T-176/98 and T-177/98 Salamander, the companies were complaining about a particular provision, that on the use of tobacco brands for diversification products. It was exactly that provision that left Member States some discretion. On the other hand, one could argue that here the right to property was violated, irrespective of how the Member States were going to use that discretion.
125 It may be argued that it follows from Joined Cases T-172/98, T-176/98 and T-177/98 Salamander, that this amount of latitude is not necessarily extensive.
2.2.2.3 Directives and Individual Concern

The Court's case law shows that, in principle, the 'dual nature' of directives does not bar individuals from being directly concerned for the purposes of Article 230, fourth paragraph, EC. The direct concern test hinges on discretionary powers in the national implementation phase. Whereas the direct concern/discretion test is a difficult hurdle, the individual concern test is even more troublesome. In fact, in most cases where directives were challenged, directly by private plaintiffs, *locus standi* was denied for lack of individual concern.¹²⁶ For the time being, any relaxation of the individual test should not be expected.¹²⁷

For a brief moment, it looked like the 'individual concern' requirement was 'dropped'. In *Jégo-Quéré* the CFI held that a direct concern test should suffice for individuals who want to challenge a normative Community act under Article 230 EC.¹²⁸ This bold attempt to drastically soften individual *locus standi* requirements did not fly very far. In its subsequent *UPA* decision, the ECJ made clear once and for all that it is the preliminary reference procedure that has to provide the European citizen with the legal remedies for attacking the validity of normative Community measures.¹²⁹ On the preliminary reference procedure as a means of contesting directives more will be said in the next sub-chapter.

In this respect, the Treaty establishing a Constitution for Europe (TCE) must be mentioned. As it appears, the IGC, at least partially, has welcomed the *Jégo-Quéré* judgment for in Article III-365 (4) they have extended the possibilities of a private annulment action against 'regulatory acts':

"Any natural or legal person may (...) institute proceedings against an act (...) which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures" (emphasis added)³⁰

¹²⁶ See for example T-167/02 *Toulorge* declaring inadmissible an annulment action against Directive 2002/2/EC.

¹²⁷ Other than the existing relaxations introduced by the 'Codorniu, Extramet and Timex' case law. See T-167/02 *Toulorge* for an interesting rejection of the 'Codorniu' case law: If Directive 2002/2 resulted in Toulorge losing its know-how (recipes), it would have the same effect on the entire sector. No individual right in the sense of 'Codorniu' would thus be affected.

¹²⁸ T-177/01 *Jégo-Quéré et Cie SA v. Commission*.

¹²⁹ C-50/00 P *UPA v. Council*. In the appeal decision on *Jégo-Quéré*, the ECJ confirmed the *UPA* decision, see C-263/02 P *Commission v. Jégo-Quéré*, paragraphs 30-33.

¹³⁰ See Article I-33, fourth paragraph, TCE.
These ‘regulatory acts’ or ‘regulations’ under the new terminology of the TCE include (tertiary) directives. However, from this more relaxed regime for direct private challenges are excluded European regulations that entail implementation. It is not clarified what exactly is meant by ‘implementation’ but it may be safely assumed that at least (tertiary) directives are excluded from this relaxed regime. Thus, even though Jégo-Quéré found some resonance in the TCE, directives (tertiary directives included) will remain subject to the stringent requirements of direct and individual concern.

2.2.2.4 Private Plaintiffs’ Interests in Annulment of a Directive

From the point of view of learning more about directives, it may be regretted that Jégo-Quéré did not prove to be good law for at least two reasons. A relaxation of the individual concern test, would place the direct concern test more in the picture than it is now. The ECJ would have to speak out on direct concern and consequently assess the amount of discretion left to the Member States by the directive at issue. It would have been particularly interesting to see how the Court would have dealt with the question of exactly how much ‘discretion’ for the domestic legislator would bar individuals from Article 230 EC.

A second reason to regret the Court’s UPA decision (for educational purposes) is that if more private plaintiffs would have locus standi to directly challenge directives the issue of ‘interest’ may arise. For interest can be distinguished from locus standi. This differentiation was already apparent in the Description and Coding decision involving a privileged plaintiff whose request for annulment was denied for lack of interest.

In this case the applicant with locus standi, the Commission, had argued a different legal basis as the one used by the Council to adopt the contested decision. However, eventually the ECJ followed neither the Council nor the Commission but concluded a third legal basis. Yet, that basis referred to a similar legislative procedure. Consequently, the Commission’s request was denied. Thus, the case illustrates that although one has locus standi, and the Community act violates a Treaty norm, the Court may deny annulment if that ultimately does not affect the position of the (privileged) plaintiff.

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131 See Article 1-37 (1) and (2) TCE assigning the task of ‘necessary’ implementation to the Member States or, if uniformity is required, to the Commission and Council. Therefore, ‘national law’ can, in TCE terminology be an ‘implementing act’.

132 No doubt however, that this phrasing of the draft Article will again stimulate the a priori argument. Against such a reading of the TCE one may propose the counter arguments as stated above against such a reading of the recent Article 230 (4) EC.

133 Up till now it has only done so in T-463/93 GUNA and Joined Cases T-172/98, T-176/98 and T-177/98 Salamander, discussed above.

The issue of private applicants' interest in the directive's annulment only arises after they have passed the *locus standi* test. It would have been interesting to see how the Court would then treat this issue. Determining their 'interest' in annulment would touch again upon the core question of this study. For what could possibly be the interest of a private plaintiff, being directly (but not necessarily individually) concerned by a directive, to bring proceedings before the ECJ if the directive's annulment would not affect national implementation law? It would seem the individual only has an interest in having a directive annulled if this affects somehow the national legislation that determines his legal position. For now it is a matter of speculation on what the Court would do in such circumstances. If there were no national consequences, would the plaintiff's claim be denied for lack of interest? Or would in such a case the plaintiff be denied *locus standi* in the first place for lack of direct concern, thereby further refining the case law on that issue?

Questions like these will remain unanswered for the time being. By rejecting the decision of the CFI in *Jégo-Quéré*, the ECJ has denied itself the chance to elaborate on the issue of a private plaintiff's interest in a directive's annulment. Consequently it also denied itself the possibility to address the issue of the consequences of a directive's invalidity for national implementation law, at least in the course of direct private challenges.

### 2.2.3 Community Law Effects of an Annulment

An annulment creates the legal fiction that the directive is deemed to have never existed. The external effect of a decision annulling a directive is that the latter is void *erga omnes* and *ex tunc*. It follows from the *erga omnes* character of an annulment that the directive, usually directed to *all* Member States, loses its validity towards all of them, not just for those who had possibly contested it. The *ex tunc* character results of course in the directive losing its validity with retroactive effect up till the time it entered into force.

Obviously, in case a directive has not yet been implemented, its annulment sets aside the obligation of the Member States' to implement it into national legislation. Because of the two month term for instituting annulment actions under Article 230 EC, it may occur that the deadline is still running when the Court reaches a decision although in most cases it will have lapsed. In case the annulled directive was already implemented into national legislation before its annulment, the fact that it is deemed to have never existed may lead to the legal

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15 In preliminary references an 'interest' test could be said to be part of the requirement that the references must be 'necessary'. Yet, that 'necessity' test is performed by the Court in a very marginal way, see for instance C-186/90 *Durighello v. INIPS*. See further Section 2.1.4 'How relevant is the validity question to the national court?'.

16 See Section 2.1.
questions and entanglement discussed in this study, particularly in the following Chapters.

In order to address the legal and practical problems resulting from the ex tunc character of an annulment, the EC Treaty has provided for Article 231 EC empowering the Court to preserve provisionally the legal effects of an annulled act. There are two cases where the Court, after an action for annulment was launched successfully against a directive, limited the consequences of that annulment through the use of Article 231 EC.\(^{137}\) The Court had to apply it by analogy since Article 231 EC only mentions regulations.\(^{138}\) In case the annulled directive has already been implemented, any legal questions as to the status of the implementing law are then discarded. In case the directive was, at the time, not yet implemented, Member States remain under the obligation to implement it, despite its invalidity. The latter result was contested by The Netherlands in the Students Residence case, where the Court applied the Article to the Students Residence Directive.\(^{139}\) Obviously, such application of Article 231 EC links with both the (expected) effects of a directive's invalidity on national law and with the interference of the ECJ with those effects. Therefore, it will be dealt with more extensively in Chapters 3 and 4.

The effects of a directive's annulment on the duty to implement and its possible effects on implementation law that has already been adopted can be called 'external effects'. Yet, there are also 'internal' consequences. Upon an annulment, one would expect all the preparatory acts to lose their validity after the annulment. Every institution involved in the legislative process must again take the necessary steps for the adoption of a possible new directive. Yet, from the Fedesa case it appeared that these 'internal' consequences do not always arise.

The Hormones Directive was annulled after a successful complaint launched by the United Kingdom.\(^{140}\) Ground for annulment was the fact that the Council had voted by written procedure in violation of its own rules of procedure.\(^{141}\) The Community Institutions then adopted a new Hormones Directive with an identical content, based upon the same Commission proposal and taking into account the same Opinion of the European Parliament. Fedesa argued the validity of this

\(^{137}\) In one case, the Court annulled a directive while refusing to apply Article 231 EC for the plaintiff (The Netherlands) did not make clear on what grounds of legal certainty, the court should apply Article 231 EC to the directive. See C-314/99 The Netherlands v. Commission.

\(^{138}\) C-295/90 European Parliament v. Council (students residents) and C-21/94 European Parliament v. Council (transport policy).

\(^{139}\) Whether this is an appropriate use of the Article (after all, what is the link with legal certainty?) will be discussed in Chapter 4 ('EU incidental consequences for the implementing measure').

\(^{140}\) Case 68/86 United Kingdom v. Council.

\(^{141}\) See further on this point, Chapter 4 focusing on the different types of norms a directive can violate.
Second Hormones Directive before a UK court _inter alia_ because it could not have been adopted in this way. The ECJ and the Advocate General, however, condoned this practice, stating that: "The Directive which preceded the directive at issue was annulled on account of procedural defects concerning solely the manner in which it was finally adopted by the Council. In those circumstances the annulment of the directive does not affect the preparatory acts of the other institutions."\(^{143}\)

It seems the Court has now introduced a new type of annulment, that of only annulling the act constituting the latest phase in the legislative process. Even though this ‘façade’ annulment may seem very pragmatic (the Second Hormones Directive had the exact same content as its predecessor; the defect was indeed of a very formal nature) it nevertheless remains hard to explain how this type of annulment can be based on the text of Article 230 EC. The ‘act’ that was subject of the nullification proceedings was the entire Directive, not just the actual adoption by the Council of the Directive.

In the _Fedesa_ case the ECJ may be said to condone a course of action that has been pursued also in relation to another Directive: The Second Laying Hens Directive, repairing the First Laying Hens Directive,\(^ {144}\) annulled earlier.\(^ {144}\) In this case too the actual reason for annulment was of a very procedural nature, again violating the Council’s Rules of Procedure.\(^ {145}\)

Whereas annulment means in one context the annulment of the entire act, including all the preparatory activities, it may in another context be a verdict with a more limited scope (a façade annulment). It is understandable that a complete annulment may be a nuisance for the institutions and not very efficient.\(^ {146}\) Nevertheless, it is hard to explain how the Court could find the Treaty basis for such ‘façade annulment’.

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\(^{142}\) See paragraph 34 of the Court’s ruling in the C-331/88 _Fedesa_.


\(^{144}\) Case 131/86 _United Kingdom v. Council_.

\(^{145}\) See further the paragraph on the scope of Article 233 EC: the Second Laying Hens Directive indicated as its legal basis Article 233 EC.

\(^{146}\) See in particular the observations of the Italian Government, referring to the principle of ‘legislative economy’, see C-331/88 _Fedesa_, on p. 1-4038.
2.3 The Validity of Directives in Preliminary References

2.3.1 Introduction

On several occasions the ECJ had to answer preliminary questions on the validity of directives under Article 234 EC. However, up till the closing date of this study it has happened only once (the Angelopharm case) that the Court has actually invalidated a directive in such proceedings.147

One specific aspect of the preliminary references that is particularly relevant for this study is that there is no time limit such as the two-month deadline for direct annulment actions. A directive may be invalidated years after its entry into force and hence years after its implementation into domestic legislation.148

A second specific aspect of preliminary references that is relevant for this study is that it is a co-operation device. When that co-operation between ECJ and national judge concerns validity issues, the 'dual nature' of the directive again raises questions. In these proceedings one would expect the constitutional relationship between the directive and national implementing legislation to be of importance. After all, it is only when the validity of a directive determines the status of national law that one expects the validity issue to arise in national proceedings. If that would not be the case, national courts might be expected to rule on the issue before them without the need of having the issue of the directive's validity clarified.

2.3.2 The Complementary Function of the Preliminary Reference

Below, the specifics of protection against invalid directives as offered by the preliminary reference procedure will be discussed. An essential feature of the preliminary reference is its complementary relationship with the annulment action under Article 230 EC. As is repeatedly stated by the Court, in the scheme of protection in EC law the limited access of private plaintiffs to

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147 See C-212/91 Angelopharm GmbH v. Freie und Hansestadt Hamburg. This case concerned a form of 'tertiary legislation' since the invalid directive at issue in that case implemented a basic directive. The Imperial Tobacco case can also be considered successful but does not stand on its own. That preliminary reference on the validity of the Tobacco Advertising Directive was overshadowed by Case C-376/98 Germany v. Parliament and Council. See for an implicit declaration of invalidity of a directive C-262/88 Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group.

148 An exception is the Imperial Tobacco case. Here the English High Court asked a preliminary question on the validity of the Tobacco Advertising Directive although it was at the time not yet implemented in UK law. In fact, the High Court was asked to prevent the British government from implementing the, allegedly, invalid Directive.
annulment proceedings is compensated by the opportunities under Article 234 EC. This indirect challenge is deemed to compensate individual plaintiffs for the lack of direct challenge.

In a practical sense the relevance of the preliminary reference procedure for private plaintiffs should not be exaggerated. True enough, in the course of EC history they have never been declared admissible in an action for annulment of a directive. Yet, at the time of writing, an actual invalidation of a directive in a preliminary reference has occurred only once.

This complementarity is also demonstrated by the so-called TWD rule. According to this rule, citizens who could undoubtedly have instituted an action for annulment against a European act, are deprived of the possibility of provoking a preliminary question on the matter. Of course, for directives, this limitation of Article 234 EC by the TWD rule is not very relevant since individuals are unlikely to have locus standi. Illustrative at this point is the Eurotunnel case in which the Court denied in categorical terms that the TWD rule could bar individuals from raising a directive's invalidity before a national court.

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149 As for instance reiterated by the ECJ in Case C-491/01 BAT, paragraph 39. See for an earlier example Case 231/82 Spijker Kwasten, par. 11. See also Megret (1984), p. 311: "Cette interprétation extensive des motifs d'invalidation permet de compenser au plan du renvoi préjudiciel, l'insuffisance des garanties offertes aux particuliers par le recours en annulation".

150 This complementary function of the preliminary reference is also demonstrated by the fact that in the two procedures the same grounds for legal review are applicable. At this point parallels may be drawn with the legal systems of some of the Member States. National law too may provide no, or only very limited, opportunities for private direct challenge of normative measures. However, indirect challenge of legislation is quite common in national law as well. As to the inadequacy of this procedure, see the complaints of private plaintiff Asocarne in the Asocarne Appeal case, paragraph 16. He pointed out that Spanish courts that were competent to rule on the matter of the validity of the implementing legislation suffered from 'widespread structural delays'.

151 See Joined Cases 21-24/72 International Fruit, paragraphs 5 and 6.

152 See C-212/91 Angelopharm GmbH v. Freie und Hansestadt Hamburg.

153 See C-188/92 TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland, see also the Eurotunnel case which mitigates the TWD case a bit: it has to be very certain that an individual would have been admissible in his complaint; something not very likely in view of the fact that the Court's criteria are strict and not always clear. See Jans (1998), p. 277.

154 By contrast, Member States that always have locus standi are for that reason barred form invoking the validity question before national courts under the TWD rule, as the ECJ confirmed in paragraphs 34 and 36 of C-241/01 National Farmers Union.

