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

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CHAPTER 5

Invalid Directives and National Implementation
1. Introduction

It was concluded in Chapter 3 that there is no such thing as a European *per se* norm. The second, logical, step now is to look into the legal consequences, if any, under the domestic legal systems of EU Member States. Is there a national *per se* norm, rendering transposition legislation invalid as a consequence *per se* of the directive's invalidity? In this chapter, therefore, the 'nature' of the national implementation law will be addressed as perceived by the Member States' legal systems. Occasionally, one finds statements indicating that this 'nature' is somewhat inferior when opposed to 'autonomous' legislation.

Illustrative is the opinion of Mertens de Wilmars arguing that the acts transposing Community obligations do not qualify as 'law', thereby defining 'law' as an

"*acte de volonté initiale et spontanée en ce sens qu'il ne procède d'aucune norme supérieure*."¹

The fact that implementation laws do spring from a superior set of norms (the Treaties and the directives) may give rise in the Member States to treat such legislation differently. As already stated in Chapter 1, national legal systems may attribute 'authority' to a directive. Such 'authority' may be reflected in the legislative basis, legislative procedure or legislative level (central or regional) of implementation law. However, whether indeed national law attributes such 'authority' to directives and if so, how much, is a matter that may vary per legal system.

As to the legislative basis, it must be reiterated that it has been established in the previous Chapters that there is no top-down imposed European concept of delegation of which a European *per se* norm would be an emanation. For that reason, national implementing measures are not *ultra vires* as a matter of EC law. However, that might obviously be different with a national concept of delegation. National law attributing to implementing legislation the power of law on the sole legal basis of the directive is quite imaginable. Such a possibility was hinted at by the ECJ and Advocate General Mischo in the *Fedesa* case. The latter wrote in his interesting Opinion to this case:

"[T]he annulment of a directive does not necessarily create a legal vacuum in all the Member States. That depends on the nature of the measures adopted at national level. (...) In the United Kingdom (...) Directive 85/649 seems to have constituted the *one and only legal basis* for the provisions adopted in national law. (...) What is to happen, therefore, if in fact in one or other of the Member States the provisions adopted in order to implement Directive 85/649 have lapsed

because in national law they were founded on a legal basis whereby acts of the European institutions may be implemented only in so far as they are valid?"

As this reasoning of the Advocate General suggests, there may be national legal systems in which the directive is attributed a great deal of 'authority'. Such attribution of authority could be found in a national delegation concept. The directive's 'authority' might become apparent from the fact that it is attributed the status of a constitutive factor for delegated (executive) lawmaking powers. Notably in the United Kingdom where the majority of directives are implemented under the European Communities Act 1972, this becomes a relevant issue to look into. Consequently, the UK system will be compared with that of Belgium, France and The Netherlands. In this context, just what 'authority' is attributed to directives in these other Member States needs to be examined.

These countries have been chosen for further study, partly out of practical reasons, partly because they contrast with the UK in a respect that appears, at least at first sight, intriguing. This is the simple statistic that about three quarters of all preliminary references on validity questions are put before the ECJ by British courts. From the rest of the E(E)C Member States such as The Netherlands, Belgium and even a large Member State as France very few validity questions saw their way to the Court of Justice.

However, before discussing these four legal systems, some general remarks will be made in the remainder of this section on general problems and questions that arise from the Member State's legislative duties pursuant to Article 249 EC and the directive.

1.2 The 'Authority' of Directives as Expressed in National Law

This Chapter will examine whether in these four countries directives are attributed so much 'authority' that, in the words of Mischo, they can be regarded as 'the one and only legal basis' for implementation law. For in such a scenario, it seems not unlikely that a directives' invalidity per se renders such national implementing legislation equally invalid.

When determining the legal relationship between directives and national law the first thing that is important to realise is that most Member States show a tendency to implement directives through legislation of an executive nature.²

² C-331/88 R. v. The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte Fedesa. See the Opinion of Advocate General Mischo, paragraphs 66, 68 and 79, emphasis added. See further Chapter 3, Section 4.1 'The Fedesa Case and the Two Hormones Directives'.

³ As to implementation under the Third Pillar, notably of framework decisions, when issues such as refugees and aliens are dealt with, it is not unlikely that national parliaments will want to retain maximum involvement, not just during the phase of European lawmaking, but also during the phase of national implementation, as for example suggested by Mortelmans, see Mortelmans, K.J.M., De ontwikkeling van de communautaire regelgeving en Haagse besoeges, NJB, 2000, p. 1009 (1013).
When that executive legislation is considered to have its sole basis in a directive, it could be said that national law has vested the maximum amount of 'authority' in the latter. However, 'authority' attributed to directives may also be displayed, but now to a lesser extent, by the law-making process of the implementing law rather than by the legal basis national law attributes thereto.

Thus, the phenomenon can be observed of Member States treating their domestic legislative processes differently when they are set to work on the implementation of EC law. These implementation techniques that Member States apply also represent a factor that may determine the national legal relationship between the directive and its implementation. That relationship may become apparent the moment the directive proves invalid for, obviously, such invalidity may put those types of national legislation suddenly in a strange light. The procedural safeguards that in that particular Member State are normally encompassed by legislation covering the theme(s) as addressed by the directive would have been established differently.

Implementation legislation can also be regarded as different from 'autonomous legislation' in yet another way. It is not unthinkable that it has a 're-centralising' effect upon legislative capacities that would normally be exercised on a de-central or federated level. This point of legislative level is in particular interesting to look at when dealing with Member States such as Belgium who have a federal structure or Member States with 'devolved' powers such as the United Kingdom. If implementation causes the Member State to diverge from the normally applied internal division of competences, the justification of such practice is the 'authority' attributed in that Member State to European directives. Then too, obviously, interesting legal questions arise if the directive later proves invalid.

1.3 Pressure to Implement

An important impetus for treating national lawmaking differently in the context of implementation is of course the time factor. Member States are, or at least should be, fully aware that the ECJ in principle does not accept any justification for late implementation.\(^4\)

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\(^4\) Sometimes, also the Treaty seems to favour executive measures rather than primary legislation, see the old Article 11 EEC: "Member States shall take all appropriate measures to enable governments to carry out (...) the obligations with regard to custom duties which devolve upon them pursuant to this Treaty"; see also Mortelmans (1982), on p. 138.

\(^5\) As to what procedural safeguards would normally be observed, the legal traditions of the Member States may of course vary. This thesis does not intend to make a legal analysis of those differences as such, but only focuses on the extent to which these have been modified.

Since the Maastricht Treaty there is the financial consequence of Member States facing lump sums or penalty payments imposed upon them for late implementation under Article 228 EC. The first time the Court imposed such payment on a Member State indeed concerned, not surprisingly, the non-compliance with directives.⁷

Financially more important than the possible penalty payments imposed by the ECJ is the Francovich case law. Private citizens claiming damages for the late or incorrect implementation of Community directives may lead to serious financial consequences for the Member states. This has led at least some of the Member States, inter alia The Netherlands, to simplify their domestic legislative procedures when used for implementation, leaving out certain democratic safeguards that would otherwise have been observed. Making an effort to implement in time has simply become a money-matter.

A way of determining which Member States are performing best in terms of swift implementation, is to surf to the Website of the European Commission on which statistics are published on a regular basis showing which Member States acquit themselves best of their duty to timely implement directives. Although the list always differs to some extent, it is striking that Denmark in the last three years almost always occupies the first place. Another swift legislator in that same period was Spain, roughly occupying the third place thereby being the best performing large Member State. Also remarkable is that the smallest Member State, Luxembourg, roughly occupies the sixth place. In the middle range are The Netherlands, Belgium and Ireland, respectively taking the fifth, eighth and ninth position. The largest Member States perform poorly: Italy the tenth place, followed by the UK (eleventh), Germany (twelfth) and France (thirteenth).⁸ It must be noted, however, that these figures only relate to the amount of directives, for which the implementation deadline has expired and ‘for which measures of implementation have been notified’. Whether those national measures amount to a complete and correct implementation can of course not be determined by merely studying these statistics. When looking at the relative position that Member States take in these

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⁷ See Case C-387/97 Commission v. Greece. The second time the Court ruled under Article 228 EC also concerned non-compliance with a directive: C-278/01 Commission v. Spain.

