The invalid directive: the legal authority of a union act requiring domestic law making
Vandamme, T.A.J.A.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Download date: 19 Jan 2019
Incidental EU Consequences for the Implementing Measure
1 Introduction

It was established in Chapter 3 that as a rule of thumb Member States regain the freedom to consider for themselves the legal and political consequences upon invalidation of a directive. However, by establishing that there is no European 'per se rule', not all has been said on the European consequences for national law resulting from the invalidity of a directive.

In the previous chapter, often allusions were made to other ways in which European law may affect the Member State freedom of manoeuvre in case an implemented directive is void. Indeed, there are quite a few exceptions to the general rule of national regained discretion established in the previous chapter. The question is whether these exceptions affect the general rule fundamentally in the sense that in fact they prove to be so important that they eclipse the general rule and hence give reason to doubt its existence. Thus, in the following sections incidental EU legal consequences from the invalidity of a directive will be addressed. The main focus thereby will be on the limitation by the ECJ of the effects of its own judgment (2), the type of norm violated by the directive and its addressees (3), exclusivity of EC powers (4) and the principle of sincere co-operation (5).

2 Limiting in Time the Effect of Annulment

One situation where an invalidation has no consequences for national law is when the Court limits in time the effects of its judgment. The power to do so is laid down in Article 231 EC:

“If the action is well founded, the Court of Justice shall declare the act concerned to be void. In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive” (emphasis added).

The term ‘definitive’ is somewhat misleading. The annulment does have the effect that the directive can at the most have only a temporary legal effect, until such time as the institution(s) whose directive has been declared void has (have) taken the “necessary measures to comply with the judgment of the Court of Justice” as required by Article 233 EC. In the past, the ECJ has, seemingly

---

1 See also Chapter 2.
2 Although in some cases the ECJ declares to be definitive provisions of that were in the mean time already repealed by the legislator, see Case 51/87 Commission v. Council (‘Tariff Preferences’). In such a case the annulment is from a legal point of view, only pro forma.
contra legem, widened the scope of the Article to decisions\(^3\) and directives. As far as directives are concerned, the landmark judgment on the preservation of effects is the *Students Residence* decision\(^4\) in which the European Parliament successfully challenged the legal basis of the Students Residence Directive.\(^5\)

The European Parliament, argued that Article 12 EC was the appropriate legal basis instead of Article 308 EC, and claimed an infringement of its prerogatives since the latter Article only provides it with a right to be consulted whereas Article 12 EC then involved the co-operation procedure.\(^6\)

The Court agreed to the Parliament’s complaint and annulled the Directive. Applying for the first time Article 231 EC to a directive,\(^7\) the Court justified this by stating that legal certainty, *ratio legis* of Article 231 EC, could be just as much at stake when a directive is annulled as when a regulation is annulled.\(^8\) Nevertheless, at the time, the possibility to apply Article 231 EC was contested. In its observations to this case, the Dutch Government pointed out that the analogy between regulations and directives was wrong since directives are not directly applicable. It was argued that it was the direct applicability of regulations that induced the Treaty legislator to attribute to the ECJ the competence of Article 231 EC.\(^9\)

Looking at the Students Residence Directive from the point of view of legal certainty this may be doubted. It must be remembered that the implementation deadline of the Students Residence Directive had already lapsed without it having

---

\(^3\) Article 231 EC was applied to an annulled decision approving the budget of the Community in Case 34/86 Council *v.* European Parliament. Furthermore, it was applied to the Council’s so-called *EDICOM* Decision in C-271/94 European Parliament *v.* Council. See for an application of Article 231 EC to an annulled decision to conclude a treaty: Vanhammé (2001) on p. 315. In that context Article 231 EC proved a valuable instrument to prevent international responsibility (for the EC but possibly, in case of a mixed agreement, also for the Member States).

\(^4\) C-231/90 European Parliament *v.* Council ("Students Residence").


\(^6\) Note that Article 12 EC, then Article 7, second sentence, EEC referred at the time to the co-operation procedure. The present Article 12 EC refers to the co-decision procedure ex Article 251 EC.

\(^7\) A ‘reparation directive’ was later established: Directive 93/36/EEC, being the first directive solely based on Article 12 EC.

\(^8\) See paragraphs 23 to 26 of C-231/90 Students Residence. See also paragraphs 29 to 33 of C-221/94 European Parliament *v.* Council, (Transport Policy case).

been implemented in most Member States. Many of its provisions seemed unconditional and sufficiently precise to be directly enforced by national courts. So even though lacking a regulation’s direct applicability, this directive could very well be directly effective. Citizens may already have relied upon the provisions of the Directive in the various Member States. In those circumstances there may be good reason to extend the protection of legal certainty to directives.

It was not until the Rieser case that the ECJ clarified exactly what it meant for an invalid directive to have its 'legal effects preserved'. What needed clarification was the exact point in time until which an annulled (but preserved) directive still produces legal effects.

The case is set in the aftermath of the annulment, under preservation of effects, of the old Transport Policy Directive 93/89/EC in case C-21/94. Austria had implemented the old Directive incorrectly by in effect charging foreign hauliers more than domestic hauliers for using the Brenner pass. When the new Transport Policy Directive was adopted (1999/62/EC) Austrian law that had remained valid after the old Directive lost its effects was subsequently not modified as a consequence of the adoption of the new Directive because of its similarity with the old Transport Policy Directive.

Due to the preservation of effects of the Old Directive, Rieser could invoke it before Austrian courts (it was directly effective) but he had to suffer again the discrimination the moment the old Directive lost its legal effects, hence the importance of knowing until what point in time these 'effects' were to be regarded as 'preserved' by the ECJ under Article 231 EC.

---

10 The deadline had expired one year before the Court’s ruling. Only Denmark and Spain had at that time fulfilled their obligation to implement. As will be demonstrated later, Member States often do not implement a directive while a case concerning its validity is still pending.

11 The terminological confusion of direct applicability of regulations and of EC law at large will not be further addressed here, see for a discussion Winter, J.A., Direct Applicability and Direct effect, Two Different Concepts in Community Law, CMLR, 1972, p. 425 and Prechal, S., Does direct effect still matter?, CMLR, 2000, p. 1047.

12 However, the Court did not rely on the possible direct effect of the Directive as such but rather on the rights the students could directly enjoy under the Treaty.

13 C-157/02 Rieser v. Asfinag.

14 As became evident from point 115 of the Opinion of Advocate General Alber to this case.

15 Any possibility to invoke primary EC law to combat this discrimination in the interval between the entry into force of the new directive and the expiry of its deadline was not addressed (ex officio) by the ECJ. Advocate General Alber, however, did tackle that issue and concluded that even though the Old Directive may have lost its legal effects Rieser could successfully invoke Article 49 EC, see points 119-129 of his opinion to this case.
The ECJ had, at the time of annulment of the old Road Transport Policy Directive, stated that the preservation of legal effects was to last until the time of 'adoption' of a new directive. Yet, in Rieser the Court corrected itself: the legal effects of the annulled Directive were to be regarded as 'preserved' until the entry into force of the new Directive for otherwise 'a legal vacuum would subsist'.

What is clear in the Rieser case is that the Court will not prolong the legal effects of an annulled directive until the expiry of the new Directive's implementation deadline. Therefore, between entry into force of the new Directive and the expiry of its deadline there persists a 'gap', despite 'preservation of effects' of the old Directive. During that gap there is no directive individual litigants can rely on against national authorities. In the Rieser case, that 'gap' produced the concrete effect that a plaintiff (Rieser) could no longer contest the wrongful implementation of the old Directive. Clearly, the Court's view that this 'gap' did not present a 'legal vacuum' is not welcomed by those who find themselves in a situation such as that of Rieser GmbH.

Furthermore, the ECJ stressed here that during this 'gap', there is no possibility to invoke the Wallonie jurisprudence, denying that the 'Wallonie norm' can be relied upon by private plaintiffs before national courts.

Interestingly, the Community legislator displays a different view on what is a legal vacuum, as becomes clear from the transitory arrangements it adopts in legislation.

An example is the new Students Residence Directive replacing the old Students Residence Directive that was annulled under preservation of effects. In its transitory arrangements it stated that the old Students Directive was to retain legal effects until the expiry of the deadline of the New Students Directive. In the light of the interpretation given to Article 231 EC in Rieser, it must be concluded that such legal effects between entry into force and expiry of the deadline are based on the new Directive, not on Article 231 EC.

---

16 See C-157/02 Rieser v. Asfinag, paragraph 60: the practical difference was one month.
18 See Article 6 of Directive 93/96/EEC (The new Students Residence Directive). When annulling the Old Directive, the ECJ had, as with the Road Transport Policy Directive, stated that the effects were to be preserved until 'adoption' of a new directive. As was already stated in Chapter 2, the legislator has enacted similar provisions when withdrawing a lawful directive, such as the Honey Directive.
19 The Community legislator could have achieved the same effect by letting the New Directive enter into force retroactively, a practice that was (within limits) accepted by the Court in Case C-331/88 Fedesa.
CHAPTER 4  INCIDENTIAL EU CONSEQUENCES FOR THE IMPLEMENTING MEASURE

What the Students Residence and Road Transport Policy decisions have in common with *Rieser* is that the ECJ does not relate terms as ‘legal vacuum’ or ‘legal certainty’ to the status of national legislation implementing the directive, at least not explicitly.20

### 2.1 Policy Continuity or Legal Certainty?

In the *Transport Policy* decision the Court upholds the legal effects of the annulled Transport Policy Directive invoking *inter alia* ‘the need to avoid discontinuity in the programme for the harmonization of transport taxation’.21 For a consequence of the preservation of legal effects is that in principle also the Member State duty to implement is preserved, not for reasons of legal certainty, but for reasons of continuity of a line of policy conducted by the institutions.22 Can this use of Article 231 EC still be called proper? Applying Article 231 EC to avoid that policy is discontinued upon a legal defect in legislation is not the same as applying it to avoid legal uncertainty.

In that sense the views of the ECOSOC on what entails a ‘preservation of legal effects’ of a directive are contestable. It held in its opinion for the New Students Residence Directive that:

“the Court ruled that the Old Directive would remain in force in those countries which had already implemented it until the new Directive was implemented”.23

That would be a more reduced application of Article 231 EC which cannot be inferred from the Court's decision in the *Students Residence* case.

Understandable as it may appear at times, the ECJ must be cautious with such use of Article 231 EC. It can lead to frustrations since the legislator has not a direct incentive to mend the established legal defects. Such frustrations were evident in the *Pesticides* case. The European Parliament challenged the Pesticides Directive successfully and asked the Court to set a term within which the new Directive had to be adopted by the Council (this time respecting Parliament's rights in the lawmaking process).24 The request was denied and the EP had to accept that it took several years before a new directive was adopted.25

---

20 See also Chapter 2, Section 2.2.3.
21 See paragraph 31 of C-21/94 Road Transport Policy.
22 Although it must be added that also the Road Transport Policy Directive (Directive 93/98/EC) had directly effective provisions as was stated in paragraphs 34-39 of C-157/02 *Rieser*.
25 In C-271/94 *Edicom*, the frustrations of Parliament were heard because there the ECJ applied the Article only halfway which led the Council and the Commission to quickly enact a new Edicom Decision. There the ECJ recognized the necessity to maintain pressure.
In the *Cabotage I* case, the only reason to apply the article seemed to be the fact that a new regulation to replace the annulled one was due to enter into force only months after the annulment. Moreover, in *Cabotage II*, the Court does not even mention Article 231 EC and applied it because “simply to annul the contested regulation would be likely to call in question the degree of liberalization which that regulation sought to achieve”.

The cases above seem to abandon the requirement of jeopardised legal certainty. However, they contrast with the later *Edicom* case. Here, the ECJ applied Article 231 EC only halfway despite pleas to apply it ‘in full’ for the sake of policy continuity.

After considering that the Council Decision on the interoperability of telematic networks was based on the wrong legal basis, the Court ordered that the effects of the Commission measures that had been taken on the basis of that Decision up till the judgment were to be maintained until a new Decision was adopted. In doing so, the ruling could be regarded as an annulment *ex nunc*. The Council and the Commission argued for the full application of Article 231 EC, upholding the effects of the Council Decision itself until its replacement (thereby providing the Commission with a legal basis to take further measures). The Court, however, was not convinced (by the facts it was provided with at the time) that the effects of annulment of the Council Decision itself would lead to great difficulties in terms of legal certainty.

In my opinion the Court’s ruling in *Telematic Networks* brings its case law back to the true spirit of Article 231 EC. It may be argued that the use of the Court’s competence of Article 231 EC must be limited to preserving those legal effects that must be deemed ‘necessary’ to protect legal certainty. However, having said that, it is by no means certain that the *Edicom* judgment constitutes a definitive shift in the case law of the ECJ.

---

27 C-388/92 *European Parliament v. Council* concerning the annulment of Regulation 2454/92 for infringement of Parliament’s prerogative to be re-consulted.
28 See paragraph 22 of Cabotage II. It has to be remembered that transport policy was only established after the Court condemned the Council to establish such policy in Case 13/83 *Parliament v. Council*, referred to in Cabotage II.
30 Probably, the Decision itself had not much concrete consequences, so it all comes down to the implementing measures the Commission took on the basis of that Decision.
2.2 Conclusion

The key word in relation to the use of Article 231 must be legal certainty although the Court may also consider policy continuance. It was indeed legal certainty that induced it to apply, by analogy, Article 231 EC to directives. However, legal certainty in relation to directives hinges to a large extent on what happens to national implementation. In two instances this proved relevant:

1. when applying Article 231 EC to a specific directive (Students Residence decision; Road Transport Policy decision); and
2. when defining the term 'legal vacuum' in relation to the scope of Article 231 EC (the Rieser decision).

In these cases the ECJ did not refer to the (expected) status of national law after a directive’s invalidation. However, implicitly such reference could be said to be there. For what else would underlie the Court’s decision to restrict, incidentally, Member State’s regained competences?

3 The Nature of the Invalidity: The Addressees of the Violated Norm

3.1 Introduction

Invalidity results from the violation of a norm. There is a difference in this respect between norms that address only the EC institutions and those that also address the Member States. The latter are categorized in this study as ‘double addressing norms’. Invalidation of a directive violating a double addressing norm may also affect the status of national implementing legislation. By contrast, if the norm violated addresses the European institutions only, the ‘rule of thumb’ as established in the previous chapter applies. The status of implementation legislation is then a matter of only national courts and legislators. This is supported by the cases discussed in the previous chapter. The Fedesa, Angelopharm, Eurotunnel and Biotechnology cases all concerned directives that (allegedly) violated a norm addressing only the EC institutions.

However, the violation by a directive of a ‘double addressing norm’ may affect the status of national implementation. Such effect is indirect for it does not follow from the directive’s invalidity per se. Rather, it follows from a Member State violation of the same norm.

What norms can be categorized as ‘double addressing’? As a starting point, the different grounds for invalidity in Article 230 EC may give some guidance.

---

31 To some extent also to the fact that it produces direct effect in the national legal order.
although not intentionally. It mentions four (types of) grounds for review of European legislation:

i. lack of competence;
ii. infringement of an essential procedural requirement;
iii. infringement of the Treaty or any rule of law relating to its application; and

iv. misuse of powers.

This classification as such is not of much practical purpose. The third ground for review, 'infringement of the Treaty and any rule of law relating to its application', covers all other possible grounds for annulment. Also the ECJ does not attach much value to the classification as such, as can be inferred from the International Fruit case:

"[T]he jurisdiction of the Court cannot be limited by the grounds on which the validity of Community measures may be contested."\(^{12}\)

Yet, for the topic of this thesis the distinction may prove to be of some importance. As will be explained below, the grounds under i., ii. and iv., do not constitute 'double addressing norms'. Thus, the main question of this subchapter could be reformulated as follows: Which infringement of the Treaty or any rule of law relating to its application by a directive affects national implementing measures too?

3.2 Protecting or Addressing the Member States?

'Lack of competence', 'essential procedural requirements' and 'abuse of power' are all grounds for review that protect Member States or Community institutions against certain exercises of power the Treaty does not account for. However, they do not address the Member States.

Typically, the ground for review of 'lack of competence' protects the Member States' interests. It envisages the situation where the Community legislator would adopt measures for which the Treaties did not provide any legal basis, thus violating the Treaty principle of conferral.\(^{31}\) Generally speaking, it will rarely happen that a European measure will be annulled for lack of competence. Existing legal bases are generally broadly interpreted and there is always Article 308 EC.

This ground for review should not be confused with that of the wrong legal basis, which is an 'infringement of an essential procedural requirement'. For instance

---

\(^{12}\) See Joined Cases 21 to 24/72 International Fruit.

\(^{31}\) Laid down in Article 5, first paragraph. EC.
in the Terminal Equipment case, it was alleged under the heading ‘lack of competence’ that the Commission lacked the competence to adopt certain provisions of the Terminal Equipment Directive under Article 86(3) EC. However, that did obviously not concern lack of competence of the EC as a whole, since, if this argument would have been successful, the provisions could probably have been adopted on the basis of Article 95 EC.