155 C-408/95 Eurotunnel SA and others v. Sea France.
Two directives on excise duties and VAT gave Member States the option to temporarily exempt from these taxes the goods sold in the duty-free shops in air- and seaports. Eurotunnel SA and Eurotunnel plc, the companies that co-manage the Channel Tunnel, brought unfair competition proceedings against SNAT, a cross channel shipping company, before the Tribunal de Commerce in Paris. The ‘Chunnel’ operators contended that SNAT should be prohibited of selling goods duty-free on board of its ships. SNAT replied that it only carried out French law that precisely implemented the exemptions that the two Directives allowed Member States to apply. Furthermore, it argued that the preliminary validity reference should be declared inadmissible because the real purpose of the proceedings that Eurotunnel had started before the French court was to have the Directives declared invalid (and not to claim damages for unfair competition) where they failed to institute an action under Article 230 EC. The argument that Eurotunnel could have instituted proceedings against the Directives before the ECJ was denied. The ECJ stated that since directives are addressed in general terms to Member States and not to natural or legal persons, it is not obvious that a direct action by Eurotunnel would have been admissible under Article 230 EC for it would not be individually concerned.

The complementarity of the preliminary reference procedure in relation to the action for annulment was subject to a quite spectacular legal debate between the CFI and the ECJ. In its Jégo-Quéré judgment, the CFI rejected the idea that private plaintiffs, not having a direct action under Article 230 EC may be forced to infringe Community law in order to gain access to the national courts for, eventually, invoking a preliminary reference. Indeed, whether private plaintiffs can be required to do so has been subject of debate earlier. It was defended by Advocate General Tesauro in his Opinion for the Assurances du crédit case:

The Assurances du crédit case concerned several private insurance undertakings who had started an action for damages under Article 288 EC. They contended Council Directive 87/343 was illegal and inflicted damages upon them as it obliged them to form extra financial reserves whereas public insurance companies were exempted from that obligation. The Directive was said to have weakened their competitive position vis-à-vis their public counterparts.

156 It concerned the Directives 77/388/EEC (Article 28k) and 92/12/EEC (Article 28) that allowed the Member States to exempt these goods from taxes until 30 June 1999.

157 Furthermore, SNAT pointed out that Eurotunnel had instituted an action against UK legislation that implemented the Directives before the High Court of Justice. In its judgment of 17 February 1995, the High Court denied Eurotunnel the authorization to bring an annulment action against this legislation.

Tesauro held that if it was not possible to institute direct actions against the national measures implementing the allegedly invalid Directive, the applicants could violate those national provisions in order to raise the validity question in a national court. He admitted certain risks were involved in that approach, yet these were risks inherent in the institution of legal procedures in general. Furthermore, they are no different from when national law is attacked as being contrary to EC law. Admittedly it often occurs that the non-conformity of national provisions with EC law is resolved in preliminary references that start with private individuals deliberately not complying with those national provisions. Yet, in its Jégo-Quéré judgment the CFI rejected Tesauro’s approach of compelling private individuals to violate the law in order to gain access to judicial review of normative Community measures. It denied such a concept, referring to Articles 6 and 13 of the ECHR and to Article 47 of the European Charter on Fundamental Rights granting citizens an effective legal remedy against general EC measures that directly affect them. The CFI thus felt that private applicants should have more access to the direct route of Article 230 EC against Community legislation and ‘dropped’ the individual concern test. In its UPA judgment, the ECJ quickly made an end to this bold revision of locus standi case law. Despite a long expose of Advocate General Jacob in his Opinion to that case, arguing the contrary, the ECJ brought everything back to the way it was before the CFI’s ‘escapade’ in Jégo-Quéré.

One of the arguments the ECJ used to justify its upholding the individual concern test is of particular importance to this study. It stated that it was up to the national legal orders to guarantee an effective legal remedy at national level, enabling private plaintiffs to contest there the validity of Community legisla-

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159 See the Assurances du crédit case, pages 1826-1827. Furthermore, he pointed out that in one EC country where these companies were active, the UK, they could have started an action for ‘judicial review’ against the national measures implementing the Directive and in the course of that proceeding invoke the validity question of the Directive itself. Admittedly, this scenario has been proven to be possible in C-331/88 Fedesa (concerning the validity of UK measures implementing the Second Hormones Directive) and in C-74/99 R v Secretary of State for Health, ex parte Imperial Tobacco And Others (concerning the intention of the UK government to implement the Tobacco Advertising Directive).

160 Despite this Opinion of Advocate General Tesauro, the ECJ looked into the claim for damages (and dismissed it), not addressing the question of whether the plaintiffs should have been denied locus standi under Article 288 EC.

161 See, however, at this point Cassia (1999), p. 416, stating that the Reue/Comet limitations to national procedural autonomy are to be transposed to the legal protection of individuals against invalid EC law: "on ne voit aucune raison susceptible d'empêcher leur (i.e.: the Reue/Comet limitations) transposition aux litiges nationaux mettant en cause le droit communautaire lui-même".

162 Paragraph 47 of the ruling of the CFI in T-177/01 Jégo-Quéré et Cie SA v. Commission.

163 Case C-50/00 P UPA v. Council.
tion. In particular, national courts are under a duty of consistent interpretation of national procedural law so as to enable private plaintiffs to contest "any decision or other national measure relative to the application to them of a Community act of general application". Translated to directives, this means private parties depend completely on national procedural and constitutional possibilities for attacking implementation legislation. Whether this entails an obligation to deliberately violate such national legislation (or executive acts based thereon) is from the Community law perspective not problematic. But besides the availability of national legal review, the Court also seems to presuppose a legal relationship between the directive and national law, the main issue of this study. These two issues will be further discussed below.

2.3.3 Article 234 EC as a Legal Remedy against Invalid Directives

As the Court reaffirmed clearly in the UPA case, the annulment action of Article 230 EC will not serve as a 'safety net'. Private plaintiffs must rely on legal protection under the preliminary reference, despite its inconveniences or even impossibilities.

What further complicates the matter is that the question of an effective national remedy against invalid directives is again interrelated with the core question of how the invalidity of the directive is expected to affect national law. If there is no 'legal link' between the directive's invalidity and national law implementing it, the availability of an adequate remedy loses its relevance. For if national law would not follow the fate of the directive's invalidity, a preliminary reference on the latter's validity may prove pointless. The question of the immediate legal consequences of a directives' invalidity will be extensively examined in Chapters 3 to 5, first from the European and then from the national point of view. Keeping that in mind, some of the problems individuals may face when

164 Furthermore, it held that if accessibility under Article 230 EC would be dependent on accessibility before national courts, it would have to assess national legal systems, something it is not competent to do. See paragraph 43 of the Court's judgment in C-50/00 P UPA. The third argument was that, if the ECJ would 'drop' the condition of individuality in Article 230, fourth paragraph, EC, in the name of the right to an effective legal remedy, this would amount to an interpretation contra legem of that Article. Therefore, a treaty revision under Article 48 EU is first required, see paragraph 44 of the Court's judgment in UPA.

165 The UPA decision concerned a regulation.

166 When the Court speaks of 'any decision or other national measure relative to the application of a Community act of general application' it must in my opinion be understood that this includes administrative acts or court orders provoked by ignoring the Community legislation, see paragraph 42 of C-50/00 P UPA. See for a critique on this obligation to violate national law: Cassia (1999), on p. 435, calling it a "hiatus dans le système de protection des particuliers."
relying on Article 234 EC for legal protection against an invalid directive will be discussed.

2.3.3.1 Benevolence of the National Courts

A particularly troublesome feature of the preliminary reference from the individual’s perspective is that the latter depends upon the benevolence of his domestic court. First of all, if that court is not convinced of the invalidity of the directive, it most probably will refrain from referring validity questions to the ECJ.\(^{167}\)

Theoretically, if the national court has serious reasons to think EC law is invalid, and yet it does not refer a validity question to the ECJ, it may be argued it to infringe Article 234 EC.\(^{168}\) This is of course no great help to the individual for when can it be said the national court had to doubt the validity of the directive?

Apart from not referring the validity question at all, it may also occur that the national judge refers a different question as that which was put forward by the national litigant. The individual has no direct influence on the formulation of the preliminary reference. Thus, for instance, the domestic court can ask only to rule on a particular EC measure while the contestant has invoked the invalidity of a whole range of EC measures. Furthermore, national courts may reduce or alter the grounds of invalidity the national litigant had relied upon.\(^{169}\) Supposedly, national litigators can appeal national court decisions that either do not refer validity questions to the ECJ or only do so in a more limited or different fashion. However, such appeal is obviously a very troublesome, lengthy and costly exercise.\(^{170}\)

The fact that different national courts will have different opinions as to the necessity to refer validity questions to the ECJ is clearly demonstrated by the Eurotunnel case. On both sides of the ‘Chunnel’, proceedings were started before national courts invoking the question of validity of two directives on VAT and excise duties. The High Court of Justice of England and Wales did not think it was necessary to refer this question to the ECJ because it was convinced the Directives were valid.


\(^{168}\) See for a national court triggering Member State responsibility C-224/01 G. Köbler v. Austria.

\(^{169}\) See the Opinion of Advocate General Jacobs in C-50/00 P UPA v. Council, paragraph 42.

\(^{170}\) Advocate General Jacobs even mentions at this point that such long delays due to the obligation to institute appeals before the national judge may prove incompatible with the principle of effective legal remedy. See paragraph 42 of the Opinion of Advocate General Jacobs in the C-50/00 P. UPA.
On the other side of the ‘Chunnel’, the Tribunal de Commerce in Paris had the opposite view and referred the question to the ECJ.\(^\text{171}\)

Here lies the first, inherent, weakness of the preliminary reference as a compensation for the lack of *locus standi* under Article 230 EC.

**2.3.3.2 Remedies against the Implementing Measure**

Assuming that the preliminary reference compensates for the lack of *locus standi* individuals have under Article 230 EC also presupposes that they do have *locus standi* before national courts. Here lies the second weakness of the preliminary reference. Since directives are implemented into national law, there are specific questions as to what the national citizens can do in order to have the national court refer the validity question to the ECJ. As the directives they implement, national measures will be normative acts. Just as it is difficult to directly challenge directives before the ECJ, it may be difficult to directly challenge national implementation measures before the national court. As will be further discussed in Chapter 6, there may be considerable differences between the Member State legal systems in this respect. Hence, also the opportunities for indirectly challenging a directive will vary per Member State as is clearly demonstrated by the Tobacco Advertising ‘saga’.

All over Europe, enterprises felt they were heavily affected by the Tobacco Advertising Directive banning all thinkable forms of tobacco advertising. Most of these enterprises in the tobacco advertising business were situated in countries where they could not directly challenge the implementing legislation. Therefore they launched a direct appeal against the Tobacco Advertising Directive before the CFI.\(^\text{172}\) The applicants contended that, in case the Court would reject their argumentation as regards being directly and individually concerned by the Directive, they would be denied adequate legal protection since in their national legal systems, there was no action available against the legislation implementing the Directive.\(^\text{173}\) The CFI was not moved by this argument, stating that, even if this

\(^{171}\) The party before the French court claiming the directive was valid, SNAT, at that point referred to the judgment of the High Court of Justice of England and Wales, stating that that should be ample reason for the ECJ to deny accessibility in this case. That argument was of course rejected.

\(^{172}\) See Joined Cases T-172/98 and T-173/98-177/98 Salamander AG And Others v. European Parliament and Council. The applicant countries were established in Germany, Austria, Greece and Switzerland.

\(^{173}\) Furthermore, there was not yet any implementing measure in these countries, being Greece, Austria and Germany. The plaintiffs also contended that the preliminary reference is no satisfactory alternative to the annulment action as it would take too long, depriving them of having the validity question settled within a reasonable time, as safeguarded by the Articles 6 and 13 of the ECHR. That argument was of course rejected, see also C-10/95 P Asocarne II, paragraph 26 where Spanish litigators complained of the slowness of Spanish courts.
were so, this argument “cannot justify this Court in departing from the system of legal remedies established by the fourth paragraph of Article 230 of the Treaty and exceed the bounds of its jurisdiction under that provision”.274

The position of the tobacco companies that started this direct annulment action before the CFI can be contrasted with the British procedures that gave rise to a preliminary reference in the Imperial Tobacco case. In this case litigants before English Courts proved to be in a far better position than their continental counterparts.

British enterprises in the tobacco (advertising) business brought their case directly before the High Court of Justice, Queens Bench Division. In the UK the Tobacco Advertising Directive was not yet implemented into domestic legislation. Interestingly, under English law these enterprises could ask for ‘judicial review’ of not only the implementing measure itself, but even, as in this case, of the intention of the UK government to adopt an implementing measure.275 In the course of this procedure for ‘judicial review’ the London court submitted preliminary references on the validity of the Tobacco Advertising Directive.276

Also in Belgium, direct proceedings against the legislation implementing the Tobacco Advertising Directive277 proved possible. In the Francorchamps judgment,278 the government of the Walloon Region together with a number of

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274 See paragraph 74 of Joined Cases T-172/98 and T-175/98-177/98 Salamander. This standpoint was later affirmed by the ECJ in C-50/00 P UPA case.

275 The UK government had the intention of implementing the Tobacco Advertising Directive under the powers granted to the UK Executive under the European Communities Act 1972, see further Chapter 5, Section 2.1.

276 Also in C-331/88 Fedesa, a reference on the validity of the Second Hormones Directive was brought before the ECJ after a number of producers of hormones brought proceedings for the English court for ‘judicial review’ of the UK measures implementing the Second Hormones Directive. Earlier they were declared inadmissible in a direct action under Article 230 EC, see Case 160/88 Fedesa v. Council. See in connection to that the Opinion of Advocate General Tesauro in the Assurances du crédit case where he points at the possibility of judicial review in the UK in relation to the admissibility question under Article 288 proceedings, C-63/89 Assurances du crédit, at 1825.

277 Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.

278 Cour d'arbitrage/arbitragehof, judgment No. 102/99 of September 30, 1999, published in the Moniteur belge, 1999, p. 38425-38437. The case was discussed by Verhoeven, A., The application in Belgium of the duties of loyalty and co-operation, F.I.D.E. congress, Helsinki, 1-3 June 2000, p. 35 (62). However, in the Francorchamps judgment the cour d'arbitrage only declared void the manner in which Belgium had used the discretion left to it by the Tobacco Advertising Directive. Therefore, it did not refer any question on the validity of the Directive.
tobacco (advertising) companies\textsuperscript{179} instituted an action directly before the cour d'arbitrage and got an annulment of the Belgian legislation implementing the Directive.

2.3.3.3 European Minimum Requirements

Thus, European and national case law on the Tobacco Advertising Directive shows convincingly that there is no uniformity in the accessibility of national courts for attacking (directly) implementing legislative measures. But procedural uniformity is of course no inherent quality of the preliminary reference in the first place. Nevertheless, one may wonder if Community law, in particular its principle of an effective legal remedy, may impose certain minimum requirements upon national procedural law. If national procedural law hinders private plaintiffs in materialising an effective remedy against Community law, this General Principle may set aside such national procedural law. A good example is the Borelli case.

Borelli had applied for aid from the European Agricultural Guidance and Guarantee Fund for the construction of an oil mill. Following the procedure set up by Council Regulation 355/77, the Regional Council of Liguria issued an Opinion that was binding on the Commission who had to take the decision on the request for aid. The Commission rejected Borelli's request for aid since the Regional Council's Opinion was unfavourable. Borelli started an annulment action under Article 230 EC against the decision of the Commission that rejected the aid. In the course of those proceedings, Borelli contested the lawfulness of the Opinion of the Regional Council of Liguria on which the Commission Decision was based. Borelli made a point of the fact that under Italian law, he had no judicial redress against the opinion of the Regional Council because it was classified as a 'preparatory measure'.\textsuperscript{180}

The Court, not having the jurisdiction to review the lawfulness of the national decision, rejected Borelli's claim.\textsuperscript{181} Nevertheless, it stated that, in so far as the Italian procedural provisions barred the national court from reviewing the national decision, the Italian court should ignore those provisions in the light of the Community law principle of access to justice.\textsuperscript{182}

\textsuperscript{179} Among which was also Salamander AG, one of the companies that was denied locus standi in an action under 230 EC against the Tobacco Advertising Directive before the CFI in Joined Cases T-172/98 and T-175/98-177/98 Salamander.


\textsuperscript{181} See also Chapter 3, The 'Per Se Rule'.