⁸ See http://europa.eu.int/comm/secretariat_general. Overview of national transpositions are published on this site every two months (under ‘archives’). Last visited on 29 October 2004. It is remarkable to see that after the accession on 1 May 2004, one new Member State (Lithuania) appears at the very top of the list and another new Member State (Malta) appears to be the worst performing state.
statistics, it must also be noted that in absolute terms, implementation compliance seems to have improved on the whole. Where in the year 2000 the 'number 1' Member State scored a percentage of 90.9 percent (of alleged implemented deadlines) and the 'number 15' a meagre 86.5 percent, in 2003 that was respectively 98.1 percent and 95.6 percent.

Finally, it must be said that the pressure to implement can at times be very high because of very strict implementation deadlines. National parliaments, assuming they want to apply the full parliamentary legislative process to the implementation of a directive, may feel frustrated when discovering that the deadline does not permit such a procedure.

1.4 Efficiency

Besides financial reasons, there may also be another, perhaps better, reason for treating implementation laws differently from 'autonomous' legislation. Basically, a good reason for simplifying implementation may be the simple fact that it concerns implementation. There seems to be consensus on the fact that when the national legislative process is used to implement directives, the full-fledged procedure that would be used for establishing 'autonomous' legislation can be regarded as a waste of time and energy.

In that regard one could even argue that there should be a duty to legislate under swift procedures when there is little discretion left to the Member States. For 'economising' on implementation legislation may imply that more emphasis is put on those policies where national procedural safeguards do still have an added value.

Yet, at the same time it must be acknowledged that directives are not all alike. Some directives require Member States to take further, politically sensitive, decisions in the phase of implementation whereas others leave them almost no discretion whatsoever. In general, however, there is little doubt that in all legal

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9 See for example Besselinck and Others (2002), on p. 105: "specifically tertiary directives impose very tight deadlines on the implementation legislator" (translation TV).
10 See Sauron, J.-L., Modalités et méthodes de transposition des directives, p. 35 (54). Besselinck has also noted this problem, arguing that this must be a reason for challenging the directive that contains such a tight implementation deadline.
systems of the EU Member States, the duty to implement directives favours 'executive rule' to the detriment of 'legislative rule'.

That being said, one must at the same time be aware that this development of 'executive rule' cannot be regarded isolated from the general trend in many a legal system to grant the executive wide powers of lawmakership, usually through some form of delegation. In fact, it is safe to say, in the words of the American Supreme Court, that there is an 'inherent necessity' to delegate law-making powers to government in modern society, irrespective of European and international integration and the correlative domestic legislative duties.\footnote{See the 1928 Supreme Court's Decision in J.W. Hampton & Co. v. United States, 276 U.S. 394. See for a concise comparative overview of delegation of lawmakerings powers in the legal systems of the EC, France, Germany, the UK and the US: Haibach, G., Separation and delegation of legislative powers, a comparative analysis, in: Andenas, M., and Turk, A., Delegated Legislation and the Role of Committees in the EC, Kluwer Law International, The Hague – London – Boston, 2000, p. 53-66. See also Cane (1996), on p. 198 drawing a comparison in this field between the UK and the US.}

In the discussion on differentiating between 'autonomous' legislation and national laws adopted for implementation purposes, the question that imposes itself is how far possible simplification may go. To what extent does the directive at issue justify recourse to a different procedure. As stated earlier, this is a matter of how much 'authority' national legal systems vest in the directive, in itself of course a national sovereign discretion. However, such attribution of authority to directives may lead to what will be called here 'democratic leakage'.\footnote{See for an earlier discussion of this theme: Vandamme, T.A.J.A., Alternative Lawmaking Procedures in the Netherlands for the sake of Implementation of the EC Directive, in: Vandamme, T.A.J.A. and Reestman, J.-H. (red.), Ambiguity in the Rule of Law, the interface between National and International Legal Systems, Europa Law Publishing, Groningen, 2001, p. 95-112.}

1.5 ‘Democratic Leakage’

In short, 'democratic leakage' is what may take place at the stage of implementation of an EC directive into national law. It can be said to occur when 'economising' on the safeguards embedded in national legislative procedures somehow is not done solely for the implementation of EC directives. Using implementation techniques to introduce legislation that is partly 'autonomous' that is to say 'not dictated by the directive', is something that will occur most likely when the directive concerned leaves Member States much discretion in the implementing process.\footnote{Theoretically, this may also occur in another form, namely when the implementation law, established by a simplified procedure, involves political choices that have no direct relationship with the directive at all. That is of course unacceptable in any case. No examples of this have come to my knowledge.}
An example is the Copyright-on-the-Internet Directive leaving so much discretion to the national legislature one could call it a form of 'non-harmonization'. The vagueness of certain provisions have led Hugenholtz to state that the Directive does not increase 'legal certainty' in the field of copyright protection on the Internet, even though bringing legal certainty is stated as one of its primary goals. In the words of Hugenholtz: "The only legal security this type of lawmaking creates is the certainty of another round of lobbying and infighting at the national level." Indeed it seems that it will be on that level that all the crucial decisions will be taken.

When implementing a directive such as the Copyright-on-the-Internet Directive, democratic leakage is what might occur when, at national level, legislative procedures are simplified or shortened, involving less democratic safeguards as would usually be applied when regulating the field of copyright law. If simplified procedures are simultaneously used for the creation of purely national, or 'autonomous', policy which is obviously the case when Member States implement the Copyright-on-the-Internet Directive, the abandonment of safeguards at national level can hardly be called justified. Consequently, democratic quality 'leaks out' somewhere between the publication of this Directive in the Official Journal of the European Union and its implementation into national law. Thus, qualifying the directive as one granting more or less discretion to the Member States should be a matter of crucial importance in this matter.

Many directives leaving no discretion whatsoever to Member States can be found amongst the 'tertiary directives' adopted usually by the Commission under delegated powers. A typical example is the Creosote Directive, meticulously prescribing (by means of an appendix) the substances (with their chemical formulae) that may not be used for the treatment of wood. As a rule, many of these tertiary Commission directives leave Member States not much discretion as they usually

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16 It in fact even seems to give room for more differentiation in copyright law as opposed to further harmonise it by allowing Member States to introduce more exceptions than are already in force in their national copyright laws.

17 See Hugenholtz, B., Why the Copyright Directive is unimportant and possibly invalid, EIPR, 2000, p. 499. Lack of clarity of a directive so grave that it makes the directive invalid for infringing the general principle of legal certainty was also invoked unsuccessfully by The Netherlands against the Biotechnology Directive in C-377/98 R Biotechnology.

18 He concludes with questioning the validity of the Copyright Directive. It has the same legal basis as the Tobacco Advertising Directive (Articles 47(2), 55 and 95 EC) that was annulled by the ECJ since it did not facilitate free movement of goods or the freedom of services nor removed obstacles to competition.

regard the technical adaptation or practical completion of basic directives, in this case of Directive 76/769/EEC on the use of dangerous substances. The implementation term for these types of directives may at times be extremely short.20

Establishing whether or not ‘democratic leakage’ has occurred in the implementing process is not easy. The major issue is that it calls for a ‘quantification’ of the amount of discretion a directive leaves to the Member States. If the amount of national political discretion is to be the criterion by which one conditions the use of these simplified procedures, ‘quantification’ is unavoidable.21 Another complicating factor is that when one discusses this topic of simplification of legislative procedures, one must realise that the ‘basic’ procedures, that is to say those that are not shortened or simplified, obviously differ per Member State anyway. As such, one could expect that a Member State where traditionally the executive enjoys wide ranging powers to legislate, will have less need for recourse to ‘alternative’ lawmaking for the purpose of swift implementation. That makes any changes in them harder to compare since the frame of reference (the normal procedure) differs per country due to differing legal traditions in the Member States as regards democracy and legitimacy. This thesis does not intend to provide a legal analysis of those differences as such, but only focuses on the extent to which national procedures, whatever they are, have been modified for implementation purposes.

What also will have to be looked into is whether Community law itself, either directly or indirectly, may be said to require any specific (minimum) democratic safeguards to be taken into account in the implementing process. Does Community law set any procedural limits to the choice of ‘forms and methods’ as provided for by Article 249 EC? I shall attempt to answer this question in sub-chapter 2.

