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

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The Per Se Rule
1 Introduction

This chapter deals with the pivotal question. Once a directive is invalidated, what are the consequences for the national rules implementing it? First, one has to establish at what level this question is to be answered: that of the EC requiring through its directive national legislative action or that of the Member States, complying with their obligation under Community law to implement. Only after having established this level of decision-making, can one begin to answer the question whether national implementing law is valid or invalid.

From the outset, it must be noted that the EC Treaty itself does not provide a rule as such that covers the question of the consequences of the invalidity of the directive. In the previous Chapter, Articles 230 and 234 EC and the other Articles governing the Community system of legal review of directives showed that these various procedures leading to the annulment or declaration of invalidity only cover the ‘internal’ consequences, that is to say the consequences of the invalidity for EC law itself. Thus, annulment of a directive causes an end to the obligation of Member States to implement, as well as an end to the Commission’s powers to supervise the implementation process and it automatically invalidates the Community decisions based upon the annulled directive for they are automatically ultra vires.1 Addressing the ‘internal’ consequences of invalidity is not that instructive since it all regards EC law.2 The interesting point in addressing the ‘external’ consequences of invalidity lies in the fact that national measures implementing a directive are partly founded in the ‘authority’ that emanates from the directive as well as in the purely national ‘authority’. That is what makes this question complex but also fundamental for it displays a constitutional relationship between European law and national law which, in normal circumstances, remains hidden.

In the following paragraphs, different aspects of EC law will be focused on ‘in quest’ for any European rule imposing upon national law consequences per se resulting from the invalidation of the directive it implemented. The term ‘per se rule’ serves two purposes. First, it discards any possible consequences EC law may have for the Member States arising from other facts than the mere fact that the implemented directive has proven invalid. Consequences for national law, dictated by EC law but not resulting from the directive’s invalidity per se, will be explored in Chapter 4 of this study. Second, this term also blocks out any possible consequences that national law itself attaches to the invalidity of the directive.

1 Unless the Court uses its powers under Article 231 EC to keep intact the legal force of these subordinate Community acts based on the invalid higher Community act, see for example C-271/94 European Parliament v. Council (Edicom).
2 For a very peculiar situation in terms of internal consequences, see C-331/88 Fedesa, where the Court accepted that annulment of the First Hormones Directive did not invalidate automatically some of the preparatory acts of the institutions leading up to the adoption of this Directive.
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2.1 Legal Writing

In legal writings, one occasionally finds statements on the consequences of the invalidity of a directive. These are never supported by any clear reasoning nor are they substantiated by reference to any (authoritative) sources and most importantly: they vary. What follows below is a brief selection of various opinions.

Cautious on the matter is Advocate General Jacobs in his opinion to the *Students Residence* case. Being convinced that the Students Residents Directive was invalid, he pleaded for preserving its effects under Article 231 EC expressing fears for what might happen if the Court would not preserve the effects:

"The status of any national measures which had been adopted to give effect to the directive might be uncertain if the Court would quash the directive" (emphasis added).\(^3\)

The Court consequently annulled the directive and, indeed, preserved the effects of the Directive under Article 231 EC, convinced by the fear of Advocate General Jacobs of what might happen otherwise. However, Röttinger, annotating the decision, contested the alleged uncertain status of national implementation law upon annulment when he wrote that

"bei aller gemeinschaftsrechtlicher Verpflichtung zur Umsetzung einer Richtlinie – ein nationales Gesetz immer nationales Gesetz bleibt; seine Rechtsnatur wird vom Beweggrund seiner Verabschiedung (hier die Umsetzungsverpflichtung) nicht berührt."

Whereas Jacobs was somewhat careful when he stated that the legality of national law might be uncertain, his colleague, Advocate General Tesauro, was more outspoken. In his opinion for the *Assurances du crédit* case,\(^4\) he argued that when the ECJ declares invalid a directive 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" (emphasis added).\(^5\)

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1 See paragraph 47 of the Opinion of Advocate General Jacobs in Case C-295/90. Another cautious statement is found in Prechal (1994), p. 43, quoted in Chapter 1.

2 See Chapter 2 where this case was mentioned as being one of the rare cases where private plaintiffs had started an action for damages against a directive under Article 288(2) EC.

3 Opinion of Advocate General Tesauro to C-63/89, point 8. The statement was made in the context of arguing that a direct action under Article 288 EC against the Export Insurance Directive was inadmis-
This can be contrasted with the opinion given by Mortelmans and Van Ooik in their comment on the Tobacco Advertising case. They contend that the annulment of the Tobacco Advertising Directive entails an end to the Sperrwirkung (the prohibitive effect the Directive has for future national legislation), but that it does not result in automatic invalidity of any national law implementing the Tobacco Advertising Directive, whereby they state that such legislation must be considered ‘autonomous’ after the annulment. What they are at least implying is that the problem of the effects of the directive’s invalidation is a matter to be determined by national law.

Quite a complete picture of the situation was drawn up by Easson. As far back as 1981, before even the first directive was invalidated by the ECJ, he sketched two different scenarios for possible consequences of the invalidity of an EC directive:

i. The scenario that a directive is contrary to a Treaty norm that also addresses the Member States. In such case, national implementation legislation “ought to be regarded in the same way as any other national law which is contrary to the Treaty”.

ii. The scenario where national law implementing the invalid directive is not contrary to the Treaty: “It must follow that nothing in Community law would affect the validity of a national law which had been enacted to comply with the directive. It would be for the national courts alone, applying domestic law, to determine the issue.”

Mortelmans, K.J.M. and Ooik, R.H. van, Het Europese verbod op tabaksreclame, verbetering van de interne markt van bescherming van de volksgezondheid? Ars Aequi, 2001, p. 114, on p. 126. In the same line, Prechal states that invalidation of a directive lifts the obligation to implement, see Prechal (1994), p. 43.

Whereby they correctly state that this national legislation of course continues to be subjected to the Treaties. See further Chapter 4 on incidental consequences imposed by Community law upon implementation law.

See for a similar reasoning also Jans, J.H. and Others, Europees milieurecht in Nederland, Boom Juridische Uitgevers, Den Haag, 2000, p. 221. Also these authors argue that in case of a directive’s invalidity, national law may stay intact as long as it respects primary Community law.


Which was only in 1988 when the ECJ annulled on one day both the Hormones- and the Laying Hens Directive.

He adds: “However, the legislation will have been introduced in good faith by the state and may have been relied upon by individuals”. He refers to the Granaria case being a standard case on the presumption of validity of a regulation, see Case 101/78 Granaria BV v. Hoofdproductschap voor Akkerbouwprodukten.
Thus, he distinguishes according to the type of norm violated by the directive. This first scenario will be further dealt with in Chapter 4, for a lot can be said on the subject. Community norms addressing both the European legislator and the Member States will here be treated under the common denominator of the "double addressing norm". On the second scenario, Easson is of the opinion that in the absence of such a 'double addressing norm', the level of decision-making on the consequences of the invalidity is the national level. In other words, he, as well as Mortelmans and Van Ooik, argues that there is no such thing as a *per se* norm. However, it suffices to point at the previous quotes by Advocates General Jacobs and Tesauro to demonstrate that there is no consensus on this matter.

Furthermore, when reading statements like these on the validity of national implementing law, one must always ask oneself whether the author reasons from the perspective of national or Community law. For instance, when Hartley states on a particular British Statutory Instrument implementing an invalid Community act that "the implementing measure will be clearly invalid"\(^\text{12}\) it becomes clear from the context that this statement concerns the British, national, point of view, not the Community law point of view.\(^\text{13}\) This national perspective will be further discussed in Chapter 5 of this study.

### 2.2 The Legislator's Opinion

Apart from legal writings, it is also interesting to see how the Community legislator has dealt with the issue of the invalid directive. When the Court has annulled or declared invalid a directive, the EC legislator has in many cases adopted a new directive to 'repair' the situation. Those replacement directives may shed some light on how the Community legislator perceives the status of national law implementing an invalid directive. In the preamble of the replacing directive as well as in some of the preparatory documents of the Economic and Social Committee (ECOSOC) or the Committee of the Regions one may find indications.

For instance, one finds the term 'legal void' to describe the situation after the directive has been annulled. When the Titanium Dioxide Directive was annulled for being based upon the wrong legal basis in the Treaty, it was shortly afterwards replaced. The Titanium Dioxide Directive intended to harmonize the distortions in competition between various producers in the titanium dioxide industry, as well as the protection of the environment against pollution by that industry. In its Opinion on the draft for this 'repair' directive, the ECOSOC emphasized that the 'temporary void' in Community law, created by the previ-


\(^{13}\) Of course one could deduce from the fact that an author chooses such a perspective that he is of the opinion that there is no European *per se* rule.
ous annulment by the ECJ should be filled. In the preamble to the new 'repair' Directive, it was stated that:

"the legal void caused by the annulment of the directive may have adverse effects on the environment and on conditions of competition in the titanium dioxide production sector. (...) it is necessary to restore the material situation created by the said Directive" (emphasis added).

One possible interpretation of this statement is that the term 'legal void' refers only to European law itself, irrespective of what happens to national law. There simply is no Titanium Dioxide Directive anymore and that, in itself, can of course be regarded as a 'legal void' within the Community law legal system. This interpretation is strengthened by the following statement that one also finds in the preamble to the 'repair' Directive:

"Whereas Council Directive 89/428/EEC was annulled by the Court of Justice (...); Whereas, if Member States have taken the necessary measures to comply with the said Directive, it is not necessary for them to adopt new measures to meet this Directive, provided the measures already taken comply with the latter" (emphasis added).

This statement suggests that national implementing law remains valid after invalidation of the old Titanium Dioxide Directive. But if that were so, why would the preamble also allude to 'adverse effects' of the invalidation of the directive on conditions of competition and the protection of the environment? That statement implies that national implementation law is either altered (for the worse) or has lost its validity after annulment of the Titanium Dioxide Directive. At no stage, however, has the legislator referred to any concrete results of such 'legal void', for instance by mentioning any concrete example where it had indeed materialised.

14 Opinion of the ECOSOC on the proposal for a new Titanium Dioxide Directive, OJEC 1992, C 98/9. It continues: "The Committee (...) recommends that the institutions involved in adopting the draft directive reach a decision as soon as possible in order to reduce the duration of the legal void to a minimum."


16 Article 12 of the reparatory directive says: "Member States which have not yet taken the necessary measures to comply with this Directive shall bring them into force not later than 15 June 1993" (emphasis added). In the previous Commission proposal, the Article did not contain that phrase. For legislative draftsmen a 'headache' is created by the following reference rule: the implementation law must refer to the 'repair' directive, also if it was adopted earlier to implement the old Directive and has remained in force after its annulment.
In other cases, it was striking that the European legislator adopted ‘repair’ directives that were to be enacted with retroactive effect, usually retaining the implementation deadline of the old, invalidated, directive which, at the time of the adoption of the ‘repair’ directive, was already history.\(^\text{17}\) Also, it has occurred that the ‘repair’ directive gave a very short implementation term.

An example of the latter situation is provided by Directive 97/57/EC,\(^\text{18}\) a replacement directive following the annulment of Directive 94/43/EC in the Plant Protection Case.\(^\text{19}\) Between the date of entry into force and the implementation deadline were not more than three days!

An example of a ‘repair’ directive requiring implementation with retroactive effect is the Fresh Meat Inspection Directive, annulled by the Court in 1989. The original deadline for implementation was 1 January 1988. It was ‘repaired’ by a new directive that dated 21 May 1991 but that retained 1 January 1988 as implementation deadline.