\textsuperscript{182} See the Court's ruling in the Borelli case, paragraphs 13 to 15, referring to Case 222/84 Johnston and to Case 222/86 UNECTEF. See also Joined Cases T-172/98 and T-175/98-177/98 Salamander, paragraph 74 and the case law mentioned there.
There is an important parallel between the facts of *Borelli* and the situation in which private plaintiffs want to contest a directive. In *Borelli* a private plaintiff complains that, at national level, there was no procedural possibility to attack a national decision (the Opinion of the Regional Council of Liguria), whereby attacking that national act is the only possibility for indirectly attacking the Community act (the Commission Decision). If *Borelli*’s complaint concerned a directive instead of a commission decision, it should equally be possible to have the implementing legislation reviewed for that would be the only way to indirectly attack the directive.

Thus, if attacking the implementing legislation is the only way to have the directive reviewed by the ECJ, the general principle of an effective legal remedy could impose requirements upon national procedural law. The next and key question would then be what the exact scope of this principle is in relation to directives and their national implementation. In my view, the principle imposes at least the minimum requirement that an *indirect challenge* in three phases is available:

i. One provokes some sort of executive decision, possibly by deliberately violating national law, in order to gain access to the national court;

ii. before the national court, one invokes the invalidity of the national law, upon which the provoked national decision was based, arguing that the directive implemented by that law is invalid; and

iii. the national court (hopefully) refers a preliminary question to the ECJ on the validity of the directive.

As this scenario is very troublesome it seems safe to assume that it indeed represents the absolute minimum. In particular the fact that private plaintiffs must violate national law makes this scenario ‘rock bottom’ in terms of legal protection against invalid directives. Therefore, it is beyond debate that this litigation in three phases must, under national law, be possible as a matter of Community law.

The legitimate question to ask is whether this scenario is acceptable as a minimum requirement. Should EC law not impose a higher minimum threshold, for example by requiring at national level the possibility to *directly* challenge implementing legislation? Hereby reference could be made to the UK litigants challenging directly the (proposed) UK implementation of the Tobacco Advertising Directive. Could the principle of an effective legal remedy be interpreted as requiring an equivalent of the UK direct remedy of ‘judicial review’ in all Member States?

It seems this interpretation of the principle of an effective legal remedy is too far-fetched. Such interpretation of the effective legal remedy principle clashes with the judgment of the ECJ in the *UPA* case, discussed earlier. As the ECJ does not regard as problematic private plaintiffs being forced to break the law in order to indirectly challenge a regulation, it will in that respect probably not make an exception for directives.
In sum, the legal protection offered at the national level against implementation legislation is governed by the General Principle of Community Law of an effective legal remedy. Yet, the principle’s scope is limited. It encompasses legal protection against invalid directives in possibly three phases whereby plaintiffs could possibly be forced to violate implementation law.

2.3.4 How Relevant is the Validity Question to the National Court?

All that is stated above on the legal protection against invalid directives offered by national courts and eventually the preliminary reference did not touch upon the core question of this study, namely the question of how the possible invalidity of the directive would affect the status of implementing law. The entire idea of complementarity of legal protection between the annulment action and the preliminary reference is based upon one premise: that there is a direct legal link between the possible invalidity of the directive and the status of national law implementing it. However, such a direct link is still to be established. Therefore, the following question is justified: what happens if the implementing legislation is not affected by a possible invalidity of the directive?

In his Opinion to the État de Sarre case commissaire du gouvernement, Combrexell pinpointed the issue very accurately when he opined before the Conseil d’État the following

"il suffrait que le juge saisi estime que l’éventuelle illégalité de la directive contestée soit ‘sans incidence’ sur la légalité des actes nationaux litigieux pour ruiner le raisonnement de la Cour et assurer l’immunité de la norme communautaire"."\(^\text{(1)}\)

In the following Chapters 3 and 4, the question as to the consequences of a directives’ invalidity, as a matter of EC law, for the status of national implementing measures will be addressed in full. For now, it must be pointed out that this is an issue scarcely addressed by both national courts asking preliminary questions on the validity of directives or by the ECJ answering them.

In that context it is important to keep in mind that the preliminary reference on the validity of the directive is required to be “necessary to enable it to give judgment”, as Article 234 EC provides. Therefore, it is arguable that even if the invalidity of a directive seems very likely but that invalidity would not affect national law, the national courts could refrain from referring the question since it would not be ‘necessary’ to render judgment. The link between the possible invalidity of the directive and the results of the case for the private litigant would be lacking, since the latter’s legal position would in any case remain to be deter-

\(^\text{(1)}\) See CE, No. 169014 of 27 April 1998, État de Sarre.
mined by national legislation. It could even be argued that if there were no such direct link between the validity of the directive and the national law, the national court is precluded from asking a question on the validity of the implemented directive.

Such a question had arisen in the Eurotunnel case, discussed earlier, in which Eurotunnel companies were pressing unfair competition charges against Sea France, a ferry boat operator offering cross-Channel connection. The unfair competition Sea France was charged with consisted of selling duty free articles on board of its ships. Yet, Sea France did nothing more than apply French (and English) legislation that faithfully implemented two directives that allowed Member States to maintain the duty free sales. Eurotunnel maintained that the competition practices are unfair because they proceeded from these two invalid directives that should never have allowed Member States to maintain in their national laws the exemption of products sold on board ships during sea crossings to another Member State from VAT and excise duties.

The ECJ indeed expressed some doubts on the matter, stating that "With respect to the argument that the questions are of no relevance to the decision to be given in the main proceedings, it is indeed the case that the national court has not provided enough information to enable the Court to see clearly what effect any declaration that Articles 28 and 28k of the said directives were unlawful might have on the outcome of the action alleging unfair competition". However, it nevertheless declared the validity questions admissible because: "it is sufficient for present purposes that if the directives were unlawful, the national court could at the very least order Sea France to refrain in the future from effecting tax-free sales as Eurotunnel requests".

The Eurotunnel case is interesting as the ECJ, in order to establish its competence in answering the validity question, seems to assume that the French law implementing the directives would be invalid, or at least would not prevent (anymore) a French court from ordering that in future the implementation legislation is no longer applied by private enterprises. Yet, no indication was given by either the national court, or the parties in the national proceedings as to the consequences of the invalidity for the national law implementing the directives. The Court seems to have drawn its own conclusion, more likely to be based upon Community law than upon French law. In Chapter 3, the Eurotunnel judgment will be re-evaluated in this respect.

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184 On overview of the case law of the admissibility of preliminary references can be found in the Court's ruling in Case C-112/00 Eugen Schmidtberger v. Austria, paragraphs 30 to 43.


186 See paragraphs 23 and 24 respectively of the Court's ruling in the Eurotunnel case.

187 See Chapter 3, Section 4.3.
Preliminary references as in Eurotunnel in which it does not become very clear in what way the invalidity of the directive affects the implementing law are no exception. Contrary to what one might expect, the several preliminary references of national courts as to the validity of directives often do not prove to be very instructive on the matter. Seldom do they provide any explicit information on how the national courts regard the relationship between national law and the directive.

An exception is the ADBHU case in which a French court referred a validity question on directive 75/439/EEC stating that the directive's invalidity would result in the French legislation being 'devoid of any legal basis'. It is clear that in this case, such statement is to be regarded as an expression of purely French law, whereas it remains to be seen what EC law itself holds of the matter. Similar statements on how national law perceives the problem can be found in the Fedesa case and the British American Tobacco case, both dealing with the consequences of invalidity of a directive for British law implementing such a directive under the powers granted to the UK executive under the European Communities Act 1972. In the latter, the issue of admissibility of the preliminary reference was raised because the directive at issue (the Tobacco Directive) was at the time of the proceedings not yet implemented into UK law. The Court accepted, however, that this in itself did not render the reference inadmissible because it sufficed that under UK law, the applicants in the main proceedings were entitled to prevent the UK legislature from implementing an invalid directive.

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189 See Case 240/83 Procureur de la République v. ADBHU, on 533.

190 Respectively C-331/88 Fedesa and C-491/01 BAT.

191 They were capable of doing so by means of the UK instrument of 'application for judicial review'.
It was mentioned in the previous paragraph that, if attacking the validity of the implementing law was the only way to have the directive reviewed, Community law, in particular the general principle of an effective legal remedy may impose certain requirements upon national procedural law. However, if the status of the implementing legislation would not be affected by the directive’s invalidity, Community Principles arguably have no ‘grip’ anymore on the matter and consequently cannot impose any requirements on national procedural law. Leaving open the question as to how EC law addresses the relationship between national implementation and directives, the following hypotheses may be formulated, both in relation to the relevance of the validity question for the courts as well as the scope of the Community Principle on an effective legal remedy.

i. European law dictates that the directive’s invalidity has automatically a bearing on the validity of the national legislation implementing it. The question of the directive’s validity will in many cases determine the outcome of the national proceedings and national courts may be expected to refer validity questions to the court. Furthermore, in the absence of locus standi before the ECJ under Article 230 EC, citizens must have access to their national courts for contesting the implementing measure. The Community Principle of an effective legal remedy applies fully although, as stated before, it may be doubted whether that principle requires a right to a national direct action against the implementing measure.

ii. European law leaves the matter as to the consequences of the directives’ invalidity to be regulated by national law and the latter provides for the invalidity of the implementing measure as a consequence of the directives’ invalidity. In this scenario, the validity question may be relevant for the outcome of national procedures and consequently, national courts may be expected to refer validity questions to the ECJ. Despite the relevance of the validity question for the outcome of a national case, it may be questioned whether in such a scenario the Community Principle of an effective legal remedy would apply. After all, it is national law that governs the situation, not Community law, making it arguable that the national law is outside the scope of Community law and hence, outside the scope of the General Principles.

iii. The third hypothesis is that, again, European law does not attach any consequences to the directive’s invalidity but this time national law does not do so either. In that case national courts may refrain from referring preliminary questions on validity to the Court for that would have no bearing on the outcome of the case before them. The Community Principle on an effective legal remedy is not applicable. Arguably, the national
law will also be outside the scope of Community law, thus unaffected by the ‘GPCL’ such as the right to an effective legal remedy.192

The differences between these three scenarios demonstrate, once again, the need to look deeper into the basic questions as to the consequences of the invalidity of a directive. More in particular, it may be interesting to see whether the last, for the moment hypothetical, situation might exist in which the status of national law is not affected by the status of the directive, neither as a matter of EC law nor as a matter of national law.

However, for completeness’ sake, it must be stressed that such a hypothetical situation only regards the situation in which it is the formal status of the national law that determines the outcome of the national proceedings. It does not relate to situations where the legal position of national citizens, public authorities or courts must be determined in case of late, or wrongful implementation.

For knowing whether a national court or other public organ must ignore national law when it conflicts with a directly effective provision of a directive it is relevant to know if such a directive is valid. Furthermore, the national court will want to know whether it might be under an obligation to interpret the, wrongfully implementing, national law in consistency with the directive. Last but not least, the validity of the directive can also determine whether in such a situation Francovich responsibility may arise.

In such a situation of possible implementation defects, the validity of the directive will of course always be of interest to citizens, national public authorities and national courts, irrespective of what such a invalidity would consequently mean for national law.

2.3.5 The Effects of a Declaration of Invalidity

In terms of effect, it is safe to say the preliminary rulings on validity do not differ much from the action for annulment under 230 EC. The compensatory idea behind the preliminary reference in relation to annulment proceedings is not just demonstrated by the same grounds that may be invoked, it is also apparent from the effects the two types of ruling have. Analogous to annulments, a preliminary ruling has both erga omnes- and ex tunc effect.

As far as erga omnes effect is concerned, the landmark decision still is the ICC case.193 If previously a national court had received an answer of the ECJ

192 See Chapter 4 ‘Incidental EU consequences for the implementing measure’.
indicating a Community act is invalid, it "may not apply the act declared to be void without once more creating serious uncertainty as to the Community law applicable". The just legal certainty is jeopardised when national courts apply EC legislation previously declared invalid, also uniformity of Community law is at stake here, as the ECJ also pointed out in ICC. Hence, the declarations of invalidity have in practice an effect *erga omnes*. Member States' administrative and legislative authorities are no longer under any obligation to implement the directive; national courts throughout the Community are obliged to regard it as invalid in so far as that is relevant in national proceedings.

Whereas the *erga omnes* effect of declarations of invalidity has not caused that many troubles, their *ex tunc* effect has been more problematic. That invalidations under Article 234 EC have retroactive effect became clear the moment the ECJ applied Article 231 EC (limitation in time of the effects of an annulment) by analogy to a declaration of invalidity. That the Court applied this power, by means of an exception, necessarily implies that, normally, declarations of invalidity under Article 234 EC have *ex tunc* effect. However, this application of Article 231 EC by analogy to preliminary references on validity has been contested vehemently by national courts, in particular French courts.

Thus, a declaration of invalidity produces the same *erga omnes* and *ex tunc* effect as an annulment. One wonders if there are any differences left that distinguish the two procedures in terms of legal effect. It appears there is a difference, be it of a formal nature. When an act is annulled under Article 230 EC, Community institutions do not have to withdraw it. What is more, they cannot do so since there is nothing left to withdraw after an annulment. A declaration of invalidity under 234 EC seems to leave intact, at least formally, the act declared to be invalid. Nevertheless, although still on the European statute books, the invalid act is non-applicable, *ex tunc* or *erga omnes* and must be repealed for reasons of transparency and legal certainty.

In that respect it is respectfully observed that the Community institutions show no expediency in swiftly removing the invalid legislation from the Official Journal. After the Court declared invalid Directive 90/121/EEC in the *Angelopharm* case, it took more than six years before this Directive was officially withdrawn from the

194 Case 66/80 ICC, paragraph 12.
195 As was also submitted by the Court in Case 66/80 ICC, paragraph 11. See also Lenaerts and Arts (1999), p. 313 and the literature mentioned there.
197 See Ward (2000), p. 269. See also Prechal (1994), p. 42, where she points out that the importance of a declaration of invalidity, officially having only an effect *inter partes*, is underlined by the fact that there was an apparent need to use Article 231 EC by analogy.
198 See Case 112/83 *Société des Produits de Maïs SA v. Administration des douanes et droits indirects*.
Needless to say that in terms of transparency, the Community legislator might want to adopt a clearer policy in this regard. Non-applicable legislation should not be in the statute books, especially not when it is so ex tunc, for it causes Community citizens too much confusion regarding their legal position.

2.3.6 Conclusions

The preliminary reference procedure in relation to legal review of directives brings about two main issues: that of relevance and that of adequacy. These two main issues are intertwined. A preliminary reference on the validity of a directive is only relevant for the outcome of national proceedings if it has some bearing on the status of national law implementing that directive. And, connected to that, only in as far as the directive's validity has an effect upon national implementation legislation can one discuss the adequacy of Article 234 as a compensation for the lack of protection individuals enjoy under Article 230 EC.

The 'validity link' between the directive and its implementing measure may thus shed a new light on the preliminary references on a directive's validity. This link will be the object of further research in the following two Chapters where it will be regarded from a Community law perspective.

2.4 Invalid Directives and the Action for Damages

2.4.1 Introduction

Article 288(2) EC provides the possibility to claim damages that result from non-contractual liability of the Communities. Its place in the scheme of legal protection against EC law is important. Besides providing the protection required against unlawful damages caused by the Community, it is officially qualified as an independent remedy, distinct from the nullification proceedings and the action for failure to act.202


201 After the Courts rulings in Case 41/84 Pinna, in early 1986, Regulation 1408/71 was amended so as to accommodate this ruling only three years later in Regulation 3427/89/EEC of 30 October 1989. After another part of Regulation 1408/71 was declared invalid in the Roviello case, the invalid part was officially withdrawn four years later in Regulation 1249/92 of 30 April 1992.

202 As reiterated by the CFI in for instance Joined Cases T-484/93 and T-484/93 Vereniging van Exporteurs van Levende Varkens And Others v Commission, paragraph 69.
CHAPTER 2 REVIEWING AN INSTRUMENT WITH A 'DUAL NATURE'

This independence may have advantages for individuals, in particular since under Article 288 EC they are not bound by the stringent demands of direct and individual concern as required for the annulment action (Article 230, fourth paragraph, EC) and the failure to act action (Article 232, third paragraph, EC). Another advantage is the much more lenient time limit of five years to bring suit instead of the two months term available under Article 230 (and Article 232 EC).