Perhaps the best example of a case involving the attribution of powers was the Tobacco Advertising case. Although the issue was presented as one concerning an incorrect legal basis, it was essentially a matter of establishing whether there was a legal basis that could support this Directive in the first place. Since the ‘centre of gravity’ of the Directive was said to be health protection, the only correct legal basis would have been Article 152 EC. Yet, since that Article explicitly denies the EC the competence to harmonize laws of the Member States dealing with health safety the Directive could not have been adopted.

The Community institutions, acting beyond the powers conferred upon them, violated the principle of attribution of powers. However, the violation of that principle does not affect the validity of national law implementing this ultra vires directive. Member States are not addressees of this norm but protégés. Their rights may be violated, but they cannot be said to contribute themselves to the violation of the Treaty by upholding national legislation implementing that ultra vires directive. One could construe such behaviour of the Member States as that of ‘waiving’ their protected rights. If, for example, the EC adopts a directive that harmonizes health care policy which is successfully challenged in court, its implementation could very well be upheld in a Member State without there being any ‘incidental European consequences’. The ‘rule of thumb’ applies fully.

The same is true for the ‘misuse of powers’ plea, the fourth ground of review mentioned in Article 230 EC. In the Working Time case the ECJ defined it as “the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure

---

34 Case C-202/88 France v. Commission (‘Terminal Equipment’).

35 Note that Germany has again started annulment proceedings against Directive 2003/33/EC of 26 May 2003, the new Tobacco Advertising Directive (against its Articles 3 and 4), inter alia stating again that Article 95 is an insufficient legal basis, because the Directive’s main objective is health policy. See C-380/03 Germany v. Parliament and Council (Pending).

36 Another example of what is basically an infringement of the principle of attribution is when the directive concerned establishes complete harmonization where the legal basis used only allows minimum harmonization such as Articles 137 (2) (b) (Social Policy), 153 (5) (Consumer Policy) and Article 176 (Environmental Policy).

37 Or, what is more likely in case of direct actions under Article 230 EC, continue the implementing process.
specifically prescribed by the Treaty for dealing with the circumstances of the case." The plea can be closely linked with the issue of the correct legal basis, as exemplified by the BAT case.

Obviously inspired by the earlier Tobacco Advertising ruling, it was contended that the Community legislator, having adopted the Tobacco Directive concerning the labeling and content of cigarettes on the basis of Article 95 EC, really wanted to adopt a Community health measure, for which Article 152(4) EC denied it any legal basis in the Treaty. The Court, however, who had already ruled that Article 95 was the correct legal basis, simply denied the misuse of powers argument by restating again that Article 95 EC was the legal basis.

This ground for review stands apart from the others because it involves subjective factors, digging into what the Community legislator really wanted. However, despite its subjective nature, fact remains that again this is a norm addressing only the EC institutions and protecting the Member States and possibly the other institutions. Therefore, its infringement by a directive bears no consequences for national implementation law.

The ‘infringement of an essential procedural requirement’ has led to the annulment of several directives whereby in at least two cases the issue arose whether or not the violated procedural rule was indeed so ‘essential’ as to justify such annulment. For a good dividing line between what is essential and what is not, one can refer to the Laying Hens case, in which the ECJ stressed the importance of a possible wrong legal basis:

"the argument with regard to the correct legal basis is not a purely formal one inasmuch as Articles 43 and 100 of the Treaty entail different rules regarding the manner in which the Council may arrive at its decision. The choice of the legal basis could thus affect the determination of the content of the contested directive" (emphasis added).

The key word is ‘content’. Violated norms labelled ‘procedural’ may very well have ‘substantive’ effects. This point of reference may be particularly helpful

---

38 See paragraph 69 of C-84/94, the Working Time case, referring to C-156/93 Parliament v. Commission. See also C-331/88 Fedesa, paragraph 24.
39 See paragraph 191 of C-491/01 BAT.
41 Case 131/86 United Kingdom v. Council, paragraph 11. In identical terms: paragraph 6 of the ECJ's judgment in Case 68/86: "the argument with regard to the correct legal basis is not a purely formal one". See also Van Ooik (1999) on p. 363 et seq.
when assessing the importance of a violated procedural norm.\(^4\) Two cases can be opposed to one another, both dealing with directives infringing the Council's rules of procedure whereby it is not in both cases equally evident that one is dealing with a procedural requirement that was 'essential'.

In the earlier mentioned *Laying Hens* case, the Directive at issue was eventually annulled for violating the Council's rules of procedure.\(^4\) The United Kingdom submitted that the actual text of the Laying Hens Directive differed from the text approved by the Council of Ministers. What in fact had happened was that after the vote certain changes had been made to the statement of reasons in the preamble by the General Secretariat of the Council. These changes were quite substantial, or at least went beyond a simple correction of spelling or grammar.\(^4\) This was contrary to the Council's rules of procedure authorising the Secretary-General only to sign the Directive, not to amend it.\(^4\)

The rule violated in the *Laying Hens* case was clearly a procedural rule safeguarding the content of EC legislation. Whereas in this case the annulment of the Laying Hens Directive is therefore not surprising, the following *Hormones* case\(^4\) presents a situation where this is less clear.

In this case it was established that the Hormones Directive\(^4\) had also violated the Council's rules of procedure. This time, the violated norm could not be of a more procedural nature. Infringed was the rule that whenever the Ministers in the Council want to vote by written procedure they first have to agree to do so unanimously.\(^4\) The Council had adopted the Hormones Directive by means of this written procedure even though the United Kingdom, strongly opposing the Directive, did not agree to such a procedure. Thus, the British Minister of Agriculture was told that the Hormones Directive had been approved by way of written procedure exactly a day after he had explicitly refused to vote in this manner.

\(^4\) As Hartley suggests, see Hartley (1994), p. 429.
\(^4\) Case 131/86 *United Kingdom v. Council*.
\(^4\) The Secretariat added a reference to Article 37 EC (the old Article 42 EC), removed the remark that the Directive was the first step towards common minimum requirements applicable in all intensive housing systems and replaced the reference to the European Convention for the Protection of Farm Animals by a reference to the common organization of the (egg production) market.
\(^4\) Article 9 of the old Rules of Procedure. Nowadays, this rule can be found in Article 15.
\(^4\) Case 68/86 *United Kingdom v. Council*.
\(^4\) Directive 85/649/EEC prohibiting the use in livestock farming of certain substances having a hormonal action.
\(^4\) This rule has survived in Article 12(1) of today's Rules of Procedure of the Council. OJEC 2000 L 149/21.
Considering that the Council adopted the Directive by qualified majority, and the UK was overruled anyway, whatever the actual fashion in which the Member States cast their votes, all this may seem a bit like splitting hairs. Yet, ratio legis of this procedural rule is that Member States should always be allowed to require direct discussion on a proposal for it gives one last opportunity to persuade the other Member States to change their position. In that sense, also this procedural rule ultimately relates to a possible influence on the final content of the European measure. Thus, the Court deemed also this procedural requirement ‘essential’ and annulled the Hormones Directive.49

A procedural requirement is not ‘essential’ if violation of the rule does not relate to influencing the content of the directive by the various players in the European legislative process. For example, the argument of a wrong legal basis may be invoked successfully but may not lead to an invalidation if this ‘flaw’ has not resulted in the use of a different legislative procedure.50 UK tobacco companies discovered this when challenging before UK courts the legal basis of the Tobacco Directive in the BAT case.

The Tobacco Directive was based on a double legal basis, namely Articles 95 (internal market) and 133 EC (common commercial policy). Some Tobacco companies issued before the High Court an application for judicial review of the intention of the UK Government to implement the Directive by means of Section 2 (2) of the European Communities Act 1972, claiming inter alia that the dual legal basis was wrong. Fact was that the Directive, containing requirements as to the maximum amounts of tar and nicotine as well as requirements as to the health-warnings that should be printed on the packaging, also applied to the production of (packages of) cigarettes that were produced for export to third countries. The ECJ held that Article 95 EC was a legal basis capable of supporting the entire Directive, including the provisions relating to the export to third countries.51 The addition of Article 133 EC on external trade was therefore wrong. However, this procedural irregularity was not sufficient to render the Directive invalid. As the Court investigated whether the two legislative procedures under Article 133 EC and 95 EC were

49 The ECJ did not substantiate why it considered this rule to be so important. Interesting parallel with the Case 131/86 Laying Hens, is that here too, the ECJ considered the question of the legal basis to be more of an institutional nature and therefore ordered the UK to bear its own costs in both cases since only such formalities were not deemed to be of a sufficient constitutional nature. As we have learned in the previous Chapter, this judgment of the ECJ got an interesting follow-up in C-331/88 Fedesa, giving a good insight into what British law did with the consequences of the annulment.


51 Reason was that such provisions relating to the production of cigarettes intended for export to third countries helped preventing the unlawful re-import of non-complying cigarettes into the Community, see paragraphs 82-91 of the ruling of the Court in C-491/01 BAT.
incompatible, and concluded they were not. Under 133 (4) EC the Council is to act by QMV and in Articles 95 in conjunction with 251 EC it is too.59

Whatever the ‘essence’ of a procedural requirement, it is clear that its violation does not lead to any incidental European consequences for national implementation. Just like the principle of attribution, these norms protect the interests of Member States (and of the institutions)51 but do not address them. Again the rule of thumb applies in that the status of implementation legislation is a purely domestic affair.

One norm that appears a bit ‘hybrid’ in this context is the obligation to state reasons in Article 253 EC. At first sight it does not seem to have a link with influencing the content of a directive but rather with the content itself, yet it is classified as an ‘essential procedural requirement’.54 However, as a ‘control mechanism’, obliging the legislator to explain why he acted the way he did, the duty to motivate undoubtedly also influences content hence giving it a partly procedural character. This is also apparent from the standard case law of the Court where it is designated as an instrument enabling the Court to exercise judicial review.

3.3 Subsidiarity and Proportionality

Earlier it was already established that the principle of attribution does not represent a ‘double addressing norm’. The other two principles also enshrined in Article 5 EC, subsidiarity and proportionality, cannot be left untouched for they raise some interesting questions of their own. Point of departure is that, like the principle of attribution, subsidiarity and proportionality protect Member States from encroachment by ‘Brussels’, but now in a more sophisticated way.

54 Whereby it must be borne in mind that a dual basis of Articles 95 and 133 EC leads to the co-decision procedure ‘absorbing’ the procedure of Article 133 EC. See also Van Ooik (2004).

51 For instance the Parliament’s right to be re-consulted, a prerogative the Council has infringed on more occasions in the field of road transport liberalization, see C-21/94 Transport Policy and C-388/92 European Parliament v. Council where for this reason the Court annulled Council Regulation 2454/92 of 23 July 1992 laying down the conditions under which non-resident carriers may operate national road passenger services within a Member State and, also concerning cabotage, the annulment of Council Regulation 4059/89 of 21 December 1989 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State in C-65/90 European Parliament v. Council (‘Cabotage I’). In both cases Article 231 EC was applied (see also Section 1.1).

54 At least in some cases infringement of Article 253 is classified under ‘essential procedural requirements’. In other cases it is also presented as an independent category of grounds for review.
3.3.1 Subsidiarity

Only in a few cases has the Court dealt with the subsidiarity of directives but, not very surprisingly, those judgments were not very spectacular, as evidenced by the fact that the Court usually does not spend more than two or three paragraphs on the topic.55

The most spectacular case may be the Biotechnology directive, not because the Court addressed it more extensively (it, again, used only two paragraphs on the topic)56 but more because of the Dutch argument in this case, giving a very peculiar meaning to the principle. The Dutch government argued that the Biotechnology Directive violated the subsidiarity principle because its aims could just as well have been achieved by a classic international agreement between the EU Member States. Such interpretation of the subsidiarity principle is of course not what the Treaty legislator had intended (it would prove a dreadful Pandora's box) and was denied by the Court.57

The principle has been applied as a standard of review to a number of directives: the Working Time Directive, the Bank Deposit Guarantee Directive, the Biotechnology Directive and the Tobacco Directive.58 However, in the first cases, subsidiarity was applied in an indirect fashion namely as forming part of the plea on insufficient motivation. It was not until the Biotechnology decision that a 'substantial' subsidiarity plea was put forward. Not surprisingly, these cases did not show a very progressive approach of the ECJ in applying the principle. Statements of the Council that the aims concerned were best achieved by action at EC level were simply accepted by the ECJ as being true.59 Evidently, the Court is at

55 See C-377/98 Biotechnology, C-84/94 Working Time, C-233/94 Deposit Guarantee case and C-491/01 BAT.
56 See paragraphs 32 and 33 of C-377/98 Biotechnology, the latter of which actually regards another norm; that of a proper statement of reasons. So it would be arguably more correct to say that the ECJ only devoted one paragraph to subsidiarity.
58 Case C-84/94 United Kingdom v. Council and C-233/94 Germany v. European Parliament and Council. In the first case the subsidiarity plea formed also part of the plea regarding the wrongful legal basis and was not to be considered as a separate plea. The UK made it also part of its plea concerning proportionality but the ECJ made it clear that these two principles should not be confused in this manner, see paragraphs 46, 47 and 54 of C-84/94 Working Time. Furtheron the UK squeezed subsidiarity into its plea concerning the alleged defective motivation of the Working Time Directive (paragraph 80). See in particular paragraph 22 of C-233/94 Deposit Guarantee. See for the Tobacco Directive case C-491/01 BAT, paragraphs 177 to 185.
59 In both cases the applicants for annulment relied upon requirements similar to those as are now proclaimed in the Protocol on Subsidiarity and Proportionality annexed to the Treaty of Amsterdam. However, in both cases the ECJ did not accept their argumentation.
this point well aware of its own constitutional position. Consequently, any future invalidation of a directive for infringing the subsidiarity principle will no doubt involve a gross and blatantly evident violation of this norm.

Assuming subsidiarity is invoked successfully against a directive, such violation of the Treaty does not result in any incidental consequences for national legislation implementing that directive. The principle was inserted into the Treaty in 1992 with the aim of protecting Member States' interests in retaining their national sovereignty. One need merely look at the Amsterdam Protocol on subsidiarity and proportionality for illustration:

"the Community shall take action in accordance with the principle of subsidiarity", and: "each institution shall ensure that the principle of subsidiarity is complied with".60

Thus, a violation by the EC institutions of Member States' interests as protected by the principle of subsidiarity does not entail any automatic consequences for national law as far as that very same principle is concerned.

Yet, complications may arise when one would exchange the orthodox application of subsidiarity as demonstrated here for a more wider ranging application. For maybe Article 5 EC and the Amsterdam Protocol only relate to what may be regarded as subsidiarity in 'the narrow sense'. However, De Búrca has made some interesting observations on the principle giving food for further thought. She starts by acknowledging that "the requirements of subsidiarity and proportionality as articulated in the Protocol and in Article 5 EC (...) are undoubtedly directed towards the Community and its institutions rather than the Member States".61 She then proceeded by suggesting that Article 5 EC is part of a broader concept of subsidiarity, indicating that decisions should be taken as closely as possible to the citizen.62 This principle should then be upheld not only by European institutions but also by Member States when acting within the scope of Community law.63

---

60 See respectively Articles 5(2) EC and 1 of the Amsterdam Protocol on Subsidiarity and Proportionality.
62 See Article 1 TEU, the preamble to the TEU and the preamble to the Protocol on Subsidiarity and Proportionality.
If an approach to subsidiarity as suggested by De Bürca would hold up, one would be dealing with a norm that can be a standard for review of Member State legislative action. When applied to directives, it would mean that their implementation of EC directives should be established as closely to the citizen as possible. This may be of particular importance for the countries in the EC that have a federal state structure such as Belgium, Germany and Austria as well as for the entities with devolved powers in the United Kingdom such as Scotland and Wales.

Interesting as this experiment of thought may be, whether one really deals with one and the same subsidiarity norm as when it is applied solely to the European legislator remains to be seen. A directive that is invalidated for violating subsidiarity was invalid because Member States could have achieved its aims just as effectively. That means Member States’ interests were encroached upon but, as stated before, they may ‘waive’ such interest by upholding the implementing measure. But from the conclusion that the directive’s goals are just as well achieved by the Member State does not necessarily follow that those same goals are then also better achieved within the Member States on a sub-national level. *Vice versa*, it could be argued that a directive whose goal is only achievable at EC level may, at the stage of implementation into national law, be implemented just as well on a sub-national level. In the latter case, this EC principle would not lead to the invalidation of the directive, but could serve only as a means for challenging national implementation law.

Thus, under the hypothesis that the principle of subsidiarity would also apply to national measures, it would involve two different tests that do not necessarily lead to the same outcome. Since the tests differ, two different norms would be applied: one at the European level and (theoretically) one at the national level. In any event, what this Section began with must be confirmed: a directive that infringes subsidiarity has not violated a ‘double addressing norm’. Hence no incidental European consequences arise.