In the case of the new Fresh Meat Inspection Directive, its preamble justified its retroactive effect very briefly: “given this situation, the deadline for transposition may be maintained”,\(^\text{20}\) whereby ‘this situation’ merely refers to the fact that the Directive replaces its annulled predecessor. It does not expand further on how ‘this situation’ is to be regarded as giving enough justification for maintaining the old implementation deadline. That is unfortunate, because one could look at ‘this situation’ from two different angles. Firstly, it could refer to the idea that national laws of the Member States that were in force before the annulment retained their validity so that the retroactive implementation deadline would, in practice, cause no problems as regards legal certainty. Secondly, it could also simply refer to the urgency for a new directive, which would rather indicate that one had assumed that national implementing laws have lost their legal effect following the annulment of the Directive.\(^\text{21}\) Only an implementation deadline

\(^{17}\) See the directives repairing Directives 85/649/EEC, 86/113/EEC and 87/64/EEC. The latter mentions explicitly in its preamble its retroactive effect.


\(^{19}\) C-303/94 European Parliament v. Council.

\(^{20}\) The same phrasing was used in the new Feeding Stuffs Directive, although with this Directive that did not amount to a duty to implement retroactively. The Economic and Social Committee expressed doubts about this particular aspect of this ‘reparation’ directive: “For technical and organizational reasons it will certainly be impossible to meet it, even allowing for the fact that the Member States have been able to make arrangements for implementation of the new Directive”, OJEC 1991. C 31/45.

\(^{21}\) Also the ‘repair’ directive of the Laying Hens Directive had an implementation deadline that was retro-active.
with retroactive effect can then ‘mend’ the legal situation as desired by Brussels. It does not become clear from which angle the legislator perceived the problem. Again, it would have been enlightening if there had been references to actual, concrete, problems at national level, but the Community legislator failed to give them when motivating the retroactive effect.

Interestingly, there is one case where the legality of a replacing directive was put to the test because it required implementation with retroactive effect. This case, the Fedesa case, gives important indications as to how the ECJ regards the effects on national law of the invalidity of a directive. It will therefore be discussed below in Section 4, dealing with the case law of the ECJ that comes closest to answering whether there is any European per se rule.

2.3 Interim Conclusion

When looking at different opinions on the consequences of invalidity for national law, both from legal writing and from EC (replacement) legislation, one gets the impression that, at least in some cases, such an opinion represents more a ‘reflex’ than well balanced conceptual thinking. Furthermore, when looking at the response of the Community legislator to the invalidation of its directives it seems that it assumes the worst. Thus, there is ample reason to clarify the obscurity surrounding the invalidated directive and its consequences for national law. In order to achieve that clarity, this study will focus hereafter on first the systematic aspects of Community law (Section 3) and then on the (closest) case law of the ECJ (Section 4).

3 Systematic Aspects of European Law

The question on the relationship between an invalid directive and national law will now be addressed as a matter of EC law itself. I will first look at the ‘general’ system of EC law and form on that basis a hypothesis. Logically, such a hypothesis starts with looking closely at Article 249 EC defining

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22 Or, in accordance with the first ‘angle’, to the fact that national laws implementing the old directive had remained in force.

23 C-331/88 The Queen v. The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte Fedesa.

24 This time the preamble did not contain any justification for its retroactive implementation requirements, as the other, previously mentioned reparation directives did. The validity of the ‘repair’ directive was also attacked because of the fact that no new opinion of the European Parliament was issued on it and that there was no new Opinion of the ECOSOC. The opinion of the Parliament may be found in OJEC C 288/158 (11 October 1985) and of the ECOSOC in OJEC C 44/14 (13 December 1984). The Second Hormones Directive dated 7 March 1988.
the legal instrument that is the directive. Furthermore, attention will be given to Article 81(2) EC, a Treaty provision sanctioning directly within the national legal systems of the Member States and, very importantly, I will look at the consequences of national law conflicting with (valid) EC law.

3.1 Article 249 EC as the Basis of a Hypothesis

A non-exhaustive list of types of EC acts is provided for in Article 249 EC. It seems logical that one takes this Article as point of departure whenever a new legal question arises concerning the European directive since it expresses its basic concept:

"A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."  

The distinctive feature remains the "choice of form and methods" that is left to the Member States. Even though the European legislator may render the distinction with regulations blurred (the phenomena of 'pseudo' regulations and 'pseudo' directives have already been pointed out), the concept of the directive remains that of an instrument leaving Member States as much discretion as possible where its insertion into national law is concerned. Irrespective of a directive's comprehensiveness and possible direct effect, it always has to be implemented into national law. Of course, there is direct effect, rendering at times inapplicable conflicting national law, in case the directive's provisions are sufficiently clear and precise. But it will still have to be national implementation that ensures the applicability of directives in 'horizontal' situations, that is between individuals. Furthermore, a directive cannot by itself create powers on the national level for any authorities to execute the directive's provisions and apply them to individuals. For that some basis in national law will always be required as is dictated by the principle of legality, a principle common to the legal systems of the Member States. In that sense, the classic Faccini Dori case, discarding as a principle the horizontal application of a directive, may be regarded as propagating the principle of legality. By contrast, on regulations,

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25 A definition not basically altered by the Treaty establishing a Constitution for Europe (TCE), see Chapter 1, 'Introduction'.
26 See for example Articles 3 and 4 of Directive 92/5/EEC, see also Steyger (1997), p. 31.
27 One could say that the directive imposes a principle of legality upon the Member States, this would then be a European principle of legality referring, however, to the various national principles of legality of the Member States.
28 As was also stated by Jans and Others (2002), on p. 50. See C-91/92 Paola Faccini Dori v. Recreb Srl.
one may find the idea propagated that these can 'bypass' this principle,29 but not as regards directives. Prechal illustrates it well by stating that:

"The directive is a source of rights and duties. In principle, however, it is an indirect source in the sense that it is the origin of rights and obligations laid down in national legislation (emphasis added)."30

Thus, the concept of a directive is based on the idea of two separate spheres. Although the doctrines of direct effect, consistent interpretation and state liability for failure to implement have brought these two spheres much closer, they remain separated. In situations where directives do not produce any direct effect, in 'horizontal' situations and in situations where national authorities want to apply them to citizens (‘inversed vertical’ situations) the ‘dual nature’ of the directive is most visible. The concept of a directive as separate from its implementing law still stands as long as it remains an instrument requiring implementation in order to have the full national effect.

The duty that Article 249 EC imposes upon Member States to implement a directive into their domestic legal orders implies that, naturally, the Member States posses the power to do so. This may seem like kicking in an open door, but it is nevertheless relevant to establish the theoretical basis of this national power to implement Community directives. There are three basic concepts that one could imagine to be serving as a frame of reference for identifying the power of the Member States to adopt these measures: that of delegation, attribution and originality.

Of these possibilities, that of 'delegation' is the most interesting. If one were to qualify the national power to adopt measures implementing Community law as a 'delegated' power, this must have implications for the question of the consequences of invalidity of an implemented directive. It is a very basic element of the legal figure of delegation that if the delegating act is rendered invalid, subsequent acts based thereupon are, in principle, 'ultra vires'. However, the concept of delegation does not apply to the national implementation of directives due to another very basic element of the figure of delegation. That is the principle of 'nemo plus delegare potest quam ipse haberet': one cannot delegate powers one does not have oneself. The European legislator himself simply cannot implement a directive into national law.31 Since such power is thus never transferred to the Community level, it must be deemed to have never left the domestic level. And,

49 See Steyger (1996), although that is not without critique, as may be found in for example Besselin and Others (2002). See also Section 5.1 on the consequences of the invalidity of a regulation.
31 It can only repeal a directive and lay down its contents in a regulation, assuming the appropriate legal basis provides for that option. If the legal basis does not provide such option, 'quasi regulations' are more likely to arise.

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vice versa, if the directive never 'delegated' any legislative powers to the Member States, no such powers can be said to 'shift back' to the Community, rendering the national measures that were adopted *ultra vires* as a matter of EC law.

One could extend the discussion on delegation by adding that under certain legal Treaty bases, such as Article 95 EC (internal market), the Community legislator is attributed the power to adopt 'measures', indicating he has received the power to adopt, at his own choice, regulations or directives in order to legislate on a certain topic. If the Community legislator adopts a directive where he could have adopted a regulation, can one then say that the EC has delegated the power to chose 'forms and methods' to the Member States? Admittedly, the national authorities would have been precluded from adopting implementing measures in case the Community legislator had chosen a regulation instead of the directive.

Yet, it goes too far to conclude that in such circumstances, national measures implementing a directive (that could also have been a regulation) must be qualified as measures adopted under delegated powers. Also when he would have adopted a regulation, the Community legislator has not got the power to adopt all measures necessary for the good operation of a regulation. This is especially so in the context of criminalization or of legal protection. As will be demonstrated below, also those national measures must be deemed to be based on national law (see Section 5.1). But more importantly, not using a given political power (to adopt a regulation) does not mean that national discretionary powers that arise as a result thereof are necessarily to be considered 'delegated'.

It follows that delegation seems at first sight an incorrect term to conceptualise the relationship between a directive and national implementation law. Establishing this can serve as the theoretical basis that, as a matter of EC law, there are no consequences *per se* for national law since EC law does not regard such national laws to be *ultra vires* in case the directive they implement proves invalid. In terms of 'authority', EC law cannot be said to attribute to directives the 'authority' of being a delegating act within the Member State legal systems. Thus, the power to adopt national measures implementing a directive is conceptually 'vested' in the Member States themselves, not in the directive.

The second concept to look at is that of *attribution*. One could argue that the Treaty attributes the power to implement directives to the Member States (under Article 249 EC). However, behind the attribution lies the basic idea that whenever a constitution (such as the EC and EU Treaties) attributes to organs or entities certain powers, it implies that these organs or entities did not posses such powers before (otherwise attribution would not be necessary). Attribution creates powers *ex nihilo*.

Obviously, Member States' powers to legislate are not created *ex nihilo* for they have (always) been endowed with them prior to the entry into force of the EC Treaty.

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122 See the general remarks on the figure of attribution, Kortmann (2001), p. 35.
The best qualification of national power to adopt implementing measures is to perceive it as a power that originates with the Member States. Such a concept is for example suggested by Hartey who makes a distinction between ‘delegation’ and ‘direction’. Under ‘direction’, Member States are to exercise their own powers in a particular way, the directive being the example par excellence of this type of governance. A logical corollary to that originality of lawmakers is that from the perspective of EC law, national measures are not automatically ultra vires as a result of the invalidity of the directive. A European per se rule would not fit into such a concept, at least not a European per se rule that is based upon any concept of delegation, rendering national implementing measures ultra vires in case the directive proves invalid.

In conclusion, Article 249 EC provides the first indication for what will be the hypothesis for this chapter: that the effects of the invalidity of a directive are determined, in principle, by the national (constitutional) law of the Member States. In the following sub-chapters some other systematic aspects of Community law will be looked into in search for arguments to strengthen this hypothesis. If the hypothesis is proven wrong, the question of whether one can qualify national powers to adopt implementing measures as ‘delegated powers’ may of course be re-assessed.

3.2 National Discretionary Powers: The Problem of ‘Extraction’

When Member States exercise discretion in implementing directives, such discretion is not limited to the choosing of the form (for example on the level of legislation: primary or subordinate) but it usually also extends to content. The latter type of (substantial) discretion left to Member States is particularly interesting when discussing the consequences of invalidation of a directive. The more substantial discretion left to Member States, the more national implementation law can be said to have a ‘national character’ in the sense that it contains political choices not dictated by the directive.