But despite these procedural leniencies, materially speaking the action for damages is usually quite troublesome, especially when it is instituted in order to recover damages resulting from illegal legislation, such as directives. Tough requisites for successfully claiming such damages have been laid down in the Schöppenstedt decision where the ECJ formulated the test which, since then, bears the same name in academic writing:

"Where legislative action involving measures of economic policy is concerned, the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred."

The requisites distinguishable within the Schöppenstedt formula are thus (1) breach of a superior rule of law (2) that is sufficiently serious and (3) protects the individual and (4) which has a causal link (5) with the damage suffered.

These cumulative Schöppenstedt requirements are not easily met as is clear from the Court's case law. However, it is crucial to realize that an unsuccessful attempt to claim damages can nevertheless result in the Court declaring a Community act invalid. Thus, the action for damages, be it successful or unsuccessful, provides another forum in which the invalidity of a directive is established.

Thus, treating the action for damages is interesting from a theoretical rather than a practical point of view. Fact is that, as yet, the ECJ never has declared a directive invalid in such proceedings let alone awarded damages.

201 Laid down in Article 43 of the Protocol on the Statute of the Court of Justice.
204 In the course of EC history, only eight claims have proved successful, See Ward (2000), on p. 288 referring to the Opinion of Tesuuro for the Brasserie du Pecheur case.
A complicating matter is that the action for damages ex Article 288 EC is, according to the Court’s case law, only possible when private plaintiffs have not been able to get full redress before their national courts.\textsuperscript{207} Thus, the common procedural route is to attack the validity of national acts and thereby provoke a preliminary reference on the validity of the underlying Community provisions. Needless to say that this route can be rather time and energy consuming. However, it is the one which, in principle, must be explored.\textsuperscript{208}

The preliminary reference on the validity in the course of such national proceedings will ensure in many cases that the claimant is re-established in the position he held before the illegal legislation was adopted. A type of situation where the Court has recognized this to be generally the case, is when plaintiffs are imposed levies by national authorities based upon, allegedly, invalid Community legislation. In such a situation the Court seems to assume that a national remedy will always be available.\textsuperscript{209}

Translated to directives, private plaintiffs have no direct action ex Article 288 EC if they can obtain full redress by indirectly challenging the directive before a domestic court. Only if such redress is not available before national courts will they have a direct action.\textsuperscript{210} In case a preliminary reference on the validity of the directive suffices, validity review of a directive takes place under Article 234 EC and there will not be much to add in that respect to what has already been stated earlier on the preliminary reference procedure.

Of interest here is the action for damages as a direct action before the Court without any national court judging the case or without the ECJ previously having pronounced itself on the validity issue in a preliminary reference. In a direct action under Article 288 EC validity review is incorporated in the action for damages. In general, such 'full fledged' recourse to Article 288 EC has been accepted in case national remedies are not adequate to obtain the required redress.\textsuperscript{211} That inadequacy of national remedies may be technical, for instance

\textsuperscript{207} See Lenaerts and Arts (1999), p. 332.

\textsuperscript{208} See for instance Case 281/82 Unifrex v. Commission, paragraph 11 and Case 175/84 Krohn v. Commission, paragraph 27.

\textsuperscript{209} See Hartley (1994), on p. 504, referring to quasi-contract. The other types of situations where the court holds the national procedure to give adequate relief, are payments unlawfully withheld and failure to issue an administrative act, both under the proviso that there is an adequate remedy at the national level. See Ward (2000), on p. 296.


\textsuperscript{211} See for example the Opinion of Advocate General Darmon to C-55/90 Cato, paragraph 14; see also Case 20/88 Roquette Frères v. Commission, paragraph 15 and Case 281/82 Unifrex v. Commission and Council.
due to flaws in national procedural law. More commonly, however, such impossibility is considered to arise when it is clear that the damages at issue can only be attributed to Community Institutions and not to Member States who lacked any discretionary powers. Although the number of such direct actions is limited, it may be interesting to observe how they have been applied to directives.

2.4.2 Direct Actions for Damages

Within this general framework, in which the review of validity as part of a direct action for damages is rare, Community courts seem to give directives a special treatment. Yet, that can only be stated with considerable caution since the case law on this matter comes down to only four cases. Nevertheless, it is remarkable that in these judgments, both the ECJ and the CFI have admitted claims under Article 288 EC against directives without there being any national procedures launched against either an administrative act applying the implementing law or directly against the implementing law itself. The CFI did so in the Bergaderm case where it ignored completely the issue of admissibility of the claim.

Bergaderm was a French company producing the tanning oil 'Bergasol', containing the substance 5-MOP. There was scientific controversy about the allegedly harmful effects of 5-MOP on human health; some leading scientists regarded it as harmless while others held it to be potentially dangerous to human health. Despite this controversy, the Commission adopted Commission Directive 95/34/EC restricting sharply the permissible levels of 5-MOP in cosmetics. This resulted in 'Bergasol' being taken of the market and its producer, Bergaderm, was put into liquidation.

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212 See for instance T-167/94 Detlef Nölle v. Council, paragraph 38 where this was not accepted for the alleged impossibility under national law to get certain legal costs reimbursed.

213 See for instance, again, T-167/94 Detlef Nölle, paragraphs 41 and 42. However, even if the Member States did not enjoy any discretionary powers, they may still be liable for damages occurring from their wrong application of Community law. Then, obviously the national route has to be followed, see also Joined Cases 106 to 120/87 Asteris and Others v. Greece.

214 One of which is pending, see T-167/02 Toulorge concerning an action for damages against Directive 2002/2/EC.

215 T-199/96 Bergaderm SA and Jean-Jacques Goupil v. Commission. Although admissible, Bergaderm lost on substantive grounds. The case also clarified that, in principle, the Schöppenstedt test applies equally to violations of EC law committed by either the Member States or the institutions, see the observations of the ECJ in the appeal case: C-352/98 P Bergaderm v. Commission, paragraph 41.

The Court investigated the claim for damages on its merits and dismissed it without addressing the admissibility issue. Bergaderm was apparently not required to challenge the national (French) legislation\(^{217}\) implementing the directive.\(^{218}\) Interestingly, a similar approach was followed in the earlier Assurances du crédit case.\(^{219}\) When a direct action for damages was launched against the Export Credit Insurance Directive,\(^{220}\) the ECJ again chose not to address the admissibility issue, despite Advocate General Tesauro strongly arguing against it.

This Directive is an example of the discretion left to the Community as to how fast, and in what steps, the harmonization process for the establishment of the internal market takes place.\(^{221}\) The point of argument was that it obliged export credit insurance companies to form financial reserves to protect insured persons from their possible bankruptcy. However, the public export insurance, meaning the insurance of export credits whereby Member State authorities back any possible claims were exempted from the obligation to form extra reserves. Belgian private sector insurance companies protested against this exclusion of the public export credit insurance. They argued the Directive caused a distortion of competition.\(^{222}\) Their criticism had convinced the Commission who changed its original proposal, extending the obligation to form reserves to 'public' export credit insurance. The Council, however, chose to maintain the exclusion of public export credit insurance from the scope of the Directive.


\(^{218}\) In fact, Bergaderm had argued that this (tertiary) Directive was in effect a decision and that, consequently, the CFI should not apply the Schöppenstedt criteria for legislative measures but the more lenient criteria for administrative decisions. De facto, ‘Bergasol’ was the only product on the Community market being affected by the Directive. The CFI and, in appeal, the ECJ rejected this argument.


\(^{220}\) Council Directive 87/343/EEC of 22 June 1987 amending, as regards credit insurance and suretyship insurance, First Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance. The Export Credit Insurance Directive was based on Article 47(2) EC.

\(^{221}\) See paragraph 11 of the Courts ruling in Case C-63/89 Assurances du crédit, referring to Case 37/83 Rewe-Zentrale v. Landwirtschaftskammer Rheinland (also concerning the validity of a directive). See also Roth (1998), on p. 478.

\(^{222}\) At that point, the plaintiffs may have felt strengthened by the opinions of the other Community institutions. At the time of adoption, this different treatment of the public and private sector insurance companies, was also heavily criticized by the ECOSOC and the European Parliament which, at that time, only enjoyed a right to be consulted under Article 47 EC.
On the issue of admissibility, Advocate General Tesaurò made interesting statements reflecting his view on the relationship between the Directive and its national implementing law. In general, he found the action for damages against this Directive to be within the scope of the ‘local remedies’ rule. The insurance companies could, and should, have instituted an action for legal review of the national measures implementing the Directive. In connection to that, he pointed out that in the UK, one of the countries in which the applicant companies did business, they could have instituted a direct action for ‘judicial review’ of UK law implementing the Directive. Furthermore, in case a direct national action against the implementing measure is not possible, he suggested the insurance companies disobey the national legislative provisions. That would provoke supervisory authorities to adopt decisions they could challenge before national courts, there raising the issue of the Directive’s validity. He stated that, if the ECJ would consequently declare the Directive invalid in a preliminary reference:

"Such a declaration entails - at least - the non-application of the Community act declared invalid within the context of the dispute referred for a preliminary ruling, which generally involves the annulment of the national implementing measure challenged before the national court."

Thus, according to the Advocate General the non-application of a Community act ‘generally involves’ the annulment of the national measure. At this point, Curtin concurred with the Advocate General. Curtin and Tesaurò

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223 Point 8 of the Opinion of Advocate General Tesaurò in C-63/89 Assurances du crédit.

224 Advocate General Tesaurò’s Opinion, on pages 1825-1826. He puts the risks the companies have to take by willingly infringing the provisions of the implementing measure into perspective.

225 Opinion of Advocate General Tesaurò, point 8 in C-63/89 Assurances du crédit.

226 In the Dutch language version the word ‘generally’ is left out. There it is formulated even stronger: “hetgeen de nietigheid met zich brengt van de voor de nationale rechter bestreden nationale uitvoeringsmaatregel”.

227 This opinion is also reflected in what he writes on p. 1-1819: “if (...) the Community provisions at issue were declared invalid and the national court then, by virtue of that ruling, annulled the national provision at issue (...)”.

228 Curtin, D., The non-contractual liability of the Community legislature for illegal directives, effective judicial protection? ELR, 1992, p. 46. Nevertheless, she concluded that plaintiffs should be granted admissibility before the ECJ since, in her opinion, invalidity of the national implementing measures could not satisfy the plaintiffs. According to her “merely annulling such provisions of national law does not achieve the positive measure effectively sought by the applicants: the extension of the financial guarantees imposed by the directive to those public sector export credit insurance agencies previously exempted”. The flaw in this reasoning is that these applicant private sector insurance companies do not necessarily want such positive extension of the financial safeguards to their public sector counterparts, but could also be satisfied with the elimination of the obligation for everybody.
THE INVALID DIRECTIVE

both seem to assume that the Directives' invalidity results in the annulment of national implementing law by national courts, but do not expand any further on this particular point.

Thus, in both the Bergaderm and Assurances du crédit decisions, the ECJ did not address the issue of whether or not national courts could be said to remedy in full the harm done to private plaintiffs by an invalid directive. Instead it chose to judge the action on its merits, ignoring the admissibility issue. That being not very illuminating, the CFI fortunately did address the issue in the subsequent Biret case. When Biret filed an action for damages it said it suffered as a result of the Hormones Directives, the Council raised the admissibility issue. As Advocate General Tesauro did in his opinion to Assurances du Crédit, the Council presumed that:

"Biret would thus have been able to obtain a declaration that the directives in question, together with the national measures transposing them, were invalid and thus prevent the alleged damage from occurring" (emphasis added).

The CFI explicitly denied the Council's argument. Since the directive left national legislators no discretion in the implementation process, any damages ensuing from that implementation are directly attributable to the Community institutions. In any event it is clear that the 'dual nature' of directives does not bar private plaintiffs from starting direct actions for damages, just as it does not bar them beforehand from starting direct annulment actions under Article 230 EC. It is the amount of discretion the directives leave to Member States that prevents them from bringing direct claims under Article 288 EC.

Thus, claims for damages fall into two categories according to discretion. One group of directives that leaves (considerable) discretion can not be challenged directly under Article 288 EC. The plaintiff must resort to national proceedings and could at the most provoke preliminary validity questions. In that case, the same questions arise as discussed earlier in the context of Article

229 See C-63/89 Assurances du crédit, paragraph 29. In relation to the admissibility of private plaintiffs under Article 230 EC for actions against directives, the ECJ has followed the same approach: dismissing the appeal on material grounds, but stating explicitly that it thereby has not settled the admissibility issue.


231 Directive 96/22/EC concerning the prohibition on the use in stock farming of certain substances having a hormonal action. In fact, it is the directive that repealed, yet materially confirmed, Directive 88/146/EEC that was under legal review in C-331/88 Fedesa.

232 See paragraphs 26 and 33 of T-174/00 Biret. See also C-93/02 P Biret v. Council. It must also be stated here that besides the issue of 'discretion' there is the issue that the case concerned a 'double addressing norm', namely WTO law. In that sense national law will be invalid anyway for infringing WTO law. See further Chapter 4 on 'Incidental EU consequences for the implementing measure'.

233 See for instance T-223/01 Japan Tobacco.
234 EC. A second group of directives leaves no discretion to the national legislators. It is that group of potential damages cases that must be further discussed here.

If private plaintiffs do not have to commence proceedings against the implementing law, questions as to the consequences of declarations of invalidity on implementation law do not arise.\(^{234}\) Or to be more precise, such questions do not arise in the phase of admissibility of a direct action for damages.

However, the issue of the relationship between directives and their national implementation law may re-emerge once damages are awarded. Then the problem arises as to the effect an award of damages has on the status of the national law whereby it must be realised that it is national law that actually imposes the harm on the private plaintiff. But before tackling that question, there is another issue to be solved: the effect of an award of damages on the legal status of the directive itself.

### 2.4.3 The Effect of Damages: Invalidity or ‘Invalidity’?

The ECJ does not seem to demand that the directive is first invalidated in a preliminary reference as long as damages are directly attributable to the directive. No preliminary reference is required and any legal consequences for the directive derive from the ruling under Article 288 EC. Furthermore, as said earlier, if in such ruling no damages are awarded, due to the stringent demands of the Schöppenstedt test, the ECJ may nevertheless declare the directive ‘invalid’.\(^{235}\) At this stage, it must be stated that, conceptually, ‘invalidity’ pronounced under Article 288 EC is different from ‘invalidity’ under Article 234 EC. In his Opinion to Assurances du crédit Advocate General Tesauro referred to this difference when arguing that the plaintiffs in that cases should have raised the directive’s validity issue in national proceedings instead of claiming damages directly under Article 288 EC. He opined that a declaration of unlawfulness under Article 288 EC is:

> “purely incidental and certainly does not produce the effects which follow from a declaration of invalidity under Article 234”.

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\(^{234}\) As already discussed earlier in relation to the preliminary reference, such an effect is not beforehand clear and will be further addressed in Chapter 3, ‘The Per Se rule’.

\(^{235}\) And vice versa: In case a directive is annulled under Article 230 EC or declared invalid under Article 234 EC, this may imply that a consequent action for damages will be successful, but there is no guarantee. Then too the stringent Schöppenstedt requirements have to be met. See Kapteyn, P. J. G. and VerLoren van Themaat, P., (2003), p. 299.
In the same line Albors-Llorens states that “although the finding of the illegality is one of the conditions for a successful action for damages, a private applicant obtains an award of damages and not a formal ruling on the validity or legality of the Community act.” Such views are supported by the ECJ. In the Schöppenstedt decision itself, it stressed the ‘subjective’ nature of the action for damages:

“The principal conclusions seek only an award for damages and therefore a benefit intended solely to produce effects in the case of the applicant.”

The difference between receiving cash and invalidating a Community act is also reflected in the discussion on the availability of interim measures in the context of an action for damages. It is disputed that a plaintiff who starts an action for damages against a legislative measure, can ask the President of the Court to grant the interim measure of suspending the application of the, allegedly harmful, measure. The reasoning is that one should not be able to obtain in interim measures what one cannot obtain in the main damages proceedings, which is merely cash and not the suspension of the normative Community act, let alone its invalidation. For national implementation legislation this implies that it is not affected by a ruling of the Court awarding damages.

However, conceptual differences between Article 288 EC and Article 234 EC in terms of effect should not blind one for the practical effects an award for damages may have, as was submitted by Prechal. After reiterating that a finding under Article 288 formally does not affect validity as such she added that:

“Nevertheless, in order to prevent the illegality being raised repeatedly in the Court of Justice, the best policy is to amend, withdraw or replace the act at issue.”