---

64 De Witte, for example, is of the opinion that from the jurisprudence of the Court “the legal effect of the concept of subsidiarity seems to be exhausted by the written rules of the Treaty”, Witte, B. de, Institutional Principles, a Special Category of General Principles of EC Law, in: Bernitz, U. and Nergellius, J., (eds), General Principles of Community Law, Kluwer Law International, The Hague-London-Boston, 2000, p. 149.

65 Not surprisingly, it were those three countries that annexed a Declaration to the Amsterdam Treaty stating that “action by the European Community in accordance with the principle of subsidiarity not only concerns the Member States but also their entities to the extent that they have their own law-making powers conferred on them under national constitutional law”, see OJEC 1997 C 340/143.

66 This may be a very ironic consequence of the subsidiarity principle for which the conservative government under John Major had pushed so hard at the negotiations on the Maastricht Treaty. Protecting Edinburgh from London was obviously not what he had in mind.
3.3.2 Proportionality: One Principle, Three Norms

It is beyond doubt that the principle of proportionality also addresses the Member States. But the complicating factor here is that under the common denominator of proportionality, different norms with different address-ees can be found. In general, the following norms can be identified:

i. a ground for review of measures derogating from the basic rules of the internal market;

ii. a principle governing the exercise by the Community of its legislative competence (the rule laid down in Article 5(3) EC; and

iii. a substantive ground for review of Community measures.

The first ground for review protects the Community as a whole and applies at all times to both national and European legislation. This variety of proportionality can therefore be of a double addressing nature. However, the interesting phenomenon can be observed that it is not applied with the same rigour to Community legislation as it is applied to national legislation. It will be further discussed in the sub-chapter on the ‘four freedoms’ of internal market and the legal review of directives.

By contrast, the second ground for review comprises an institutional norm aiming to protect only Member State legislative competence vis-à-vis the European legislator. This was the norm embedded in Article 5 EC and referred to in the Amsterdam Protocol:

“In exercising the powers conferred on it, each institution shall ensure (...) compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty”.

This ‘institutional’ variety of proportionality is therefore the ‘half sister’ of subsidiarity. The norm only addresses the Community institutions and not the Member States who it only protects. Again, one may argue that Member States may at all times ‘waive’ the protection offered to them. Thus, when this principle ex Article 5(3) EC is successfully invoked against a directive, no defect clings

---

67 Tridimas (1999), on p. 90.
68 Although, if the restriction on the free movement is due to human rights protection, such as in the Schmidtberger case, the ECJ intends to leave Member States a ‘wide discretion’ in achieving such protection, see C-112/00 Schmidtberger v. Austria, paragraph 93.
69 Although Tridimas seems to have another view on this: “That is not to say that the protection of rights of the individuals is excluded from the scope of Article 5(3) EC.” Also: “Article 5(3) (...) lays down a principle that is directed primarily, although not exclusively, at the political institutions of the Community.” See Tridimas (1999) on p. 118 and 119 respectively.
to that directive which affects national legislation. Upholding national law that implemented a directive that is invalidated for violating this norm must therefore be possible from the point of view of European law.

The third norm protects the European citizen against unnecessary burdens imposed upon them by Community law. It is a substantive norm that seems primarily designed to constrain the European legislator but some cases have demonstrated that it may also address the Member States as illustrated by the *Standley* case in which the validity of the Nitrates Directive was contested as well as its implementing British legislation.

Member States were required under this Directive to identify waters affected by pollution. The UK Minister of Agriculture, Fisheries and Food designated a few rivers as water that could be affected by pollution from nitrates as well as some areas of land draining into those rivers as nitrate vulnerable zones. *Standley*, whose property was designated as land affected by nitrate pollution, feared the decrease in value of his land due to action programmes that were accompanied by this designation and also required by the Directive. He claimed that since the level of concentration leading to the designation of vulnerable areas was not necessarily only attributable to agricultural sources, he was burdened by disproportionate obligations since the action programmes imposed on farmers alone the responsibility for ensuring that the threshold of nitrate pollution was not exceeded.

The ECJ held, however, that the Directive itself could not be said to infringe the principle of proportionality since Member States were given enough room to implement the directive in such a way as to not offend the principle of proportionality:

---

70 See for example C-84/94 Working Time, where the principle is applied in this way to the Working Time Directive. See also C-426/93 Germany v. Council.


73 C-293/97 R. v. Secretary of State for the Environment Minister of MAFF, ex parte H.A. Standley and Others.


75 They were not dictated by the Directive to infringe the principle of proportionality in setting up their action programmes. For those action programmes did not have to impose obligations on farmers alone. If farmers were not the only contributors to the nitrate pollution, but also the industry, the Member States were free to involve the industry as well.
"[T]he Directive contains flexible provisions enabling the Member States to observe the principle of proportionality in the application of the measures which they adopt. It is up to the national courts to ensure that that principle is observed."\(^{76}\)

The case illustrates that Member States are also bound by (this variety of) proportionality when implementing a directive. It also illustrates that if the directive would have left less discretion to the Member States and hence could be said to oblige them to infringe proportionality it would have been invalid. In its ‘substantive’ capacity, proportionality would then be applied as ‘double addressing norm’ affecting both national and European law.

In the *Molenheide* case which dealt with the Sixth VAT Directive,\(^{77}\) the ECJ issued a similar statement: “the principle of proportionality is applicable to national measures which, like those at issue in the main proceedings, are adopted by a Member State in the exercise of their powers relating to VAT (...).”\(^{78}\)

Taking the *Standley* and *Molenheide* cases as a point of reference, it is thus imaginable that a situation arises where there are consequences for national law if an EC directive is annulled for infringement of the principle of proportionality.

### 3.4 ‘Double Addressing Norms’

As was stated earlier, ‘infringement of the Treaty or any rule of law relating to its application’ may encompass ‘double addressing norms’: norms whose violation by a directive also affect national implementation.\(^{79}\) Unfortunately, with regard to invalid directives, there are not yet any examples of this in the case law of the ECJ. Those directives that were up till now (partially) invalidated were always held to be incompatible with a norm that did not address the Member States. However, when dealing with regulations, the ECJ rendered judgments that are interesting to discuss at this point since these rulings are transposable to directives. Without aiming to provide an exhaustive list, hereafter, attention will be devoted to three important categories of ‘double addressing norms’. First the rules governing the internal market and the four freedoms will

---

\(^{76}\) Paragraph 50 of C-293/97 *Standley*.

\(^{77}\) Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Garage Molenheide BVBA and Others v. Belgian State*.

\(^{78}\) Par. 48 of Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide*.

\(^{79}\) Or ‘universal norm’ if one prefers that term. On the other side of the spectrum of applicable norms there are also norms that only apply to one or two specific EC institutions, for example the principle of collegiality addressed solely to the European Commission, see C-137/92 *Commission v. BASF and others* and C-191/95 *Commission v. Germany*. 
be discussed, then international treaties and public international law and finally the General Principles of Community Law ('GPCL').

3.4.1 The Position of the Internal Market under the European Constitution

When discussing the relationship between European legislation and the internal market, the point of departure is that the Community institutions may not violate the four freedoms and therefore find themselves in the same position as the Member States. In that sense the rules on the internal market ('the four freedoms' on goods, workers, establishment, services and capital) certainly qualify as 'double addressing norms'. Clear examples hereof are provided by certain cases on Regulation 1408/71 on social security, such as the ruling in Kohll where the ECJ stated that

"the fact that a national measure may be consistent with a provision of secondary legislation (...) does not have the effect of removing that measure from the scope of the provisions of the Treaty".  

This statement relates to two aspects of the Kohll case, first of all that whenever EC law violates the four freedoms, national law adopted pursuant to that EC law is also affected. Secondly, it also confirms the general rule that whenever Member States are to act within their competences of implementing or executing European law they must at all times comply with the basic requirements of the internal market. In the Kohll case it was eventually established by the Court that it regarded the second issue rather than the first, meaning that the Regulation left enough room for manoeuvre to the Member State not to infringe the four freedoms. Whereas in Kohll Regulation 1408/71 could still be upheld, in the Pinna case a double addressing norm actually manifested itself in a situation where both Regulation and French law 'executing' it contravened Article 39 EC on the free movement of workers.

---

80 C-158/96 Kohll v. Union des caisses de maladie, in particular paragraph 25. See also paragraph 12 of the Opinion of Advocate General Tesaur on this case.

81 An issue discussed in Chapter 2 under 'consistent interpretation'.

82 The violation by the national legislator of the free movement of services (requiring prior authorization by medical insurance companies for treatment abroad) was therefore not to be led back to Regulation 1408/71 which the national (Luxembourg) judge seemed to assume. As that assumption was wrong (the Regulation did not require prior approval), the legal question was brought back to a direct test of Luxembourg legislation on its compatibility with Articles 49 and 50 EC on the freedom to provide and receive services.
Italian national Pinna did not receive child support for his children who resided in Italy while he was working in France. This time it was Regulation 1408/71 that prescribed this unfortunate result and French law did so too in the *Code de la sécurité sociale*. It was established that if Mr Pinna had the French nationality, he would have received French child support for his children in Italy. The Court, after finding that the regulation actually *prescribed* discrimination of foreign workers in social security matters, declared that:

"France has been induced to maintain for a long period practices which were consistent with Regulation No. 1408/71 but which had no legal basis under Articles 39 and 42 of the Treaty".83

Outside the sphere of social security the *Ramel* case presented one where a Community regulation violated the free movement of goods. What in fact happened was that the regulation setting up the common organization in wine provided Member States with the express possibility to introduce tariffs for the protection of the domestic wine market.84 When in 1975 the French market was confronted with a huge influx of Italian wines, the French government, in reliance on this regulation, issued a decree that imposed a levy on the import of Italian wine. A number of wine importers brought proceedings against the imposition of that levy, thereby questioning the validity of the Regulation authorizing France to impose it. The ECJ held that the safeguard clause in the Regulation was contrary to the ban on charges having equivalent effect as customs duties.85 Obviously, both regulation and French decree were invalid. For if Community institutions cannot derogate from the provisions on the free movement of goods, nor can they explicitly allow Member States to do so.86

The *Pinna* and *Ramel* cases both concerned a regulation and national measures that may be regarded as 'flanking' or 'executing' it. Yet, also directives are regularly challenged for violating the rules in the internal market.87 For example, in the *Bristol-Meyers Squibb* case88 a number of manufacturers of

---

83 Paragraph 27 of the Court’s ruling in C-41/84 Pinna. Interestingly, the fact that France relied upon the invalid provision of the Regulation was one of the factors the ECJ took into account for the limitation of the effects of its declaration of invalidity.

84 Joined Cases 80/77 and 81/77 *Ramel v. Receveur des Douanes*.

85 It could not be exempted from the common market rules on the basis of the agriculture paragraph in the Treaties.

86 The case bears resemblance to the *Lancry* case, where a Council Decision was declared invalid for allowing France to infringe Article 25 EC, see C-363/93 Lancry.

87 See Case 5/77 Tedeschi, Case 37/83 Rewe, Case 240/83 ADBHU, C-51/93 Meyhui, C-127/93 Norbrook and C-166/98 Socridis (on Article 90 EC). As far as direct actions are concerned: C-168/98 Luxembourg v. European Parliament and Council and C-376/98 Tobacco Advertising (in the latter the issue was not addressed by the Court).

88 Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Meyers Squibb and Others v. Paranova A/S*. 

179
pharmaceuticals relied on the First Trademark Directive\textsuperscript{89} in support of their argument that they could ban imports of their own ‘repackaged’ goods.\textsuperscript{90} If their interpretation of the Directive were correct, the Directive would effectively narrow down the long-standing ‘exhaustion rule’ established by the Court when interpreting Articles 28 and 30 EC.\textsuperscript{91} They claimed in fact that the Directive would allow them to ban imports where they could never have done so by relying on the intellectual property exception in Article 30 EC. This constitutional issue was addressed by the ECJ in the following words:

“[A] directive cannot justify obstacles to intra-Community trade save within the bounds set by Treaty rules.”\textsuperscript{92}

Not surprisingly, by applying consistent interpretation, the Directive was said not to impose obstacles to intercommunity trade and was hence declared valid.\textsuperscript{91} However, what intrigues most about the paragraph cited here is the phrase ‘save within the bounds set by Treaty rules’. This requires some further inquiry, mainly because, as other case law and most legal writers indicate, there are cases where the Community legislator and the national legislator, although both addressed in principle by the rules on the internal market, are not addressed to the same degree.

\textsuperscript{89} Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks.

\textsuperscript{90} In doing so, the competitor could undercut prices in various Member States, making use of existing price differences for medicines in the internal market which were likely due to different legislation in Member States on maximum prices, profit margins of pharmaceutical wholesalers and pharmacies or the maximum amount of medical expenses which may be reimbursed under health insurance schemes.

\textsuperscript{91} The ‘exhaustion rule’ means that when a trademark owner markets his products anywhere in the EC, he cannot prevent further circulation of those products within the EC, for his trademark is then ‘exhausted’. Article 7(i) of the Trademark Directive repeated this long standing case law-based rule. Rather than arguing for the one exception that exists to the exhaustion rule, the manufacturers claimed that their action was not within its scope. The exception is laid down in Article 7(2) of the Directive stating that the exhaustion rule does not apply “where there exist legitimate reasons for the proprietor to further oppose commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market”. It was on the basis of this exception that the ECJ further ruled on the case.

\textsuperscript{92} Paragraph 36 of Joined Cases C-427/93, 429/93 and 436/93 Bristol Meyers Squibb. See also point 34 of the Opinion of Advocate General Jacobs: “A directive (...) cannot derogate from the fundamental rules of the Treaty”. See also C-51/93 Meyhui v. Schott Zwiesel Glaswerke to which the ECJ refers in this case.
3.4.2 The Community Legislator Exempted From Treaty Obligations?

Apart from case law and legal writing, also primary law itself indicates that there may be a difference in the degree in which the EC itself and the Member States are bound by the four freedoms. In the context of the subsidiarity issue (Article 5 EC) one of the situations under which it is assumed that Community action is justified, is when such action taken at national level would infringe the Treaty as is clearly stated by the Amsterdam Protocol on subsidiarity and proportionality. Community action is said to be in conformity with the principle of subsidiarity if:

"actions by Member States alone (...) would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion)."  

This statement already clearly presupposes that there are Treaty norms that do not address Member States and Community institutions to the same extent. This obviously relates to any type of Community legislative instrument and thus also to directives. The Deposit Guarantee case gives a good illustration. It may very well be argued that the attainment of the goals of the directive at issue in that case, the Deposit Guarantee Directive, could not have been possible...

---

93 In the hypothetical case the manufacturers were right the Court would find the occasion here to declare the First Trademark Directive invalid for infringement of Articles 28 and 30 EC with obvious consequences for national trademark legislation implementing it. Although the ECJ was only asked to rule on interpretation in this case, it can arguably declare a Directive's invalidity ex officio. However, the ECJ will always attempt to interpret secondary legislation as much as possible in conformity with the Treaty, as is also stated expressis verbis in paragraph 27 of this case.

94 See Article 5 of the Amsterdam Protocol on Subsidiarity and Proportionality. See also Van Nuffel (2000), on p. 371 et seq.