When discussing the validity of such directives leaving some amount of discretion to the implementing authorities, the question of validity of national law becomes particularly intriguing. If one argues that it would be for European

34 It may be added that one also would come to the same conclusion if one were to regard these measures as based upon attributed powers.
35 Also when dealing with national legislative measures, implementing regulations, the question of conceptualisation of national legislative powers in terms of ‘delegation’ becomes again relevant.
36 As opposed to ‘formal discretion’ embedded in the choosing of ‘form’ in the terms of Article 249 EC.
37 More on this subject in Chapter 5 where this aspect of directives is related to the question whether it is appropriate to ‘economize’ on national legislative procedures used for the implementation of (minimum harmonization) directives.
law to determine the consequences per se of the invalidity of the directive, one would have to face the difficulty that the national measure implementing the directive will partly reflect what is dictated by the directive and partly reflect what one could call ‘autonomous’ decision-making. How is one supposed to deal with this ‘purely national’ component of the implementing measure in terms of a European per se rule? Fact is that these national provisions with either a ‘Community character’ or a ‘national character’ will often be inextricably intertwined. Most clearly can this be illustrated by looking at a particular type of directive that always leaves Member States with considerable discretionary powers: the directive providing for minimum harmonization.

Take for example a directive introducing as a minimum norm that surface water cannot be polluted with more nitrates than 50 milligrams a gallon. If national law introduces at the occasion of the implementation of this EC directive a stricter norm of 25 milligrams per gallon, and the directive is later annulled, one is faced theoretically with a national law introducing a pollution norm that is for 50% autonomous and for 50% of a Community nature. If one would argue that the ‘Community component’ in the national law is invalid as a consequence per se of the annulment of the directive, how would one deal with the fact that the national and Community component are inextricably intertwined in one and the same national legislative provision?

In conclusion, it seems that if one would derive from Community law a rule providing that the invalidity per se of a directive renders a national implementing law invalid, one would have to account for the problem of ‘extraction’. Whenever directives leave Member States a degree of national discretion in terms of content, there necessarily is a ‘national component’ in the implementing measure that is arguably not affected by the invalidity of the directive.

3.3 Implementation Through Existing Law

As it seems unlikely that national implementation law would have to be extracted from ‘autonomous’ provisions under an assumed European per se norm, it is equally difficult to imagine that under such rule, national law existing already prior to the directive, would be affected by the invalidity of the directive.

It is important to realise that, although in many cases a Member State has to enact new legislation in order to comply fully with the directive, the implementation of the directive is most of the times, in full or in part, ensured by pre-existing national law. For example, the implementation in The Netherlands of Directive 93/13/EEC on unfair terms in consumer contracts. This Directive was completely ‘covered’ by the pre-existing Dutch civil code. See also Ministerie van Justitie, 101 praktijkvragen over de implementatie van EG-besluiten, Sdu Uitgevers, Den Haag, 1998, on p. 54. It is very common that national implementation consists of a
combination of pre-existing and new legislation. One could think in particular of national legal provisions in the fields of legal protection and law enforcement that directives require; these requirements are usually dealt with by pre-existing national provisions. Pre-existing legislation in these cases forms part of the entire national legislative complex that is the 'implementation' in terms of Article 249 EC.

For example some of the provisions of the Tobacco Advertising Directive were already implemented by Luxembourg by means of a statute. Consequently, the Luxembourg Government had already notified the Commission of this Act prior to the annulment of the Directive. Obviously, the annulment had no effect for this Luxembourguen statute.

Pre-existing legislation is by definition ‘autonomous’, emanating from national political considerations and not dictated by the directive. Although the directive definitively affects such legislation in terms of sperrwirkung or of interpretation, it played no role in the (process of) adoption of this legislation. As stated in the previous section on ‘autonomous’ components within the implementing measures adopted pursuant to the directive, a fortiori also pre-existing ‘autonomous’ legislation would seem unaffected by a hypothetical European 'per se' rule.

3.4 EC Law and Conflicting National Law: A European ‘Minimum Sanction’

When looking into the systematic aspects of EC law, one should also consider those aspects that concern the status of national law infringing EC law. Also, this jurisprudence allows deductions from the 'system' of EC law that are instructive on how the Community Constitution defines the relationship between directives and their implementation. The difference is of course that now the 'status issue' is not triggered by the invalidity of a directive but by the incompatibility of national law with, valid, EC law. The situation can be said to 'mirror' that of national law implementing an invalid directive.

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39 A specific problem which then arises for legislative draftsmen in this respect is what to do with the duty to refer. See Veltkamp, B.M., *Implementatie van EG-milieurichtlijnen in Nederland*, Kluwer 1998, on p. 89 and further.

40 In The Netherlands, one can think of the General Administrative Code (Algemene wet bestuursrecht) for implementing such requirements of legal protection and of the Economic Offences Act (Wet Economische Delicten) for law enforcement.

41 When Member States inform the Commission of the implementation they have adopted, something they are required to do under a standard clause that is incorporated in every directive, they must provide it with all the relevant national implementation law, either new or pre-existing.
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Yet, the similarity lies in the fact that the consequences for national law infringing EC law also boil down to defining the status of the former and the question who decides upon that status. It may therefore prove interesting to see if the conflict of national law with, valid, EC law teaches us anything on the relationship between these two legal orders from the point of view of EC law.

3.4.1 Non-Existence of National Law?

As early as in 1968 the question arose before the German Finanzgericht whether or not German tax laws that were infringing Article 90 EC (the prohibition to impose higher tax burdens on imported products than on domestic products) were to be regarded 'null'. From this case, the Lück case,\(^4^2\) it became clear that the ECJ did not regard the German tax provisions, as a matter of EC law, null and void.\(^4^3\) The ruling in Lück was later reaffirmed in the IN.CO.GE. case in which again the question arose on the consequences European law draws from the conflict between national law and directly effective European law.\(^4^4\)

The case concerned a provision in Italian law imposing on enterprises a fee for registering in the register of commercial enterprises. This Italian law contravened a directly effective provision of Directive 69/335/EEC\(^4^5\) concerning indirect taxes on the raising of capital. Companies who had paid these fees now reclaimed them from the Italian State.

However, national procedural law on the retrieval of money distinguished between claims of a fiscal nature and claims of a civil nature granting a more relaxed term for bringing proceedings to civil claims. Since these claims were regarded under Italian law as being of a fiscal nature, the companies that had paid these illegal contributions were in a far worse position than if the argument would be classified as of a civil nature.

Particularly interesting in this context is the argument of the Commission. It contended that the Italian fiscal law imposing the fees had become 'non-existent'\(^4^6\) as a result of its being in conflict with a directly effective provision of the Directive at issue. Thus, the legal relationship between the companies and the Italian State could no longer be governed by provisions of Italian tax law for the latter did not exist anymore within the Italian legal order. Consequently, the more favourable provisions applicable to civil law claims were applicable.

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\(^4^2\) See Case 34/67 Lück.
\(^4^3\) See the Court's ruling in Lück on p. 251. See also Vermuele n (2001), p. 85 en 86.
\(^4^4\) Joined Cases C-10/97 to C-22/97 Ministero delle Finanze v. IN.CO.GE.\(90\) Srl And Others.
\(^4^5\) As established earlier in Joined Cases C-71/91 and C-178/91 Ponente Carni.
\(^4^6\) Non-existence as the term is mentioned here is of course not to be confused with the same term as applied by the ECJ to Community acts.
The ECJ, rejected the Commission’s argumentation, stating that “It cannot (...) be inferred from the judgment in Simmenthal\(^{47}\) that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering that law non-existent. Faced with such a situation, the national court is, however, obliged to disapply that rule” (emphasis added).\(^{48}\) Consequently, it was further determined by Italian law whether or not the legal provisions were indeed non-existent because of their infringement of EC law.\(^{49}\)

A case such as \textsl{IN.CO.GE} demonstrates the standard case law that the ECJ does not attach any further consequences to the infringement of EC law other than the ‘non-applicability’ of the national law that causes the infringement.\(^{50}\) That does not rule out that such national law is indeed rendered ‘non-existent’ (as the Commission contended in \textsl{IN.CO.GE.}) as long as it is clear that such status of non-existence follows from national law itself, not from EC law.

The \textsl{IN.CO.GE.} case has demonstrated the practical differences between ‘non-applicability’ and ‘non-existence’. Another example of such a practical difference could be derived from the problems concerning ‘notification’ of technical regulations to the Commission under the Notification Directive. In case a national provision withdraws a technical regulation, that provision is itself a ‘technical regulation’ and must be notified according to the Notification Directive. If it is not notified, the EC minimum sanction of ‘non-applicability’ kicks in. The measure is, however, not non-existent which means that probably in most national legal systems the earlier national provision it withdrew, does not ‘revive’. For that to happen, national courts or legislators must annul respectively withdraw the non-applicable regulation.\(^{51}\)

The sanction imposed by Community law upon national law must be regarded as having a ‘minimum’ character. Further reaching consequences for the status of national law, if any, are a matter of domestic law. At one point, during the Intergovernmental Conference on Political Union in 1990 there was a sugges-


\(^{48}\) See paragraph 21 of Joined Cases C-10/97 to C-22/97 \textsl{IN.CO.GE.}.

\(^{49}\) See paragraph 29 of Joined Cases C-10/97 to C-22/97 \textsl{IN.CO.GE.}: “Any reclassification of the legal relationship established between the tax authorities of a Member State and certain companies in that State when a domestic charge subsequently found to be contrary to Community law was levied is therefore a matter for national law.” See also Jans and Others (2002) on p. 119-120.

\(^{50}\) At this point, a parallel could be drawn with sanction mechanisms under other Treaty regimes. Under the European Convention on Human Rights (ECHR), the status of national law violating the ECHR remains intact. The violation (only) leads to a duty for national authorities to compensate for any damages, see Article 41 ECHR. See also Kooijmans (2002), p. 369.

\(^{51}\) See Steyger (1997), on p. 69.
tion to grant the ECJ the power to strike down national law infringing the Treaty but that proposal did not fly very far.\textsuperscript{52}

The fact that the Court can only pronounce 'non-applicability' of national law is by no means altered by the observation that Community law does impose upon Member States the duty to amend or withdraw the conflicting, 'non-applicable' domestic law.\textsuperscript{53} In fact, such duty presupposes that the national law is not, from a Community perspective, 'erased' from the national legal order. EC law respects the 'institutional autonomy' of the Member States in these matters and the status that national legislation may still retain under national (constitutional) law. At this stage, the opinion of Advocate General Fennelly in the \textit{Lemmens} case may be quoted.

The \textit{Lemmens} case concerned, as in the earlier \textit{CIA Security} case, a situation in which a national technical requirement was not notified under the Notification Directive.\textsuperscript{54} The Dutch authorities had not notified the Commission of regulations for the approval of breathalyzers analysers. Mr Lemmens was stopped at a Dutch motorway and underwent a test with one of these analysers and was found drunk. Criminal charges were instituted against him for driving under influence based on the evidence that was provided by this breathalyzer. Mr Lemmens argued in these proceedings that the proof delivered by the breathalyzer could not be used against him because Dutch technical regulations on the testing of breathalyzers were never notified to the Commission under the Notification Directive.

Thus, the formal status of Dutch provisions governing breathalyzers became relevant. At this point Advocate General Fennelly reasoned that "the consequence of the non-notification of a technical regulation is that a Member State authority may not enforce this against individuals. It does not follow that non-notified technical regulations are inapplicable for all purposes, and hence in effect null and void; such a consequence would only arise if the Community had a power to annul provisions of national law. Such a power has never been claimed by the Court"(emphasis added).\textsuperscript{55}

This statement of Advocate General Fennelly fits perfectly with the reasoning of the ECJ in cases as \textit{Lück, Simmenthal} and \textit{IN.CO.GE.}\textsuperscript{56} However, the consequent

\textsuperscript{53} See Case 167/73 \textit{Commission v. France}. A duty that would otherwise be automatically complied with if national law would indeed attach to the infringement of Community law the sanction of non-existence.
\textsuperscript{54} See C-226/97 \textit{Johannus Martinus Lemmens}.
\textsuperscript{55} See paragraph 25 of the Opinion of Advocate General Fennelly in C-226/97 \textit{Johannus Martinus Lemmens}.
judgment of the Court in Le mmens calls for a closer look because it also brings up another question: that of the exact scope of the EC-concept of 'non-applicability'.