One may wonder about the relevance of ‘democratic leakage’ in the context of this study. The reason it is discussed here is that the common point between ‘democratic leakage’ and the consequences of invalidity of a directive for national law both deal with the legal relationship between the directive and its national implementing measure. The more efforts are made to avoid ‘democratic leakage’ the more it could be expected that the Member State concerned will

20 See for an extreme example Directive 98/99/EC with an implementation period of only a few days! See also the Advice of the Dutch Council of State, 26.200 VI B, p. 6 where the phenomenon of short implementation deadlines is also discussed. See also Besselink disagreeing with the fact that short implementation terms may justify simplified lawmaking procedures for implementation purposes. Besselink, I. F. M., and Others, De Nederlandse Grondwet en de Europese Unie. Europa Law Publishing, Groningen, 2002, p. 144.

21 See also Vandamme (2001) and Besselink (2002), p. 125: arguing that the terms ‘exclusively purporting to implement’ must be read as stricter than implementing solely when there is a ‘small margin of discretion’.
follow the normal domestic legislative procedures and the less likely it would be that the consequent invalidity of a Directive will bear any consequences upon such national legislation. Hence, when focussing on the four countries studied, the issue of 'leakage' will reappear when appropriate.

1.6 National Politics Regain Power

For the sake of clarity, it must be emphasized that this study is not concerned with the phenomenon of what is popularly called the 'democratic deficit of the European Union'. Basically, that may be described as the process in which national competences are transferred to the Community institutions where they are more difficult to control. Clearly, a democratic deficit cannot in any way be 'mended' during the stage of implementation of Community obligations that were (allegedly) undemocratically established. Only the improvement of European legislative procedures and/or other improvements of European 'government' can achieve that. For even if the national legislative procedure whereby the EC directive is implemented would be fully equipped with every thinkable safeguard, it cannot make up for the (alleged) loss of democratic quality at European level.

For the purposes of this study, this type of democratic deficit may be referred to as 'democratic deficit a priori'. Where EC directives are suffering from any such 'deficit' and are implemented in national law, that national law may be said to suffer from the same 'deficit'. At that stage no national implementing procedure can possibly make up for this (alleged) deficit for it was already there beforehand: a priori. What would be a more useful term in this study regarding the invalidity of Community law, is that of a 'democratic deficit a posteriori'. For the democratic safeguards involved in the European legislative process (for whatever they were worth) may be regarded by the Member States as having 'vanished' alongside the invalidity of the directive. If that is indeed the national view on the situation after the annulment of the implemented directive, such view may be regarded as that of a democratic deficit, but not in the classical sense of the word, which I would like to call a priori, but rather as a democratic deficit a posteriori. Whether Member States will regard a national law as suffering from a democratic deficit a posteriori is a political question. It is imaginable that at Member State level, the historical fact of the adoption of the once-existing directive remains as representing a highly democratic moment in time from which the national law can continue to draw its democratic legitimacy.

This can be illustrated by a discussion in the Dutch Parliament on the possible consequences of the annulment of the Tobacco Advertising Directive after the Advocate General Fennelly had already opined it was invalid. When asked what she intended to do if the Directive would be invalidated the Dutch Minister of
Heath answered that if that were to be the case, she would continue the legislative process (and therefore not withdraw the Government bill).

Thus the question whether the national implementing law suffers from a 'democratic deficit a posteriori' is a political rather than a legal question. The paradox is that, since national politics may decide upon such matters, it may be argued that formally speaking there is no such thing as a democratic deficit a posteriori. Since it is established in previous chapters that, at least on paper, Member States have regained the full legislative competence on the matter covered by the former directive, national democracy is entitled to act in any way it sees fit. It may withdraw, alter or confirm the national implementing law. The matter of (still) attributing 'authority' to the directive, is a national matter. Moreover, whatever democratic deficit may have existed at the time the directive was in force (thus referring to the democratic deficit a priori), has also formally vanished together with that directive. The annulment of a directive entails the formal 're-transfer' of competences to the national legislatures where they are once again, at least formally, under full control of national parliament and executive. The fact itself that it is up to the Member States to asses the situation as representing one of democratic deficit a posteriori or not, is of course the best evidence that, formally, there is no such deficit! One could capture this by the English saying 'The proof of the pudding is in the eating'. Nevertheless, this study looks at the legal consequences, for it may be that it is primarily a national court that decides on the destiny of the implementing measure rather than national politics. Whether or not national courts, apart from national politics, can play any role in this situation, the question of justiciability will be one of the questions to be addressed in this Part of the study.

1.7 National Courts Regain Power

It has been stated on several occasions that the invalidity of the directive is a test case for the constitutional relationship it has with its implementing law. Since it is established in the previous Chapters that the constitution to decide on that issue is the national constitution, not the European constitution, attention therefore focuses on the guardians of those national constitutions, usually the national (constitutional) courts. It is crucial in a study concerned with the legal consequences of invalidity of an implemented directive to see whether the matter is entirely in the realm of national politics in deciding what 'authority' remains to be drawn from the, now invalid, directive (see above, subparagraph 1.6) or whether the national law imposes legal restrictions upon political discretion in this regard.

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The legal consequences of the invalidity of the directive are in many countries thus determined by two factors: (1) the implementation mechanism and to what extent that mechanism attaches weight or ‘authority’ to directives and (2) the possibility/opportunity for national courts to speak out on the validity of such national legislation. The second factor is thus the availability and scope of the direct and indirect possibilities for legally challenging national legislation.

It has been discussed earlier\(^ {23} \) that the possibilities for private plaintiffs to legally attack EC directives to a large degree come down to whether or not they have any possibilities for attacking the national legislative measures implementing these directives. This necessity has been reiterated once more by the ECJ in its UPA judgment where it stated that it is up to the national legal systems to ensure the availability of actions for individuals to challenge EC nominative acts indirectly.\(^ {24} \)

As has also been stated by Advocate General Jacobs in his Opinion to the UPA case, the availability of national direct actions against national legislative measures (irrespective of whether or not they serve as implementing measures) is becoming more commonplace.\(^ {25} \) Yet, as will be seen later, that seems to be true for subordinate legislation which is in principle open to legal review by the courts of all Member States (although the extent and availability of such review actions differ greatly).\(^ {26} \) However, with regard to statutory law, legal review can be very difficult to obtain, if not impossible as is for example the case in The Netherlands and in the UK.\(^ {27} \)

### 1.8 ‘Shifting’ National Democratic Safeguards

As a corollary to the phenomenon of ‘economising’ on national legislative procedure, reflecting national attribution of ‘authority’ to the directive, it may be wondered if there is not a counter development of more emphasis of national democratic forces on the European legislative process. The logic is simple: if applying full democratic procedure to legislation that is to at least some extent (if that is the case is of course another question) pointless, should that not be ‘redirected’ to the Community legislative process? Is seems that such a ‘shift’ is indeed taking place, partly facilitated by EC law itself but mainly manifesting itself at national level.

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\(^ {23} \) See Chapter 2.

\(^ {24} \) See C-50/00 UPA v. Council, paragraph 42.

\(^ {25} \) See paragraphs 85 to 90 of the Opinion of Advocate general Jacobs for C-50/00 UPA.

\(^ {26} \) See for example Wet, E. de, Judicial Review as an Emerging General Principle of Law and its Implications for the International Court of Justice, *NLR*, 2000, p. 181 drawing attention to the fact that constitutional review of decisions of political bodies varies greatly.

\(^ {27} \) See Article 120 Netherlands Constitution (NL C.).
From a political perspective such ‘shift’ is an interesting phenomenon. For it may be expected to influence the political reaction to a directive’s invalidity. A plausible hypothesis could be that the more national parliament is effectively involved in the Community decision-making process, the more it could later on be expected to accept some form of ‘authority’ of the invalidated directive in the Member State, even in relation to directives that left very little discretion in the implementing process.

However, as this study focuses on the legal rather than the political reaction to a directive’s invalidation, these national aspects of European lawmaking will not be addressed further.

1.9 EC Requirements as to National Legislation

Once it is established that a particular directive provision needs transposition into national law, it is of course a matter of national law how that is achieved exactly. For this study it is vital to establish that, in principle, there is no requirement as to the level of legislation. Implementation may take place at ‘statutory level’ but it is by far more common that it takes place at the executive level. EC law is in principle indifferent to this aspect of implementation.