95 See Mortelmans (2002), on p. 1308.

96 As mentioned by Van Nuffel who also mentions the Minimum Oil Stocks Directive (Directive 98/93/EC of 14 December 1998 amending Directive 68/414/EEC imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products, OJEC 1998 L 358/100) and the Regulation on orphan medicinal products (Regulation 141/2000, OJEC 2000, L 18/1). It may be doubted whether Van Nuffel is right in arguing that these two pieces of European legislation concern goals that indeed would otherwise be absolutely unattainable by the Member States. However, he is right in pointing out that their preambles seem to state that this is the case.

by action of the Member States since that would have amounted to a situation where they were bound to infringe the Treaty.98

The Deposit Guarantee case is set against the background of the establishment of a single European banking market. It required Member States to set up deposit guarantee schemes to which their credit institutions were obliged to adhere.99 Based on the third sentence of Article 47(2) EC, it was one of the first directives in the history of the EC to be established by means of the co-decision procedure.100 Its greatest opponent, Germany, was outvoted in the Council and subsequently started nullification proceedings under Article 230 EC. It attacked several isolated provisions of the Directive,101 one of which being the so-called ‘export prohibition clause’102. This provision forbade the ‘export’ of national levels of protection of bank deposits in case of a bank’s bankruptcy.103 The underlying idea of the clause was to prevent the possibility that deposit guarantee protection schemes would become an instrument of competition. Banks established in countries with a high domestic protection scheme, such as Germany, could profit from this when employing activities in other Member States that maintain lower levels of protection. In his annotation, Roth104 argues that the export prohibition clause could not have been established by Member States because ‘Member States cannot justify regulations that impinge on the basic freedoms by referring to their economic interest’.105

---

99 Before adoption of the Deposit Guarantee Directive Member States were already encouraged to do so by Commission Recommendation 87/63/EEC, OJEC 1987 L 33/16. Apparently, this had not lead to the desired result.
100 Also, it was the first directive to result from the conciliation process as established by Article 257 EC (then Article 189b EEC).
101 See for another example where a Directive was argued to be invalid in its entirety and, in the alternative, only to be invalid on certain points, C-84/94 United Kingdom v. Council (‘Working Time’). See further Chapter 2, Section 1.2.4 on severability.
102 Article 4(1) of the Deposit Guarantee Directive. The other provisions under attack were the ‘supplementary guarantee’ provision in Article 4(2) and the ‘membership obligation’ provision in Article 3(1) of the Deposit Guarantee Directive.
103 The export prohibition clause was to apply until the end of 1999, after which date, the Commission would evaluate the operation of this provision in order to see whether it had to be continued. The Commission did not think it opportune to prolong the provision, so it ended on 1 January 2000. As from this date, branches of credit institutions situated in other Member State are also obliged to offer the same deposit guarantee as their parent institutions. See Written Question E-2361/99 by Christopher Huhn and the Commission report on the application of the export prohibition clause in COM (1999) 722 final.
104 On which Van Nuffel seems to rely in his thesis, see supra.
That then raises the question whether the European legislator was capable of obliging the Member States to pursue objectives they could not legally pursue for themselves.\textsuperscript{106} Roth was of the opinion that the EC does not have such capacity and deplored that the ECJ did not face this issue.\textsuperscript{107} Assuming his analysis is correct, annulment of the Deposit Guarantee Directive would amount to a situation where existing national law would suddenly appear to be contrary to the Treaty because of the fact that there is no longer an underlying directive. It is clear that in case the ECJ in the Deposit Guarantee case would have concluded that the Deposit Guarantee Directive was indeed contrary to Article 43 EC, national law would automatically share the fate of the Directive. However the Deposit Guarantee Directive seemed to have more or less the status of an ‘umbrella’, protecting national law. Considered valid (or better: not considered to be invalid), it not only authorized but even obliged Member States to adopt legislation that would otherwise be deemed contrary to Article 43 EC\textsuperscript{108}

Another ‘umbrella’ situation seemed to have occurred in the case law on tariffs impeding the free movement of goods. Long standing case law on Article 25 EC has established the strict rule that “any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and is not a customs duty in the strict sense, constitutes a charge having equivalent effect to a customs duty”.\textsuperscript{109} However, in the context of Member States imposing fees for veterinary inspections on livestock, the ECJ had accepted an important exception to Article 25 in the Bauhuis case.\textsuperscript{110}

In the Bauhuis case the Animal Transport Directive\textsuperscript{11} required Member States to carry out such inspections. This Directive did not mention any fees at all\textsuperscript{112} but merely obliged Member States to carry out certain inspections on animals.\textsuperscript{113} A

\textsuperscript{106} Assuming they would wish to do so, something that may of course be doubted in the case of Germany.

\textsuperscript{107} Roth (1998) on p. 479.

\textsuperscript{108} An important issue was that the Deposit Guarantee case presented typically a case of incomplete harmonization. It was deemed in the Community interest that German companies should not profit from the temporary difference in protection level.

\textsuperscript{109} See for instance paragraph 5 of Case 18/87 Commission v. Germany, confirming the Court’s judgment in C-46/76 Bauhuis.

\textsuperscript{110} Case 46/76 W.J.G. Bauhuis v. The Netherlands.


\textsuperscript{112} The difference with the Ramel case is that there the Regulation on Wine expressis verbis permitted national measures that contravened Article 28 EC. It appeared from the Bauhuis case that the Animal Transport Directive simply did not mention the matter.

\textsuperscript{113} In fact that was a point the Commission and Advocate General Reischl relied on in order to argue that the fees imposed for the inspections were illegal.
beef exporter challenged the validity of such fees imposed in connection with these veterinary inspections. Since it was clear that the two exceptions to Article 25 EC could not be applied to these fees,\textsuperscript{114} it seemed that indeed they were illegal. However, the Court held that it followed from the system of veterinary inspections established by this Directive \textit{in the general interest of the Community}, that these fees could not be regarded as charges having an equivalent effect to customs duties.\textsuperscript{115} Although the Directive did not mention any fees imposed for the sanitary checks, the Court held that such fees were allowed in this particular type of situation. Fees charged in connection with inspections carried out pursuant to a Community provision could, under certain conditions,\textsuperscript{116} be regarded as not interfering with Article 25 EC.

Just like the \textit{Deposit Guarantee} case, this case was not uncontroversial. Dutch commentator Barents pointed out that the dues resulting from inspections prescribed by the Directive nevertheless have the effect of increasing the cost price of goods and hence impede their exportation.\textsuperscript{117} Indeed, also the Commission and Advocate General Reischl argued that imposition of those duties by the Council was not possible since “the Community legislature, too, is bound by the principle of the free movement of goods”.\textsuperscript{118} Nevertheless, in a case such as \textit{Bauhuis}, the European legislator seems exonerated to do, or, to be more precise, to permit, action that what would be violating the Treaty in case Member States carried it out independently. One commentator put it very clear when he wrote:

\textit{“La circonstance particulière d’une disposition communautaire change le caractère d’une taxe à l’exportation qui sans cela eût été contraire au traité.”}\textsuperscript{119}

\textsuperscript{114} Being the duties that follow from the general system of internal dues or the payments for services rendered.

\textsuperscript{115} See paragraphs 29 to 32 of the Court’s ruling in C-46/76 \textit{Bauhuis}. The Commission submitted that “the Council may not \textit{permit} or \textit{charge} such fees since the Community legislature is also bound by the provisions of the Treaty.” In this case, it is indeed a matter of \textit{permission} by the EC legislator.

\textsuperscript{116} These conditions are: (1) the fees do not exceed the actual costs of the inspections, (2) the inspections are uniform and obligatory, (3) they are prescribed by Community law in the general interest of the EC, and (4) promote the free movement of goods, in particular by neutralising obstacles which could arise from unilateral measures of inspection adopted under Article 30 EC, see paragraph 7 of Case 18/87 Commission \textit{v. Germany}.

\textsuperscript{117} See Barents, R., annotation to the \textit{Simmenthal} and \textit{Bauhuis} cases, SEW, 1977, p. 563.

\textsuperscript{118} Opinion of Advocate General Reischl in C-46/76 \textit{Bauhuis}, point 25. He argued that a situation as in Case 10/73 \textit{Reue Zentral AG v. Hauptzollamt Kehl} concerning monetary compensation conceived only to prevent disturbances to trade, does not apply here. See on the latter also paragraph 37 of the Courts ruling in Joined Cases 80/77 and 81/77 \textit{Ramel}.

The Deposit Guarantee-, Bauhuis- and Meyhui cases indicate a relationship between the directive and national legislation as one where the directive could be said to ‘protect’ national law that would otherwise be infringing the Treaty. It is exactly that which makes these cases contrast with the Pinna, Roviello or Ramel cases where the ECJ did strike down European legislation for infringement of the fundamental freedoms. It goes too far to discuss this topic more extensively at this stage, but it suffices to state that in certain cases the four freedoms do not always address the Member States and the European legislature to the same extent in the sense that ‘in the general interest’ the Community legislator is allowed more discretion in derogating from the internal market rules than the Member States.\(^\text{120}\)

On the topic of the extent to which the Community legislator is bound by the rules on the internal market exists extensive literature.\(^\text{121}\) For instance, Scheffer and Mortelmans suggest a distinction between on the one hand authorizing/co-coordinating Community law and on the other hand Community law that tries to set common rules by harmonization.\(^\text{122}\) They suggest that the cases where the Community legislator is granted more discretion for derogating from the four freedoms than the Member States will most likely be found in the category of Community law setting ‘common rules’.\(^\text{123}\) Indeed, this distinction does ‘fit’ the case law discussed in this paragraph: Deposit Guarantee, Bauhuis and Meyhui all concern directives that enacted 'common rules'.

In the situations addressed here, the directive may be regarded from the point of view of national implementation law as an ‘umbrella’ shielding it from the rules on the internal market. Such ‘umbrella directives’ may be of importance to this thesis for the relationship between national law and the directive is rather special. When national law implements a directive that violates the internal market, such national law is automatically non-applicable. However, in case of an ‘umbrella directive’ national legislation remains valid because of the underlying directive. That logically renders national legislation quite ‘sensitive’ to any legal defect clinging to such an ‘umbrella directive’. For the latter cannot be said to violate the internal market but nonetheless it may be tainted with other defects. For instance, in the Deposit Guarantee case Germany pleaded that the

\(^{120}\) See paragraph 29 of C-46/76 Bauhuis. See also paragraph 15 of the ADBHU case classifying environmental protection as a ‘general interest’.


\(^{123}\) See Mortelmans (2002), on p. 1334 and p. 1308.
('umbrella') Directive at issue was adopted on an improper legal basis.\textsuperscript{124} If that argument would have been successful, national implementation anywhere would violate Article 43 EC on free establishment.\textsuperscript{125}

The same would be true for the Animal Transport Directive that had set the scene for the \textit{Bauhuis} case, although in the latter case it would not be implementing legislation \textit{sensu strictu} that would become invalid, but nevertheless legislation imposing fees that could not have been imposed if it were not for the existence of this Directive.

Sometimes it is not always clear whether one is dealing with a genuine 'umbrella' situation or simply with a matter that has escaped judicial review. A case where this was particularly unclear, apart from the already discussed \textit{Deposit Guarantee} case, was the \textit{Meyhui} case.\textsuperscript{126} It concerned a legal dispute over the Crystal Directive\textsuperscript{127} concerning trade in crystal products. It obliged manufacturers to indicate the correct name of the type of (crystal) glass they were selling. Problematic was that, at the same time, it prohibited the indication of the correct names for this type of crystal in the other official EU languages. Reason behind this was that the different names for the different types of glass could mislead the consumer since in some EU languages the word 'crystal glass' was the correct name for cheaper types of glass containing a smaller percentage of lead.

Advocate General Gulmann held the Directive to be invalid in so far as it prohibited the use of such names in other languages where this would not mislead the consumer, namely in cases where the correct terms in different languages are very similar.\textsuperscript{128} He points out that, according to the Directive, Portuguese law must require that Spanish products contain only the Portuguese indication \textit{vidro sonoro}, omitting the Spanish indication 'vidrio sonoro'. Could Portugal rely on consumer protection justifying the ban on import of Spanish products that indicate these two official names differing only with the letter \textit{i} in \textit{vidrio}? According to the Crystal Directive, Portugal not only \textit{can} ban those Spanish glass products from its market, it is \textit{required} to do so!\textsuperscript{129} The Court, however, did not address this issue of the

\begin{footnotesize}
\textsuperscript{124} \textit{In casu}, the legal basis was Article 47 (2) EC.
\textsuperscript{125} Assuming that commentator Roth is right when he states that "the export prohibition has to be considered as an unjustified infringement of Article 52 EC by the Community legislature", see Roth (1998) on P. 479.
\textsuperscript{126} C-31/93 Meyhui v. Schott Zwiesel Glasswerke AG.
\textsuperscript{127} 69/493/EEC.
\textsuperscript{128} Some of those names were indeed very similar (for instance the French \textit{verre sonore} is very similar to the Spanish \textit{vidrio sonoro}, the Italian \textit{vetro sonoro} or the Portuguese \textit{vidro sonoro}).
\textsuperscript{129} Of course, some situations covered by the Directive are more acceptable such as the situation where the German term \textit{Kristall glas} or the English \textit{Crystal glass} would be placed on the product next to the Dutch term \textit{sonoorglas} or the Italian \textit{vetro sonoro}. See also footnote 22 of the opinion of Advocate General Gulmann.
\end{footnotesize}
requirement to ban the use of languages of other Member States, even in case the terminology in those other languages cannot possibly mislead the average (Portuguese) consumer.\textsuperscript{10} The result is that another 'umbrella situation' has emerged. In the Portuguese example, national legislation clearly depends for its validity on the existence of the Crystal Directive.

A case such as Meyhui where the Court ignored the issue of compatibility with the internal market must be deplored. It would have been more transparent if the Court would have stated that this typically is a situation where the Community legislator enjoys more discretion under Article 28 EC than national legislators do. After this ruling one could still expect the next preliminary reference in proceedings on Portuguese implementation law requiring a Spanish exporter of crystal glass to re-label his vidrio sonoro as vidro sonoro.

3.4.3 Notification

Whenever national law implements a directive that has previously been invalidated for reasons other than violating the rules on the internal market, such law must obviously comply with all basic Treaty requirements. Therefore, national measures implementing an invalid directive must be justified by the exceptions laid down in the Treaty or by the 'mandatory requirements' as established by the ECJ in its Cassis de Dijon case law. In as far as the directive concerned was not itself in violation of the rules on free movement or a directive of the 'umbrella type' as explained above, there is no reason to believe that the Member State would not succeed in upholding the former implementation law under the internal market regime.

Yet, in such a case Member States must be aware of the fact that in one respect many directives in the internal market require national implementation measures that amount to 'technical regulations'. As is well known, Member States must 'notify' such regulations to the Commission under the notorious\textsuperscript{11} Notification Directive.\textsuperscript{12} In the context of this thesis the Notification Directive

\textsuperscript{10} The ECJ limited itself to judging the validity of the requirement of the directive in so far as it requires the use of the language of the country where the product is marketed. See also the annotation of Temmink who agrees with the opinion of Advocate General Gullmann at this point: Temmink, H.A.G., SEW, 1995, p. 619.

\textsuperscript{11} Many Dutch lawyers will not easily forget C-194/94 Securitel, as the one upsetting the Dutch lawmaking machinery. Numerous Dutch regulations suddenly proved to be non-applicable as a result of them being 'technical regulations' that were not notified to the Commission in accordance with the Notification Directive. See for a description of the aftermath of this crisis as far as the Dutch civil service is concerned: Zwaan, J.W. de, Haags post-Securitel coördinatie, de doorwerking van de Securitel-affaire op de Haagse coördinatie met betrekking tot Europees recht, SEW, 1998, p. 362.

\textsuperscript{12} Directive 98/34/EC of the European Parliament en the Council laying down a procedure for the provision of information in the field of technical standards and regulations. It consolidates Directive 83/189/EEC that had undergone several amendments.
may be relevant in so far as it provides Member States with a very obvious exception to the duty to notify: the technical specification laid down in implementing legislation. It provides that the duty to notify

"shall not apply to those laws, regulations and administrative provisions of the Member States (...) by means of which Member States comply with binding Community acts which result in the adoption of technical regulations".  

Thus, whenever national legislation that may be qualified as a ‘technical regulation’ in the sense of the Notification Directive, is adopted only for reason that it implements an EC directive, such legislation is exempted from notification.

The Commission is informed of such legislation through another channel since directives usually contain an obligation for the Member States to inform the Commission of the implementing legislation they have adopted.  

That opens the question as to what consequences annulment of a directive would have in case legislation implementing that directive is to be qualified as a ‘technical regulation’. It would seem logical that those Member States wishing to retain the implementing law must notify the commission thereof as soon as possible.

One could draw the parallel here with the situation in which a directive only envisages minimum harmonization. In that case, it may be argued that when the implementing measure a Member State chooses to adopt is more stringent than the minimum level as required by the directive, this measure falls within the ambit of the Notification Directive if it concerns a technical regulation. It seems that also national legislation implementing an annulled directive must be notified since then too it is a national autonomous decision to uphold the implementing legislation. The fact that this law used to be in conformity with a directive that is now invalid does not change the fact that the internal market is at stake.

Applying this hypothesis to the Directive that the Court declared invalid in the Angelopharm case, it does indeed seem logical. That invalidated Directive prohibited a certain substance in cosmetic products. If, after the Court’s ruling, German legislation still prohibits it to be included in cosmetics, this obviously amounts to a ‘technical specification’. Other Member States may choose to allow

\[13\] See Article 10, paragraph 1, first indent of the Notification Directive, recently discussed in C-390/99 Canal Satélite Digital SL v. Administración General del Estado.

\[14\] Sometimes a directive also obliges them to refer to the Commission the drafts / proposals for such legislation.

\[15\] Defined in short as specifications laying down the characteristics required of a product.
the substance being included in cosmetic products but those may still not be marketed in Germany if it upholds its implementation measures. The same is true for the Tobacco Advertising case. If The Netherlands had implemented the Tobacco Advertising Directive before its annulment, its, now purely national, measure to ban Camel boots because they bear the Camel trademark in an identical form to the Camel trademark used for cigarettes, is obviously a 'technical specification' that must be notified.

A duty to notify the Commission of the desire to uphold national implementing measures after the invalidation of the underlying directive applies only to the technical specifications in terms of the Notification Directive. Yet, that does not necessarily mean that on implementation measures other than 'technical regulations' there is no need for at least some form of communication with the institutions, notably the Commission. Hereafter, it will be argued that certain consultative duties can be founded on the principle of Community loyalty (Article 10 EC).