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238 See Case 5/71 Schöppenstedt, paragraph 5.
239 See the arguments of the Council and the Commission in Case T-228/93 R Lehsfreund v. Council and Commission, paragraphs 15-19. Unfortunately President Saggio did not at the time address the admissibility of the claim for interim measures for failure to demonstrate irreparable harm. Hoskins argues on the basis of the broad wording of Article 243 EC and the effective protection of Community rights that such interim measures should be possible in the context of an action for damages, see Hoskins, M., The relationship between the action for damages and the award of interim measures, in: Heukels, T. and McDonnell, A., The Action for Damages in Community Law, T.M.C. Asser Institute, The Hague, 1997, p. 259. He supports his reasoning by drawing a parallel with the Factortame case, although in my opinion that parallel is false: in Factortame, the national court was deemed capable of doing what it also could do in the main action: ordering the non-applicability of a UK Act of Parliament.
In short, the effect of an award of damages may formally only be *inter partes*, but there may be many of such *partes*. As the action for damages is not subject to any individual concern *à la Plaumann*, the number of actions against the directive can be enormous. Thus, if the group of potentially affected persons with a valid claim for damages is very large, it would seem that the Community legislature is forced to repeal the act. However, such repeal would follow from the financial consequences and not from the Court's judgment(s) awarding damages.

In this duty to repeal invalid legislation lays the formal difference between the effects of a preliminary reference and those of an action for damages. Only a preliminary ruling declaring a directive invalid produces a duty to repeal.\(^{241}\) Such repeal following an award of damages under Article 288 EC is formally voluntary and likely induced by financial considerations. The more potential plaintiffs may come forward to claim damages, the more likely it will be that the Community legislator will repeal the directive. If the number of expected claimants is small, it is not unimaginable that the EC legislature opts for paying damages and maintaining the directive in force.\(^{242}\)

For instance in the *Gibraltar* case, the Gibraltar government was not entitled to challenge the directive excluding *explicitly* the Gibraltar airport from the benefits of liberalizing air traffic for lack of individual concern. Even though not individually concerned, Gibraltar could have considered claiming damages under Article 288. If that action were successful, it would seem that not many other actors, beside the Gibraltar government, would have a good chance at claiming damages too and perhaps the Community institutions would have retained the exclusion of Gibraltar.\(^{243}\)

Thus, 'invalidity' as one of the conditions for awarding damages has no *erga omnes* effect but depends for such effect on a repeal by the Community legislator of the harmful directive. Yet, apart from practical/financial considerations as mentioned above, there is a second reason for not exaggerating the formal difference between invalidity under Article 234 EC and 'invalidity' under Article

\(^{241}\) See Joined Cases 117/76 and 16/77 Rückdeschel v. Hauptzollamt Hamburg. See also Meij (1997), p. 276.

\(^{242}\) Under the *proviso* that the damages paid are isolated in time, otherwise the same plaintiffs would continue to suffer damages and be entitled to start '288-proceedings'. Then of course, a repeal by the Community legislature would again be adamant out of practical and financial considerations. The other *proviso* may be that these applicants were not able to challenge the Community measure directly in order to be indemnified, as stated by Mead (1997), p. 257-258, arguing for an exhaustion of Community remedies, based on Case 175/84 Krohn.

\(^{243}\) See C-203/89 Government of Gibraltar v. Council. Another case where such a scenario would not be unlikely is C-352/98 P Bergaderm, where it was established that the Directive affected only one single company.
288 EC. After an award for damages it may be expected that at least one national court will refer preliminary questions on the directive's validity to the ECJ. Thus, even if 'invalidity' pronounced under Article 288 EC is inferior to the 'invalidity' as pronounced under the preliminary reference procedure, it may be only a matter of time before the first invalidity is confirmed by the latter. Once that has occurred, the Community institutions are under a duty to repeal the directive from the statute books.\textsuperscript{144}

2.4.4 National Damages against National Measures

Since the 'invalidity' as pronounced under Article 288 EC does not formally affect the status of the directive, Member States must in principle uphold the harmful implementing measures. Any harm that continues to be inflicted upon individuals by national implementing legislation will remain attributable to the Community.\textsuperscript{145} However, from the moment the 'invalidity' under Article 288 EC has been 'upgraded' to invalidity as known under the preliminary reference procedure, the situation changes. As the directive is then invalid \textit{erga omnes} and \textit{ex tunc}, the Member State cannot be said anymore to be forced by the Community to inflict any harm upon individuals.\textsuperscript{146}

One could for a moment ponder on the possibility of national law remaining intact. Obviously, the successful action for damages against the Community can only relate to the damages inflicted upon the plaintiff until the ECJ has declared the directive invalid in a preliminary reference. Any damages dating from \textit{after} that judgment but attributable to the fact that the national implementing legislation remains in force must be reclaimed through national procedures from the Member State.

For completeness' sake, there is also another situation in which national implementation may lead to liability of Member States. That is when the directive at issue did leave considerable discretion to the Member States (until now assumed not to be the case) and the Member State used the 'room for manoeuvre' left by the directive in an unlawful way. That is of course a different matter, not being governed by Article 288 EC. For these damages, plaintiffs will have to address national courts, where their actions will be subject to national law.

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\textsuperscript{144} Which leaves open the question as to the status of national law implementing a withdrawn directive, see Section 4.2.

\textsuperscript{145} Although the complexity may be greater when considering the high probability that the norm violated by the directive in question is a 'double addressing norm' since that norm, in terms of Schöppenstedt, must be 'a superior rule of law for the protection of the individual'.

\textsuperscript{146} See Oliver (1997), p. 308: "one would expect the Community to have to bear the loss in full for the period prior to the judgment of the Court of Justice ruling the directive to be invalid, since the Member State is bound by the directive until then".
In the Asteris case,\textsuperscript{47} for example, private plaintiffs had started an annulment action before Greek courts after the Court had denied their claims under Article 288 EC. The ECJ, in answer to a preliminary question from this Greek court, said that such action could be undertaken under Greek tort law, but only if the action was not based on any invalidity of EC legislation.

If directives and their implementation are at stake, the situation can resemble that of Asteris. Damages resulting from implementation legislation are to be addressed before the national courts without reference to any fault originating in the directive.\textsuperscript{48}

2.4.5 Conclusions

In as far as the action for damages can be an independent route for establishing the directive’s invalidity, it had to be addressed in this study. The ECJ and the CFI, the latter most notably in the Biret case, seem to indicate that direct actions under Article 288 EC against directives are indeed not an unlikely route. The ‘dual nature’ of the directive does not in itself discard the possibility of direct action under Article 288 EC. As long as the damages, tortuous by nature, are attributable directly to the Community, claims can be made under Article 288 EC. To a large extent, that defuses the central problem of this study. As it is not required to first attack implementation legislation, as Advocate General Tesauró seemed to assume in Assurances du crédit, the issue of the effect of a directive’s invalidity on national law need not be addressed.

However the ‘dual nature’ of directives may still lead to peculiar situations in the context of Article 288 EC. After damages have been awarded, the ‘invalidity’ established under Article 288 EC does not affect the status of national law for such ‘invalidity’ does not have the same scope as invalidity pronounced in a preliminary reference. National implementation law remains under the ‘authority’ of a ‘valid’ directive. That changes only the moment the ‘288-invalidity’ of the directive would have been ‘upgraded’ to a ‘234-invalidity’. At that point the central question of this study re-emerges.

\textsuperscript{47} Joined Cases 106 to 120/87 Asteris and Others v. Greece.

\textsuperscript{48} Again, the Francorchamps judgment can be referred to. There the Belgian court d’arbitrage annulled the legislation implementing the Tobacco Advertising Directive because the national legislator had used the freedom provided by the Directive in an illegal way. Obviously, if also damages were claimed before the Belgian court, such damages could not be attributable to the Community.
2.5 The Plea of Illegality

In the action for damages under Article 288 EC the directive's invalidity is, officially, incidental to the proceedings. Also in a plea of illegality, legal review is 'incidental'. It is laid down in Article 241 EC, reading:

"Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation (...) is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.""\(^{49}\)

It appears from the Court's case law that, although Article 241 EC seems to limit its scope to regulations, it also applies to directives. Notably, in the *Simmenthal*\(^{50}\) decision, the ECJ had stated Article 241 EC to be a route for the indirect challenge of 'all normative acts'.\(^{51}\) Therefore, it would seem that directives are not excluded *a priori* from the scope of Article 241 EC.\(^{52}\) Nevertheless, fact remains that the plea of illegality must always be raised in other, direct, proceedings before the ECJ or CFI.\(^{53}\) In relation to directives that raises the issue as to what its use can be for individuals and for Member States.

### 2.5.1 The Position of Individuals

It would seem that directives, capable of being challenged by individuals under Article 241 EC, must be somewhat peculiar.\(^{54}\) It follows from Article 241 EC that individuals invoking the plea against a directive need access to the Court of Justice on the basis of attacking another Community act addressed directly to them. For directives that may limit the scope of 241 EC considerably. A directive's effect will normally be through its implementation

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\(^{49}\) The former Article 184 E(E)C.

\(^{50}\) Case 92/78 *Simmenthal v. Commission* (*Simmenthal IV* case).

\(^{51}\) Reaffirmed in *Joined Cases T-305/94 to T-335/94 Limburgse Vinyl Maatschappij*, par. 285. Also Prechal holds it 'conceivable' that directives are challenged under Article 24 EC. see Prechal (1994), on p. 42.

\(^{52}\) See for a similar opinion Smit and Herzog (1999), p. 537.

\(^{53}\) It cannot be 'combined' with the other indirect attack, the preliminary reference procedure in the sense that one cannot raise the plea of illegality when that was not an issue brought before the national court and included in the latter's reference for a preliminary ruling on validity, see Case 44/65 *Hessische Knappschaft v. Singer*.

\(^{54}\) Sinaniotis, in his extensive article on the plea of illegality, argues that the scope of the plea' must be limited to those directives that produce similar effects as regulations, see Sinaniotis, D., *The Plea of Illegality in EC Law*, *EPL*, 2001, p. 103 (114/115): "In cases where the directive takes a regulatory form, it would be acceptable for the Member State to plead the illegality of such an act." However, it may be doubted whether such quality of being a 'quasi-regulation' is the determinat factor.
into national legislation. Any individual decision addressing a citizen will be taken by national authorities based on national (implementation) law. Therefore, directives usually do not serve as a *direct* legal basis for individual decisions. Hence, private plaintiffs will not be addressing the Community Courts but national courts where they can provoke a preliminary question on validity but no plea of illegality. This would only be different in the exotic case of a directive being the legal basis of a (Commission) decision that is addressed directly to a private individual. Much less exotic are directives that serve as the legal basis of a (Commission) decision addressed directly to the Member States. In that respect, it is particularly relevant to know whether the plea may be invoked by Member States.

2.5.2 The Position of Member States and Community Institutions

The position of Member States under Article 241 (and under Article 234) EC became an important topic in the legal proceedings that followed the Mad Cows crisis. In the *Mad Cows I* case the ECJ seemed to be in favour of Member States in this respect. It allowed a plea for illegality against a directive albeit not *expressis verbis.*

At the height of the BSE crises the Commission took a decision banning imports of British beef and veal and numerous products derived from such meat. This Commission Decision was directly based on two directives. The UK sought annulment of the Commission Decision claiming *inter alia* that the directives on which it was based were invalid (it argued they could not have been based upon Article 37 EC). If the directives were indeed invalid, their invalidity would consequently render the Commission Decision *ultra vires.* The ECJ dismissed the argument but on other, substantive, grounds.

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256 C-190/96 *United Kingdom v. Commission.* Van Ooik has also drawn attention to this case in relation to Article 241 EC, Van Ooik (1999), p. 346.

257 Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy.

258 Directives 90/425/EEC (as amended) and 89/662/EEC (as amended).

259 See paragraphs 131 to 136 of C-190/96, *Mad Cows I.* The two Directives covered mainly products listed in Annex II to the EC Treaty. The fact that they incidentally covered other products was no reason to conclude to their invalidity, as the Court already established earlier in the *Animal Nutrition* case, C-11/88 *Commission v. Council.*
From the point of view of legal certainty, objections can be raised against such action by the Member State as privileged plaintiff. Since they are allowed to start direct annulment actions under Article 230 EC one may wonder whether legal protection would not outweigh too much the principle of legal certainty. The same thought underlies the TWD case law. Under this case law private plaintiffs cannot raise validity questions before a national court if they would undoubtedly have been able to institute direct challenges under Article 230 EC.

Indeed, considerations of legal certainty are at the basis of some controversy concerning the position of the Member States under Article 241. Advocate General Roemer gave an interesting argument in favour of a Member State's right to plead illegality in his opinion to a case in which Italy requested the Court's declaration that 'Regulation 17' was inapplicable under Article 241 EC. He pointed out that the wording of the Article clearly states that 'any party' may invoke the plea but also that defects of legislation often emerge only once it is applied to a particular case, being mostly after the two months time limit to start annulment proceedings has lapsed. Unfortunately, the Court did not address this question since the validity of the regulations was deemed to be irrelevant for solving the case. Not everybody agrees with Advocate General Roemer. Some seem to agree while others disagree or leave the question open. In its subsequent Mad Cows II decision, the Court finally took a clear stand in this debate on a Member State's right to plea illegality.

When food safety of British beef seemed to be again guaranteed, the Commission adopted two decisions that allowed for a conditioned import of British beef to the other Member States. France refused to comply with these Commission Decisions and was consequently sued by the Commission in an infraction procedure. In that procedure France justified its failure to comply by invoking the illegality of these two Commission Decisions. The Court, however, denied France the possibility to invoke the plea of illegality.

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251 See Case 32/65 Italy v. Council and Commission, on p. 414.

252 Hartley seems to allow it since he, when mentioning different possible applications of Article 241 EC, simply names that in which a Member State invokes it under Article 226 proceedings, see Hartley (1994) P. 417.

253 Such as Sinoniatis (2001).


255 Case C-1/00 Commission v. France (Mad Cows II).
Thus, Member States cannot jeopardise legal certainty beyond the two months time limit in which they were able to start annulment proceedings. In fact, it may be stated that the TWD rule applies to the Member States on all fronts. It became clear in the National Farmers Union case that national authorities cannot invoke the validity issue before national courts.

Before a French court, the French Government again raised the issue of invalidity of the same Commission Decisions that it wanted to challenge earlier by invoking the plea of illegality.\textsuperscript{266}

What is true for the Member States is equally true for the Community institutions. The Ouzo case provides an excellent example of an institution wishing that Article 241 EC was not interpreted so strictly. The Commission had commenced '226-proceedings' against Greece for taxing its domestic ouzo too favourably and thereby violating Article 90(1) EC. The Commission lost the case as the conduct of Greece was explicitly authorised by a provision of Directive 92/83/EEC. The arguable point that that Directive itself was violating Article 90(1) EC could not be made by the Commission as that would have allowed it to circumvent the time limit of Article 230 EC.\textsuperscript{267}

2.5.3 Inapplicability

According to the wording of Article 241 EC, a successful plea of illegality results in the 'inapplicability' of the Community act.\textsuperscript{268} That suggests that the effect of the Court's judgment is only \textit{inter partes}.\textsuperscript{269} However, it is obvious that a directive which is held 'inapplicable' after a successful plea of illegality cannot have the same status as other directives whose legal validity is impeccable.

On the effect of non-applicability after a successful plea of illegality, Sinaniotis refers to the tension between two rivalling principles, that of \textit{legality} and that of


\textsuperscript{267}The only possibility was then the possible non-existence of Directive 92/83/EEC. The Court indeed looked into that matter but denied it, see C-475/01 Commission v. Greece ('Ouzo'), paragraph 21.

\textsuperscript{268}Lauwaars, by referring to Joined cases 31/62 and 33/62 Wöhrmann, states that the inapplicability of a regulation following a successful plea of illegality should be well distinguished from an annulment and from a declaration of invalidity in a preliminary reference procedure. He does not provide an argumentation for that distinction. See Lauwaars, R.H. and Timmermans, C.W.A., \textit{Europees recht in kort bestek}, W.E.J. Tjeenk Willink, 5th edition, Deventer 1999, p. 156. See Joined Cases 31/62 and 33/62 Wöhrmann v. Commission.