Furthermore, the EC does not require that implementation is laid down in central legislation. Lower, regional, authorities such as provinces or municipalities with the capacity to adopt binding provisions may legislate in order to perform the Member State’s implementation duties. Specifically, in the Member states with a federal state structure or with devolved legislative powers, there is no problem with the directive being implemented at the level of the federated states.

It is unclear whether the central authorities must set up procedures in order to guarantee full compliance with the directive by regional authorities. The Court

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28 See Case 97/81 Commission v. The Netherlands, paragraph 13: "either by the national authorities or by regional or local authorities", see also Joined Cases 227 to 230/85 Commission v. Belgium, paragraph 9 and C-131/88 Commission v. Germany, paragraphs 28 and 71 and see the Opinion of Advocate General Jacobs for C-58/89, point 30-31: “it is not necessary for the implementing provisions to be adopted in every case by the Member State’s central government, rather than by local or regional authorities competent to adopt such measures”.

29 Respectively Germany, Austria, Belgium (federal states) and Italy, Spain and the UK (devolved powers).

30 In all these cases, the central legislator remains of course answerable for a correct implementation covering the entire geographic area of the Member State. See Wouters, J. and De Smet, L.: The Legal Position of Federal States and their Federated Entities in International Relations. the Case of Belgium, in: Vandamme, T.A.J.A. and Reestman, J.-H. (eds), Ambiguity in the Rule of Law, the Interface between National and International Legal Systems, Europa Law Publishing, Groningen, 2001, p. 121.
seems to hint at such a rule in C-237/90.\textsuperscript{31} Below, in sub-chapter 5, some attention will be given to any ‘safety valves’ involving ‘re-centralisation’ of devolved/federal powers in Belgium and the UK.

Yet, there have been curtailments emanating from the Court’s jurisprudence mostly for reasons of legal certainty and, related to that, accessibility/cognoscibility. First of all, implementation must be ‘law’ in the view of the ECJ. An acknowledged consequence of this line of case law is that mere administrative practice (such as the granting of permits in accordance with a directive’s substantive provisions) can never be regarded as constituting proper implementation. Such policy will have to find its basis in national law whereby such law must make it clear that public authorities could not have acted otherwise (for example by granting permits in violation of the directive).\textsuperscript{12}

In national law it may be possible for public authorities such as agencies granting permits, to state to the public what their future administrative practice will be (administrative guidelines). Such practice in particular will more than likely not amount to correct implementation.\textsuperscript{13} Yet, that is not to say that, while awaiting proper ‘law’ implementing the directive, such national public authorities are not still under a duty to apply such (pre-advertised) practices if indeed, \textit{de facto}, they amount to proper ‘implementation’ (in the broad sense of the word, see Chapter 1, Section 3.4).\textsuperscript{34}

More interesting for this study is that the freedom of Member States can be curtailed even if it is common ground that the implementing provisions are legally binding. As such, implementation measures should be of the \textit{same force of law} within the national legal hierarchy of norms as the legislation that has to be amended for that purpose.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{31} See Jans And Others (2000), p. 209 and Case C-237/90 Commission v. Germany.
\item \textsuperscript{32} See Prechal (1994), p. 95. See also Jans And Others (2000), p. 201 and Case 291/84 Commission v. The Netherlands. In this context, they point out that Case C-190/90 Commission v. The Netherlands, where the Court seemed to allow for such implementation practices, must be considered a ‘white raven’, see Jans And Others (2000), p. 211.
\item \textsuperscript{33} See for example Kortmann discussing this practice from the Dutch perspective, pointing to the inherent capability of Dutch administrative authorities to divert from such ‘policy directives’. See Kortmann (2001), p. 325.
\item \textsuperscript{34} See Gronden, J.W. van der, \textit{Europese monografieën, De implementatie van het EG-milieurecht door de Nederlandse decentrale overheden}, Kluwer, Deventer, 1998, on p. 123, criticising a judgment of a Dutch court (Kritisch Faunabekheer e.a. v. Minister van LNV, KG, 1986, No. 241) where this court disregarded a ‘policy statement’ because it did not have the ‘force of law’ thereby ignoring that all the same it correctly ‘implemented’ an EC directive.
\item \textsuperscript{35} See for example Gronden, Van der, J.W., \textit{Europese monografieën, de implementatie van het EG-milieurecht door de Nederlandse decentrale overheden}, Deventer, 1998, on p. 123 and 125.
\end{itemize}
This case law can be related to the possible direct effect of a directive not providing the Member State with a good excuse for non-implementation of that directly effective provision. Also then, there is at least a textual conflict that might confuse the citizens as to their legal position.\(^\text{16}\)

Thus, legislation conflicting with the implementation rules must be repealed or amended.\(^\text{17}\) The fact that legislation may not confuse the citizen is also the underlying reason why the Court requires implementation to have the ‘same legal force’ as the law in which the subject matter of the directive was regulated before the directive entered into force.\(^\text{18}\) The interesting aspect of this jurisprudence is, however, that, as will be seen later in Section 2, it is not uncommon for a Member State such as the UK, Ireland, Belgium or The Netherlands to implement directives by having executive (implementation) legislation derogate from higher, often statutory, law. This national legislative practice is obviously put in a strange light by the Court’s case law requiring implementation law to have the ‘same force of law’. Would it allow for this implementing technique or not?

A second question that may be brought up in this regard is whether Member States may implement by means of referral to a directive. This is a legislative technique whereby the implementing law content-wise merely refers to its ‘parent’ directive. Basically one can distinguish two types of referral, dynamic and static referral. Static referral refers to a specific directive as it stands at a specific moment in time whereas dynamic referral would refer to a directive as it would stand then, but also as it would stand after future modifications. From the point of view of accessibility the latter type of implementation appears to be the most troublesome.\(^\text{19}\) There are indications that the Court might accept static referral, but it is less clear whether it accepts dynamic referral.\(^\text{40}\) Since the phenomenon of referral is more concerned with content rather than national legislative procedure, it will not be addressed here further.

\(^{16}\) See Case 116/86 Commission v. Italy and Case 102/79 Commission v. Belgium. See also case C-138/91 Steenhorst-Neerings.

\(^{17}\) See C-165/97 Commission v. France and Case 74/86 Commission v. Germany and C-259/01 Commission v. France. See also C-145/99 Commission v. Italy (on the lex posterior rule).


\(^{19}\) See Prechal (2004) second edition, forthcoming, expressing her doubts as to referral as a means of implementation, especially dynamic referral.

\(^{40}\) See on dynamic referral Case C-96/95 Commission v. Germany. It has to be submitted that this ruling concerned an ‘extreme case’ of referral. Germany implemented two directives into its law on aliens (Ausländergesetz) by simply referring to the supremacy of EC law! See also C-58/89 Commission v. Germany which, unfortunately, is again not conclusive on the matter and Case 208/85 Commission v. Germany.
1.10 Valid Directives and Invalid Implementation

A problem not completely resolved is whether national courts are under an obligation to regard as valid national law that implements Community law when the validity of that national law is attacked on purely national grounds. This situation mirrors that which is the focus of this study: the implemented directive is valid (or better: not yet invalidated) but the implementation itself is tainted with a national legal invalidity.

An example may be found in the Francorchamps case. The Walloon Region started annulment proceedings before the Belgian Court of Arbitration against the implementing legislation.\(^4\) It invoked the non-discrimination principle since the law imposed too heavy a burden upon Belgian organisers of events at world level that are sponsored by tobacco companies. The Court of Arbitration agreed to the Wallonian complaints. Since other Member States might use the option to defer the ban on such events to 2006, as provided by the Directive, the Belgian decision to do it earlier was too severe and ineffective since Belgians would still be able to watch on television sports games organized abroad and sponsored by the tobacco industry. In those circumstances, the Belgian law was ineffective for the protection of public health and therefore not proportional. The result was that it infringed Articles 10 and 11 of the Belgian Constitution. This judgment, dated 30 September 1999, precedes the judgment of 5 October 2000 where the ECJ annulled the Tobacco Advertising Directive,\(^4^2\) which was therefore valid at the time the Belgian court rendered judgment. In Francorchamps the Belgian Cour d’arbitrage declared void the manner in which Belgium had used the freedom to manoeuvre within the boundaries set by the Tobacco Advertising Directive. The cour did not refer any question on the validity of the Directive to the ECJ because the complaint of the Walloon Region as to the national decision to not make use of a possibility provided by the Directive, did not relate to the Directive itself.\(^4^3\)

In his opinion to the Angelopharm case, Advocate General Jacobs drew the parallel with the Marleasing case.\(^4^4\) It may be remembered that in this case the ECJ had ruled on the basis of Article 10 EC, the principle of sincere cooperation,\(^4^5\) national courts are under an obligation to interpret national law in

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41 Together with quite a number of tobacco (advertising) companies, such as Salamander AG, also known from Joined Cases T-172/98, T-176/98 and T-177/98 (the Salamander case) before the CFI.