3.4.4 International Treaties and Customary International Law

When considering the 'double addressing norm', international agreements prove to be an important category since a double addressing norm par excellence is found in the wording of Article 300(7) EC:

"Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Communities and on the Member States".

Since this implies that these treaties are to be classified automatically as Community law and in that quality as binding upon the Member States, one can find proof in this of the monistic nature of Community law. Furthermore, because of the communautarization of international agreements through Article 300(7) EC the EU Member States are bound by them, even if they are not signatory parties.

Also directives as acts of the Community must comply with these treaties. It may be remembered that, although directives and treaties concluded by the Community are both part of the corpus of secondary Community law, in case

---

189

196 See Vanhamme (2001), on p. 166: "Aangezien de lidstaten in heel wat gevallen zelf geen partij zijn bij de verdragen die de Gemeenschap sluit, kan de tegenstelbaarheid aan hen van dergelijke verdragen enkel steunen op de automatische kwalificatie van verdragen gesloten door de Gemeenschap als gemeenschapsrecht." He agrees with Kovar when he states that the decision of the Council to approve a treaty cannot be qualified as an act of transposition.
of conflict between the two, the latter prevail. At this point, the hierarchy of norms between different sources of secondary Community law is clear.

Hence, the scenario is possible that a directive is invalidated for infringement of a treaty concluded by the Community. Yet, that has up till now been a rare occurrence. Never has a directive been invalidated for violating a treaty or any other source of international law for that matter. Furthermore, it has been (unsuccessfully) invoked in four cases. Such invalidation by the ECJ automatically affects national implementation law. It automatically follows from Article 300 (7) EC that such national legislation is non-applicable for infringing that same treaty. Point of departure therefore is that treaties concluded between the EC and decisions of international organizations of which the EC is a member are 'double addressing norms' affecting both directives and national implementation. Yet at this point a further qualification of 'double addressing norms' becomes adamant, namely that they can manifest themselves. For, as is well known, although treaties bind the European institutions, they are not always sanctioned. What sets treaties apart from other norms within the Community legal order is that their 'direct effect' is required for validity review.

As one scholar, when writing on the status of WTO dispute settlement reports in the German legal order, comments: "As a result of their Communityarization, they (= the dispute settlement reports) enjoy the highest legal rank in the German legal order. At the same time, German courts are bound by the case law of the European Court concerning the lack of direct effect." Thus national citizens cannot challenge the implementing measure for violating the (mixed) treaty.

---

137 See case 40/72 Schroeder v. Germany, paragraph 7 and C-61/94 Commission v. Germany, paragraph 52 and the Opinion of Advocate General Mayras in the International Fruit case. Joined Cases 21-24/72 International Fruit Company v. Produktschap voor Groenten en Fruit, on p. 1235. See also Vanhamme (2001) on p. 113. As between these agreements and the body of primary Community law, the hierarchy is that then the latter prevails, see C-327/91 France v. Commission. To draw the hierarchy line further, primary Community law is in its turn subjected to general international law, see Case 41/74 Van Duyn, paragraph 22, see also Vanhamme (2001) on p. 111.

138 Namely C-1/96 Compassion in World Farming and C-49/01 BAT, both preliminary references, in T-174/00, Biret, in damages proceedings under 288 EC and in C-377/98 Biotechnology in annulment proceedings.

139 As was clear from the case law of the ECJ, these two sets of norms are treated on the same footing. See in that respect Lavranos, N., Legal Interaction between Decisions of International Organizations and European Law, Europa Law Publishing, Groningen, 2004.


142 Yet, these treaties are nevertheless 'directly applicable' in the Community legal order and therefore also in the national legal order. Nevertheless, national authorities that would comply with the treaty and thereby violate the un-challengeable directive would, to say the least, violate the principle of Community Loyalty, if not more.
Having stated that, it then becomes relevant, both for the directive and its implementing measure, to investigate whether the treaty concerned can be a standard for review of the directive. Hereafter some remarks will be made on this prerequisite for legality review of EU directives in the light of international treaties and international decisions together with the other, obvious, prerequisite that treaties must be concluded by the Community.

3.4.4.1 ‘Concluded by the Community’

In principle, a conflict between a European directive and a treaty may be a ground for annulment of that directive only if the treaty concerned binds the Community. Simply following the Pacta Tertiiis rule as established in public international law, the Community cannot be bound by treaties to which it is no party. Therefore, treaties to which the Community is no party normally fall outside the scope of judicial review by the ECJ.

However, from the Community point of view, there may be a form of indirect binding attached to treaties concluded by others than the EC. The Court’s ruling in the Biotechnology case showed that under circumstances a directive may be reviewed in the light of treaties to which only the Member States are party. In this case, The Netherlands Government challenged the Biotechnology Directive claiming inter alia that it contravened the European Patent Convention, to which the EC is no party. Allegedly, Member States were obliged to violate their obligations arising from this treaty when abiding by their duty to implement the Biotechnology Directive. In other words, the Biotechnology Directive was said to place the EC Member States in a ‘treaty conflict’. The ECJ took this plea serious by stating:

"Moreover, and in any event, this plea should be understood as being directed, not so much at a direct breach by the Community of its international obligations, as at an obligation imposed on the Member States by the Directive to breach their own obligations under international law while the Directive itself claims not to affect those obligations."144

The Court proceeded by indeed reviewing the legality of the Biotechnology Directive in the light of the European Patent Convention on the basis of this possible treaty conflict. A question that remains to be answered is whether a plea claiming that a directive imposes upon Member States a ‘treaty conflict’ is only taken into account when the directive itself contains a ‘no conflict clause’ as was the case with the Biotechnology Directive.145 Or could it be that the Court

143 To which all the EC Member States and five third countries adhere.
145 See Article 1(2), of the Biotechnology Directive, to which the ECJ also alluded.
introduced in Biotechnology a more overarching principle of 'no treaty conflict' as a general standard of review. In a way this would not be a novelty since in the human rights context the Court has long since opened up Community legislation for review by treaties to which the EC is no party. However, as will be explained below, in those cases indirect review of EC law hinges on the General Principles of Community Law, not on a mere 'no treaty conflict' rule as in the Biotechnology case.

However interesting for this study, it must be observed that the treaty conflict rule as applied in the Biotechnology case (whatever the scope of that rule may be) does not represent a 'double addressing norm'. For such 'no treaty conflict-norm' addresses only the Community institutions. Imagine the Biotechnology Directive is invalidated for infringing the norm that institutions may not impose a 'treaty dilemma' on Member States. National law itself, implementing the Biotechnology Directive, does not conflict with that norm but with the conflicting treaty itself. Consequently, whatever happens to national law in such a situation depends solely on the Member State's national (constitutional) law, not on Community law. Since there is diversity among the EU Member States as to the 'monist' or 'dualist' concepts, the consequences for implementation law will differ.

3.4.4.2 Invocability and the Nakajima Exception

Next to being binding upon the Community, the second condition for testing a Community measure against treaties with third parties is that the latter have direct effect or, to use a more fitting term in this context, 'invocable'. As stated above, when the norm of public international law lacks invocability, the ECJ will not review the legality of the directive, nor will the national courts review legislation implementing that directive. The latter may be illustrated by the Jippes case.

In the Jippes case, the validity of Directive 85/511/EEC banning vaccination of farm animals against foot and mouth disease was contested. Mrs Jippes, desperate to vaccinate her animals, claimed before a Dutch court that the Directive's ban on vaccination was contrary to the 1976 European Convention on the Protection of

---

146 Also Wouters and Van Eeckhoute prefer to use this term in the international context to the term direct effect in order to avoid confusion, see Wouters, J. and Eeckhoute, D. van, Giving Effect to Customary International Law through European Community law, in: Prinssen, J.M. and Schrauwen, A. (eds), Direct Effect, Rethinking a Classic of EC Legal Doctrine, Europa Law Publishing, Groningen, 2002.

147 See C-189/01 Jippes, paragraph 35. This same Convention was invoked unsuccessfully against a directive in C-1/96 Compassion in World Farming.
Animals Kept for Farming Purposes. The Dutch court denied this claim, reiterating the jurisprudence of the ECJ that this Convention is not directly effective.

If not invokeable, the treaty norm cannot have the effect of invalidating a directive and neither can such effect arise in national courts vis-à-vis national legislation implementing that directive despite the fact that the EU Member States under Article 300(7) EC are bound by treaties concluded by the Community. The jurisdiction on determining such direct effect does not always lie with the ECJ. Difficult questions in this respect may arise with so-called 'mixed agreements' to which both the EC and its Member States are party. In some cases the ECJ has interpreted its jurisdictional powers of interpretation broadly.

When one is dealing with 'mixed agreements' one should clearly distinguish between the 'double addressing norm' that can be embedded in the 'Community component' of such treaty and the 'Member State component' which does not represent 'double addressing norms'. In case a Member State violates the treaty obligations that fall within its competences, it only breaches its own obligations arising from that treaty vis-à-vis third parties. The Member State in such a situation does not, however, breach any obligations under Community law that could be construed under Article 300(7) EC.

Treaties lacking direct effect will first have to be transposed, be it sensu stricto (implementation through legislation) or sensu lato (administrative application

---

148 In particular, Article 3 thereof. This convention was approved by means of Council Decision 78/923/EEC, OJEC 1978 L 323/12. This same Convention was invoked unsuccessfully against a directive in Compassion in World Farming.

149 See paragraph 5.2 of the judgment of the Industrial Appeals Tribunal (College van Beroep voor het Bedrijfsleven) of 26 April 2001, AB, 2001, no. 201. As the annotator to the case called it, the absence of direct effect of the Convention in the Community/Dutch legal order was an acte éclairé.

150 See Vanhamme (2001), on p. 175.

151 See for instance C-53/96 Hermès International v. FHT Marketing Choice BV. Some Member States submitted the ECJ was not competent to interpret a certain provision of the TRIPS Agreement, a mixed treaty, for that provision fell within their sphere of competence. The Court, however, made clear that "the WTO Agreement was concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties". It is not clear whether the Court regarded this point in itself to be adequate to construe its power of interpretation since it continued to argue that in fact there was a link with the community sphere of competence by applying a 'Leur-Bloem' construction. Towards third countries the binding effect of a mixed agreement on the Member States can indeed be limited by such declarations of competence as for example attached to the Convention on Biological Diversity. In the absence of such a declaration, they are, however, bound by the entire agreement.
in good faith) in Community law.\textsuperscript{152} Implementation of a treaty by Community legislation may take the form of a directive, although regulations seem more appropriate in this respect.\textsuperscript{151} In the absence of such an implementing Community act, a ‘double addressing norm’ is not provided by the treaty since Community acts will not be reviewed by the Court on compatibility with those treaties.\textsuperscript{154}

However, it is interesting to regard the Biret Appeal decision in this context. The ECJ had stated that, although WTO law is not directly effective in the Community legal order, a Dispute Settlement Body decision may change that effect. In particular, after the period expired within which the EC had committed itself to comply with the Dispute Settlement Body decisions, legal review must be deemed possible.\textsuperscript{155}

However, in case there is such implementation of international obligations into Community acts, the so-called Nakajima jurisprudence comes into play. In this case law, the ECJ stated that if a Community measure implements a particular treaty obligation or if it refers to specific provisions of a treaty, that particular treaty may be invoked in order to test the validity of that Community measure.\textsuperscript{156} Hence, this case law transforms a non-directly effective treaty into a ‘double addressing norm’. When applied to a Community directive Nakajima leads to national legislation being non-applicable for violating the treaty implemented

\textsuperscript{152} As far as the treaty falls within the competence of the Community. In case the Community does not take such action it may be subjected to an action for failure to act ex Article 252 EC by either a Community institution or a Member State.

\textsuperscript{153} Because of their direct applicability (in the sense of not needing national implementation measures), see Leefmans, P.J., Externe milieubevoegdheden, Communautaire grenzen aan externe milieubevoegdheden van de EG-lidstaten, Kluwer, Deventer, 1998, on p. 262. Examples of treaties that were implemented by means of a directive were the Montreal protocol, the treaty of Bern (1979) and the treaty of Geneva (1979) and (partially) the Convention on Biological Diversity. See also Lavranos (2004), p. 8.

\textsuperscript{154} An example is the British American Tobacco (BAT) case in which it was claimed before a UK court that the Tobacco Labelling Directive was infringing Article 20 of the TRIPS agreement. The Court declined to review it due to the ‘TRIPS’ nature and structure’, see Case C-491/01 BAT.

\textsuperscript{155} On this point the ECJ had corrected the CFI that disregarded the relevance of DSB decisions for determining whether the Hormones Directive could be reviewed in the light of WTO law. See C-93/02 P Biret v. Council, paragraphs 55-64.

\textsuperscript{156} See C-280/93 Germany v. Council, paragraph 111: “In the absence of such an obligation following from GATT itself, it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules”. See also C-149/96 Portugal v. Council. See also Vanhamme (2001) on p. 178 and 182: “door de omzettings- of uitvoeringshandeling aan te vechten vraagt de rechtszoekende helemaal geen rechtstreekse werking van het verdrag in kwestie”. 

194
into the Community legal order. As such, Nakajima has not been applied yet to review directives.\(^\text{157}\) However, in the above mentioned Biotechnology case, the Court applied international law on a directive in a way that can be said to closely resemble Nakajima.

In the Biotechnology case the ECJ did not apply Nakajima as such but tackled the approach under the ‘treaty conflict rule’ as discussed above. Article 1(2) of the Directive stated expressly that the Directive did not prejudice the international obligations of the Member States. Under this treaty conflict rule the ECJ proceeded to review the compatibility of several treaties, including WTO Agreements and the Convention on Biodiversity.

The ‘no treaty conflict rule’ in the Biotechnology Directive can be considered a reference to international treaties in the sense of Nakajima and can therefore account for the fact that the court proceeded to review the Directive in the light of these treaties despite them lacking direct effect as the Court has in the same case once again reiterated.\(^\text{158}\) Support for viewing the case from this angle may be drawn from the fact that in the crucial passage, the ECJ refers to the Racke decision, a case that can be regarded as an application of Nakajima in order to review Community legislation in the light of customary law (see infra).

It may be remembered that in the previous paragraph the ‘no treaty conflict rule’ was designated to be no ‘double addressing norm’. A further refinement must be made here. The treaty conflict rule itself is no ‘double addressing norm’ for it refers to the components of treaties (or entire treaties such as the European Patent Convention) that are binding only upon the EU Member States. However, in as far as the treaty conflict rule triggers review of the directive in the light of the Community component of (mixed) treaties, one does deal with a double addressing norm for one is then in the realm of Article 300 (7) EC.

Whereas under Nakajima the validity review of directives may result in the directive being invalidated and the Member State being faced with a situation in which implementation legislation is non-applicable as a matter of EC law, the possibility that this will actually occur should of course not be exaggerated. For it must be realized that, even if the Nakajima approach is followed by the ECJ as arguably was the case in Biotechnology, one still faces the problem that, since the treaty would in other circumstances not be ‘invocable’, the ECJ will only

\(^{157}\) In C-93/02 P Biret (action for damages) the Second Hormones Directive 88/146 was allegedly violating the WTO ASP Agreement. The CFI denied to review the directive under a ‘Nakajima construction’ for the simple reason that the Hormones Directive predated the SPS Agreement so that it could not possibly refer to it or implement it.

\(^{158}\) As also suggested by Wouters and Eeckhoutte (2002), on p. 228/229.
annul in ‘Nakajima cases’ for manifest violations of such a treaty. This is inevitable when taking into account the constitutional position of the Court in the Community legal order encompassing marginal review of ‘vague’ norms.159

3.4.4.3 Customary International Law

The Community, as a legal subject of public international law,160 has to exercise its powers in conformity with rules of customary international law.161 But besides recognizing that the EC is bound by customary rules, the ECJ has gone as far as to state that Community legislation may actually be sanctioned for infringing custom as it did in Racke.162

In Racke, a Council regulation suspending the effect of an agreement between the Community and the Federal Republic of Yugoslavia possibly contravened the rebus sic stantibus rule. Racke could rely on this rule of customary international law in contesting the Council Regulation’s validity. The Court based its conclusion on the fact that the Regulation infringed the rights which Mr Racke derived directly from the suspended treaty with Yugoslavia.

One way of looking at the Racke case is that it extends to customary rules the Nakajima jurisprudence which is used to review Community law in the light of treaties (see supra). For what seemed crucial in Racke is that the Council Regulation suspending the treaty with Yugoslavia could only be based on the principle of rebus sic stantibus, thus in a way ‘implementing’ the customary rule into the Community legal order. When considered from this angle, direct effect of the rebus sic stantibus principle was indeed not required.163

Conclusion is that contesting the validity of directives in the light of their compatibility with principles of public international law must be possible in certain cases, although it is not certain what the exact conditions are since the interpretation of Racke given above is but one of many. However, for this study it is important to stress that in as far as the ECJ does invalidate a directive in the light of customary law, this would amount to a ‘double addressing norm’ manifesting itself.