\textsuperscript{269}Sinaniotis (2001) on p. 123: "The fact that the Community act was declared inapplicable does not open the way to attack the legislator directly."
THE INVALID DIRECTIVE

legal certainty. However, it seems questionable that these two principles are really on an equal footing after a directive's invalidity has been pronounced under Article 241 EC. Legality demands that law is applied also as regards Community legislation. Legal certainty requires that, after the two-month term for instituting annulment proceedings has lapsed, legislation can be relied on. But is legal certainty not already weakened by the declaration of the Court that a directive is 'non-applicable'? As a result, legal certainty is weakened from the outset, at the moment a directive is declared inapplicable inter partes, if only for the fact that a possible preliminary reference, upgrading the 'incidental invalidity' is not unlikely. If one counterbalances in such a situation the principle of legal certainty against the principle of legality, the latter must have the upper hand.

If a directive is successfully challenged by invoking the plea of illegality, it's 'inapplicability' may only be inter partes but it is thereby declared invalid all the same. As was also stated in relation to the action for damages under Article 288 EC, the invalidity of a Community act that is incidental in another procedure may be expected to have wider effects. The preliminary reference procedure is not unlikely and will always be able to 'upgrade' the 'merely incidental invalidity', thereby imposing upon the Community legislator a duty to withdraw the 'inapplicable' act.

2.6 Non-Existent Directives

Although invoked successfully only once in the lifetime of the European Communities, non-existence, or absolute nullity, does pop up every once in a while in European case law. Case law teaches us that non-existence refers to the situation that a Community act is tainted with a legal defect so


271 Joined cases 1/57 and 14/57 Société des usines à tubes de la Sarre v. High Authority. They concerned an advice of the High Authority which was devoid of any motivation. In view of later case law, however, it may be doubted if it is still good law, see Hartley (1994), p. 355. Also the CFI has on one occasion declared a Community act to be non-existent (the reason was that the Commission Decision was not authenticated in accordance with the Commission's Rules of Procedure). However, it was appealed in the BASF case, in which the ECJ annulled the judgment of the CFI: C-137/92 P Commission v. BASF AG and Others.

272 See for instance Case 15/85 Consorzio Cooperative d'Abruzzo v. Commission (in which the Commission invokes the non-existence of its own decision) and Case 226/87 Commission v. Greece. Particularly interesting is C-475/01 Commission v. Greece ('Ouzo') in which the non existence of a directive was investigated.
grave and apparent that one has to consider it as simply 'not being there'.\textsuperscript{273} In the words of the ECJ this is only the case

"if the measure in question contained particularly serious and manifest defects such that it could be deemed non-existent" (emphasis added).\textsuperscript{274}

Thus, two requirements are set for a Community act to be non-existent: the legal defect is sufficiently serious (1), and immediately obvious (2). Case law makes clear that, since it is an exception from the presumption of legality of Community acts, reasons of legal certainty require the doctrine of non-existence to be applied only in 'extreme cases'. By limiting non-existence to these extreme cases the Court attempts to strike the balance between the concepts of legal certainty and respect for legality.\textsuperscript{275}

One could think of extreme examples of violating the Community decision-making process, such as a directive on the safety of toys, based on Article 95 (internal market) but adopted by the Council without any co-decision by the European Parliament or a regulation on the common organization of the sugar market emanating only from the European Parliament.\textsuperscript{276} Or what to think of an act dealing with a subject-matter that is completely outside the scope of the Treaty, such as a directive abolishing all remaining monarchies in the European Union?

The great difference with other procedures for invalidating Community law is that non-existence is no procedure but a phenomenon. For that reason, no court, either European or national, has the power to even annul or declare invalid non-existent Community directives. Such courts can only affirm non-existence of the Community act.\textsuperscript{277} The judgment is to be considered as merely declaratory, not constitutive. It follows from the concept that also national courts confronted with non-existent EC law can confirm this to be the case without referring a preliminary validity question to the ECJ. Obviously, this diversion from the Foto Frost case law can only take effect in case the national court is more than abso-

\textsuperscript{273} See for French law from which this concept originates, Brown (1998), p. 240-242. English law knows the distinction between void and voidable acts but non-existence definitely is a more radical concept than 'void'.

\textsuperscript{274} See Case C-404/97 Commission v. Portugal, paragraph 35 and Case C-226/87 Commission v. Greece, paragraph 16 and Case C-74/91 Commission v. Germany, paragraph 11, C-261/99 Commission v. France, paragraph 19. See also C-195/91 P Bayer AG v. Commission. In all these cases non-existence had not manifested itself.

\textsuperscript{275} See the Court's ruling in C-137/92 P Commission v. BASF AG and Others, paragraph 48.

\textsuperscript{276} Thus, one must think of infringements of the Treaty that are so serious and obvious, one is inclined to think they can only occur where the Community is in a grave constitutional crisis.

\textsuperscript{277} Consequently, if an act is declared non-existent: an annulment action will be declared inadmissible.
lutey sure the act before it is non-existent. If non-existence is wrongly assumed, the Member State concerned risks an infraction procedure. Such procedure could be expected to be based on the failure to comply with the existent act as well as with Article 234 EC, since the national court violated the 'Foto Frost rule'.

It is tempting to hold national courts under all circumstances responsible for referring preliminary questions to the ECJ when they are confronted with non-existent acts. That would discard any liability in case the national court were wrong on the non-existence. Indeed, if the national court has doubts as to the non-existence, it is under an obligation to have the ECJ confirm its suspicions in a preliminary reference. However, theoretically, it remains so that if the national court is certain of the non-existence, it may single-handedly ignore the non-existent act without a preliminary reference being obligatory. Again, one must realise that non-existent acts are so gravely violating the Community legal order that even the temporary upholding of the presumption of validity is more damaging to Community law than the fact that national courts autonomously ignore the act concerned. A fortiori no recourse to the Atlanta/Zuckerfabrik case law is possible for such a course of action upholds the formal presumption of validity of the EC act.

In practical terms the doctrine of non-existence plays a very small role in legal protection from EC acts. It may be hoped this role will always remain small as every non-existent act is ipso facto a disruptive element in the EC legal order.278

In terms of effects, non-existence of a directive279 does not differ much from an annulment under Article 230 EC. In both cases the legal fiction is presumed that, with effect ex tunc and erga omnes the act concerned was deemed to have been there.280 Only difference is that in the case of non-existence, it may not really be a legal fiction, but 'legal reality' in the sense that it is less likely that people and Member States would already have complied with the act concerned.281 In particular as far as Member States are concerned, it seems very hypothetical indeed that they would have implemented a directive that is so blatantly and gravely invalid.

278 Some even argue it has no place whatsoever in the Community system of legal protection. See Mathijssen, P., Nullité et annulabilité des actes des institutions européennes, in: Miscellanea W.J. Ganshof van der Meersch, 1972, vol. II, p. 271.

279 In most cases where non-existence was pleaded, it concerned a Commission (High Authority) decision. In the Schots-Kortner case, however, it was pleaded in relation to the Statute on EC civil servants. Joined Cases 15/73 to 33/77, 52/73, 53/72 57/73 to 109/73, 116 73 117/73 123/73 132/73 and 135/73 to 137/73 Schots-Kortner.

280 Obviously, the effects of non-existence cannot be mitigated by the ECJ analogous to its powers under Article 231 EC.

281 A further legal difference would be that, obviously, preservation of legal effects under Article 231 EC is impossible in case of non-existence.
3 Suspending the Application of Community Law

In any legal action, either national or European, the necessity for interim relief may arise. Stringent considerations of protection of interests may induce courts to take measures for the safeguarding of interests so as to prevent legal action from becoming illusory. In the European system of legal protection, the Presidents of the ECJ and CFI, have such power in the course of annulment actions, laid down in Articles 242 and 243 EC. Article 242 EC regulates the suspension of Community acts:

"Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended."

In its Zuckerfabrik decision, the ECJ acknowledged that as a matter of principle, national courts too should be able to grant interim relief against a Community act when the latter’s validity is contested in national proceedings. Below, specific questions will be discussed that may arise when interim relief is provided against directives, either by national courts or by the Community judicature.

3.1 The European Court

In the Fedesa Order, the President of the ECJ was for the first time requested to grant interim measures against a directive (the Second Hormones Directive). However, the case is not very instructive on the peculiarities of applying Article 242 EC to a directive since the application for interim relief was declared inadmissible.

Fedesa, a private plaintiff, was deemed ‘manifestly inadmissible’ in the main annulment proceedings.\(^{281}\) The poor chances private plaintiffs have under Article 230 EC when it comes to challenging directives reflect upon their chances to obtain interim protection by the Community judicature.\(^{282}\)

More interesting was the Biotechnology Order,\(^{284}\) concerning interim relief against the Biotechnology Directive. Applicant was The Netherlands which had previously launched an action for annulment against this Directive.\(^{285}\)

\(^{281}\) See Case 160/88 R Fedesa v. Council, paragraph 22. Indeed, a few months later, the Court reached that conclusion in the main proceeding: see Case 160/88 Fedesa v. Council, paragraph 13 where it declares the Directive to be ‘manifestly not of individual concern’. See also the subchapter on private annulment action against directives.

\(^{282}\) See for a similar case (but concerning a regulation) T-13/99 R Pfizer v. Council.


The Netherlands held strong objections against the Biotechnology Directive. This Directive attempted to harmonize the rules on patentability of biotechnological inventions, thereby including to some extent patents for living organisms and patents regarding human material. The implementation deadline was 30 July 2000. The Dutch objections emanated obviously more from political objectives and moral repulsion rather than from a conviction that the Directive was legally invalid. In fact, the Dutch government even admitted as much during the course of the proceedings.

The ‘dual nature’ of directives poses two questions in relation to interim relief. First and foremost, the damages anticipated by a possible annulment presume a relationship between that annulment and the national implementation law that actually imposed the damages. Secondly, the fact that directives require the adoption of national legislation may have repercussions on what the possible scope can be of interim protection against directives.

3.1.1 The Anticipated Damages

In the Biotechnology Order, The Netherlands had to define the ‘damages’ that had to be averted. It did so by stating that if Biotech-patents were to be granted on its territory, legal certainty and legal equality would be compromised if at a later stage the ECJ annulled the Biotechnology Directive.

As regards legal certainty, it was argued that investors might already have invested in biotechnological research with the prospect of patent protection. Legal inequality, it was argued, might arise between those inventions dating from after the possible annulment of the Biotechnology Directive, not being protected by a patent, and those dating from before that date that would be protected under national (implementing) patent law.286

These Dutch arguments hinged on the fact that a later annulment of the Directive would result in national law losing its validity. Interestingly, the President dismissed the application for interim relief for he did not foresee serious and irreparable damages occurring after a possible annulment of the Directive. He stated that damages, if any,287 could be prevented by The Netherlands through

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286 See paragraphs 25 and 26 of C-377/98 R Biotechnology Order.
287 The likeliness of damages seemed indeed very hypothetical. The Netherlands did not provide any data on the number of patent applications to the Dutch Octrooiraad (Patent Council) that would only be patentable if the Directive were implemented into Dutch patent law, see paragraphs 53-54 of C-377/98R Biotechnology Order.
the manner in which the Directive would be implemented in Dutch law.\textsuperscript{288} He suggested the Netherlands implement it by inserting conditions in the implementation legislation to the effect that biotech patents are granted under dissolving or suspending conditions.\textsuperscript{289}

At this point, the President in effect makes a statement on the anticipated effects of a possible annulment for national law. He seems to suggest that national implementation law would remain unaffected by such annulment. Of particular interest are the suggested ‘dissolving conditions’. If an annulment of the Biotechnology Directive would automatically invalidate, as a matter of EC law, national implementation law, such dissolving conditions seem superfluous. As this strikes at the core issue of the constitutional relationship between national laws and the directive they implement, this aspect of the Biotechnology Order will be further discussed in Chapter 3.

### 3.1.2 The Scope of Interim Relief Against a Directive

The second question that arises in relation to the directive’s dual nature is how to define the scope of interim relief against an instrument requiring the adoption of legislation. Also in this regard the Biotechnology Order proved interesting. The request amounted to a freeze of the process of adoption of Dutch legislation. Although the President denied that, he made the interesting suggestions mentioned above: inserting dissolving or suspending conditions in the national implementing law.

Particularly intriguing is the suggestion to implement the Directive under ‘suspending’ conditions.\textsuperscript{290} Although presented as a mere suggestion, suspending the operation of implementation law would also amount to interim relief. Perhaps it is a more modest form of relief than asked by the Dutch Government, but interim relief all the same. Imposing suspending conditions to (future) patent holders would hinder the effect desired by the Directive. Normally, one

\textsuperscript{288} It is not clear to whom the President attributes possible damage. He reiterates the rule that it has to be only the applicants’ damage that is to be taken into account, referring to C-319/99 P(R) Pfizer Animal Health. Nevertheless, he also addresses the damages that could be suffered by the patent holders (paragraph 56), stating that those could be indemnified by simply compensating them for the loss of their patents. See also paragraph 32: The defending parties indeed argue that the damages cannot be attributed to The Netherlands. Furthermore, they state that even if taken into account, such damage is not irreparable since patent holders could claim damages from The Netherlands for withdrawing with retroactive effect their patents.

\textsuperscript{289} See paragraph 58 of C-377/99 Biotechnology Order.

\textsuperscript{290} A ‘dissolving’ condition is less troublesome for then the patents would be granted and have full effect until such time as the Court would have annulled the Directive. If the Court does not do so, the dissolving condition never enters into force and the patent will be granted its normal lifetime. Granting patents but then suspending them is, however, another story.
would argue that The Netherlands violates its obligation under Article 249 EC if it would indeed insert this suspending condition in the implementing law.\(^{291}\)

Having said that, such interim relief as ‘suggested’ by the President seems to fit nicely in the whole concept of interim relief, particularly since it concerns a directive. Providing interim relief must be a balancing act between the interests of the Member State seeking the prevention of irreparable harm\(^{292}\) and of the integrity of the Community legal order (by having the Directive implemented in time). It seems that such balance is indeed best achieved by leaving intact the duty to implement an allegedly invalid directive.\(^{293}\) If The Netherlands were allowed to suspend the duty to implement, that is, suspend the operation of Article 249 EC, it would have been highly unlikely, if not impossible, to comply with that legislative duty the moment the Court declares the Directive valid in the final judgment.\(^{294}\) By contrast, if it is not the implementation itself but the operation of implementation that is suspended, the right balance appears to be found.

Furthermore, the applicant’s claim for urgent measures should also be satisfied by the simple non-application of implementing legislation, rather than by stopping the implementation process itself. The latter is not necessary to provide a plaintiff with the required provisional protection until such time as the Court reaches a verdict on the directive. Although the European and national courts enjoy a broad discretion as to the assessment of the facts and the need to order interim relief,\(^{295}\) they must always take due account of the Community interests, not prejudicing in law or in fact the outcome of the case before the ECJ.

Thus, stopping the legislative process as a form of interim relief against a directive prejudices the outcome of the latter’s legal review. Furthermore, it does so unnecessarily. Therefore, the ‘suggestion’ the President of the Court made in the Biotechnology Order should be regarded as more than merely a suggestion, but rather as a limit as to how far national and European courts can go when granting interim relief against a directive.\(^{296}\)

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\(^{291}\) Which in effect it did not. Interestingly, the Social Democrat fraction of the Dutch Parliament asked for it but the Government denied the request, stating that this would be contrary to Article 10 EC!

\(^{292}\) Although such harm allegedly caused by a directive can be questioned, see section 3.1.1.

\(^{293}\) Although the President did not rule out \textit{a priori} the possibility that under Article 242 EC a Member States’ duty to implement could be frozen.

\(^{294}\) In the example of the Biotechnology case: the date of the final judgment, declaring the Directive valid was 9 October 2001 while the implementation deadline was set at 30 July 2000.

\(^{295}\) C-149/95 P (R) Commission v. Atlantic Container Line A.B., paragraph 23.

\(^{296}\) See further on the Biotechnology Order Chapter 3, Section 4.4, for the conclusions that could be drawn from this Order on the \textit{per se} consequences of Community law on the status of national law implementing an invalid directive. It could be inferred from this judgment that, especially, suggesting ‘dissolving conditions’ implies \textit{a contrario} that the invalidity of a directive \textit{per se} does not affect the status of national law.
3.1.3 Member State Disobedience During Cases Pending

There is one phenomenon outside the legal spectrum that cannot be ignored when discussing interim relief against directives. It is a fact that whenever a directive's validity is contested, Member States are more often late to implement than normally.