43 However, at another point, the Belgian law was also successfully attacked, but this time for a reason that did originate directly in the Directive. At that point, the cour d’arbitrage should have posed a preliminary reference on the validity of the Directive but failed to do so.

44 See paragraphs 70-74 of the Opinion of Advocate General Jacobs in C-212/91 Angelopharm.

45 The former Article 5 E(EE)C.
conformity with EC directives.\textsuperscript{46} Jacobs argued that on the basis of Article 10 EC, a national court is also held to regard an implementing measure as valid, even though its invalidity would follow from grounds of national (procedural) law.\textsuperscript{47}

Although the ECJ did not address this aspect of the Advocate General's Opinion, it is an interesting exercise to theorise on this parallel with \textit{Marleasing}. In the latter decision, it was accepted that the national court's duty to interpret in consistency with a directive goes only so far as national law would allow for. Thus, the Court accepts that national (constitutional) rules may set limits to how far a national court must go in its attempt to observe Community law. It is hard to imagine that where national constitutional borders may be respected in the context of 'remedial interpretation', they \textit{should} be crossed in case national courts are confronted with invalid law implementing a valid directive.

There is another question that imposes itself as regards this parallel with \textit{Marleasing}. Advocate General Jacobs does not explain what the consequences are for the national legislator in connection to this action by the national court. It would seem that if the parallel is drawn with \textit{Marleasing}, this should be done consistently. In \textit{Marleasing}, the obligation of the national court to interpret national law as far as possible in conformity with the directive must be considered as 'temporary patchwork'. It obviously cannot absolve the legislator from implementing that directive correctly into national law. The same then should be true in case national courts would be under an obligation to regard national law as valid despite its invalidity on national grounds for the mere reason that it is implementing a directive. In that case too, 'temporary patchwork' does not absolve the national legislator from his duty to correctly implement the directive.

\section*{I.II Intermezzo}

The coming section will focus on the manner in which the United Kingdom, Belgium, France and The Netherlands comply with their implementation duty. In particular, the question will be investigated if, and in what manner, these states attribute 'authority' to the EC directive when they adopt implementation legislation. Are they doing so by means of a national concept of delegation, or is it reflected in a process of 'economising' on national legislative procedure? Then the question must be answered whether the national courts (can) respond to the invalidity of the directive.

It must be stated a the outset that the differences between these legal systems is great. Therefore, in principle, the 'authority' attributed to the direc-

\textsuperscript{46} See also Ward (2000) discussing the Angelopharm case on p. 276.

\textsuperscript{47} In his Opinion to the \textit{Pierrel} case, Advocate General Lenz also claims that the national judge is under an obligation to regard the implementing measure as valid, even though it is afflicted with a national defect. See C-83/92 \textit{Pierrel SpA and Others v. Ministero della Sanità}, in particular paragraph 14 of the Opinion of Advocate General Lenz for that case.
tive must primarily be judged by standards of democracy and legitimacy within these legal systems. However, comparing the directive's 'authority' within these systems necessarily encompasses certain simplifications. In the coming sections, similarities rather than differences will be emphasized.

An example hereof is the typically British phenomenon of the Henry VIII clause (see infra). This is a statutory clause that grants the executive the legislative power to deviate from statutory law. When discussing Henry VIII clauses in the other Member States in the sense that also there governments may alter statutory law, one must at all times keep in mind that, although similar in concept, the constitutional positions held by legislatures and governments differ in these countries from those held by Westminster and Whitehall.

Where appropriate, the coming sections will draw upon any concrete consequences of the invalidity of those directives that have occurred. This chapter will end with some general conclusions in Section 3.

2 The Invalid Directive and the Legal Systems of Four Member States

2.1 The United Kingdom of Great Britain and Northern Ireland

As in other Western European countries, democracy is more and more dependent on ministerial accountability to parliament rather than on parliament co-legislating on laws. The United Kingdom is no exception. Even though the country is home to the 'Mother of Parliaments', the British Executive generally occupies a powerful position. As a matter of fact, such governmental power seems to be even greater in the UK than in The Netherlands, Belgium or even France for the separation of powers does not appear to be a very well developed feature of the (unwritten) British Constitution.

Perhaps the best example thereof is the fact that, by constitutional convention, all ministers in Her Majesty's Government must also sit in one of the Houses of Parliament and hence vote on their own proposals.48

48 Being a very important source of British constitutional law, even though it is not enforceable in UK courts.

49 The blurring of the separation of powers by this rule is enhanced by the fact that the UK governments are unusually large, more than a hundred ministers is customary. To top it off, party discipline is very strict upon the MPs who do not form part of Government, the government backbenchers. In France, Belgium and The Netherlands, ministers cannot be an MP at the same time. Party discipline is less strict in the House of Lords and a vote approving an amendment is thus more likely to arise there than in Lower House. In general, however, when the bill is drafted and before Parliament, changes to its substance are usually limited.
English statutes, 'Acts of Parliament', are capable of governing any given subject, according to what is still considered to be the keystone of the British Constitution, the 'Sovereignty of Parliament'. According to most British authors, the Parliament of Westminster could thus also validly legislate contrary to EC law, the European Communities Act merely being an exercise in self-restriction.\textsuperscript{50} If it does so, it will have to make this very clear for without such desire to divert from EC law being laid down \textit{expressis verbis} in the Act of Parliament, UK courts will not apply Acts of Parliament that run counter to EC law.\textsuperscript{51} Thus, EC law provides the one important exception to the basic constitutional rule that judges cannot review Acts of Parliament.

Nevertheless, in practical terms the power of the executive in the UK, as in other Member States, is considerable, and reflected in the wide degree of legislative powers being delegated to the government.\textsuperscript{52} Already in the 1930s, this led to some concern in parliament who set up a committee to report on the phenomenon. The Donoughmore committee reported that delegation of powers is inevitable for several reasons such as the pressure on parliamentary time and the technicality of the subject matter.\textsuperscript{53} Obviously, since the 1930s, these reasons have lost nothing of their relevance. Nevertheless, there has always been parliamentary concern about both the quantity and the intensity of delegation of lawmaking powers, not in the least when this delegation involves so-called Henry VIII clauses. Such is the popular name for clauses in Acts of Parliament that grant the executive the power to repeal or amend by secondary legislation an Act of Parliament.\textsuperscript{54} In the UK it is not uncommon to adopt Henry

\textsuperscript{50} And some others do not, see Finer, S.E., \textit{Comparing Constitutions}, p. 45. See further Thompson (1993), p. 54 and Lord Denning MR in Case 129/79 (Macarthis v. Smith).

\textsuperscript{51} Or at least temporarily freeze the operation of the Act of Parliament while awaiting an answer of the ECJ confirming that the Act concerned indeed infringes EC law, see C-213/89 \textit{R. v. Secretary of State for Transport, ex parte Factoritame}. See also Koopmans, T., \textit{Vergelijkend Puplicrecht}, Second edition, Kluwer, Deventer, 1986, p. 29.

\textsuperscript{52} Apart from the powers delegated to government by statute, British constitutional law also knows the Order in Council by prerogative powers, a remnant of the old autonomous powers of the King resembling to some extent the \textit{pouvoir réglementaire autonome} known in French law.


\textsuperscript{54} The clause thanks its name to the Statute of Proclamations 1539 (later repealed) granting King Henry VIII the power to issue proclamations 'as if they were Acts of Parliament'. As such it were not only his wives that this monarch could silence.
VIII clauses in order to facilitate compliance with international obligations. An interesting example thereof is the Henry VIII clause that is part of the 1998 Human Rights Act. Ministers can alter Acts of Parliament in order to bring them in line with the European Convention of Human Rights.\textsuperscript{55}

But also for purely domestic affairs, the use of Henry VIII clauses has become more common, the most far-reaching example being the Deregulation and Contracting Out Act 1994 which is basically one big Henry VIII clause.\textsuperscript{56} Another example is the Child Support Act 1991 that contains several Henry VIII clauses. Furthermore, they may also appear in devolution matters as is apparent from Section 105 of the Scotland Act 1998.