159 As is for example also evident from the review of subsidiarity and proportionality, see infra.
160 The question of legal personality of the EU, for years hotly debated in legal literature, is finally settled in the Treaty establishing a Constitution for Europe (TCE), see in particular Article 1-7 TCE.
161 See C-286/90 Poulsen and Diva Navigation.
162 C-162/96 A. Racke GmbH & Co. v. Hauptzollamt Mainz. Earlier this could also be deduced from the Opel Austria case, see T-115/94 Opel Austria GmbH v. Council. However, that case is a bit blurred by the fact that the ECJ mainly applied the General Principle of Community Law of legal certainty rather than the public international law principle of bona fides. See also Vanhamme (2001), No. 273 and 274.
163 As also suggested but eventually denied by Wouters and Van Eeckhoutte (2002), on p. 203 and 224.
Referring to Racke, one need merely imagine the situation in which the treaty with Yugoslavia was not suspended by a regulation but by a directive, implemented into national law. Such national implementation law would be, as a matter of Community law, non-applicable for violating the *rebus sic stantibus* rule.

It is not necessary to investigate the applicability of the customary rule in the national legal order from a national (constitutional) point of view, something that differs widely between the different countries of the EU.\(^{164}\) In this respect, Cassia may be quoted when he notes the ‘new status’ of customary law in the context of validity review of Community acts by French courts:

> "Le contentieux de la validité pourrait alors avoir des conséquences imprévues sur la hiérarchie des normes en droit national, si le juge administratif était saisi de la compatibilité d’une loi transposant un règlement communautaire au regard des principes coutumiers de droit international".\(^{165}\)

### 3.5 General Principles of Community Law

#### 3.5.1 Introduction

Special attention must be given to the General Principles of Community Law (hereafter: ‘GPCL’) as potential ‘double addressing norms’. As the law stands today, the GPCL include a basic catalogue of human rights,\(^{166}\) as well as other general principles relating to good administration and to the institutional structure of the EC/EU. With the exception of the principle of proportionality (see *infra*), the ECJ does not make a distinction between these various ‘sub-groups’ of GPCL.\(^{167}\) This category of norms differs from the others mentioned in this chapter because of the uncertainty as to the extent to which they are applicable to Member State legislation. The process of drafting the ‘Charter of Fundamental Rights of the Union’, a document that to a considerable extent codifies the various present GPCL, showed again the continuous efforts of the Member States to restrain their ‘grasp’ *vis-à-vis* domestic laws and actions. This issue will be addressed hereafter in the context of the invalidated directive. Whereas their invokability in relation to national legislation is not always clear,

---

\(^{164}\) In Germany, general principles of public international law have a status superior to federal law and the law of the *Land*, see Article 25 of the German Constitution. The Italian Constitution too attributes such status to them, as was pointed out by Kuyper in his annotation to C-162/96 *Racke*.


\(^{166}\) As stated in Article 6(2) EU.

the GPCL can of course be invoked in relation to Community directives, as for example had happened before a UK court in *Woodspring*.168

Before the High Court of Justice a question arose on the validity of a directive in the light of *inter alia* the principle of proportionality. Directive 64/433/EEC169 obliged fresh meat to be checked by licensed veterinary surgeons both *ante-mortem* and *post-mortem* and was implemented in UK law by different statutory instruments.170 An operator of a slaughterhouse refused to pay for these ‘double’ medical checks of his cattle, invoking the principle of proportionality as rendering the Directive invalid. The ECJ stated that:

“since the principles of proportionality and non-discrimination have been recognised by the Court as forming part of the general principles of Community law (...) the validity of acts of the Community institutions may be reviewed on the basis of those principles of law”.171

Accepting that the GPCL are standards for review of Community legislation is of course not very surprising.172 However, the *Woodspring* case then touched upon the ‘double addressing’ character of the GPCL as the High Court asked, in case the directive were invalid, whether

“the UK Statutory Instruments that purport to implement it but which also have another independent legal basis in national law remain enforceable law”.

The High Court makes clear that the British national provisions implementing the directive at issue were not affected *per se* by the invalidity of the directive

---

168 C-27/95 *Woodspring District Council v. Bakers of Nailsea*.
171 See paragraph 17 of the Court’s ruling, with reference to Joined Cases 117/76 and 16/77 *Ruckdeschel and Others v. Hauptzollamt Hamburg-St Annen* and Case 265/87 *Schräder v. Hauptzollamt Gronau*.
172 Evidenced by the fact that also Advocate General La Pergola did not waste much time on answering this question, see par. 3 of his Opinion.
173 The Meat Inspection regulations 1987 were made under the powers conferred by sections 13 and 118 of the Food Act 1984. The Fresh Meat and Poultry Meat Regulations 1990 were based on powers delegated by the Food Safety Act 1990 and, as far as the Minister of Agriculture, Fisheries and Food and the Secretary of State are concerned, on section 2(2) of the European Communities Act 1972. The Fresh Meat Regulations 1992 are also based on the Food Safety Act 1990 and on section 2(2) of the European Communities Act 1972. See Chapter 6 on national law and the observations made there on British implementation.
since they had an 'independent legal basis in national law'.\(^7\) Yet, it inquires whether the implementation law is nevertheless contrary to European law for equally infringing the principles of proportionality and non-discrimination. Unfortunately the ECJ never answered this question of the British court for it held the directive itself not to infringe this GPCL. Before going into some more detail on the GPCL, including the principle of proportionality, another, preliminary, question has to be answered first: in case the ECJ in Woodspring would have led the directive to be invalid for infringing the GPCL, would the British Statutory Instruments implementing it still be subjected to them? In other words: would in such a scenario UK legislation be within the scope of Community law?

A survey of the various legal challenges of directives reveals that the GPCL are often invoked. Apart from the principle of proportionality one finds the right to a legal remedy (see for example the Radiom case, where Advocate General Colomer questioned in his Opinion whether Directive 64/221 was compatible with this GPCL),\(^7\) the principle of legal certainty,\(^7\) the principle of non-retroactivity of penal provisions,\(^7\) the principle that the polluter pays\(^7\) and the right to property.\(^7\)

3.5.2 Inside or Outside the Scope of Community Law?

When discussing the GPCL in relation to national law, one is confronted with the question of scope of Community law. If the rule violated by the directive is a 'GPCL' and one would like to know how that affects the national implementing measure, one first has to establish whether the national legislation formerly implementing the directive falls within the scope of Community law. In this thesis this question as such did not arise before. For if national legislation is contrary to a Treaty provision and that provision addresses Member States, such as Article 28 EC, it is ipso facto a measure within the scope of Community law. But at this stage the matter of scope becomes relevant since a GPCL may, as a norm, be capable of addressing the Member State but only if the latter operates within the scope of Community law. The background hereof is of course the principle of attribution,\(^7\) hence the limited applicability of the GPCL, as exemplified very clearly in the Grant case.\(^8\)

\(^7\) See Joined Cases C-65/95 and C-111/95 Singh Shingara and Radiom.

\(^7\) See for example C-314/99 Netherlands v. Commission.

\(^7\) See C-331/88 Fedesa.

\(^7\) See C-293/97 Standley.

\(^7\) See for example C-200/96 Metronome.

\(^7\) Article 5, first paragraph, EC.

\(^7\) C-249/96 Grant v. South-West Trains Ltd.
Lisa Grant, a female employee of South West Trains Ltd did not receive the same benefits for her female partner as her heterosexual colleagues got for their partners. The ECJ looked at the conclusions of the European Commission of Human Rights and of the ECHR in order to establish that there was no rule in Community law so as to regard stable homosexual relations as equivalent to heterosexual ones. But even if Ms Grant was right in stating that there is a General Principle of Community Law prohibiting gay discrimination it would not have helped her much since there was no link with Community law. In the words of the ECJ: “although respect for the fundamental rights, which form an integral part of those general principles of law, is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community”.

Thus, the heart of the matter is to know whether national law formerly implementing a directive that was invalidated for contravening a GPCL (still) falls within the scope of Community law. Measures within the scope of Community law are generally split into two categories:

i. measures which interfere with the fundamental freedoms but come within the ambit of an express derogation provided for in the treaty; and

ii. measures implementing community acts.

The leading case on the category of situations under i. is the \textit{ERT} case. Under this case law the GPCL apply to national legislation where they leave Member States regulatory freedom under an exemption from the four freedoms governing the internal market. It could be of some significance for legislation implementing an invalidated directive that approximated legislation in order to establish the internal market. If such a directive is annulled, these measures may afterwards need exemption from the four freedoms as any national (‘autonomous’) legislation. Such legislation does fall within the scope of Community law.

This can be illustrated by the aftermath of the \textit{Tobacco Advertising} case. The Tobacco Advertising Directive was annulled for a wrongful legal basis. Article 95 EC could not support a ban on tobacco advertising and sponsoring to the extent envisaged by this Directive. Mortelmanns and Van Ooik rightly point out that annulment of the Tobacco Advertising Directive ‘re-nationalizes’ advertising and

\begin{footnotes}
\item[\textsuperscript{181}] See paragraph 45 of C-294/96 \textit{Grant}. See also Case 12/86 \textit{Demirel}, paragraph 28: “the Court [...] has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law”. See also C-299/95 \textit{Kremzow}.
\item[\textsuperscript{184}] Case C-260/89 \textit{ERT}, at paragraph 43.
\item[\textsuperscript{188}] See also C-159/90 \textit{Grogan}. In Case 12/86, \textit{Demirel} the term ‘implementation’ is used.
\end{footnotes}
sponsoring for tobacco products whereby Member States are again to take into account primary EC law and, hence, may need derogation.\textsuperscript{184}

Apart from this specific scenario, this type of national measures deemed to be within the scope of EC law is not that relevant for this study for it is not conclusive on the question whether national law, formerly implementing a directive, is in general still within that scope.

3.5.2.1 Measures Implementing Community Acts

Ever since the Court’s ruling in \textit{Eridiana}, it is settled law that national legislation implementing Community law, may be reviewed on its compatibility with the GPCL.\textsuperscript{185} In this context it must be remembered that in many cases where national measures are being reviewed on compatibility with the GPCL, they implement European legislation that is in itself held to be perfectly valid. It has to be noted that the ECJ interprets regulations and directives as much as possible in conformity with the Treaty and the GPCL.\textsuperscript{186} It is only when this consistent interpretation has reached its limits that EC legislation will be annulled for breach of the GPCL. Applied to a directive, this means that as long as Member States are left enough discretion to implement the directive by means that do not infringe the GPCL, it will not be struck down. Still a very good example (although dealing with ‘implementation’ of a regulation) is provided by the \textit{Wachauf} case:

Mr Wachauf had a lease agreement with the princess zu Sayn-Wittgenstein.\textsuperscript{187} Upon the expiry of the tenancy, he applied for compensation for the definitive discontinuance of milk production under German legislation.\textsuperscript{188} For that he needed the consent of the lessor, which was denied to him by the Princess. Was the requirement of such consent compatible with the GPCL. The EC regulations

\textsuperscript{184} Mortelmans, K.J.M. en Ooik, R.H. van, \textit{Het Europese verbod op tabaksreclame, verbetering van de interne markt van bescherming van de volksgezondheid? AAe, 2001, p. 114, on p. 127. See further Chapter 3.}

\textsuperscript{185} Case 230/78 \textit{Eridiana} \textit{v. Minister for Agriculture and Forestry.}

\textsuperscript{186} See for an example where this consistent interpretation is applied to a directive Case C-392/93 \textit{British Telecommunications}, par. 28: “that interpretation makes it possible to ensure equality of treatment between contracting entities and their suppliers, who thereby remain subject to the same rules”.

\textsuperscript{187} Case 5/88 \textit{Hubert Wachauf v. Germany.}

\textsuperscript{188} The Law on Compensation for Discontinuance of the Production of Milk for Sale (\textit{Gesetz über die Gewährung einer Vergütung für die Aufgabe der Milcherzeugung für den Markt, Bundesgesetzblatt I, p. 942}) and an implementing order: the Order on Compensation for the Discontinuance of the Production of Milk for Sale. (\textit{Verordnung über die Gewährung einer Vergütung für die Aufgabe der Milcherzeugung für den Markt, Bundesgesetzblatt I, p. 1023}).
governing the common organization of the milk market in this case gave Germany on this particular point (the definitive discontinuance of milk production by the lessee of land) considerable discretion. In that sense the milk regulation itself could not be regarded as invalid for infringement of a GPCL. However, in a sweeping statement, the ECJ stated that:

"Since those requirements (the protection of fundamental rights, TV) are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements." As Germany was left enough margin of appreciation to effectively protect the fundamental right in its national legislation, the Milk Regulation was not invalid.

Clearly, if the Regulation at issue in Wachauf had left less discretion, in effect dictating to Germany the infringement of fundamental rights in the process of its ‘implementation’, obviously there would be an incompatibility with the GPCL both at EC and at national level. When the same Regulation was tested on the principle of equal treatment of producers and purchasers of milk in the Klensch case, Advocate General Slyn opined that:

"[It is clearly the duty of the Council and the Commission, when making a regulation within the framework of a common organization of the market, (...) to exclude any discrimination between producers or consumers. If, in a particular case, it were contended that the choices given must lead to discrimination, the proper course would be to challenge the validity of the regulation (emphasis added)]."

Although the Wachauf and Klensch cases involved a regulation, the exact same approach can be taken to directives, as was also stated by Advocate General Mischo in his Opinion to the Booker Aquaculture where he seriously questions the line drawn by some in this respect:

189 See paragraph 19 of the Court’s judgment. The right to property is not mentioned in so many words but it seems obvious that this is the GPCL the Court has in mind.

190 See also paragraph 13 of Case 473/73 Nold and paragraph 15 of Case 44/79 Hauer.

191 Interestingly he then argued that Article 34(2) EC was not applicable to the Member States, but was only directed to the Community institutions in their rulemaking capacity. However, this Article is in his eyes an expression of a broader principle of non-discrimination as a GPCL. The latter is also directed towards Member States ‘in the administration of such a common organization of the market’, see the Opinion of Advocate General Gordon Slyn on p. 3500. His reasoning was then followed by the ECJ as well.

"It is difficult to see the justification for saying that, when implementing directives, Member States are freed from their obligation to respect the fundamental rights enshrined in the Community legal order."\(^{93}\)

The cases mentioned above all illustrate convincingly the 'double addressing' nature of the GPCL in the timeframe before invalidation.\(^{94}\) However, it is clear that after such invalidation, a national measure formerly implementing that directive cannot be said to 'implement' that directive. There simply is no directive anymore and, due to the retroactive effect of invalidation by the ECJ, there never has been.

### 3.5.2.2 A Wider Community Context?

It is sometimes argued that there are also national measures, besides those falling in the categories of derogations of the internal market and implementing Community obligations, that also fall within the scope of Community law.\(^{95}\) One then basically relies on a more vague notion of 'Community context' in order to draw national legislation in the ambit of the GPCL. In case such a third category of national acts is construed, as one finds in literature, it usually contains the measures Member States take to secure the application of Community law on their territory, e.g. the provision of penalties.\(^{96}\)

However, such measures and acts could be easily classified under 'implementation', depending on how one defines that notion. As will be stated in the following chapter, 'implementation in the broad sense' can also cover national measures relating to the enforcement and application of the directive, rather than its 'transposition' in national law.\(^{97}\)

Even though the notion of 'implementation' can be stretched to some extent, depending on how one defines it, fact remains that national legislation formerly implementing a directive is neither authorized by, nor obligatory under, Euro-

---

\(^{93}\) See paragraph 52 of the Opinion of Advocate General Misch to Booker Aquaculture. The ECJ adopted the same approach, see Joined Cases C-20/00 and C-64/00 Booker Aquaculture v. Scottish Ministers, paragraph 88.

\(^{94}\) They also illustrate that, whenever possible, the ECJ will by means of consistent interpretation try to 'save' Community legislation, possibly only regarding the implementing measure to be contravening a GPCL as was already noted in Chapter 2 on consistent interpretation.


\(^{96}\) See Case 77/81 Franken v. Germany. See also Eckhout (2002), on p. 964.

\(^{97}\) The latter being 'implementation in the narrow sense'.

203
pean law. For that an even wider ‘Community context’ is required. Interestingly, the thesis of such ‘wider Community context’ was tested before a national court in the *First City Trading* case which, sadly, has not resulted in a preliminary reference.\(^9^8\)

The case was set against the background of the BSE crisis. The Commission had imposed a worldwide ban on the export of beef from the UK. Following this EC measure, the UK government decided to adopt the ‘Beef Stock Transfer Scheme’, granting emergency aid to enterprises that operated slaughterhouses and cutting premises and who were obviously much affected by the Community ban. Those enterprises that only exported beef were not granted such financial relief. Some of these enterprises that were denied the BSE emergency aid had argued that the ‘Beef Stock Transfer Scheme’ infringed the principle of equal treatment, a GPCL. However, the High Court ruled that the Beef Stock Transfer Scheme fell outside the scope of Community law. The fact that it would was adopted *in direct consequence* of the Community ban on British beef was not sufficient to bring it within the scope of EC law.\(^9^9\)

The difference between a case such as *First City Trading* and a case dealing with national law that formerly implemented a directive, is that in *First City Trading* the British measure *never was* within the scope of EC law for there has never been an obligation upon British authorities to adopt the measure. By contrast, in case an implemented directive is annulled, there *has* been in the past such a Community obligation and therefore there has been a time where this national law was undoubtedly within the scope of European law.