3.4.2 Delimiting ‘Non-Applicability’

The Le mmens case can be regarded as the follow-up of the CIA Security case. The latter case made clear that the Notification Directive had direct effect. Thus, a national (Belgian) legislative provision imposing technical requirements that were not notified was ‘non-applicable’ and could consequently not be imposed upon private individuals.57 So far this case is not any different from the already mentioned IN.CO.GE case: the formal status of the national legislation is determined by national law.58 However, one may wonder whether in the later Le mmens case the ECJ did not intend to attach further sanctions to the national law conflicting with EC law. If that were so, one may then ask the question how that relates to the division of competences between the ECJ and the Member States (in particular the national courts) with regard to the formal status of national legislation.

In the Le mmens case the ECJ, following Advocate General Fennelly, starts by reiterating in the first place the ‘minimum character’ of the European sanction of non-applicability of national provisions in conflict with EC law.59 However, it seemed to go further by stating that the non-applicability of the Dutch regulations for the approval of breathalyzers did not result in a situation where every use of a product that complied with un-notified regulations was illegal:

“While failure to notify technical regulations, which constitutes a procedural defect in their adoption, renders such regulations inapplicable inasmuch as they hinder the use or marketing of a product which is not in conformity therewith, it does not have the effect of rendering unlawful any use of a product which is in conformity with regulations which have not been notified.”60

Thus, the Court seemed to dictate the exact consequences of ‘non-applicability’ of a national law within the domestic legal order, thereby violating the principle of ‘institutional autonomy’ of the Member States. The ‘non-applicability’ of the

57 See paragraphs 53 to 55 of C-194/94 CIA Security SA v. Signalson SA and Securitel SPRL.
58 See Steyger, E., Het belangveriste in verband met de inroepbaarheid van richtlijnen, beschouwing naar aanleiding van het Securitelarrest, RegelMaat, 1997, p. 67 (69).
59 See paragraph 33 of C-226/97 Le mmens. See also paragraph 25 of the Opinion of Advocate General Fennelly for this case, who stressed that non-compliance with a procedural obligation as the notification of a technical regulation had the same consequences as non-compliance with a more ‘substantial’ obligation arising from a directive.
60 See paragraph 35 of C-226/97 Le mmens.
Dutch law on the approval of breathalyzers did not amount to the situation that the breath tests executed with such analysers could not be used as criminal evidence in national proceedings, as a matter of EC law.

Of course, there is a lot to be said for the ruling of the ECJ not in the least because the national legislative provisions Mr Lemmens was confronted with, were not the Dutch technical regulations on breathalysers, but the Dutch law on traffic regulation (Wegenverkeerswet), containing the norm that one cannot drive a car while under the influence of alcohol. Yet, despite this logic, the question remains what this teaches us about the 'jurisdiction' of the ECJ in relation to the status of national legislation, in particular its scope. Is it not reserved to the Dutch legal order to determine the exact legal consequences to which the non-applicability leads?

This idea is strengthened by the fact that the Dutch Supreme Court (Hoge Raad) had rendered in an earlier case, very similar to the Lemmens case, a judgment with the same outcome as that of the ECJ in Lemmens.61 However, the Dutch Supreme Court came to this judgment without posing a preliminary question on the consequences of 'non-applicability'.62 The reason it refrained from posing preliminary questions may very well have been that it regarded the issue as one of national law.63

Yet, the question whether the Lemmens case requires a re-assessment of the earlier conclusion as to the division of competence between the Member States and the EC with regard to the status of national law conflicting with EC law must be answered negatively.64 For what the ECJ did in a case such as Lemmens must be considered as interpretation. The sanction of 'non-applicability' may be minimum, its origin is in Community law and consequently the ECJ is competent to interpret it and delimit its scope. In the Lemmens case too, the ECJ does not take a stand on the formal status of national legislation. It only limits a possible 'snowball-effect' that European 'non-applicability' could have within the national legal order.

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62 The Commission was of the opinion that by not posing such a preliminary question the Dutch Supreme Court (being obviously the court of highest instance in The Netherlands) had made The Netherlands violate its obligations under Article 234, last paragraph, EC. See OJEC 1998, C 250/196.
63 See also Mortelmans, K.J.M., 'Dronken rijders: de Securitel-test verduidelijkt of niet?', AAr 1998, p. 905, paragraph 15: "Of het probleem van de inroepbaarheid van de niet-aanmelding naar nationaal recht, Europees recht dan wel een combinatie van beide rechtsstelsels moet worden benaderd wordt niet duidelijk."
64 See also Mortelmans (1998): "The Lemmens case does not lead to a general theory on the consequences of failure to notify" (translation by author).
3.5 The Parallel with Competition Law

When looking at the consequences for national law that result from an infringement of EC law there is one Treaty article that catches the eye: Article 81(2) EC. This, directly effective, provision regards agreements between undertakings and decisions of associations of undertakings that conflict with EC competition rules. It spells out a very clear and direct sanction for those agreements and decisions:

"Any agreements or decisions prohibited pursuant to this Article shall be automatically void."

This sanction of being void imposed upon a national act with retroactive effect seems a-typical for the Community legal system. Here EC law seems to penetrate further into the national legal order, going beyond mere 'non-apPLICability'.

Yet, Article 81(2) EC is less a-typical than it seems, for one is not dealing with national legislative provisions but merely with contracts or decisions. The latter depend for their enforceability on national (contract) law. What Article 81(2) EC does, is to lift the binding effect national (contract) law would normally attributes to them. Therefore, the 'penetration' of Article 81(2) EC into the national legal order has the effect of rendering inapplicable national contract law to a particular contract or decision. The fact that the contract or decision is void results from Article 81(2) EC, incidentally rendering non-applicable national contract law. Thus, the sanction of Article 81(2) EC in relation to national legislation (non-apPLICability) is the same as that imposed by EC law upon national legislation outside the sphere of competition law.

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65 Case 127/73 Belgische Radio and Televisie et Société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior.
66 In the Dutch language version: “De krachtens dit artikel verboden overeenkomsten of besluiten zijn van rechtswege nietig.”
67 As first clarified by the ECJ in Case 48/72 Brasserie de Haecht II.
68 In any case, ‘non-applicability’ is hard to imagine with contracts infringing Article 81(1) EC. It would presuppose that the contract, although violating 81(1) EC, would remain applicable in ‘other situations’ where it would not conflict with 81(1) EC. Such other situations do not exist since the contract, through its very existence, will always be infringing Article 81(1) EC. By contrast, the non-applicability of national law leaves open the possibility that it could still be applied to situations where EC law is not infringed.
69 With the difference that in this case, there is of course no obligation for national legislators to amend or withdraw non-applicable national legislation.
Apart from these considerations it may also be added that even this EC sanction of being void does not cover comprehensively the status of national contracts or decisions. EC law leaves it to the Member States and their domestic (contract) laws to determine the precise further national consequences of the European voidness ex Article 81(2) EC. An important example is the issue of severability.\(^70\) When a contractual provision is void for infringing Article 81(1) EC, it us up to national law to regulate how that affects the validity of the remains of the contract.\(^71\) Whether the rest of the contract is regarded as retaining enough substance to continue its ‘legal life’ is up to national (case) law.\(^72\) Even a Community sanction that seems to strike directly upon the national legal order has its limits.\(^73\)

3.6 The a Fortiori Argument

In sum, the ECJ limits the consequences of direct effect and supremacy of EC law on national conflicting law to the minimum sanction of ‘non-applicability’. At the most it assumes the competence to interpret this minimum sanction in cases such as Lemmens. Apart from that, the formal status of national provisions is governed by national law itself. The question that then imposes itself is why the Court would be authorised to pronounce itself on the status of national law implementing an invalid directive when it has never claimed such power vis-à-vis national law conflicting with EC law.

In relation to this question, it must be stressed that there is an important difference between the invalid directive scenario and that of national law infringing EC law. The latter scenario deals with a conflict, while in the former scenario that remains to be seen.\(^74\) However, it is the conflict in the first scenario that necessitated ‘non-applicability’ as a European (minimum) sanction. Non-applicability as a sanction ensures the effectiveness of Community law. Ensuring that effectiveness has always been the traditional justification for watering

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\(^70\) Another example could be that of the procedural rules governing the retrieval of goods delivered under a contract that later appeared void ex Article 81(2) EC.

\(^71\) See Case 319/82 Société de Vente de Ciments et Betons de l’Est v Kerpen & Kerpen.

\(^72\) See Goyder, D.G., EC Competition Law, Oxford Law Library, Third Edition, p. 156. See also C-234/89 Delimitis, par. 48. Also, national law could provide for certain rules as to conversion of the contract.

\(^73\) Although the main rule is thus that the further consequences of the European sanction of being void are determined by national law, EC law does provide that among those national consequences there must be a possibility offered (or at least not beforehand denied) to contract parties to claim damages when that contract has proven void ex Article 81(2) EC, see C-453/99 Courage Ltd v. Bernard Crehan. However, as Komninos pointed out correctly, these Community-based damages are a result of Article 81(1) EC, and do not derive from the nullity provision ex Article 81(2) EC, see also Komninos, A.P. New prospects for private enforcement of EC competition law, Courage v. Crehan and the Community right to damages, CML Rev., 2002, p. 447 (473).

\(^74\) Such ‘conflict’ is only imaginable if one were to accept a per se rule in Community law.
down national institutional autonomy. However, whether national law needs to be sanctioned when it implements an invalidated directive is questionable for it presupposes a conflict which is not evident.

For these reasons, an important a fortiori argument can be derived from the case law on national law conflicting with EC law. Since, in case of a conflict, EC law does not govern the formal status of national law, it a fortiori does not govern such status of national law implementing an invalidated directive as in such case there is not necessarily a conflict. Thus, it is obvious that a hypothetical per se rule in EC law could result in no more than the ‘non-applicability’ of national law.

But even such hypothetical non-applicability of national implementation of an invalid directive would be questionable for where is the conflict? In the absence of any other norm of EC law that would lead to conflict, it would have to be the per se rule itself from which the conflict springs. If the situation of national law transposing an invalidated directive is not deemed to be a situation of conflict, the ECJ will declare itself categorically incompetent to rule on such status.

Such incompetence is evident from for instance the Borelli case, where there was no direct conflict between national law and Community law. Cases as Borelli concern the incompetence of the ECJ to rule on the validity of national acts upon which a Community act is (indirectly) based. In Borelli it happened to be a decision of the Regional Council of Liguria that led the Commission to adopt a decision refusing to Borelli certain Community-financed funding. The validity of such national act, even though it represents a crucial step in the Community decision taking process, is beyond the powers of review of the ECJ.

Another good example in a totally different area of law, that of access to documents, is the Messina case. Mrs. Messina a student of the University of Napels, requested from the Commission under Council regulation 1049/2001 access to correspondence between the Italian authorities and the Commission on state aid. Under Article 4(5) of the Regulation, Member States may object

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75 An impressive illustration is Factoritame in which the ECJ held that a British judge, contrary to the British principle of constitutional law of Sovereignty of Parliament, had to have the possibility of setting aside temporarily an Act of Parliament when there were strong suspicions that it was infringing Community law. See C-213/89 R. v. Secretary of State for Transport, ex parte Factoritame.

76 See the judgment of the Court in C-158/80 ‘Butter cruises’, in which a regulation was declared invalid that was ‘implemented’ into German law and in which it was stated that the German implementing measure had become ‘non-applicable’.