The best illustration thereof is the aftermath of the *Biotechnology* case in which The Netherlands had unsuccessfully challenged the Biotechnology Directive. Most other Member States had also not completed the implementation process in time. Consequently, the Commission started infringement proceedings against several Member States.

In the infraction proceedings for not implementing the Biotechnology Directive, the Dutch Government stated that indeed it had waited until the final judgment in the annulment proceedings it had instituted against this Directive. The statement is of course peculiar since for this reason in particular The Netherlands had applied for interim relief which the President of the Court explicitly denied. It would seem that The Netherlands had created its own interim relief. Yet, considering that many more Member States were far too late implementing, one cannot help but get the impression that the Dutch case does not stand on its own.

Anticipating an annulment or a declaration of invalidity in the course of a case pending is of course risky. As observed earlier, all Community acts are presumed to be valid until the contrary has been established by the ECJ. And even if the Court does annul the directive, there is the possibility that it upholds the legal effects under Article 231 EC.

The risks involved may be illustrated by a case in which The Netherlands did not implement a directive for it would be amended in a short time anyway. That was of course no valid reason for infringing the obligations arising from that directive and Article 249 EC.

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297 The other Member States too gravely neglected their implementation duties. The Commission has instituted proceedings against The Netherlands (C-395/03, pending), Belgium (C-454/03, pending), France (C-448/03, pending), Italy (Case C-456/03, pending), and Luxembourg (C-450/03, pending). Furthermore, by the time the ECJ annulled the Transport Policy Directive in case C-21/94, only two Member States had implemented it.


Furthermore, whenever a Member State does not implement because it holds a directive to be invalid, it must realise that the directive might be sufficiently precise and unconditional so as to produce direct effect. Creating its own interim relief might then be hindered by national courts applying the directive's provisions.\footnote{For example in the case of the Biotechnology Directive, such direct effect should not be excluded.}

3.2 The National Court

Whereas in the course of an annulment action, interim relief is possible under Articles 242 and 243 EC, the Treaty's founding fathers have not thought of such protection in the context of a preliminary reference.\footnote{See Jans and Others (1999), p. 292.} This shortcoming in the set of remedies available against invalid acts of the Community institutions has been addressed by the Court in the Zuckerfabrik case law.\footnote{It seems to be intended as a complimentary instrument. The moment one could get interim protection before the ECJ itself, national courts are to abstain from interim relief. See Jans and Others (1999), pp. 294 and 297.} Under this case law, national courts have the possibility to suspend the operation of Community law when there are strong indications as to its invalidity.

Since the President of the Court of Justice has applied the European rules on interim protection (Article 242 EC) to directives,\footnote{See C-377/98R Biotechnology Order and Case 160/88R Fedesa Order.} Zuckerfabrik, being the national counterpart of these European rules must also be deemed applicable to directives. The ECJ has explicitly stated that there must be coherence in the system of interim protection.\footnote{See paragraph 18 of the Zuckerfabrik case and paragraph 22 of the Atlanta case. However, this coherence does not lead to the institutions whose act is contested having any procedural rights before the national court, see C-334/95 Krüger GmbH v. Hauptzollamt Hamburg Jonas, paragraph 46.} As the ECJ rejects 'double standards of protection' in this respect, national courts too must be allowed to grant interim relief against directives\footnote{See for instance Curtin, D., The non-contractual liability of the Community legislature for illegal directives, effective judicial protection? EL Rev, 1992, p. 46 (52): "national courts have the jurisdiction to suspend a national measure based on a Community directive", referring to the Opinion of Advocate General Jacobs in C-358/89 Extramet Industrie S.A. v. Council.} under the same conditions as the Community judicature does.\footnote{See paragraph 39 of C-465/93 Atlanta.} At least one example of a national court granting interim protection against a directive is provided for by the London Court of Appeal against the Tobacco Advertising Directive, as will be discussed below.

Interim relief by a national court may have a sort of \textit{ergo omnes} effect. When in one Member State a national court rules the Zuckerfabrik criteria to be applica-
ble and refers a validity question to the ECJ, other national courts are of course allowed to grant such interim relief too, but without necessarily referring validity references. That course of action was already accepted by the ECJ itself in the Zuckerfabrik decision itself.

Following this parallel between protection under Article 243 EC and under Zuckerfabrik, the statements made earlier on the scope of interim relief against directives apply also to such interim relief as provided by national courts. Hence, also before national courts interim relief cannot take the form of a freezing of the legislative process itself, at least not in principle.

An example of a national court taking the right approach in this sense is the Conseil d'État in its Techna decision on the validity of Directive 2002/2/EC. Since a preliminary question on validity of this Directive was already referred to the ECJ by the High Court in the UK, the Conseil d'État seemed convinced of a fumus boni iuris and decided to suspend the operation of décret 2003-751 implementing this allegedly invalid directive.

Thus, under Zuckerfabrik, legislators must continue to transpose a directive whose validity is seriously doubted.

3.2.1 Zuckerfabrik During the Implementation Term: The UK Tobacco Cases

Defining what interim relief under Zuckerfabrik and Article 242/243 EC may entail does not answer the question when the rules for granting such relief apply. Again, a specific 'directive question' arises: what rules on interim relief apply during their implementation term?

In particular UK courts have struggled with this question. The issue became topical when the validity of the Tobacco Advertising Directive was questioned.

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307 See the Techna case of the Conseil d'État. Since the UK High Court has already referred the question on the validity of Directive 2002/2 (under case number C-453/03), the Conseil d'État declined the request to do so too. The same action was taken by the Scottish Court of Session (Outer House) who also chose not to refer the validity question.

308 Whether such erga omnes effect extends to other authorities than courts is the subject of a pending preliminary question before the Court, see Case C-194/04 Nevedi v. Productschap Diervoerder, where this issue was raised in relation to Directive 2002/2, contested in the courts of several Member states. In these cases one gets the impression that the willingness of the national courts to refer to the rulings of other national courts has everything to do with the competitive disadvantage that would follow from a different validity appraisal.

309 See CE 260768 of 29 October 2003. Since the UK High Court has already referred the question (under case number C-453/03), the Conseil d'État declined the request to do so too.
before the English High Court. Imperial Tobacco and some other tobacco (advertising) companies started a national action, in UK terms an 'application for judicial review', against this Directive. Or to be more precise: they applied for judicial review of the intention of the UK government to implement the Directive. At that time, the implementation deadline was still running. The case came before three different courts of which the first (the High Court) and the third (The House of Lords) argued in favour of national law, while the second (the Court of Appeal), concluded that Zuckerfabrik should apply.

On 29 October 1999, Turner J. indeed granted an injunction restraining the Secretary of State from implementing the Tobacco Advertising Directive under the powers of the European Communities Act 1972. The injunction was to last until the ECJ would have settled the issue of the validity of the Directive. Turner J. had applied criteria of domestic law and not the Zuckerfabrik criteria. The Secretary of State had appealed to the Court of Appeal which did apply the Zuckerfabrik criteria, although it did not reach that conclusion unanimously, Laws L.J. being opposed to applying Zuckerfabrik to the issue. The case then came before the House of Lords although at that time the Court had already ended the discussion on the validity of the Tobacco Advertising Directive. Germany's action for annulment of the Directive had in the mean time proven successful and the ECJ had annulled the Directive on 5 October 2000. Although the House of Lords ruled on the question of law, several of the Law Lords expressed their regret on the fact that, since the validity issue had already been settled by the ECJ, it was no longer possible to refer any preliminary references on the question of applicability of Zuckerfabrik to this case.

The House of Lords disagreed with the Court of Appeal and ruled that in a case such as this, it is a matter of national law to determine the criteria under which a court can restrain the implementing authority. Since the deadline had not yet passed, it is up to the Member State to implement either sooner or later. In case implementation takes place at a later stage as a result of an injunction such as the one granted to the tobacco companies, this is to be considered an internal affair, outside the scope of Community law and, thus, also outside the scope of the Zuckerfabrik rule. Lord Hoffmann had put this very clearly when he stated that:

510 They wanted a court order preventing the Secretary of State to use his powers under the European Communities Act 1972 to implement the Directive in UK law, see also Chapter 6.
511 There was some dispute over the question whether, materially speaking, these criteria in fact diverged.
512 It must be said, however, that the House decided this with the smallest majority. Lords Slynne of Hadley and Nicholls of Birkenhead disagreed with Lords Hoffmann, Clyde and Millett, the majority.
"It is not disputed that the executive or legislative branches of government of a Member State can delay the implementation of a directive until the end of the implementation period for reasons of politics or expedience which they think fit."

Although it is speculating on what the ECJ would have answered in case the House of Lords would have referred the question, it would seem the views of the House were correct. However, one important proviso must be added. One must keep in mind the British context of the case. In Britain, the legislative framework for implementation is usually the European Communities Act 1972, empowering the British executive to swiftly implement EC directives. Keeping that in mind, an injunction stopping the process of transposition was indeed not likely to endanger the timely implementation of the Directive. There would have been ample time to implement the Tobacco Advertising Directive after the Court would have ruled it to be valid. However, if this were not the case, the matter would be of a different nature. In case restraining the executive to implement a directive would make it impossible for the UK to transpose in time, the matter enters the scope of Community law. For in that case an obvious connection with the Wallonie case emerges.

In Wallonie the Court stated that Article 10 EC imposed upon Member States a duty to refrain from taking any measures that are seriously liable to compromise the result prescribed by a directive, even though the implementation term is still running. Thus, the moment that a national court wants to restrain the executive from implementing a directive, it is to ask itself whether that would be likely to result in the Member State infringing Article 249 EC. If so, the Zuckerfabrik criteria should be applied to such an interim relief. After all, Article 10 EC applies to courts as much as to other organs of the state. In sum, interim relief against a directive during its implementation term is governed by national law. Unlike under the Article 242 EC/Zuckerfabrik rules such national interim relief could take the form of stopping the implementation process itself as the UK courts did in relation to the Tobacco Advertising Directive. Yet, such freezing of the transposition process must be deemed to be contrary to Article 10 EC if it is clear beforehand that the Member State could

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313 As was also the case with the implementation of the Tobacco Advertising Directive.
314 C-129/96 Inter-Environnement Wallonie ASBL v. Région Wallonne.
315 Several elements should be taken into account by the national court: at least the length of the national legislative procedure to be followed for implementation of the directive, the amount of time that is still left before the implementation deadline lapses and, last but not least, whether the final judgment of the ECJ can be expected before the deadline lapses.
not possibly implement in time if later the directive (unexpectedly) proves valid.\textsuperscript{316}

Thus, the question whether a national legislator can be stopped by court order to implement a directive boils down to the question whether he operates within the scope of Community law. Establishing the scope of Community law in this regard becomes a detailed matter, depending on three interrelated issues: the implementation deadline, Article 10 EC and the national conditions for legislation. National courts, when asked to grant interim relief against a directive, will have to take these three issues in regard which could result in three possible scenarios:

i. the implementation deadline has passed (Zuckerfabrik applies, the transposition process must proceed);

ii. the deadline is still running but stopping the transposition process would very likely result in overdue implementation (Zuckerfabrik does not apply but under Article 10 EC the court order can only extent to ‘freezing’ the operation of implementation law); and

iii. the deadline is still running and the national court is satisfied that a court order stopping the transposition process will not jeopardise the timely implementation (Zuckerfabrik does not apply nor does Article 10 EC impose any restraints).

Thus, national interim relief against a directive is within the scope of Community law either when the implementation term has passed, or, in case it is still running, if the Member State is not likely to implement in time if an injunction were granted.\textsuperscript{317} In both cases, either under Zuckerfabrik or under Article 10 EC/Wallonie, interim relief can only amount to stopping the operational rather than the legislative aspect of implementation.

3.3 Conclusions

The key issue of the relationship between the (validity of) the directive and the status of national law implementing it also emerged in relation to interim relief against directives. First of all, if one imagines a situation in which national legislation is not affected by the directive’s invalidity, neither as

\textsuperscript{316} As this matter is therefore complex and requires knowledge of both Community law and national law, it would seem that interim relief of this kind should only be provided for by courts, rather than by other national authorities (which is one of the preliminary questions still pending before the EC), see Case C-194/04 Nevedi v. Productschap Diervoerder. (pending).

\textsuperscript{317} The same applies of course for interim relief sought before the Community judicature. In the case of the Biotechnology Order, the Netherlands could have refrained from implementing the Biotechnology Directive if it were clear that, considering the Dutch legislative process, there would have been ample time to implement after the expected judgment of the Court.
a matter of European law, nor as a matter of national law, courts would not be interested in suspending the operation of the national implementing legislation.

Furthermore, the President of the Court, when asked to grant interim relief against the Biotechnology Directive, seems to have indicated that national law would not be affected by the invalidity of the Directive. Whether that conclusion can indeed be drawn from the Biotechnology Order will be further investigated in Chapter 3.

The second issue is that of the scope of interim relief against directives. Again the Biotechnology Order is interesting. The President made the 'suggestion' to not freeze the transposition itself but rather the operation of the transposition law. Indeed, such 'suggestion' does seem to strike the right balance between the protection of the individual or the Member State on the one hand and of not jeopardizing the Community interest on the other hand.

Whatever form interim relief should have under European law, it must first be established that European law applies, either under Zuckerfabrik or more generally under Article 10 EC. In this respect the British Imperial Tobacco cases proved very interesting for they posed the question whether Zuckerfabrik applied during the implementation term. It would seem that the position of national courts is indeed different depending on the timeframe. In a scenario in which a directives' implementation deadline has not yet expired, the Zuckerfabrik criteria do not apply. However, this does not discharge national courts from avoiding the risk of compromising the result prescribed by the directive. If therefore it can be reasonably expected that after the ECJ had settled the validity issue, there will still be time to implement the directive, a national court may stop the legislative process. If not, it must abstain from doing so.

4 EU Political Consequences of Review

4.1 The Scope of Article 233 EC

How politicians react when their policy has been established to be invalid in a courtroom is partly outside the scope of this thesis. However, there is a legal aspect to this political question as the court’s judgment, besides invalidating the law, at the same time sets certain boundaries for what can or

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318 Unless, as earlier stated, the granting of interim relief is bound to result in the Member State violating Article 249 EC by not implementing the directive in time. An obvious analogy with the Wallonie case makes the Zuckerfabrik criteria then applicable.

319 The exercise of evaluating under Member State law the issue whether stopping the process of transposition would still leave ample time to implement the challenged directive is an exercise beyond the competence of the Community Judicature (see for instance C-50/00 P UPA v. Council). Hence, the Presidents of the ECJ and the CFI cannot be expected to go into such details.
must be done in the future. Community law has a specific provision on this matter, namely Article 233 EC. It provides that:

"The institution or institutions whose act has been declared void (...) shall be required to take the necessary measures to comply with the judgment of the Court of Justice."

Before going into what these ‘necessary measures’ might be, it is observed that the Article refers to acts of the Community being ‘void’. In the terminology of the Treaty ‘void’ is the sanction following a successful annulment under Article 230 EC. Indeed, is has been suggested by some that Article 233 EC does not apply to EC acts declared ‘invalid’ in actions for damages or in pleas of illegality. As stated earlier, the ‘invalidity’ pronounced under those procedures indeed, formally, has only effect inter partes. However, as was also observed, such actions could very well be followed by a separate preliminary reference on validity. If that is indeed the case, there would be no difference with the annulment action since a declaration of invalidity in a preliminary reference also triggers the duty of the competent institution to take the necessary measures as the Court has already ordered in several rulings.

Article 233 EC could be interpreted as granting the institutions whose directive was invalidated the exclusive authority to determine ‘the next step’ after the Court has rendered judgment. However, one could also infer from the Article that the Court is granted the power to indicate the general nature and contents of those ‘necessary measures’ to be taken. However, there is consensus on the general rule that the Court does not have the power to map out the actions of the institutions whose act has been invalidated. At the same time, it is clear that the dictum of the Court and the considerations in the judgment that have led to that dictum can have obvious implications for the freedom to manoeuvre of the policy makers after the judgment.

In this, admittedly rather vague, framework the question arises what the scope of Article 233 EC could be in relation to directives. In fact, practice has

120 As demonstrated by Article 231(1) EC: “If the action (being the action for annulment, TV) is well founded, the Court of Justice shall declare the act concerned to be void.”