Yet, the parallel appears more compelling than the difference. In *First City Trading* there would have been no ‘Beef Stock Transfer Scheme’ without the previous European ban on the export of British beef. Similarly, when a European directive is invalidated after having been implemented, one can be confronted with national law that would never have been enacted if it were not for a prior Community act. Taking into account this parallel, one can deduce from the *First City Trading* case that the GPCL are inapplicable in both scenarios.

Although the ECJ has up till now not had the chance to settle this particular question as such, an indication that the High Court in *First City Trading* was correct can be inferred from the Court’s ruling in *Idéal Tourisme*.\(^2^0^0\) In this case, national legislation regulating an area of law that was not yet covered by Community harmonization but was closely connected to such harmonization

---


199 *First City Trading* case [1997] CMLR 250, at 27, in particular Laws J. Reference could be made here to the opinion of Advocate General Gulmann in C-2/92 *Bostock* at 971.


204
was held to fall outside the scope of Community law and thus was not review-
able in the light of the GPCL.

However, in the case law of the ECJ on the scope of EC law one notices a different
approach to the applicability of the GPCL concerning the principle of non-discrimi-
nation on the basis of nationality. Here a 'wider Community context' suffices to
bring national law under scrutiny of this particular GPCL. Following this 'prefer-
ential treatment' of the principle of non-discrimination based on nationality,
national implementation law will at all times have to comply with that principle,
also after the underlying directive is invalidated.

Establishing that national legislation when it does not implement a directive
anymore is no longer in the scope of Community law, of course fits in very well
with the rule of thumb established in the previous chapter. Without going so far
as to call it a corollary to that rule of thumb, it definitely is congruent with it. It
is completely in line with the 're-nationalization' of national implementing law
that underlies the rule of thumb.

In sum, even though the Community directive may have been the raison
d'être of the national legislation, the latter cannot be said to be an implementing
measure anymore for there is nothing left to implement. The GPCL are only
a standard for review for national law implementing a directive if the latter is
valid, and they lose their double addressing character after the invalidation of
the directive.

3.5.3 Some Remarks on Human Rights

Establishing that the GPCL are not double addressing norms
anymore in the timeframe after their infringement has led to the invalidation
of a directive, is of course not the end of the matter. It has to be kept in mind
that the GPCL, in as far as they relate to human rights, are heavily inspired by
international human rights agreements, particularly the European Convention
on Human Rights ('ECHR'), and by the constitutions of the Member States. In
this case, there is not much debate possible whether or not these norms are
'dual' in the sense that they address both Member States and the EC institu-
tions.

What makes this category of norms interesting is that they may affect
national legislation in two capacities. National law that implements a valid

---

201 See for example Eeckhout (2002), on p. 961-963.
202 Thus, with the possible exception of the principle of non-discrimination based on nationality.
203 Whereby the invalidation does not necessarily result from an infringement of a GPCL itself. Any invalid-
dation results in the implementation law 'leaving' the scope of Community law.
204 See Article 6(2) EU.
The invalid directive can be reviewed by standards of the ECHR and of the GPCL. After invalidation of a directive for infringing the ECHR (as being a substantive part of the GPCL), national law, although outside the scope of the GPCL may still be affected by the fact that the same norm is also enshrined in the ECHR to which all Member States are party. At this point, the differing (monist/dualist) traditions of the Member States show differences so that the effects for legislation formerly implementing such directives will differ accordingly.

A complication that may arise in this context is that the directive is not annulled by the ECJ, but it is the implementing law that is tested by the European Court of Human Rights (ECrtHR). The ECrtHR cannot pass judgment on the directive, but it can on the implementing legislation of the Member States. If it consequently finds that the latter infringes the European Convention, there is no guarantee the ECJ will follow that judgment in case it gets the chance to test the validity of the underlying directive on the basis of the GPCL. One must then face the problem of possible differing interpretations of human rights by the ECJ (Luxembourg) on the one hand and the ECrtHR (Strasbourg) on the other hand.

4 Exclusivity of Community Competences

A third possible exception to the rule of thumb that should be investigated is the possible exclusivity of Community competences. It is a topic one does not have to dwell too long on for it must be stated at the outset that in legislative fields that could be said to be exclusively European, directives are rarely used as legislative instruments. The instrument with its guaranteed participation of national lawmakers sits uneasy with the concept of exclusive Community competences. Thus, such legislative terrains are almost entirely governed by regulations and decisions.

One need only to look at the directories of legislation in force in the fields at issue. In the Common Fisheries Policy for example, a search through the directory

205 Only the EC Member States as such are directly bound by the European Convention, as was painfully demonstrated by the Matthews case, ECrtHR, No. 24833/94, Matthews v. United Kingdom, judgment of 18 February 1999.

206 Before the entry into force of the Human Rights Act 1998 in the UK, many attempts were made in cases before UK courts to argue for a broad 'scope of Community law' in order to have measures reviewed for violation of the ECHR as part of the GPCL. After the Human Rights Act was adopted, there is a significant decline in such cases. See Boch (2004), on p. 61.

207 Leading to possible treaty conflicts for the Member States that are both signatory parties to the European Convention as well as the EC Treaty. Interesting new developments in this respect may be inferred from the Matthews case (ECrtHR) and C-377/98 Biotechnology (ECJ).
reveals only one single directive. The same exercise in the Common organization of the market of Fresh Fruit and Vegetables (exclusively European by occupation of the field, see infra) revealed only three directives.

Yet, in the rare case that an invalid directive can be situated in a legislative field that is exclusively European, an interesting ‘incidental European consequence’ may arise.

First and foremost, it has to be stressed that exclusivity of Community powers is in itself a norm that addresses Member States. If a Member State legislates in a field that is exclusively European, it violates the norm of exclusivity regardless of the contents of the national law and regardless of whether it conflicts with other norms of European law. Such national legislation is ‘non-applicable’ like in any other case where Member States violate an EC norm that addresses them. What makes exclusivity of powers a difficult aspect of European law is that it comes in two varieties, in literature often designated as exclusivity a priori and exclusivity through occupation of the field.

Although this categorization will be followed here, it must be kept in mind that also other classifications can be found in literature. And then there are those who do not seem to distinguish at all.

---


209 It may be argued that exclusivity as a norm is ‘double addressing’ in terms of the previous subchapter since also the Community itself would violate that norm by transferring back to the Member States exclusive powers, see for instance Lenaerts, K. and Nuffel, P. van, Constitutional law of the European Union, Sweet & Maxwell, 1999, p. 97.


211 Cross, E.D., Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis, CMLRev., 1992, p. 447 who distinguishes between ‘express saving’ (savesguarding the competence of Member States, a sort of ‘reversed exclusivity’), ‘express pre-emption’ (European legislation expressly states that it pre-empts Member States to act), ‘occupation of the field pre-emption’ (the Community has regulated an area to such an extent that the Member States have lost their legislative capacity) and ‘conflict pre-emption’ (precedence).


207
In case of exclusivity *a priori*, the EC is endowed with exclusive competence in a given field directly by the Treaties whereas in case of 'occupation of the field' it became exclusively competent by (intensely) regulating in a certain area. Hereunder it will be explained that the distinction between 'being' exclusively competent (*a priori* competence) and 'becoming' so (occupation of the field) can be of relevance from the perspective of an invalid directive.

### 4.1 Exclusivity *a Priori* and the British Fisheries Cases

Legal fields in which the Community is exclusively competent *a priori*, because the Treaties so provide, are rare. The legal domains that are generally held to fall within this category are the common commercial policy, fisheries (conservation) policy, the customs union and the monetary policy of the European Central Bank.

Excluded from *a priori* exclusivity is the competence to establish harmonization of national measures on the internal market. In the *British American Tobacco* cases it was argued to the contrary but the ECJ would not hear of it: "Article 95 EC, in as much as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving [the internal market]." Thus the Court proceeded with performing a subsidiarity test on the Tobacco Labeling Directive.

Landmark cases on *a priori* exclusivity and its consequences for the Member States are the *British Fisheries* cases. The legal field concerned was the protection of the natural marine resources in Community waters, an exclusively European legal terrain. However, on the necessary conservation measures, the Council could not reach a decision. What then happened was that the UK, the member of the Council responsible for blocking decision-making, unilaterally took measures without asking the Commission for prior approval to do so. The

---

213 As can be learnt from Opinion 1/75 and from Case 41/76 Donckerwolcke. See also Opinion 1/94 WTO and C-83/94 Leifer.

214 The Draft Treaty for a Constitution for Europe confirms these areas to be exclusively European in Article 12, together with Competition policy, in as far as it relates to the 'functioning of the internal market'.

215 See C-49/01 BAT, paragraph 179.

216 It became exclusively European after the expiry of a date agreed on in Article 102 of the Act of Accession whereby the UK, Ireland and Denmark acceded to the Community. The Court had made this clear in Case 61/77 Commission v. Ireland.

217 It is noteworthy that not that many comments have been written on these cases by English authors. For a detailed analysis, see Hofmann, R., *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1981, p. 804, Timmermans, C.W.A., *SEW*, 1982, p. 114, Martins Robeiro, M.E., *Cahiers du droit Européen*, 1982, p. 144, Schwarze, J., Ungeschriebene Geschäftsführungsbefugnisse für die Kommission bei
Court was of the opinion that, since the case concerned an exclusive competence of the Community, the UK was not competent to establish such measures without the Commission's prior approval. On the fact that the Community legislator had not acted and hence was responsible for a legal vacuum, the Court responded that

"such a failure to act could not restore to the Member States the power and freedom to act unilaterally in this field". 218

It is interesting to look at the parallel that can be drawn between the British Fisheries cases and the invalidation of a directive. Within a legal field on which the Community enjoys exclusive competences a directive can be annulled or declared invalid. This situation would have in common with British Fisheries that on a terrain where the Community is exclusively competent, no concrete Community measure exists (anymore). Whether the Community measure does not exist because of an annulment or because there is a political deadlock in the Council is not distinctive in this sense. What is important is that there remains an exclusive ‘context’ that governs the situation where no Community measure exists (anymore). 219 Thus, national measures implementing an invalid directive are within the ambit of exclusivity of Community powers. 220 What is more, they violate ipso facto the exclusivity norm.

The fact that national law implements a directive that deals with exclusive competences brings back the idea of directives having an ‘umbrella’ function as was already discussed in the context of Community legislation and the internal market. Within the sphere of exclusive competences, Member States can only operate under derogations/authorizations expressly or implicitly granted by the

218 See paragraph 20 of the Court’s ruling in the British Fisheries cases. Even though the Court then ruled that the exclusivity of the Community powers in the field of marine conservation did not exclude all national measures, it was clear that the UK was not competent anymore to act unilaterally.

219 See also Case 326/85, annotated by Timmermans, SEW, 1989, p. 275. Also relating to fisheries policy in which the Commission holds the Member States to be bound by its proposal, not yet accepted by the Council, on the basis of Article 10 EC and the fact that it concerns a terrain on which the EC is exclusively competent.

220 Purists could even argue that the exclusivity requires an empowerment of the Member States to maintain their national implementing measure, just as it was on the moment of annulment of the directive. It would seem to me that this empowerment may be inferred from the former directive and need not be required explicitly.
European legislator. Although such authorization is usually inferred from regulations (whereby the ECJ has been known to be quite creative in the construction of such authorizations), such authorization can of course be deemed to be embedded in a directive in relation to the national implementation legislation it requires. Since the legal terrain is exclusively European, it is incumbent upon the Community legislator to cope with the questions that (can) arise. By analogy to the British Fisheries cases, prior approval of the Commission could temporarily ‘remedy’ the situation, but not under all circumstances.

Such prior approval of the Commission may limit the consequences of an annulment in the sense that national implementation cannot be said to infringe the exclusivity norm. Yet, as established in the previous chapter, such national law may nevertheless be invalid as a consequence of the invalidity of the underlying directive in case this follows from national constitutional law. In such circumstances the Community legislator who wants national law to persist will have to act promptly by quickly adopting new legislation replacing the invalidated directive. Furthermore, in such circumstances it would of course be desirable to request the ECJ to apply Article 231 EC. When taking into account that it has proven to be sympathetic to stringent reasons of policy continuance, one assumes it will lend a benevolent ear to such requests from the European institutions.

4.2 Exclusivity by ‘Occupation of the Field’

The same has to be said on this second category of exclusivity which appears to be less rare than the a priori variety. Here, exclusivity is established through concrete legislative action by the Community in a field in which it enjoyed no exclusive competence before (but only concurrent competence). It is generally accepted that this form of exclusivity mainly manifests itself in the various parts (or market organizations) of Community Agricultural Policy. A complication here is that the doctrine of exclusivity through occupation of the field is a bit ‘rough on the edges’. It may not always be clear if a certain field of policy is exclusively European and, if so, how that field must be delimitated.

---

221 See for example Lenaerts and Van Nuffel (1999), p. 98.
223 Cross attempts to formulate a few factors for verifying whether a legal field is exclusively European through occupation of the field: (1) the comprehensiveness of the Community regulation, (2) the degree to which the field in question is reserved to the Community under the treaties and (3) the extent to which the objectives of the Community legislation at issue can be better achieved at Community level, see Cross (1992), on p. 462. He warns against a liberal application of the occupation of the field doctrine by the Court just like Soares who wants occupation of the field to be restricted “to areas where its invocation would be absolutely indispensable” because of its inherent antagonistic relationship with the principle of subsidiarity: Soares, A.G., Pre-emption, conflicts of powers and subsidiarity. ELRev. 1998, p. 132 (140).
Furthermore, the doctrine must be clearly distinguished from the pre-emption of Member State powers that result \textit{ipso facto} from all binding Community legislation. This pre-emption at ‘micro level’ is in fact a mere consequence of the precedence of Community law and the ‘Sperrwirkung’ this has for national legislative competence in general. Distinctive for when a legislative field is exclusively European ‘by occupation’, is that national law need not be in direct conflict with Community law in force, or as Cross puts it:

“\[A\]ll Member State measures in an occupied field will be considered invalid, even when such measures are not contrary to, or do not obstruct, the objectives of Community legislation in any way.”

Assuming a particular field of policy is exclusively European through ‘occupation of the field’ the consequences thereof for the invalidity of a directive are in principle the same as when dealing with \textit{a priori} exclusivity. As the Court stated in for instance the \textit{Prantl} case:

“once rules on the common organization of the market [in wine] may be regarded as forming a complete system, the Member States no longer have competence in that field \textit{unless Community law expressly provides otherwise}.”

‘Community law expressly providing otherwise’ obviously includes the situation where the Community legislator used the instrument of the directive, which, in such a case not only obliges the adoption of national legislation but at the same time ‘authorizes’ such adoption. Furthermore, also in these (agricultural) fields (market organizations) where the Community legislator has established a ‘complete system’, lacunae may (still) exist. If this is the case, Member States cannot fill those lacunae unilaterally without infringing the ‘exclusivity norm’, save perhaps in case a situation arises where the invalidation of the directive has affected the exclusivity itself as will be explained below.

\begin{footnotesize}
\begin{enumerate}
\item[225] See Case 16/83 \textit{Prantl} on p. 1324.
\item[226] Again, it has to be kept in mind that this is rare, as stated earlier. For example the directory of legislation in force in the market organization of milk products only contains three directives on a total of about 100 regulations and decisions.
\item[227] See for instance Case 159/73 \textit{Hannoverische Zucker}. Also in \textit{CERAFEL} there was a 'lacuna' in Community law at hand, see Case 218/85 \textit{CERAFEL}. See also C-1/96 \textit{Compassion in World Farming}, paragraph 41.
\item[228] Again, by analogy to the \textit{British Fisheries} cases, a Commission approval could provide a temporal escape.
\end{enumerate}
\end{footnotesize}
4.3 Is the Field Still Occupied?

Although it was established that in principle the European incidental consequences that arise when a directive is set in an exclusively European context, are the same for both a priori- and occupation of the field-exclusivity, the distinction between the two types of exclusivity remains important for this study in one respect: that of reversibility. Where a priori exclusivity cannot be reversed, as firmly established by the Court in British Fisheries, the second type of exclusivity can.\(^229\) That brings up the question whether, in case of exclusivity through occupation of the field, the invalidity of a directive has the side-effect of ending that exclusivity.

As stated before, every directive establishes in itself a certain degree of exclusivity, a Sperrwirkung closely associated with the primacy of Community law. What is characteristic is that with the invalidation of a directive, Member States are no longer bound by that inherent exclusivity. This underlies the ‘Rule of Thumb’ as established in the previous chapter. In order for occupation of the field-exclusivity to make a difference, there must be enough other legislation in force after the established invalidity of the directive to still provide enough exclusive ‘context’. In that case the invalidation of the directive merely creates a lacuna within the exclusive field of competence, if not, its invalidation brings down the exclusivity itself.