Whenever similar arrangements are found in the Belgian, French and Dutch legal systems, this study will refer to them as ‘Henry VIII clauses’.\textsuperscript{57}

Parliamentary concern on the issue of delegation focused of course on how to secure democratic control upon this system of lawmaking. Such control appears crucial in the light of the fact that the terms under which powers may be delegated to the British executive are often very broadly and vaguely circumscribed.\textsuperscript{58} In most cases this takes the form of either the affirmative or the negative resolution procedure.\textsuperscript{59} The latter is the ‘lighter version’ in that the statutory instrument concerned takes effect if neither of the Houses rejects the proposal that is laid before it.\textsuperscript{60} Under the affirmative resolution procedure, a proposal

\begin{itemize}
\item \textsuperscript{55} However, here it is required that before this clause can be used to amend an Act of Parliament, a UK court first issues a declaration of incompatibility between that Act and the European Convention on Human Rights, see also Tomkins, \textit{Delegation in the English Constitution}, for a brief description of the Human Rights Act in the more general context of delegation of legislative powers in the UK. See Article 10 of the Act: “If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility”.
\item \textsuperscript{56} See Tomkins (2000).
\item \textsuperscript{57} See, however, the remarks in Section 1.11 on the relativity of such national concepts.
\item \textsuperscript{58} See Cane (1996), p. 306.
\item \textsuperscript{59} The Statutory Instruments Act 1946 lays down the procedure for the negative and affirmative procedure. Some Statutory instruments are not subject to the 1946 Act such as sub-delegated legislation. Powers to sub-delegate may be express or implied. All are subject to judicial review.
\item \textsuperscript{60} In practice scrutiny at this stage emanates almost entirely from the Joint Committee on Statutory Instruments consisting of Members of the House of Commons and Peers from the House of Lords. Another important actor in this respect is the House of Lords ‘Delegated Powers and Deregulation Committee’ which since 1992 focuses on scrutinizing bills for Acts of Parliament containing delegation clauses, see also Tomkins (2000). Among the terms of reference of the Committee is the possible doubt as to the ‘vires’ of the statutory instrument.
\end{itemize}
can only take effect if the Houses expressly grant their consent. Although there is no strict criterion as to when to use what procedure in the parent act, the affirmative resolution is generally less often used, mostly for the 'more important' issues or for money raising measures. The majority of Acts of Parliament prescribe the negative procedure that does not necessitate debate, a matter of great importance considering the parliamentary timetable.

The products of the executive legislator are grouped together under the generic term of Statutory Instruments, covering both the Orders in Council that are established by certain Ministers and the Queen ('the Queen in Council') and Ministerial or Departmental Decrees, usually referred to as 'Regulations'. Lawmaking at the Ministerial or Departmental level is subject to a previous Order in Council in which such Minister or Department is 'designated'. Such designations may be quite broadly drafted such as the designation of the Minister of Agriculture, Fisheries and Food to implement the Common Agricultural Policy. Powers may also be sub-delegated although the option to do so must be very clearly allowed for by statute.

Of great importance for this study is that statutory instruments differ from Acts of Parliament in that they are not immune from judicial scrutiny. Much judicial scrutiny of Statutory Instruments takes place through the public law mechanism of application for judicial review (see infra). Under this mechanism the possible 'illegality' of a statutory instrument is reviewed. Covered by 'illegality' is the defect most relevant for this study: that of the Statutory Instrument being ultra vires, meaning going beyond its parent Act. Even though most Statutory Instruments undergo some sort of parliamentary scrutiny, it is striking to note that the courts play a larger role in policing the vires of a the Statutory Instrument than does the Joint Committee on Statutory Instruments, the parliamentary body (consisting of Commons and Peers) charged with the scrutiny of proposals for such subordinate legislation.

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61 Interestingly, the requirement that statutes often pose that the statutory instruments be laid before Parliament is not a requirement which, if violated, renders the statutory instrument concerned invalid, see Cane (1996), p. 192.

62 Disturbingly, it also happens that no parliamentary control is provided for, see Tomkins (2000).

63 See e.g. the European Communities (Services of Lawyers) Order 1978 (S.I. 1978 No. 1910). The term 'Council' refers to the ancient Privy Council.

64 European Communities (Designation) Order 1972 (SI 1972 No. 1811).


66 The other grounds for review under the 'AJR' are 'irrationality' and 'procedural impropriety'.

67 Or sometimes beyond another act than the parent act, see Tomkins (2000).

68 The 'Lords' are in the middle of a reform now. At the time of writing only a handful of the former 'hereditary peers' still sit in the House.
Between 1914 and 1986 only 12 statutory instruments were annulled by courts, none of which were spotted by Parliament.  

This phenomenon of low intensity of parliamentary scrutiny of Statutory Instruments has not escaped the attention and concern of legal literature. With both procedures of scrutiny (affirmative or negative), Parliament does not have any power of amendment, making the instrument of negative resolution or denying an affirmation rather blunt.

### 2.1.1 The European Communities Act 1972

The UK has set up a very swift set of procedural arrangements for the implementation of EC directives under its European Communities Act 1972 (hereafter: ECA). These arrangements involve a high degree of executive autonomy as far as the ‘forms and methods’ are concerned. As with the other legal systems, such approach reflects the position the executive traditionally holds within the overall constitutional structure. The system of the ECA seems to contribute to the fact that the UK is, at least among the larger Member States, one of the better performing states in terms of implementation record. Its key provision for implementation is Section 2(2) delegating a general legislative competence to the executive:

> “Subject to Schedule 2 to this Act (see infra), at any time after its passing Her Majesty may, by Order in Council, and any designated Minister or department may by regulations, make provisions

a) for the purposes of implementing any Community obligation of the United Kingdom or enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

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69 See Tomkins (2000) and Cane (1996), p. 311 and p. 196 who explain that most such legislation receives little to no discussion in either House. Cane writes that the combined factors of little public scrutiny, the low key nature and infrequency of judicial review and the large volume of non-parliamentary rule making “might one lead to expect considerable dissatisfaction with the system. But there seems to be very little dissatisfaction”.


71 See http://europa.eu.int/comm/secretariat_general. Overviews of the national transpositions are published on this site every two months (under ‘archives’). The site learns that the UK has not performed admirably over the last three years, but nevertheless better that Germany and France. There is, however, a traceable negative effect resulting from the devolution of powers.
b) for the purpose of dealing with matters arising out of or to be related to any such obligation or rights or the coming into force, or the operation from time to time of subsection (1) above.”

The competence hinges on the existence of any kind of obligation arising from EC law, including of course the implementation of EC directives. Furthermore, the first phrase of section 2 (4) contains a Henry VIII clause:

“The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament.”

The legislative powers under the ECA are extremely broad, especially in comparison with special ‘implementation arrangements’ (if any) in Belgium, France and The Netherlands. As with other statutory instruments, the Westminster Parliament plays a minor role (both on paper and in practice). The procedure for Parliamentary scrutiny is the ‘negative procedure’ before both Houses. As stated earlier, a ‘negative resolution’, rejecting the draft Statutory Instrument, is a rare occurrence, also in the context of the ECA.

Using the broadly delegated lawmaking powers of the ECA to implement directives is not mandatory. First of all, it is of course always up to the sovereign Parliament to decide to implement a directive by means of a statute. Secondly, there is the option of the executive implementing the directive under powers delegated under other Acts of Parliament than the ECA. An example thereof is the British implementation of the annulled Laying Hens Directive.

The Welfare of Battery Hens Regulations 1987 implemented Directive 86/113/EEC (the First Laying Hens Directive) later annulled by the ECJ. This Statutory Instrument is based upon powers delegated, not by the ECA, but under powers delegated by the Agriculture (Miscellaneous Provisions) Act 1968.