78 As explained in Chapter 3, paragraph 2.3.3.3 the ECJ has ruled in the same case that as a corollary of the incompetence of the ECJ to review such national acts, the Community principle of effective legal protection requires that on the national level remedies are available against such acts.

to such disclosure of ‘their’ documents. One of the issues that arose in this case before the CFI was whether the decision of the Italian authorities to inform the Commission that it could not disclose the correspondence to Mrs. Messina was in accordance with Italian law. The CFI, not surprisingly, declared itself incompetent to make any statements on that matter.

The Borelli and Messina cases form part of an established line of ECJ jurisprudence.\(^8\) These cases do not relate to national law implementing an invalid Community act, rather they refer to the ‘implementation’ of a possibly invalid national act in Community law. Yet, these cases definitely concern national acts that are indirectly triggered by Community law and in that sense within the ‘sphere’ of EC law. Yet, they do not conflict with EC law and the ECJ is therefore incompetent to rule on their “applicability”.

### 3.7 Interim Conclusion

From the systematic arguments mentioned above, derived from the general system of the EC Treaty, the solid hypothesis emerges that, at least as a ‘rule of thumb’, there is no European per se norm, dictating what should happen to national law implementing a directive that has proven to be invalid. Such a norm seems to conflict in the first place with the concept itself of the directive that, as a legal instrument, relies upon Member States’ original power to adopt the measures necessary for implementation. Secondly, the Treaties, Article 81 (2) EC included, respect national autonomy as to the status of national law if the latter infringes EC law. A fortiori, it may be expected to respect such autonomy in a scenario where national law implements an invalidated directive. Furthermore, the practicalities of such a hypothetical per se norm would be maddening, since one would have to deal with questions as what to do if the national provision is partly of an autonomous nature in the sense that it partly expresses purely the will of the national legislator. A European per se rule would also have to provide for an answer as to what would happen to national implementing law pre-dating the invalidated directive.

In the following subchapter, this hypothesis is put to the test by looking at the case law of the Court that comes closest to answering the question as to the consequences for national law triggered by the invalidity of the underlying implemented directive.

\(^8\) See also T-22/97 Kesko, paragraphs 82-83 and Case C-8/88 Commission v. Germany.
4 Testing the Hypothesis: Case Law

In resolving the question of the consequences per se of the invalidity of a directive from the point of view of EC law, a small number of cases come close to addressing the issue. Even though none of them settles the matter a such, when they are read in combination they seem conclusive especially when considering that they all point in the same direction even though their context is quite different. The first case, Fedesa, concerns the implementation of a directive with retroactive effect into national law. The Angelopharm case, the only case in which a directive was declared invalid in preliminary reference proceedings, concerned the relationship between an invalid directive and national law predating that directive. The Eurotunnel case is set against the background of a 'horizontal relationship' between two competing undertakings and finally, the Biotechnology Order regards interim relief by the President of the ECJ against an invalid directive.

4.1 The Fedesa Case and the Two Hormones Directives

The Fedesa case81 concerned the rather peculiar Second Hormones Directive. This Directive 'repaired' the legal situation that was established by the First Hormones Directive,82 annulled earlier by the Court.83 This Second Hormones Directive, having the exact same contents of its predecessor, including the same implementation deadline, required Member States to implement it retroactively.84 Consequently, Fedesa, a large association of users of certain hormones, argued before the High Court of England and Wales the invalidity of this Directive inter alia because of the retroactive effect it required from national implementation legislation. It concluded that, because the Second Hormones Directive was invalid, the British statutory instrument that implemented it was invalid too.85

The argument that the Second Hormones Directive required the Member States to implement it with retroactive effect was contested by several parties in this case. It is there that the whole issue of an EC per se rule emerged: if the invalidity of the First Hormones Directive would lead to the invalidity per se

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81 C-331/88 The Queen v. The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte: Fedesa and Others.
83 Case 68/86 United Kingdom v. Council.
84 See Article 10 of the Second Hormones Directive. It is standard case law of the EC that European acts may, exceptionally, operate retroactively. Case 98/78 Racke, paragraph 20, Case 99/78 Decker, paragraph 8 and C-368/89 Crispoloni, paragraph 17.
85 See paragraph 2 of the Court's judgment in C-331/88 Fedesa.
of the national implementing measures, than there is a legal vacuum and the Second Hormones Directive, filling that vacuum, can indeed be said to force Member States to implement with retroactive effect. Retroactive effect would only be at stake when one is held to comply with national provisions sanctioning behaviour that was not sanctioned before because the national law implementing the earlier, annulled, directive was not applicable anymore as a result of that annulment. However, if the consequences of invalidity of the First Hormones Directive were left to be determined by national law, there would not necessarily be such a legal vacuum nor a requirement to legislate with retroactive effect.

In this respect the observations submitted by the Council are interesting for it clearly argued that the consequences for the national legal order are determined by national law. Thus, because it held the situation to be governed by national law, it did fear a possible legal vacuum resulting from national law and by reference to such a possibility stressed the importance of European legislation preventing any possible national legal vacuum:

“in so far as the continued validity of these national provisions depended on the existence of a valid directive” (emphasis added). 86

If the Council were of the opinion that there was a European per se rule, it would have used a word as ‘since’ instead of ‘in so far as’. Also the Italian Government rejected any per se rule:

“The national implementing measures, that are not directly affected by the annulment of Directive 85/649/EEC, were already in force at the time of the adoption of the Second Hormones Directive” (emphasis added). 87

Advocate General Mischo aligns his Opinion with that of the Italian Government and the Council. In his eyes, it depends on the nature of the implementing measure whether the annulment of the directive has the effect of creating a legal vacuum at national level. 88 Finally, also the ECJ acknowledges that the invalidity of the First Hormones Directive has no consequences per se for national law. This can be inferred from the fact that it takes into account the possibility that national legislation implementing the annulled First Hormones Directive is void and proceeds by stating that, consequently, the Second Hormones Directive:

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86 See paragraph 75 of the Opinion of Advocate General Mischo.
87 Both opinions can be found in the Report for the Hearing, p. I-4040. I rest my case when it comes to arguing the use of publishing such reports.
88 See paragraph 65 of the Opinion of Advocate General Mischo.
“may not provide a basis for criminal proceedings instituted under provisions of national law which have been adopted in implementation of the annulled directive and whose sole basis is to be found in that directive” (emphasis added).

There is one ambiguity in this statement. It may be interpreted as recognising that the invalidity of national law as a consequence of the invalidity of the directive is a matter of domestic law.\textsuperscript{89} If that is the case under domestic law, and there is thus a legal vacuum as a consequence of the directive’s invalidity, actions pursued during that vacuum cannot be criminalized by a consequent Second Hormones Directive. However, what makes it a bit ambiguous is that it seems also to promote a rule, namely that national law which is adopted in implementation of a directive that is consequently annulled and whose sole basis is to be found in that directive will always be invalid. It is not quite clear whether this is to be interpreted as a rule with an EC character or that the Court simply refers to the actual situation in which, under British law, the Statutory Instruments implementing the annulled Hormones Directive were indeed void.\textsuperscript{90}

In sum, the \textit{Fedesa} case strongly points to the national level as the level of decision-making as regards the consequences of the invalidity of a directive, yet the issue was only marginally dealt with. One should therefore be cautious not to read too much into it, including in the somewhat ambiguous statement of the Court just mentioned. More instructive would be to read the case in combination with three other cases that point in the same direction: the \textit{Angelopharm} and \textit{Eurotunnel} cases as well as the \textit{Biotechnology Order}.

\section*{4.2 \textbf{The Angelopharm Case: Validity of Pre-Existing Legislation}}

In \textit{Angelopharm}\textsuperscript{91} a German Verwaltungsgericht asked the ECJ whether it could annul under national law a legislative measure that served to implement a directive. The case is rather peculiar since the German legislation that the Verwaltungsgericht was asked to annul was by origin ‘autonomous’ in the sense that it predated the directive and only at a later stage also served to implement a directive.

\begin{quote}
Angelopharm produced a hair growth lotion in Germany. German law forbade the marketing of the lotion for alleged risks it posed to consumer health. Before the Hamburg court had to render judgment, the proceedings lost their purely national character because of the adoption of Directive 90/121/EEC.\textsuperscript{92} This Directive also
\end{quote}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{89} See paragraphs 44 and 46 of the Court’s ruling in C-331/88 \textit{Fedesa}.
  \item \textsuperscript{90} See on British implementation techniques, Chapter 5, Section 2.1.
  \item \textsuperscript{91} C-212/91 \textit{Angelopharm GmbH v. Freie und Hansestadt Hamburg}.
  \item \textsuperscript{92} OJEC 1990 L 71/40.
\end{itemize}
\end{footnotesize}
THE INVALID DIRECTIVE

prohibited the marketing of Angelopharm's lotion and had entered into force while the proceedings before the Verwaltungsgericht were still pending. The Verwaltungsgericht, in the meantime, was so convinced by the arguments of Angelopharm that it asked the ECJ whether it could annul the German national law, despite the fact that in the mean time Directive 90/121/EEC was adopted.

What makes the case extraordinary is that it started as purely national proceedings against a German measure and ended as a case concerning the validity of Community legislation. Angelopharm's original argument was that the prohibition to market its lotion laid down in the German measure was disproportionate because it did not harm public health, thereby relying on higher German law. This argument had nothing to do with the validity of the Directive that was only later adopted. Only in a later phase had Angelopharm put forward an argument concerning the validity of the underlying Directive 90/121/EEC. The Verwaltungsgericht was of the opinion that the arguments of Angelopharm, purely based on national law, were correct and that on that basis alone, it could annul the provisions.

The question of the Verwaltungsgericht whether it could annul national legislation was rephrased by the ECJ as one regarding essentially the validity of the directive. The Court held that such invalidity of the directive would automatically provide the Verwaltungsgericht with the liberty to do with the implementing measure whatever it would see fit:

"The questions referred by the Verwaltungsgericht serve a purpose in the main proceedings only if the relevant provisions of the Directive are valid. If they are invalid (...), the Community directive cannot prevent a national court from examining whether the national regulation can be applied."

The ECJ consequently came to the conclusion that, indeed, the directive infringed an essential procedural requirement and declared it invalid, leaving it up to the Verwaltungsgericht to take it from there. Thus, the case supports the

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93 Namely Articles 26 en 32 of the Lebensmittel- und Bedarfsgegenständegesetz which was of a higher order than the Siebzehnte Verordnung zur Änderung der Kosmetik-Verordnung.

94 Angelopharm claimed that the Directive violated an essential procedural requirement since, for its adoption, the Scientific Committee was not consulted, although such consultation was allegedly obligatory under the Cosmetics Directive, the parent directive of Directive 90/121/EEC.


96 Namely the failure to consult the scientific committee.

97 Who thus gained the liberty to annul the implementing provision for violating a German higher norm that required the legislation at issue to actually be capable of protecting public health. The ECJ consid-
conclusion drawn earlier from the \textit{Fedesa} case that it is national law and national courts that govern the status of national law implementing an invalid directive.

4.3 The \textit{Eurotunnel} Case: An Invalid Directive in a Horizontal Situation

A third case that is of interest is the \textit{Eurotunnel} case.\footnote{C-408/95 \textit{Eurotunnel} SA And Others v. SNAT, CMLR 1998, p. 1205.} Where \textit{Fedesa} and \textit{Angelopharm} concerned vertical relationships, \textit{Eurotunnel} concerned a horizontal situation namely unfair competition proceedings.