122 See Joined Cases 103 and 145/77 Royal Scholten-Honig Ltd. v. Intervention Board for Agricultural Produce, Joined cases 124/76 and 20/77 SA Moulins et Huillères de Pont-a-Mousson v. ONIC, Joined Cases 117/76 and 16/77 Rückdeschel and others v. Hauptzollamt Hamburg and Case 66/80 ICC. paragraph 16. Likewise, Mei (1997), p. 276: “According to established case law, the obligation following from Article 176 EC for the competent Community institutions is equally applicable in case of a declaration of invalidity under Article 177 EC”. See also Ward (2000) on p. 269.

confirmed that invalidated directives are followed up by replacing legislation. But could the Community legislator be obliged to do so? It would seem that the answer is, at least in principle, negative. When directives are based upon powers that are to an important extent discretionary, such discretion must be respected by the ECJ. However, in that light it appears very odd, to say the least, that at one occasion Article 233 EC has been used as the legal basis of a directive that 'repaired' its annulled predecessor.

The Laying Hens Directive was annulled by the Court for a quite peculiar reason. The secretariat of the Council had made several changes to the statement of reasons to this Directive. The Court annulled it because this went clearly beyond the powers of the Council's secretariat. Less than a month later, the Council had adopted a reparation directive with the exact same content but without the amendments made by the Council's secretariat to the statement of the reasons, based solely on Article 233 EC. In fact, the entire legislative procedure was skipped since the new directive simply referred to the old Opinion of the European Parliament and the old Opinion of the ECOSOC. Only the last phase, the adoption of the Council, was again enacted.

This case seems to suggest that the Council was of the opinion that it had to re-enact the Laying Hens Directive with the same contents and thus that this rather strange new directive was 'necessary' to comply with the judgment of the ECJ. In my opinion, such a conclusion cannot be drawn from the Court's judgment. The obligations arising from annulments or declarations of invalidity are determined by the circumstances of the case. A directive, being a normative act, is not to be compared to for example a Commission decision. That is a factor that influences the scope of obligations following a Court's judgment. Community acts requiring political choices, such as the Laying Hens Directive, must be considered less affected by Article 233 EC than administrative acts. Consequently, the institutions should have the opportunity to enact any consecutive legislation they wish, if they want to adopt it in the first place. Therefore, the Council was wrong in reacting to the Court's judgment in the Laying Hens

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324 Be it sometimes at a late stage, such as the directive that was invalidated in the Angelopharm case and only 'repaired' six years later.

325 See Case 131/86 United Kingdom v. Council.


327 As had also happened with the Second Hormones Directive, see C-331/88 Fedesa, where the ECJ explicitly approved of such practice, and the remarks made above on the possible differing scope of Article 231 EC as to the consequences of an annulment.
decision. It should not have suggested that it was obliged under Article 233 EC to re-enact the Laying Hens Directive, let alone re-enact it verbatim.128

4.2 Withdrawal

Up till now the focus was on the various ways in which the ECJ could terminate the legal force of a directive. However, its legal force can also be terminated by those responsible for adopting it by means of withdrawal. Withdrawal is a means of terminating the legal force of a directive that differs fundamentally from the other ways of terminating its legal force because it requires no legal authority (the ECJ).129 The question to be answered here is whether the same problems may arise in the Member States as when a directive loses its legal force in any of the other settings. Primarily: what is the status of the national measure implementing the withdrawn directive?

There is up till now almost no case law on revocation of EC legislation.130 There is only some case law on the revocation of decisions in which the Court had formulated some conditions for their withdrawal.131 In that respect, Hartley draws the distinction between the revocation of lawful and unlawful decisions. The same distinction should be made as far as directives and other normative acts are concerned. Thus, below, the directive's 'dual nature' will be discussed in relation to withdrawal under these two different circumstances.

4.2.1 Lawful Directives

As far as lawful directives are concerned, these are regularly repealed for various reasons.132 The consequences for national implementation

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128 As to the fact that not the entire legislative procedure was again followed, such a practice was thus condoned by the ECJ in the Fedesa case. It is indeed admitted that, as in that case, the illegality of the previous directive resulted from the violation of a very procedural issue, specifically relating to the last phase of the legislative process and the possibility of influencing content in that last phase of the legislative process.

129 It also is very different from non-existence because it does require a legislative procedure whereas non-existence requires no procedure whatsoever, neither legislative nor judicial.


legislation depend in the first place on the contents of the withdrawing act. Directly or indirectly, the act withdrawing the directive may address national legislation implementing the withdrawn directive.

It may stipulate that certain obligations of the withdrawn act remain enforceable in the sense that Member States are not absolved from complying with them. An example is the New Notification Directive that stipulates that certain effects of a number of repealed directives nevertheless remain binding on Member States as far as their implementation is concerned.

This type of practice may lead to some technical problems for the national legislators. For instance the New Honey Directive, issued in January 2002, repeals the Old Honey Directive as from 1 August 2003, while Member States have to implement the New Honey Directive itself before that same date. It seems that when they do implement before August, they must maintain two sets of national legislation, that implementing the Directive which is then still in force and that implementing the New Honey Directive. The same technique was used in the New Laying Hens Directive repealing the old directive with effect only from 1 January 2003 whereas its own provisions must be implemented no later than 1 January 2002.

In that respect it is interesting to see the phrasing of the New General Product Safety Directive, repealing its predecessor. There it is stated that the new implementing measures shall be brought into force ‘with effect from 15 January 2004’. It is on that date, that the Old Product Safety Directive will be effectively repealed. The problem of the obligation to maintain two sets of implementing rules is then discarded.

Secondly, the withdrawing act may ‘overlap’ in many respects the withdrawn act. Obviously, that too has repercussions for domestic legislation. Some of the

33 For completeness’ sake, it must also be mentioned that the Community legislator may enact provisions containing a so-called ‘sunset clause’. Such a clause can be regarded as a sort of withdrawal in advance. A directive containing such a clause has from the outset only a limited legal effect in time, its legal force ending on a specific date specified in the directive itself.


37 They will presumably do is stipulate that the new implementing legislation only takes effect after 1 August 2003 and that until that time the old implementing legislation still applies.


existing national provisions may have to be maintained because they implement provisions of the old directive that are copied into the new one.\textsuperscript{340}

Thirdly, when the new directive explicitly provides for obligations that are contrary to those imposed by the old directive, national implementation law will have to be amended or withdrawn so as not to conflict with the new directive.

A fourth situation where the withdrawal affects the national laws directly is when a directive is being replaced by a regulation. It has been observed earlier that when the Community legislator intends to modify the contents of a legislative act, it can only do so by means of an act of a similar nature. Hence a regulation can only be modified by a subsequent regulation and a directive by a subsequent directive.\textsuperscript{341} Therefore, when the Community legislator envisages to change the contents of a directive by means of a regulation, it must repeal that directive before adopting the regulation. An example is the Waste Directive,\textsuperscript{342} the content of which was later partially laid down in Waste Regulation 259/93.\textsuperscript{343} In case a directive is withdrawn to be replaced by a regulation,\textsuperscript{344} Member States will be confronted with a specific situation. Their existing implementing measures may have to be repealed as well, for the simple reason that they would violate the Court's long-standing prohibition to 'implement' a regulation.\textsuperscript{345}

In all these situations, it is EC (withdrawing) legislation that directly or indirectly affects national implementation law. However, it is only when there is no preserved effect, no 'overlap' and no subsequent regulation that the consequences for national law are less evident. What is evident is that if a directive is withdrawn, there is no longer an obligation to implement it into national law.\textsuperscript{346} What is also evident is that, since withdrawal does not have retroactive effect,\textsuperscript{347}

\begin{thebibliography}{99}
\item[340] Although Member States may be required to insert a new reference to the new directive.
\item[341] Explaining for instance why the original Notification Directive (83/189/EEC) was replaced by Directive 98/34/EC. Van Ooik noted that the original directive had better been repealed to be replaced by a regulation. Article 93 EC (its legal basis) provides for such possibility, see Van Ooik (1999), p. 261 and 272-274.
\item[342] Directive 84/631/EEC.
\item[343] The validity of this Regulation was upheld in Joined Cases C-307/00 to C-311/00 Oliehandel Koeweit BV and Others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer. See Council of State, Administrative Division (Afdeling Bestuursrechtspraak Raad van State), judgment of 8 August 2000, AB, 2000, 414.
\item[344] The other scenario is also possible: Directive 2002/30/EC on noise related restrictions at Community airports repeals Regulation 925/1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and certified.
\item[345] However, sometimes they may remain in force, namely when they can be qualified as 'flanking legislation' necessary for the operation of the regulation.
\item[346] See Prechal (1994).
\item[347] Unless the withdrawing act explicitly provides for the contrary. An example is Commission Regulation 1410/96 repealing with retroactive effect Regulation 3053/95. See also Lenaerts and Arts (1999), no. 300.
\end{thebibliography}
the up till then existing legislation will at least have to remain in force as far as the past is concerned. Apart from that, it is an open question how the implementing legislation of the Member States may be affected by the withdrawal. Just as with the invalidity of directives, the question arises whether withdrawal per se has implications for national implementing law. That particular aspect of withdrawal is interesting to observe. It shows, just as much as the invalidity of a directive, how Member State legislation may be affected by the legal 'disappearance' of a directive and consequently it may demonstrate the constitutional connection between the two.

4.2.2 Unlawful Directives

Lawful directives will usually be withdrawn for purely political or technical reasons. However, the Community legislator may withdraw a directive because it has proven to be invalid. As stated before, there is at this point a difference between annulments and declarations of invalidity. After a successful annulment withdrawal is not possible anymore, for there is nothing left to withdraw.

In that regard it is interesting to note the legislator's reaction to the annulment of one provision of the Working Time Directive. The annulment proceedings that the UK had started against that Directive resulted only in the annulment of the provision indicating that workers in the EU should enjoy, in principle, a weekly free Sunday. Six years later, an amending directive officially 'deleted' this void provision. The different wording seems to reflect that, indeed, one cannot withdraw a void provision but one nevertheless must 'clean up' the statute book by 'deleting'

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148 In his Opinion for Joined Cases C-434/02 and C-210/03 Arnold André, Advocate general Geelhoed implicitly states that there are no European law per se consequences for national law implementing a withdrawn directive, see point 66 of his Opinion.

149 There is one important difference between withdrawal and annulment, that is that in case of the first, Member States are under a duty to comply with the directive and that that duty remains in force after withdrawal, meaning that if before the withdrawal there was a breach of Community law the Member State can still be held responsible for that. There is an analogy at this point with cases where the Court would still condemn a Member State for not implementing a directive even though the Member State had meanwhile complied with it.

150 Nor is that possible when a directive would prove to be non-existent.


previously invalidated provisions. Also the legal fiction of being void *ex tunc* and *erga omnes* may require ‘cleaning up’.

However, withdrawal remains possible after one of the other actions has been successful: the declaration of invalidity in the course of a preliminary reference, the action for damages or the exception of invalidity. In case of invalidity declared in a preliminary reference, such withdrawal is even obligatory.

The latter point seems to be a ‘leftover’ from the days where there was still a strong difference between annulment and a declaration of invalidity. Since these two sanctions have grown closer to one another, the fact that one act can be withdrawn while the other cannot becomes a bit incongruous. Furthermore, things become more puzzling when one realises that a withdrawn directive can still be annulled. Reason is that the withdrawal will usually not have retroactive effect. Therefore, the applicant might still have an interest in its annulment. Yet, an act’s invalidation in a preliminary reference has effects *ex tunc*. Therefore, withdrawal of acts that are unlawful seems to make more sense in the aftermath of a (successful) action for damages or of a plea of illegality.

Sometimes, Community legislation may be withdrawn for being invalid without such invalidity having been established by the ECJ. Commission Regulation 1410/96 withdraws Regulation 3053/95 (with retroactive effect) since the latter “contains a procedural defect that warrants at least its withdrawal or partial annulment”.

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354 See for an interesting discussion on the necessity to withdraw invalid legislation in the Dutch legal order: Savornin Lohman, O. de, *Onrechtmatige doch niet onverbindende wetgeving*, *Regelmaat*, 1988, p. 2 (5). He calls it an *actus contrarius* ending a misleading, factual, situation. He adds that in his opinion there need not be constitutional problems with a Dutch court ordering the legislator to repeal void legislation. Which is an interesting statement in the light of the later *Waterpakt* decision of the Dutch Supreme Court (*Hoge Raad*).

355 See Lenaerts and Arts (1999), no. 300. They rightly point out, however, that it is possible for the European legislator to withdraw *ex tunc*. In that case, there will be no such interest of the applicant to have the act annulled, see C-46/96 *Germany v. Commission*. The only possible remaining interest would then be that the applicant will want to prevent the legislator from adopting a new identical act, but that seems unlikely. See also Joined Cases T-481/93 and T-484/93 *Vereniging van Levende Varkens en Others v. Commission*, paragraphs 46 and 47. See on the conditions for withdrawal of administrative Community acts, Lübßig (2003), p. 233.

356 Although, as said before in Section 2.4.3., the Community may prefer to pay future damages.

357 See also Commission Directive 2000/11/EC of 10 March 2000 withdrawing Directive 90/121/EEC as well as several other Commission directives vitiated with the same procedural defects as Directive 90/121/EC but who were never officially declared invalid.
For this study, it is important to realize that if directives are withdrawn because they are invalid, the withdrawal does not really add anything to the already existing situation. In so far as there are consequences for national legislation, they result from the directives’ annulment or declaration of invalidity in 234 proceedings, not from its withdrawal. In so far as a valid directive was withdrawn or at least a directive that was only declared ‘invalid’ in Article 288 proceedings, the act of withdrawal may give rise to separate consideration on the status of national implementing law, as stated in the previous Section.

5 Conclusions

The main focus of this chapter was on the particularities of the directive as a legal instrument in relation to its legal review. Substantive, but mainly procedural, aspects of the review of directives have generated questions arising from its ‘dual nature’: being addressed to the Member States as a sort of ‘assignment’ but at the same time having a normative character.

In the first place, the ‘dual nature’ of directives seems to underlie the a priori arguments that occasionally pop up in cases and literature and that seek to exclude directives beforehand from the scope of certain types of legal review. Most prominent were such arguments in the legal discussion on the locus standi of private plaintiffs under Article 230 (4) EC. Under this a priori argumentation, the ‘assignment’ character of directives would preclude a priori private plaintiffs from directly challenging directives. For quite some time, EC case law proved ambiguous on this point but at a later stage ruled out any a priori exclusion of individual plaintiffs. It is safe to assume that these a priori arguments will soon belong to the past and that the directives, despite their ‘dual nature’ occupy the same place as regulations when it comes to the scope of various aspects of legal review of normative Community acts.

Yet, the dual nature of directives remains an intriguing aspect in the context of their legal review. The question as to how to define the relationship between implementing law and the directive still proves relevant to determining the practical use and effect of the various avenues for legal review within the Community system of legal protection. First, one can identify the question as to the ‘interest’ private plaintiffs may have under Article 230 EC in the annulment of a directive. An issue that may at some future point arise if the tough Plaumann criteria were to be relaxed. A similar question arises in the context of preliminary references: what causes the necessity for national courts to refer the validity question to the ECJ?

Another important question is the relevance of interim relief against an invalid directive: does a national court need to provide interim measures against an allegedly invalid directive if such invalidity would not affect the status of national implementing law? Furthermore, the general issue was raised as to the applicability of the General Principle of Community Law on adequate legal
protection. Although this principle arguably has a modest scope in relation to the legal review of directives, its applicability depends on how the relationship between directives and national law is defined.

The action for damages and the plea of illegality proved to raise less questions that underpin specifically the directive's 'dual nature'. Damages that are attributable to the directive are not attributed to the implementing legislation although in practice the latter inflict those damages. Furthermore, national law may continue to inflict those damages as long as the 'invalidity' established under Article 288 EC is not 'upgraded' by an invalidation under Article 234 EC. Also the invalidity established under Article 241 EC (plea of illegality) seems formally of a more restricted nature than 'invalidity' under Article 288 EC. Yet, due to their 'dual nature' Article 241 EC it a very unlikely avenue for legal review of directives.

These questions represent ample incentives for clarifying the relationship between the directive and national implementing law, in particular in how far the latter depends on the former for its legal status. In the following two Chapters, such clarification will be provided as far as Community law is concerned.