72 See Schedule 2, part 2, paragraph 2 to the ECA. See also Boch (2004), p. 51.
73 Which is not surprising since it may be reminded that there is always a dominant majority in the House of the governing party and that decision-making is governed by a strong party discipline.
Implementation by means of such powers delegated by other provisions than Section 2(2) ECA may be immune for the directive's invalidity. The Welfare of Battery Hens Regulations 1987 provide a good example. Unlike the ECA, their parent Act did not attribute to the (valid) directive the status of constitutive factor for the delegated lawmaking power. Consequently, they remained valid after annulment of the directive they implemented.

Hence, when the New Laying Hens Directive was enacted replacing its annulled predecessor (with an identical content), Britain could simply inform the Commission that the same Regulations as enacted in 1987 were to be regarded as the implementation of the Second Laying Hens Directive.

Thus, recourse to the ECA is not adamant. Furthermore, implementation by other measures as those envisaged by the ECA may be necessary if its 'Schedule 2' applies. This important appendix to the Act excludes certain topics from the wide legislative power as granted by the ECA, namely:

a) to make any provision imposing or increasing taxation; or
b) to make any provision taking effect from a date earlier than that of the making of the instrument containing the provision; or
c) to confer any power to legislate by means or orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal; or
d) to create any new criminal offence punishable [by more than specified limits of penalty].

Thus, implementation of a directive requiring taxation, retroactive effect or penalties over a certain limit, cannot take place under Section 2(2) of the ECA. Nevertheless, it is striking to note that besides these restrictions in 'Schedule 2' there are no restrictions imposed upon the British executive to use section 2(2) ECA as a basis for the implementation of 'any Community obligation'. In particular, there are no limitations as to the amount of discretion the directive may leave the Member States. That is not to say that if considerable discretion is acknowledged it never induces the implementation legislator to take recourse to other means such as the adoption of an Act of Parliament.

An example of such a case in which the legislative powers delegated by the ECA could have been used but instead a parliamentary statute was enacted, is the Milk Act 1983. Reason for this action was that the 'Community obligation' arose “from

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77 Which would be rather bizarre anyway considering the fact that this Act of Parliament predates Britain's accession to the EEC in 1973.
78 Directive 88/166/EEC.
a judgment of the Court of Justice which does not indicate the precise limits of that Community obligation". Consequently, a statute was enacted.79

Having said that, fact remains that the ECA does not set any further limitations as to the scope of the delegated powers other than that there is 'a Community obligation'. In a way the example of the Milk Act 1983 illustrates this. Recourse to an Act of Parliament is explained by concerns over 'democratic leakage' (see Section 1.5), not by the fact that the implementation under the ECA would have been ultra vires. Formally, there is no objection to recourse to the delegated lawmaking powers under the ECA, not even if the directive concerned would leave very important decisions to be taken by the national legislator.

Furthermore, the power to legislate under the ECA extends well beyond the duty to transpose directives. Section 2(2), second paragraph, ECA also empowers the Executive to legislate "for the purpose of dealing with matters arising out of or related to any such obligation" (emphasis by author). It became apparent in the Unison decision of the High Court that for this 'relation' a rather weak link may suffice.80

One does occasionally find opinions of those who, even though acknowledging that there is a tradition of wide ranging powers being delegated to the UK Government, feel that the ECA does stretch that tradition to its utmost limit.81 However, such thoughts do not as of yet seem to have any impact on legislative practice. The following statement of Drewry seems characteristic for the British approach to implementation matters when he writes that Secretaries of State when implementing Community law act "more in the position of interpreter than author of the legislation".82

Even though a widespread delegation of legislative powers, coupled with Henry VIII clauses seems at first sight to be in a tense relationship with the concept of a 'sovereign' parliament, one naturally may counter this by arguing that the widely


80 R. v. Secretary of State for Trade and Industry, ex parte Unison CMLR. (1997), p. 459. See also Boch (2004), on p. 52 who poses in this context the question whether Section 2(2) ECA may be used to enact regulations implementing minimum harmonization directives while going beyond the 'minimum norm'.


delegated powers of the ECA can also be regarded as the very emanation of such 'Sovereignty'. Moreover, Parliament can at all times change the ECA, for example by building in more safeguards or by deleting its Henry VIII clause.\(^{83}\)

In sum, the ECA attributes great 'authority' to directives within the UK legal system. Under its provisions, directives are the constitutive factor for widespread lawmaking powers. Furthermore, in exercise of those powers, the UK Executive may deviate from statutory law under the Henry VIII clause in the ECA.

2.1.2 UK Courts and Implementation

As was said earlier, unlike Acts of Parliament, Statutory Instruments, also those implementing an invalid directive, can be reviewed by UK courts. This aspect of British constitutional law makes implementation by means of an Act of Parliament for this study less interesting since the invalidity of the directive does not result in the Act being tainted with any invalidity and even if it were, no UK court could strike down any such Act.\(^{84}\) A parliament can hardly be called 'sovereign' if it were not allowed to implement an invalid directive.

In the *Oost van der Grinten* case the validity of Directive 90/435/EEC was challenged before the Special Commissioners of Income Tax even though it was implemented by statute (the Finance Act 1998). This is explained by the fact that the challenged Directive was said to exempt the Finance Act from other Community tax legislation. Therefore, invalidity of this provision would render the Act of Parliament in conflict with Community law and thus the validity question could determine the status of the Act of Parliament.\(^{85}\)

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83 See also Boch (2004), p. 32.
84 See MacRory (1996), p. 70. See Cane (1996), p. 28/29 and 348: this also implies that they prevail over common law. An interesting question would also be whether provisions of a Directive could be deemed implemented by common law in the UK. Assuming this meets the requirements as set by the ECJ such implementation is again not likely to be affected by the directive's later invalidation. Also, the (hypothetical) implementation of a directive by means of a prerogative Order in Council (the legal basis of which is Common law) would not likely be affected thereby. Legal review of prerogative governmental powers boils down to the question whether they were exercised in conformity with common law (the source of such power), see Prakke (1998), p. 80a.
85 The provision at issue was challenged on procedural grounds: infringement of Article 253 EC and the failure to consult the European Parliament, thus not for conflict with a 'double addressing norm' which would of course also make the validity issue relevant despite the fact that it is an Act of Parliament that implements the directive.
All the more interesting is implementation by statutory instruments since such implementation can be, and has been, invalidated by UK courts because the underlying directive proved invalid.

Since statutory instruments are acts of the administration, some remarks must be made on administrative law in the UK. This has a background completely different from those of the continental administrative law systems of The Netherlands, Belgium and France. British administrative law was originally based on the concept of an administration that does not occupy a position any different from that of ordinary citizens. This type of 'Diceyan' thinking based on the Rule of Law, propagated that the administration should be judged in the same common law courts and be subjected to the same (rule of) law as ordinary citizens in private disputes. Obviously, this concept proved untenable and the common law courts were forced to develop a system of (rudimentary) administrative law. Furthermore, review of administrative acts often takes place in administrative 'tribunals'.

Of such 'tribunals' there is a huge proliferation (largely due to the creation and growth of the welfare state), their competences differing per statute (setting up the tribunal). As two authors wrote: "to achieve a full mastery of the subject one requires an encyclopaedic knowledge which is hardly worth while acquiring". The tribunals operate as court substitutes. Their procedures (which differ per statute) are modelled on those of the courts.

These tribunals may lay before the ECJ questions regarding the validity of EC directives, as indeed happened once in the earlier mentioned Océ van der Grinten case where the Special Commissioners of Income Tax questioned the validity of Directive 90/435/EEC. However, practically all preliminary questions from British courts on the validity of directives were posed by the judiciary: from the High Court (the vast majority), the Court of Appeal of England and Wales, the Court of Appeal of Northern Ireland or the Court of Session in Scotland.

Remedies available for judicial review of administrative action may be obtained by way of an 'application for judicial review' (AJR) to the High Court, an umbrella term covering the remedies of mandamus, prohibition, certiorari, declaration and injunction. In order to filter out cases without merit, leave of the High Court must be sought before the actual proceedings can commence (one third of the leave applications is rejected). It can be rejected because the courts

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88 C-58/01 Océ van der Grinten N.V. v. Commissioners of Inland Revenue.
89 The first three of these remedies are commonly denominated as the 'prerogative orders'. An application for judicial review may be joined with a claim for damages, see also Yardley (1984), p. 144.
hold the action to be ‘vexatious or frivolous’. Furthermore, the High Court examines whether the applicant has ‘a sufficient interest’.