\textit{Eurotunnel}, who exploits the famous tunnel between Dover and Calais, commenced unfair competition proceedings against ferry companies operating on the same route. \textit{Eurotunnel} accused them of unfair competition because they sold tickets below cost price. The ferry companies were capable of doing so because of the profits they made by tax-free sales on board of their ships. Selling boat trips at a loss was, according to French competition law, not unlawful, so that Eurotunnel's complaints focussed on the tax-free sale of merchandise on board of these ships. The ferry operators were capable of doing so because French tax law made use of the possibility to exclude from taxes the sale of goods during intra-Community (boat) trips until the 30th of June 1999. This possibility was granted to the Member States by Directives 77/388/EEC and 92/12/EEC.\footnote{Council Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes, OJEC 1977 L 145/1 and Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement, and monitoring of such products, OJEC 1992 L 76/1. Abolishing tax free shopping in inter-Community traffic has proven a very sensitive subject, as was apparent from the attempts to postpone the implementation deadline of 30 June 1999.} \textit{Eurotunnel} held that these two Directives, providing the French legislator with the option to postpone taxing these goods until 1999, were invalid. Consequently, it held that the ferry companies acted contrary to competition law by applying the French law implementing these two, allegedly invalid, Directives.

The case is interesting when it comes to the issue of competence of the ECJ. The ferry companies argued that the ECJ was not competent to answer the preliminary questions on the validity of the Directives and on the consequences such invalidity could have for national (unfair competition) proceedings. They stated that even if the ECJ would declare the Directives to be invalid, such a declaration
could not possibly affect the outcome of the national proceedings since the only thing these companies did was correctly apply national law. Also Advocate General Tesauro, although he eventually held the validity question admissible, conceded that he did not quite see how the invalidity of the directives could be used as an argument against the ferry companies in the national proceedings:

"It goes without saying that, at most, the possibility could be considered of liability attaching to the institution which adopted the directive that was subsequently declared invalid, but not to the State which was under an obligation to adopt the implementing legislation, and still less to an individual who applied such national legislation with its origin in Community law." 

Thus, even though he clearly doubts the relevance of the validity issue for the outcome of the national procedures, he advocated a very marginal approach to this sort of admissibility questions, thereby respecting whatever, bizarre, consequences the national legal systems of the Member States might attach to the invalidity of the Directive. On this matter, the Advocate General was followed by the ECJ. On the relevance of the validity of the Directives for the outcome of the proceedings, and thereby its competence to answer the preliminary questions, the latter stated that, at the least, the invalidity of the two Directives provides the French judge with the possibility to forbid the ferry companies to sell products tax-free:

"it is sufficient for present purposes that if the Directives were unlawful the national court could at the very least order Seafrance to refrain in future from effecting tax-free sales, as Eurotunnel requests" (emphasis added).

The ECJ clearly translates the consequences of the possible invalidity of the Directives in terms of competences of the national courts that then arise.

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100 See paragraph 11 of the Opinion of Advocate General Tesauro.
101 See paragraph 35 of the Opinion of Advocate General Tesauro. Thus, he thinks that, at the most, it could be the Community institutions that could be held responsible for any damages under Article 288 EC.
102 He then concludes, just as the ECJ does later, that the Directives are valid.
103 See paragraph 24 of the Courts judgment. However, see also paragraph 23 in which the Court also seemed to doubt the relevance of the validity issue for outcome of the national procedure.
104 Also in the BAT case, it was argued that the validity question of a directive had not bearings on the outcome of the national proceedings and should thus not be answered. However, that case differs considerably from Eurotunnel since there the directive at issue (the Tobacco Directive) was not yet implemented in national law (which was why the admissibility issue was raised in the first place), see C-491/01 BAT, paragraphs 34-38.
Under a European *per se* rule, it would have concluded that the French court had to forbid the ferry companies to sell products tax free. It may be regretted that the case did not contain at this point any reference to the *Fedesa-* or *Angelopharm* cases. In fact, none of the judgments of the Court, discussed in this subchapter, contain any cross references to the other cases.

### 4.4 The Biotechnology Order

The issue of *per se* consequences of invalidity became again relevant in the Biotechnology Order. It resulted from the fact that in The Netherlands there were fundamental problems regarding the implementation of the Biotechnology Directive. This Directive required Member States to provide legal protection under their respective national patent laws for biotechnological inventions, including those containing isolated human material. The controversy this aroused in The Netherlands induced it to vote against the proposal but to no avail. The Netherlands then instituted an action for annulment under Article 230 EC against the Directive. Since such actions do not affect the date by which Member States have to implement the Directive, the President of the Court was requested under Article 242 EC to postpone the duty to implement as long as the annulment proceedings were pending. In the request for a suspension of the duty to implement, The Netherlands stressed the importance of averting any irreparable damage that would occur if The Netherlands would implement the Directive before its possible annulment by The Court:

> "If the Directive were to be annulled, the measures transposing it in The Netherlands would be cancelled; this is not a requirement imposed by Community law, but it nevertheless constitutes the logical consequence of the institution by The Kingdom of The Netherlands of proceedings before the Court for annulment of the Directive" (emphasis added).

Interestingly, this statement was repeated by the European Parliament and the Council, the defending parties. The absence of any *per se* rule was used in their

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106 See Articles 1 and 5(2) of the Directive 98/44/EC (Biotechnology).

107 Directive 98/44/EC (Biotechnology) was based on Article 95 EC allowing the Council to vote by qualified majority.


109 This requirement for awarding interim relief is laid down in Article 83 (2) of the Rules of Procedure of the Court of Justice.

110 See paragraph 24 of C-377/98R *Biotechnology Order.*
defence as to any allegation that the annulment of the Directive, while already implemented in Dutch law, would cause any problems in terms of legal certainty for owners of biotechnological patents:

"Even if the Directive were to be annulled, Community law would not necessarily require the repeal of the national legislation, and no problems of legal uncertainty would therefore arise. Community law does not require, in case the Directive is annulled, that the national implementing measures are withdrawn" (emphasis added)."" 

The President of the Court implicitly confirmed this constitutional point made by the various parties to the proceedings. He held that The Netherlands had the power to take legal precautions for any biotech patents that would be granted under the implementing legislation:

"The Netherlands authorities are themselves able to mitigate the adverse effects on which they rely in the present proceedings in order to show the existence of a risk of serious and irreparable damage."""" 

The President then canvasses the possibilities that The Netherlands have to alleviate the national consequences of the possible annulment of the Directive, such as providing in the implementation legislation that patents could be granted under dissolving or suspending conditions."""" By referring so clearly to the choices that The Netherlands enjoy in how to deal with any consequent annulment of the Biotechnology Directive, the President implicitly denies any European per se rule under which Dutch law would be rendered invalid as a consequences per se of the invalidity of the Biotechnology Directive."""" 

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111 They add to that that even if national legislation were to be repealed, Community law would not require the withdrawal of any patents already granted. In other words: Community law does not require the repeal of the implementing measure, and a fortiori, does not require such repeal with retroactive effect. See also paragraph 33 of C-377/98 R, Biotechnology Order.

112 See paragraphs 58 and 59 of C-377/98 R Biotechnology Order.

113 Inserting conditions as these in the implementing legislation would constitute in itself a form of interim relief, although not the sort the Dutch government asked for (namely the suspension of the duty to implement the Directive altogether). See further Chapter 2 on the scope of interim protection offered by Community and national courts against allegedly invalid directives and the specific questions that raises.

114 After all, if national law would be per se invalid, inserting dissolving conditions in such law, as the President suggested, seems superfluous.
4.5 Conclusion: No Per Se Consequences

The arguments against any per se consequences of the invalidity of directives for national implementing measures seem overwhelming. Although one might find occasionally a statement that could be interpreted to the contrary,\(^\text{i15}\) it is safe to assume that when a directive proves to be invalid it is, as a 'rule of thumb', up to national courts and legislators to determine the consequences for national legislation implementing it. The entire system of Community law provides ample material to construe such a 'rule of thumb' as a hypothesis and the case law of the Court and its President clearly confirmed this hypothesis.\(^\text{i16}\)

5 Invalidity of other Community and Union Acts

When discussing the (absence of) European per se consequences of the invalidity of directives for the status of national law, it may be interesting to also bring into the picture other Community acts that require national legislative measures. Also, regulations and sometimes decisions (especially when they form the operative part of a regulation or a directive) may require Member States to adopt legislative provisions. Furthermore, broadening the scope from EC to EU, there are also the Third Pillar 'framework decisions' requiring implementation in the exact same manner as directives do under the First Pillar of the European Union. If these acts are annulled or declared invalid, 'gaps' occur in the EC/EU-law structure as well. Other acts, notably those of a sui generis nature, remain untouched here although it could very well be that among these one may also find acts requiring the adoption of national law.\(^\text{i17}\)

5.1 Regulations

Article 249 EC states that every regulation is "binding in its entirety and directly applicable in all Member States". The possibly disruptive effect ex tunc and erga omnes of a regulation’s annulment is acknowledged by the Treaty legislator in Article 231, second paragraph, EC, granting the ECJ the power to limit the effects of such an annulment.\(^\text{i18}\) The invalidity of Regula-

\(^{i15}\) See Section 2, 'The annulled directive in the state of the art'.

\(^{i16}\) Any possible restrictions to this 'regained national liberty to regulate' will be addressed in Chapter 4 'European Incidental Consequences'.

\(^{i17}\) Recommendations and opinions as mentioned in the last paragraph of Article 249 EC shall not be addressed since they are not binding upon Member States.

\(^{i18}\) For instance in Joined Cases C-164/97 and 165/97 European Parliament v. Council and in C-93/00 European Parliament v. Council. As discussed earlier, decisions and directives have been brought within the scope of this Article by means of interpretation, see C-271/94 Telematic Networks (decisions) and Case 295/90, Students Residence (directives) and Chapters 2 and 4.
tions is obviously felt in the national legal orders of the Member States in which they are ‘directly applicable’. Since regulations, at least formally, do not require national legislative measures, the question that imposes itself is whether the various characteristics of regulations lead to different consequences of their invalidity.

It has already been pointed out on several occasions in this study that the qualification of regulations as ‘directly applicable’ is somewhat misleading. Regulations often require national ‘implementing’ measures. In order to avoid terminological confusion with directives, such national provisions shall be addressed as ‘flanking’, ‘executing’ or ‘operational’ measures whereas the term ‘implementation’ is reserved for directives.\textsuperscript{119} The fact that regulations are directly effective implies, among other things, that Member States are in principle prohibited from ‘implementing’ them into national legislation for that could confuse citizens as to the origin of the law directly applicable to them.\textsuperscript{120} Nevertheless, the ‘flanking’ or ‘executing’ national provisions must be enacted if the regulation requires it.\textsuperscript{121} Member States are required to do so under the principle of sincere co-operation, expressed in Article 10 EC. Also, the Court has stated that provisions of regulations may be copied into national law if this enhances the coherence of the provisions applicable to a certain matter.\textsuperscript{122} This jurisprudence of the ECJ and legislative practice of the Community legislator have led some to believe that the difference between regulations and directives is fading.\textsuperscript{123}

A type of national ‘flanking’ legislative measure that is very often required of the Member States is the designation of the national authority competent to apply the regulation to concrete cases. As to which authority the Member State chooses for the task, it normally enjoys ‘institutional autonomy’ meaning it has the liberty to choose any organ it sees fit.\textsuperscript{124} Limitations to this principle of institutional

\textsuperscript{119} See for a similar approach in relation to the Dutch language: Bonnes, J.M., Uitvoering van EG-verordeningen in Nederland, W.E.J. Tjeenk Willink, Zwolle, 1994, p. 11/12. She too reserves implementation (implementatie) for directives and execution (uitvoering) for regulations. See also Chapter 5.

\textsuperscript{120} See Case 39/72 Commission v. Italy, Case 50/76 Amsterdam Bulb BV v. Productschap voor Siergwassen and Case 94/77 Fratelli Zerbone v. Amministrazione delle finanze dello Stato.

\textsuperscript{121} This requirement may be implicit but can also be explicitly required by the regulation, as was for example the case with Regulation 1463/70 on Tachographs. In such cases the regulation often contains an ‘implementation deadline’ similar to those on directives, see for example Article 44 of Regulation 793/93 (Waste Transport) that provides for an ‘implementation term’ of 15 months.