To tackle this question, it is important to evaluate the importance of the annulled directive and its place and importance within the legal area that is exclusively European through ‘occupation of the field’. Probably the best example where exclusivity of the field may be unaffected by the invalidation is when the ECJ annuls a ‘tertiary’ directive implementing a basic directive. However, if it were the basic directive itself that is annulled, the legal basis for a whole body of tertiary legislation exists no more and the conclusion could very well be that with the invalidity of that important directive, the Community cannot be said to ‘occupy the field’ anymore.

4.4 Conclusion

As the scope of Member State powers after a directive’s annulment is the central issue of this Chapter and the previous Chapter, the topic of exclusivity of Community powers could not remain untouched. Although directives are a rare instrument to find used in exclusively European fields, exclusivity of Community powers is nevertheless interesting, be it mostly from a theoretical point of view. For all directives that are adopted in fields that are exclusively European, have an ‘umbrella function’ in the sense that, as an ‘incidental European consequence’ the national implementation legislation violates

\(^{229}\) See for instance Barents and Brinkhorst (2001), on p. 136.
that exclusivity from the moment the directive is invalidated. If the Community wants to avoid the situation in which the Member States must therefore withdraw their legislation, it will have to undertake action: firstly requesting the ECJ to apply Article 231 EC, secondly issuing approvals to the Member States (by analogy to British Fisheries) and thirdly swiftly adopting a new directive replacing the invalidated directive.

As to exclusivity itself, the distinction between exclusivity a priori and exclusivity through occupation of the field is partly irrelevant. It is irrelevant in the sense that, as long as it is clear that the invalid directive was embedded in an exclusive 'context', there are legally no differences between the two types of exclusivity for in both cases Member State legislation remains within that exclusive 'context' after invalidation of the directive. Yet, in one respect, the distinction between the two types of exclusivity was relevant since exclusivity through occupation of the field distinguishes itself by possible 'reversibility'. In the (admittedly rare) case that an invalid directive is situated in a field that is exclusively European through occupation of the field, one must therefore first assess the relative importance of the directive concerned in order to establish that the invalidation has not affected the exclusivity as such.

5 The Principle of Sincere Co-Operation

5.1 The Scope of Article 10 EC

One important question remains to be answered in this chapter. Can an exception to the rule of thumb of Member State autonomy be construed upon the principle of sincere co-operation?\(^{210}\) Presently laid down in Article 10 EC, the principle states that:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measures which could jeopardise the attainment of the objectives of this Treaty."\(^{211}\)

As is well know, the Article has been used on several occasions as the basis for filling in the 'gaps' in the written European constitution. One of these occasions presented itself in the Wallonie case in which the ECJ held that during the implementation term of a directive, Member States should refrain from taking any measures that are 'seriously liable to compromise the result prescribed'\(^{212}\)

\(^{210}\) Or, as it is also called, the principle of Community loyalty or loyal co-operation.

\(^{211}\) It re-emerges in Article 1-5 (2) of the Treaty establishing a Constitution for Europe (TCE).
by this directive. The Wallonie is particularly important for this study for it is tempting to draw some sort of analogy between the situation after a directive is invalidated and that before its implementation deadline has lapsed. The two situations have in common that written EC law does not require national legislators or courts to behave in a certain way. Nevertheless, the Wallonie situation differs strongly from that where a directive is annulled. The duty upon the Member State not to legislate contrary to the directive during its implementation term is construed in the first place upon the directive itself which, as the Court stressed in the Wallonie case, has already entered into force.

An intriguing problem that may arise in that context is whether the Wallonie norm is in any way enforceable before national courts. The issue arose in the Rieser case, concerning the New Transport Policy Directive replacing the Old Transport Policy Directive that was earlier annulled under preservation of legal effects (see Sub-chapter 2 'limiting in time the effect of an annulment'). During one calendar year, the implementation term of the New Transport Policy Directive, there was no obligation to have national law in line with the provisions of the New Directive that largely resembled the provisions of the Old Transport Policy Directive. The Court first reiterated its Wallonie case law that, during the implementation term, Member States were required to refrain from taking any measures liable to gravely jeopardise the attainment of the result prescribed by the New Directive, but then stated that this Wallonie norm cannot be enforced by individuals before their national courts.

Thus, the obligation under Wallonie to refrain from legislating contrary to a directive arises from the combined factors of the directive at issue, Article 249 EC and Article 10 EC. However, in contrast with the Wallonie situation, the moment a directive is annulled, any duty upon Member State authorities to behave in a certain way will have to be construed solely upon Article 10 EC.

5.2 Limits to an Open-Ended Article?

What are the limits of an open-ended Article such as Article 10 EC? The use of Article 10 EC as the exclusive basis for Member State obligations is not without contestation. Nevertheless, the Court has in the past already derived impressive obligations for Member States from the wording of Article 10 EC.
One may think of the obligation not to encourage or strengthen infringements of the European competition rules by private undertakings (the Flemish Travel Agencies case law based on Articles 10, 3 paragraph 1, section g, and 81 and 82 EC); the Rewe/Comet jurisprudence concerning national procedural law and the Francovich case law.\textsuperscript{335}

Impressive indeed, especially since the already mentioned Wallonië case can be added to this list. Yet, in all these examples Article 10 EC is never the sole basis of Member State obligations. Always there is a link with other Community law. Either private undertakings infringe Community law (Flemish Travel Agencies case law), private citizens cannot effectuate rights they derive directly from European law (Rewe/Comet), Member States infringed Community law (Francovich) or were bound to infringe it (Wallonië).

Thus, Article 10 EC has not yet been used to construe obligations for Member States that seem completely detached from other, more concrete, obligations for Member States or private citizens under Community law. However, such a situation arises in case of an annulled, but implemented, directive. Can in such a situation Article 10 be construed as an independent source of obligations?

It would seem that indeed such a construction is possible. The wording of Article 10 EC, particularly the phrase stating that Member States are not to 'jeopardise the attainment of the objectives of this Treaty' indicates that it applies at all times. This can also be concluded from Article 8 of the Amsterdam Protocol on Subsidiarity and Proportionality. This Protocol is interesting in this respect for it links Article 10 EC to the fact that a legal situation is not covered by Community legislation. It reads:

"Where the application of the principle for subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 10 of the Treaty, by taking all the appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty" (emphasis by author).

\textsuperscript{335} See for a different view: Due, O., Artikel 5 van het EEG-Verdrag, een bepaling met een federaal karakter? SEW 1992, p. 355. Due mentions these groups of case law as examples where the principle of sincere co-operation should be regarded as an independent source of Member State obligations.
The Protocol states that also if the Community legislator is not competent to act (which is not necessarily the case in a situation where a directive is invalidated) the Member State duty not to jeopardise the Community objectives remains intact. The conclusion must be that this duty applies at all times, also when Member States find themselves in the situation after Community legislation has proven to be invalid. However, that still leaves open the question what this duty ‘not to jeopardise’ exactly entails.

5.3 The Concrete Duties of the Member States

Stating that Member States may not “jeopardise the attainment of the objectives of this Treaty” is in itself rather vague, taking into account the wide description these Treaty objectives have been given in Article 2 EC. However, EC legislation, also after it had been annulled, will always link up with those Treaty objectives. That means the Treaty objectives had materialized into more or less concrete legislative provisions attempting to attain more or less concrete goals. In view of those concrete goals, one could propose to link the applicability of Article 10 EC to the likeliness that a directive will be re-enacted with the same contents as it had before its annulment. Indeed, situations have occurred in which there was a great deal of political certainty as to the political course after the annulment.

In the Hormones case and the Laying Hens case indeed repairing directives with identical contents were established shortly afterwards. Another case where it was very foreseeable what would happen after annulment of a directive was the Students Residence case. The European Parliament contested the legal basis, but in the course of the proceedings made explicitly clear that it only wanted to make an institutional point out of the matter without contesting the actual contents of the directive itself. For that very reason, it was not surprising that the ECJ in the Students Residence case decided to apply Article 231 EC for the first time by analogy to an annulled directive.

In cases such as the Hormones, Laying Hens or Students Residence, there is a great amount of certainty as to the political ‘follow up’ of the annulment of a directive: establishment of the same policy in a new, legally binding, document. An important side note thereby is of course that all three cases involved annul-
ment of directives on procedural grounds. But can one, based on that finding, construe an obligation upon Member States to not legislate contrary to what was required by the invalid directive and what will again be required by an expected new directive?

The problem with translating purely political expectations into a legal duty for the Member States is that in many cases the political 'follow up' of an annulment is not as evident as in the Hormones, Laying Hens and Students Residence cases. And even for these cases, it has to be kept in mind that also defects of a procedural nature that are nevertheless classified to be serious enough to lead to an annulment, always have a link with the content of possible follow-up legislation. As stated before a procedural defect is classified as 'essential' in the sense of Article 230 EC when its violation could have influenced the content of the Community act. The main problem is therefore that there is never an absolute certainty as to the contents of a replacement-directive, if indeed there will be one in the first place. This renders problematic the construction of obligations for Member States based on Article 10 EC: it would be difficult to determine the required degree of political certainty as criterion. Must Article 10 EC be interpreted so as to require 'absolute certainty' or is 'reasonable certainty' the yardstick for Member State obligations? And if so, what situations are to be classified as 'absolutely certain' or 'reasonably certain'? It is clear that it would be too difficult, maybe even impossible, to construe upon Member States the obligation to maintain their legislation in force based upon alleged political certainty as to the future developments after a directive's invalidity is established. A fortiori it would be unlikely that any concrete duty could be imposed upon Member States to re-introduce legislation that lost its validity as a consequence of the previous annulment of the directive (a national per se rule, to be discussed further in Chapter 5). Uncertainties as to what role Article 10 EC plays in these matters are aggravated by the absence of Community jurisprudence on the matter.

However, the link between political expectations and Article 10 EC was explored, at least once, before a national court. In Shepherd Neame, the English Court of Appeal promoted a very strict limitation to the obligations arising from Article 10 EC. It concerned beer duties that were still only partially harmonized by means of Directive 92/84/EC. The wording of that Directive did not prohibit Member States from raising beer duties. When the UK did so, these higher beer levies were contested with reference to minutes of the Council that had established

---

338 Unless perhaps when the annulment by the ECJ is interpreted as a sort of 'façade annulment' under which apparently the legislative process need not be repeated from the beginning, see Chapter 2, Section 2.2.3.

339 Article 10 EC is only interesting for imposing positive obligations on Member States. Negative obligations are dealt with earlier when discussing the 'double addressing norm'.

40 R v. H.M. Treasury ex parte Shepherd Neame Ltd (Court of Appeal, 12 February 1999).
certain reference rates for the Member States (and which the UK would exceed by raising the excise duties). Since the minutes of the Council do not form part of EC legislation, the applicant sought to enforce the reference rates against the UK government on the basis of Article 10 EC. The Court of Appeal denied such claim based on Article 10 EC. A political statement of the Council, laid down in the minutes only, could not create obligations for the Member States, not even if read in conjunction with Article 10 EC. It is regrettable that the Court of Appeal did not refer preliminary questions to the Court on the matter.

If no concrete obligation to uphold or re-introduce national implementation legislation can be derived from Article 10, the question imposes itself what other, more modest, obligations can be based on this Article. It is defendable that the duty not to jeopardise the attainment of Community objectives crystalizes into an obligation to consult. Support for this idea can be found in the Staff Regulations case.

This case concerned family allowances paid by the European Communities to their servants. Belgium had adopted legislation that negatively affected those European benefits. The Commission tried to establish a general rule to be consulted by Member States whenever they would adopt such legislation, affecting negatively the Community interest. For this the Commission relied primarily upon the Protocol on the Privileges and Immunities of the European Communities. The Belgian Government emphasized that the relevant provisions of the Protocol did not address the Member States. The Court, however, did not consider the Protocol but rather based such an obligation to consult the Commission solely upon Article 10 EC.

Due deduced from this case a more general obligation for Member States to consult with the European Commission whenever they intend to adopt legislation that could negatively affect the tasks and duties of the Communities.

---


242 Belgium had adopted legislation that affected negatively the EC Staff Regulations by providing that Belgian family allowances were only payable in so far as the EC did not already pay similar allowances. The EC Staff Regulations provided for the opposite arrangement: only in so far as national family benefits were not payable could EC servants get money from the Community.

243 Due, O., Artikel 5 van het EEG-Verdrag, een bepaling met een federale karakter?, SEW, 1992, p. 355 (362). See similarly Van Gerven and Gilliams (1990), on p. 1160. This opinion is also followed by Blockmans, see Blockmans (1998), p. 87.
Such an obligation to consult is all the more appropriate in case Member States want to amend or withdraw legislation that used to implement a directive now invalidated. Proposals to do so should be subjected to the Commission in order for the latter to give its opinion as to the threats posed to the attainment of Community objectives by the envisaged national action.

5.4 Conclusion: No Duty to Maintain

The Member States, when confronted with an invalid directive that is implemented into their national legislation, may not jeopardise the attainment of the goals of the Treaty. In that sense their actions fall within the ambit of the principle of sincere co-operation of Article 10 EC, as do all their actions. However, the applicability of Article 10 EC to their actions post invalidity seems to materialise into modest concrete obligations. A duty to maintain in force their legislation seems difficult to construe upon the principle of sincere co-operation. First of all, deriving concrete duties from Article 10 EC in the context of an invalidated directive, does not link up with other, more specific, duties that arise from Community law. Secondly, it would be difficult to find an appropriate standard as to when Member States would be obliged to do so. Even though it may be tempting to look at the degree of political certainty as to the future political ‘follow up’ of the annulled directive, that approach faces big conceptual difficulties. The conclusion is therefore that Article 10 EC materializes into a specific duty for Member States to consult the Commission before taking any legislative steps as regards amending or withdrawing the former implementing measure.

6 Conclusions

This chapter has elaborated upon the several ways in which Community law has limited the discretion that Member States enjoy after a Community directive has been invalidated, the rule of thumb established in the previous chapter. As appeared in this chapter, that national discretion is far from absolute, rendering the term rule of thumb all the more appropriate. European law interferes on at least four points with national discretion regarding the status of national implementing legislation: limitation of the effects of an annulment in time, the ‘double addressing norm’, and to some extent the exclusivity of Community powers and the principle of sincere co-operation.

Yet this interference is of a different intensity. In case of exclusive competences and sincere co-operation, European interference, or incidental European consequences as it was called in this chapter, is more modest. Sincere

\[24^{5}\] See also on the Commission's general right to information Case C-33/90 Commission v. Italy. See Shaw (2000), p. 300.
co-operation materializes at the most into a duty for Member States to consult the Commission on future steps regarding the follow-up of the invalidity of the directive. Furthermore, in the rare case the directive concerned emanated from a domain that was exclusively European, such consultation may take the form of Member States asking permission of the Commission to maintain the implementation in force in order not to violate exclusivity as a norm. If the latter would be inclined to grant such permission for the sake of policy continuance, it is not unlikely that the ECJ will be requested to apply its powers under Article 231 EC, temporarily limiting the effects of the annulment. When considering that policy continuance is something the ECJ has proven not to be indifferent to when applying Article 231 EC, this scenario is not unlikely.

A scenario that does not require the Member States to consult the Commission is if the invalidated directive violated a 'double addressing norm'. In such a case, national law will be non-applicable, the European minimum sanction discussed earlier in chapter 3. What is certain is that the basic freedoms of the internal market are among these norms. Although one may argue on the possibility of the Community legislator enjoying more discretion in this field than the Member States, nobody will argue that once the ECJ does invalidate a directive for violating for example the free movement of goods, national implementation legislation must obviously be deemed non-applicable for violating the same norm. Furthermore, international treaties concluded by the Community and possibly also customary law are 'double addressing' norms, although one will first have to establish their exact status within the Community legal order.

Perhaps most surprising is the denial of a 'double addressing quality of the General Principles of Community Law (GPCL). Here one observes the interesting phenomenon that invalidation of a directive results in national implementation legislation 'leaving' the scope of Community law, in fact a logical consequence for this may be seen as the corollary of the established 'rule of thumb' that the discretion as to what happens to national implementation legislation after invalidation of a directive is a national affair. Any consequences for national legislation in that scenario will have to result from the possible counterpart of that particular GPCL in national constitutional law and/or in international law.

In sum, the interference of EC law with national discretionary powers seems substantive, but it does not 'eclipse' the rule of thumb. Yet, one can now delineate the situations where it applies. In fact, the rule of thumb applies in situations where the norm was of a procedural nature, designed to protect Member States' interest in the legislative process or that of the European institutions themselves. Infringement of the Council's voting procedures, wrong legal basis and lack of powers are important examples thereof, actually having resulted in the concrete annulment of directives such as the Laying Hens, Hormones and Tobacco Advertising Directives.