\textsuperscript{122} See Case 272/83 Commission v. Italy.

\textsuperscript{123} See for example Burg, F.H. van der, Europees gemeenschapsrecht in de Nederlandse rechtsorde, W.E.J. Tjeenk Willink, Deventer, 1998, on p. 35. See also Chapter 1, Section 3.4.

\textsuperscript{124} The principle of institutional autonomy applies of course also to directives, but is there part of the wider liberty to choose ‘form and methods’ ex Article 249 EC. See for the respect for this principle in relation to a directive C-54/96 Dorsch Consult.
autonomy are to be found in the principles of effectiveness and uniformity of EC law that have to be guaranteed by the chosen authority and sometimes in further, more specific, requirements of the regulation at hand. 125 It must be admitted that in case such a national measure designating such authority would ‘survive’ the invalidation of the regulation, the measure would obviously appear somewhat peculiar.

The question is how the relationship between regulations and their executing legislative measures is to be defined and whether it is the same as that between directives and their implementing measures. On the ‘concept’ of directives, as expressed in Article 249 EC, the hypothesis was based that their invalidity has no effect per se on the validity of national law. As later appeared, this hypothesis proved correct in the light of the case law of the ECJ. When regarding the ‘concept’ of regulations, a different hypothesis may impose itself.

5.1.1 A Per Se Rule for Regulations?

In as far as regulations do not require any national action and are thus ‘directly applicable’ in the true sense of the word, they represent a European principle of legality imposed upon Member States. Any national administrative action that is taken in order to apply a regulation to the concrete facts of a case is, and must be, directly based on that regulation. This is a logical consequence of Article 249 EC and the correlative prohibition for Member States to transpose regulations into their national legal orders. Thus, whenever a regulation has proven invalid, national administrative acts can be said to have lost their legal basis since that basis must be the regulation. In that particular area of the law, there is a European per se rule.

Evidence for the statement that there are per se consequences of an invalid regulation for national administrative acts may be found in the case law on the claiming of damages arising from invalid regulations under Article 288 EC. The Court’s case law strongly indicates that such national acts merely applying the invalid regulation to the facts of specific cases are invalid as a matter of Community law. When for example duties are levied, based on what later appears to be an invalid regulation, the ECJ takes the position that these sums can always be claimed back from national authorities in procedures before national courts.126

What is interesting to focus on is not the executive but the legislative action Member States took to render the regulation operational. The fact that national measures executing or flanking an EC regulation may only be adopted when

126 See Case 20/88 Roquette frères, paragraph 14, confirmed in C-282/90 Vreugdenhil, paragraph 12.
that is expressly or implicitly required by the regulation seems to present an important difference between directives and regulations. It is this fact that may give rise to a 'delegation theory'. According to such theory, whenever Member States must adopt national legislative measures in order to ensure the effective operation of a regulation, they must be deemed to be 'delegated' the power to adopt these measures by the European legislator.

A promoter of this theory is Steyger. Following her line of reasoning, the basis of these national powers lies in Article 10 EC, the principle of sincere co-operation. This principle comprises an implicit authority to sanction the regulation, for the original power to adopt the regulation in the first place would otherwise be meaningless. Thus, according to this delegation theory, the national criminal or administrative provisions executing the regulation must be considered as forming part of that same regulation. This would make the ECJ competent to interpret such national provisions. Yet, Steyger accepts certain restrictions to this interpreting power of the ECJ admitting the ECJ cannot have more powers over national legislation than national courts do. Thus, the ECJ may give a more restrictive interpretation to these national provisions, but not a more extensive one. In that sense she opines that, like national courts, the ECJ too is bound by the will of the national legislator.

If such a concept of delegation were indeed embedded in regulations, it is EC law that construes the legality of national legislative measures executing a regulation, 'delegating' the power to establish them. Accepting such a concept


128 National provisions implementing directives cannot be interpreted by the ECJ. However, in its Leur-Bloem ruling, the Court had established firmly that it was competent to interpret a directive provision when a Member State voluntarily extended the operation of that directive to areas it does not cover. One could say that what the Court is then doing is interpreting national law. See Case C-28/95 Leur-Bloem v. Inspecteur der Belastingdienst.

129 Apparently, Steyger thinks the citizen will understand that the same national provision may have a completely different meaning when used for the execution of a Community regulation than when it is used for the execution of 'autonomous' legislation. In her eyes a simple circular suffices, see Steyger (1996), p. 27. I do not share this opinion.

130 See Steyger (1996), p. 27. When such 'remedial interpretation' by the national or the European court is not possible, an infraction procedure under Article 226 EC is not unlikely.

131 Steyger also looked at the problem of the executed regulation from the angle of national (Dutch) constitutional law. In her opinion the principle of legality ('legaliteitseheinsel') as a principle of Dutch constitutional law had shifted to the EC level. Thus, she argued that, from a Dutch constitutional perspective, regulations are to be regarded as 'statutory laws'. In contrast, she held directives not to be able to have such constitutional status under Dutch law, see Steyger (1996), p. 28.
implies that the invalidity of a regulation affects directly the validity of its executing national measures since delegation implies a *per se* rule. After all, the concept of delegation entails that when the delegating instrument appears to be invalid, any subordinate provisions based thereon are *ultra vires*. That is a general rule within the legal systems of the Member States but also within Community legal system.\(^{133}\)

Defining the constitutional relationship between regulations and their national executing legislative measures in terms of delegation is questioned. It was for instance rejected by Van der Vlies and Widdershoven. They explicitly contest the existence of a European principle of legality being imposed upon Member States in relation to this type of national legislation:

"The far-reaching penetration of regulations that is advocated by Steyger is until now not claimed by the Court of Justice."\(^{134}\)

The interesting aspect of invalidity of regulations being executed by means of national legislative acts is that it should display the constitutional relationship between the two. Researching on what the ECJ has stated on this matter might therefore prove a 'delegation' theory such as Steyger's right or wrong.

### 5.1.2 The Case Law of the Court

When looking for jurisprudence of the ECJ on the formal status of national legislation executing regulations, one comes across the *Eridiana* case. At first sight, it seems to give reason to believe European Community law confirms the delegation concept.

The case concerned the Italian sugar market. Contesting the lowering of sugar quotas, Italian sugar giant Eridiana brought proceedings before an Italian court for the annulment of a ministerial decree altering these quotas. It argued that the contested decree was unlawful *inter alia* because of the unlawfulness of Article 2(2) of Regulation 3331/74 "which constitutes the *basis in law* of the contested Ministerial decree"(emphasis added).\(^{135}\)

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\(^{132}\) See also Chapter 5 'National law'.

\(^{133}\) See for instance C-271/94 *European Parliament v. Council* ("Edicom").


See for a display of this discussion also Jans and Others (2002), p. 46-53.

\(^{135}\) See Case 230/78 *Eridiana v. Minister for Agriculture*, in particular paragraph 3.
A statement such as that of Eridiana, claiming that a ministerial decree necessary for the operation of a regulation has its basis in law in that very same regulation can be considered from two sides. Either it means that indeed, there is a European principle of legality according to which national measures executing a regulation are measures taken by the Member States under delegated powers (which vanish the moment the regulation is proven invalid) or it amounts to a statement on Italian law. The later explanation then only amounts to stating that it is Italian law that attributes the EC regulation the ‘authority’ of ‘basis in law’ but that the regulation does not attribute that status to itself. As to which of these two possible explanations (or both explanations) was correct, the case is not conclusive since the ECJ, holding the contested regulation to be perfectly valid, did not address this issue.

In the Butter Cruises case, the ECJ did seem to address the relationship between an invalid regulation and its executing national measures of a legislative nature. At first sight, the Court seemed to indicate here that the annulment of the regulation in question had per se consequences for the national measures as a matter of European law.

The contested regulation in Butter Cruises attributed to Member States the possibility to adopt in their national laws an exception as to the levying of Community import duties with regard to the personal luggage of travellers entering the Community from third countries. When challenged in national proceedings, the ECJ in a preliminary reference declared the regulation invalid for lack of proper motivation. It hereby made an explicit statement on the consequences of the invalidity of the regulation:

“With regard more particularly to Regulation 3023/77, it should be noted that that regulation in itself does not confer any exemption. It merely conferred upon the national authorities power to grant a restricted exemption. It accordingly follows from the fact that the regulation is invalid that national measures taken on the basis thereof are not in conformity with Community law” (emphasis added).  

Although the Court seems to say that national measures are invalid per se as a consequence of the invalid regulation, such interpretation must be rejected. The statement that the national measures were not taken ‘in conformity with Community law’ does not mean that the invalidity of the Regulation had any per se consequences. Rather, it refers to the specific fact of the case that the invalid Regulation provided Member States with options that were contrary to EC law. The invalidation of the Regulation resulted in a revival of the main prohibition in Community law to not allow goods to enter the Common market ‘duty free’. Therefore, national law executing the invalid Regulation is itself rendered ‘non-

117 See paragraph 45 of Case 158/80 ‘Butter Cruises’.
applicable', but not as a consequence per se of the invalidity of the Regulation, but rather because of the infringed Treaty norm addressing both the Community institution when adopting the said Regulation and the Member States when 'executing' it in national legislation. As will be further elaborated in Chapter 4, this situation will be qualified as one of a 'double addressing norm'.

Thus, neither Eridiana nor Butter Cruises provides any clear answer to the question of regulations being different from directives in the sense that their invalidity would produce per se consequences for national law. In order to get more clarity, one must look for case law dealing with the status of national law executing an invalid regulation where the invalidity does not result from a norm that addresses also the Member States (as in Butter Cruises). Such a scenario can be found in the Rey Soda case.

The Basic Regulation organizing the sugar sector delegated widely the power to the Commission to equalise on a yearly basis the sugar prices. The Council kept influence over Commission decision-making through the 'management committee' procedure. However, what the Commission did in its Implementing Regulation was to sub-delegate this discretionary power to the Italian national authorities, leaving it to them to determine most of the applicable rules on sugar pricing. The Council was at that stage deprived of its influence (through the management committee procedure) on what would exactly happen on the Italian sugar market. The ECJ regarded this an unauthorised sub-delegation of the Commission to the Italian authorities and consequently declared invalid the provision of the Commission Regulation that pertained to sub-delegate this discretionary power to Italy.

One of the questions that arose in Rey Soda was what would happen to the Italian Law-decree that was already applied in Italy, levying sugar stocks in order to redistribute the increased value of those stocks to the Italian sugar beet growers. Advocate General Mayras stated that "it is for the Italian constitutional court to

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118 The qualification 'not in accordance with Community law' renders national law 'non-applicable' and not for example non-existent, at least not from the perspective of EC law, see Section 3.4.

119 See for another case where the invalidity of a regulation also 'revived' a basic norm from which national authorities could no longer derogate: C-127/94 R. v. Ministry of Agriculture, ex parte Ecroyd.

120 As appears from the Butter Cruises case, such a norm is not necessarily the norm whose violation led to the regulation's invalidity. Not only did the case concern a 'double addressing norm', it also involved a norm on a field of Community law that may be regarded as one of exclusive Community competence: the Community customs union.

121 Case C-23/75 Rey Soda v. Cassa Congiuglio Zucchero.

122 See paragraph 25 of Case C-23/75 Rey Soda. The same considerations apply to sub-delegating discretionary powers to agencies, see Hartley (2003), p. 124.

123 Article 6 of Commission Regulation 834/74/EEC.
decide the question, should it be referred to it by the national court". At this stage it suffices to note that the ECJ rephrased this question slightly, abstracting from the specific regulation and the specific national constitutional context in which the Italian decree was set. It stated that as a principle:

"It is first of all for the national authorities to draw the consequences in their legal system of the declaration of such invalidity made under Article 177 of the EEC Treaty".

Thus, the consequences for national law implementing a regulation were obviously determined by national law and the hypothesis that regulations are to be regarded differently from directives seems incorrect. Indeed, a regulation is a different type of EC measure than a directive, yet, it seems that the national measure executing or flanking a regulation is not to be regarded as of a different nature than the national measure implementing a directive. Most important conclusion therefrom would be that the constitutional relationship, from a perspective of European law, cannot be framed in terms of any delegation concept embedded in the regulation for such a concept would imply that national law would be ultra vires.

5.2 Some Remarks on Union Law

On the Second Pillar of the EU dealing with Common Foreign and Security Policy (CFSP) this study can be brief. It is certainly possible that acts adopted by the institutions in the Second Pillar framework result in legislative measures of the EU Member States. Also, one can discern a sort of hierarchy of norms within the Second Pillar. Nevertheless, the ECJ is deprived of any competence to legally review such acts. Article 46 EU clearly states that its competences do not extend to the Second Pillar. The only possibility for legal review would be under a construction as adopted by the ECJ in its Air Transit Visa case. In case a Union act is adopted (partly) dealing with a subject matter for which the Community Institutions are competent under the First Pillar, the ECJ may exercise its jurisdiction under the First Pillar in order to determine

144 Mr Mayras alludes here to the fact that the Italian decree was adopted under a specific procedure under Article 77 of the Italian Constitution and could consequently prove unconstitutional in case the underlying Regulation is invalid.

145 See paragraphs 50 and 51 of the Court's ruling in Case 23/75 Rey Soda.

146 Still, the fact remains that the regulation itself has ceased to exist and this may obviously result in bizarre legislative 'gaps'. Surviving national 'flanking provisions' may at least appear a bit odd. In that sense there still is a difference between regulations and directives.

147 Case C-170/96 Commission v. Council.
whether the EC or EURATOM Treaties and the *acquis communautaire* have not been encroached upon.\(^{148}\)

In case, for example, a 'Joint Action' is adopted under the Second Pillar, providing for food aid to Iraq, the Commission could institute an action based on Article 230 EC claiming a violation of its powers under Article 177 EC.\(^{149}\)

5.2.1 Third Pillar Framework Decisions

The Third Pillar, having in general more Community law features than the Second Pillar may prove more interesting for the topic of this study. In particular the 'framework decisions', introduced by the Treaty of Amsterdam draw the attention.\(^{150}\) Framework decisions must of course be regarded as the EU 'equivalent' of the (First Pillar) EC directive, as is evident from its definition in Article 34 (2) under b EU:

"The Council may adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect."

What is not clear is whether or not the 'choice of form and methods' is curtailed in the same manner as elaborated by the Court in its jurisprudence on EC directives. The difficulty is that cases before the Court concerning overdue, wrong or insufficient implementation are less likely to arise here than in the First Pillar. The Commission cannot start 'infringement actions' against Member States for allegedly wrong or late implementation of framework decisions.\(^{151}\) Only Member States seem able to do so under Article 35 (7) EU, after failure of the Council to mediate between them.

Furthermore, since direct effect is expressly excluded, private parties have no possibility to hold their national authorities responsible for their duty to correctly

\(^{148}\) See Article 47 EU.

\(^{149}\) Van Ooik holds this to be possible, see Van Ooik (1999), on p. 411.

\(^{150}\) As to 'decisions' ex Article 34 (2) under c EU, it is clearly expressed that they cannot regard the harmonization of laws. Nevertheless, they can take the form of equivalents of regulations as defined in Article 249 EC.

\(^{151}\) That is only possible in relation to the conventions ex Article 34 (2) under (d) EU, see Article 35 (7), last sentence, EU.
and timely implement framework decisions, at least not as a matter of EU law.\textsuperscript{152} So it seems that both the Commission and the private plaintiffs have lost their roles as the traditional ‘watchdogs’ overseeing correct implementation.

As to the review of their validity, the ECJ may settle such issues under the preliminary reference arrangements in Article 35 (2) and (3) EU\textsuperscript{153} or in an annulment action instituted by the Commission or a Member State (Article 35 (6) EU).\textsuperscript{154}

As to the annulment action, the grounds that can be invoked are the same as those mentioned in Article 230 EC: “lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application or misuse of powers.”\textsuperscript{155}

When Article 35 (6) EU mentions ‘infringement of this Treaty’ as a ground of review, it refers to the EU Treaty. That implies \textit{inter alia} that the Court is also authorised to review the compatibility of framework decisions in the light of the General Principles of Community Law, including human rights.\textsuperscript{156} Furthermore, since the \textit{Air Transit Visa} case, it is clear that the Court will also be able to review framework decisions on the ground that they infringe the EC Treaty or its \textit{acquis communautaire}.\textsuperscript{157} That means that under Articles 230 EC or 234 EC, Member States, Community institutions and, before their domestic courts, private individuals can claim that a Third Pillar framework decision is contrary

\textsuperscript{152} Probably, Article 34(2) EU does not preclude the national legal orders of the EU Member States to accord direct effect to Third Pillar framework decisions. It only precludes such direct effect as a matter of EU law. However, Lenaerts seems to think differently on the matter, stating that it is precisely to prevent national legal orders from granting direct effect to framework decisions that this was excluded in the EU Treaty, see Lenaerts, K. and Nuffel, P. van, \textit{Constitutional Law of the European Union}, London, Sweet & Maxwell, 1999, p. 605. On the matter of primacy he states that “in ‘Monist’ Member States (such as Belgium and The Netherlands), binding CFSP and PJCC acts may take precedence over domestic law as acts governed by international law”.

\textsuperscript{153} In case the Member States recognize the authority of the Court to do so as required in paragraphs 2 and 3 of Article 35 EU.

\textsuperscript{154} A regrettable difference with the Community Pillar is that under this annulment procedure, the European Parliament has not been granted \textit{locus standi}.

\textsuperscript{155} For the EU preliminary reference procedure, the grounds on which the legality of framework decisions may be reviewed are not pointed out, but there is little doubt that they are the same as for the EU annulment action. Also in the EC Treaty, Article 234 EC does not mention explicitly the grounds for review, but there too they are the same as those mentioned in Article 230 EC, second paragraph.

\textsuperscript{156} See Article 46, under d, EU.

\textsuperscript{157} C-170/96 Commission v. Council. As stated before, this must also be deemed possible in relation to Second Pillar Acts.
to the EC Treaty if it covers (partly) a subject for which there is a legal basis in the First Pillar.\footnote{See Van Ooik (1999), p. 408-412. He is of the opinion that such an 'Air Transit Visa' route is not possible through a preliminary reference based on Article 68 EC, claiming the framework decision has infringed Title IV of the EC Treaty, since Article 68 (i) EC only deals with validity of acts based on Title IV itself.}{158}

As to the preliminary reference procedure under the Third Pillar, it seems to be inadequate to ensure the same kind of uniform interpretation and application of EU law as does its First Pillar-counterpart in Article 234 EC.\footnote{See Albors-Llorens, A., Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam, \textit{CMLRev.}, 1998, p. 1273 (1282).}{159} Article 35 EU makes its operation subject to a declaration of every Member State indicating that it is willing to grant its domestic courts the power to refer questions on validity to the Court, leaving it up to each state to choose whether or not all its courts can refer or only its highest courts and, in the latter case, whether they are obliged to refer.\footnote{The literal text of Article 35 EU seems to only provide for the possibility that the highest courts may refer preliminary questions to the Court. However, it was agreed differently in Declaration 10 to the Treaty of Amsterdam, giving the Member States also the option to provide that such courts are obliged to refer.}{160} Thus, this variable geometry introduced in the system of EU judicial protection has resulted in British, Danish and Irish courts not being able to refer any questions on validity (or interpretation) of Third Pillar acts to the ECJ.\footnote{France was among these states but has later changed its view and deposited a declaration, see the \textit{Décret No. 2000-668} of 10 July 2000 portant publication de la déclaration de la France pour la mise en oeuvre de l'article 35 du traité sur l'Union Européenne, \textit{Journal Officiel}, 2000, p. 11073.}{161}

The preliminary reference is interesting since, just as is the case with directives, the chances are that on the moment the ECJ declares invalid a framework decision, it may by that time already have been implemented in national law.\footnote{Examples of framework decisions are Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings and Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism and Council Framework Decision 2002/384/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States.}{162} That brings us to the crucial question of the possible consequences of invalidity of a framework decision for national law. Even though at the time of writing there is no case law on the matter,\footnote{Per 7 September 2004, the closing date of this research, no preliminary validity questions or annulment actions were instituted that related to framework decisions.}{163} it is hard to imagine that where the invalidity of an EC directive has no \textit{per se} consequences for national law, such a \textit{per se} rule would follow from Union law in relation to the implementation of an invalid framework decision. Thus, then too it would seem national law determines the consequences of the invalidity of the framework decision for the implementing
measure. One is even inclined to think that such must be a fortiori the case with Union law since it still has a more intergovernmental character than EC law despite the undoubted communautarisation of the Third Pillar. Consequently, there is still a more ‘loose’ relationship between Union acts and national law. Not only are framework decisions denied any direct effect but even their supremacy could still be questioned.

6 Conclusion

It was established that the consequences on invalidity of a directive are governed by the (constitutional) law of the Member states. EC case law, in particular the *Fedesa*, *Angelopharm* and *Eurotunnel* cases of the Court and the *Biotechnology Order* of its President, confirmed the hypothesis derived from the ‘system’ of EC law that the invalidity of a directive has no per se consequences for its national implementation. Under the EC Constitution directives are not attributed the ‘authority’ of acts from which national legislation draws its legality. There is no such thing as a European principle of delegation imposed upon the Member States. In as far as this is possibly the case under Member State constitutions must be addressed in Chapter 5 dealing with the legal systems of the UK, Belgium, France and The Netherlands.

Perhaps more surprising is the observation that the same appears to be true for invalid regulations in case they have required Member State legislative action. Despite what one could arguably think on the basis of the *prima facie* entirely different nature of regulations, they are not regarded different from directives, at least that seems to follow from the *Rey Soda* case. Thereby, the validity issue also proved wrong any sort of ‘delegation concept’ as a tool for defining the legal relationship between national law and regulations (at least from the point of view of EC law).

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164 Notably since the ECJ has jurisdiction to interpret and rule on validity of Third Pillar acts such as the framework decisions and the Commission enjoys a right of initiative.

165 See for example Lenaerts and Van Nuffel (1999).

166 Interestingly, in the first case where the ECJ arguably had the opportunity to clarify that matter, it did not address the issue, see C-187/01 Gözütok. The confusion would end if the Treaty establishing a Constitution for Europe (TCE) would enter into force as it states that all Union law shall have primacy in the domestic legal orders. see Article 1-6 TCE.

167 An interesting opening for such a study was provided for by Advocate General Mischo in the *Fedesa* case. In his Opinion to that case, which this Chapter has shown to be correct, the consequences for national law of the invalidity of the First Hormones Directive depended on the way in which the Member States had implemented the directive. See paragraph 67 of the Opinion of Advocate General Mischo to C-331/88 *Fedesa*. 

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Before discussing the legal ‘authority’ directives enjoy under Member State constitutions, there is first still one important issue of Community law to be addressed. As was exemplified in this Chapter by the Butter Cruises case, European law, although not imposing any \textit{per se} consequences on national law, may still affect national implementing legislation in an incidental way, in particular when the norm violated by the directive also addressed Member States. These types of norms will first be examined in further detail in the following Chapter. In particular, it must be established whether these ‘Incidental European Consequences’ are not so important that they may overshadow the principle of national institutional autonomy as established in this Chapter.
THE INVALID MAJESTY