Though an AJR is not the only way for judicial review of public action, it is, however, the only procedure for a ‘prerogative order’ (mandamus, prohibition and certiorari). This procedure can be found in Order 53 (from 1978) and in the Supreme Court Act 1981 regulating the operation of the Supreme Court of Judicature (Crown Court, High Court and Court of Appeal) and is quite different from the ‘writ procedure’. Also declarations and injunctions (see infra) must proceed according to the ‘Order 53’ provisions.

To have a ‘sufficient interest’, the locus standi requirement for an application for judicial review, is generally not very hard to meet. As the House of Lords made clear in one case, there must be an alleged breach of duty or illegality (see infra) which, when related to the position of the claimant, made it clear that he had an individual interest. In fact, there has been an expansion from rights to interest and a widening of standing to include third parties and interest groups. However, this generosity is a bit counterbalanced by the strict time limit of three months to bring suit. At first sight the remedy of certiorari would seem the most relevant remedy in the context of this study since it is designed to quash an administrative action or decision. However, certiorari is not available against the Crown therefore, usually, recourse is taken to the remedy of ‘declaration’. A ‘declaration’ is a form of relief that is most often used to obtain a declaration of invalidity. The importance of the latter may not be underestimated for the Crown and other administrative authorities consider themselves bound by a ‘declaration’.

91 Since, historically, the British did not believe that private citizens should be able to freely challenge governmental action, the so-called ‘prerogative orders’ certiorari, prohibition and mandamus were all three initially perceived as a ‘royal prerogative’ (hence their name). The indication of such proceedings still reflects that: Regina v. Respondent Body, ex parte (on behalf of) the real applicant.
92 See Supreme Court Act 1981, Section 31(3).
93 See the decision of the House of Lords in IRC v. National Federation of the Self Employed (1982) AC 617, still the leading case on the matter. The House of Lords rejected an earlier, more liberal view on locus standi from the Court of Appeal. See also De Smith and Brazier (1994), p. 637.
94 That is not to say that there cannot be (rather sad) examples of locus standi being denied, such as happened in the Rose Theatre case, R. v. Secretary of State for the Environment, ex parte Rose Theater Trust [1990] All ER 954.
95 The three months term starts to run on the day the grounds for application arose, see Cane (1996), p. 92.
96 It mirrors the prerogative order of Prohibition.
97 It can, however, serve all sorts of purposes, for example a declaration that one is married.
It must, however, be a declaration on an issue that has already materialized, an example being the case of Mr Blackburn who sought a declaration stating that it would be unconstitutional for the Queen to sign the Treaty of Accession to the EEC; that fact had at the time not occurred yet.98

Besides declaration, also the remedies of *mandamus* (the order to compel the performance of a public duty) and *injunction* may play a role in EC affairs. In the *Duddridge* case,99 *mandamus* was applied for forcing the executive to use its powers under Section 2(2) ECA.100

Originally, *injunctions* were not available against the Crown or Crown ministers.101 However, since the *Factortame* case, such injunctions are possible against the Crown 'in Community law matters'.102 Pursuant to *Factortame*, there have been suggestions to change this in order to do away with the different approaches to EC and domestic cases.

The remedy of 'injunction'103 was applied in the *Imperial Tobacco* case and in the *British American Tobacco* cases in order to restrain the Secretary of State from implementing the Tobacco Advertising Directive, respectively the Tobacco Directive under the lawmaking powers in Section 2(2) ECA.104 Up to the House of Lords, there had been discussion on the matter, not on availability of the 'injunction' remedy as such, but rather on the criteria under which this remedy should be granted (British or EC law criteria). This case will be discussed below in Section 2.1.6.

### 2.1.3 Ultra Vires

When looking at the substantial aspects of an application for judicial review one can, for the purposes of this study, be brief. The grounds for judicial review can be grouped around the three themes of illegality, irrational-
ity and procedural irregularity. \(^{105}\) ‘Illegality’ comprises what is commonly called the principle or doctrine of ultra vires. \(^{106}\) It is founded on the idea that public bodies must keep within the powers that they have been given and therefore boils down to ensuring the compliance with the will of Parliament. At times its application by the courts may require an examination of Parliamentary intention of the statute concerned. Yet, it may be obvious that such an enterprise need not be undertaken in the context of implementation of invalid directives under the ECA. Thus, under the ultra vires concept the ECA requires a valid directive as a conditioning factor for the executive adopting legislation.

This does not mean that the vires issue is necessarily the only reason these statutory instruments, may be invalid. Whereas in the Imperial Tobacco case the courts were mainly concerned with the validity of the directive as such triggering the possible vires question as a matter of UK law in cases such as Standley and British American Tobacco, it was obvious that besides the vires issue, there were also other norms at stake such as the protection of property and the principle of proportionality, norms earlier described in this study as ‘double addressing’. It could be said that the latter two cases have therefore a more hybrid character than the first.

UK law makes a distinction between ‘void’ and ‘voidable’ acts. The former category is null ex tunc, the latter ex nunc. Statutory instruments that are ultra vires for implementing an invalidated EC directive are void and thus null ab initio. \(^{107}\) All in all, there is much resemblance between this UK concept of ultra vires and the French concept of incompétence which will be discussed hereafter.

2.1.4 Indirect Challenge

As in France, Belgium and The Netherlands, the invalidity of a statutory instrument can also be raised incidentally in criminal or civil proceedings. \(^{108}\)

\(^{105}\) Procedural irregularity, the third class or review grounds includes what is often designated as the procedural ultra vires, but also compliance with natural justice such as a fair hearing et cetera. The latter however, does not apply to secondary legislation, see Thompson (1993), pp. 56 and 343 and Cane (1996), p. 172.

\(^{106}\) Illegality is broader than the concept of ultra vires, yet one often sees that the terms within (intra vires) or without (ultra vires) are being used as synonymous for ‘legal’ versus ‘illegal’, see Cane (1996), p. 9.


\(^{108}\) See for example Yardley (1984), p. 138: “it should also be noted that a defence to a prosecution for an offence under delegated legislation may well take the form of an assertion that the regulation concerned is ultra vires”. An important difference being that, unlike in France, in such cases before UK courts there is no system of referring such validity questions to a specialised administrative court (no question prejudicielle as before French civil courts).
Thus, in *Booker Aquaculture*, the question of the validity of Directive 93/53/EC arose before the Inner House of the Court of Session (Scotland). This court, judging in first instance civil cases under Scots law, was asked to award damages for the destruction of fish stock. The ministerial decision ordering this destruction was based upon statutory instruments that implemented the allegedly invalid directive.\(^{109}\) The statutory instruments in their turn were based upon Section 2(2) ECA.

Evidently this may bypass the strict three months deadline for an application for judicial review.

### 2.1.5 Invalid Directives and British Preliminary References

Since the majority of the EC directives is implemented by means of the ECA, the directive's validity is a highly relevant issue for UK courts. The consequence of an invalidation of a directive implemented under the ECA is that the Statutory Instruments are invalid.\(^{110}\) The Order in Council or Ministerial regulations are *ultra vires* the ECA and thus open for judicial review. Therefore, an implementation mechanism set up by the ECA, although swift, also makes national implementation highly 'vulnerable' if at a later stage the issue of validity of the underlying directive arises. This fact, combined with the earlier remarks on the availability of the ‘application for judicial review’ with its *locus standi* requirements being not that hard to meet may account for the fact that the vast majority of preliminary references to the ECJ concerning the validity of EC directives (about three quarters) come from UK courts.\(^{111}\)

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109 See joined Cases C-20/00 and C-64/00 *Booker Agriculture v. the Scottish Ministers*. The exact implementation were the Diseases of Fish (Control) Regulations 1994 (S.I. 1994 No 1447), based upon powers delegated by ECA.


111 See for a ‘domestic example’, Yardley (1984), p. 138: “In any event, it has long been accepted that delegated legislation may be set aside if it should prove to be *ultra vires*”, referring to *Ridge v. Baldwin*, [1964] AC 40 [1963] 2 All ER 66.
By contrast. The Netherlands and even a large Member State such as France, have each ‘produced’ only two, respectively three validity references whereas the courts in Belgium only one, whereby one must keep in mind that these three states have been Members of the EEC 15 years longer than the UK. Of course, UK courts may also confirm the validity of Community Acts without referring a preliminary reference to the ECJ. This occurred in the Eurotunnel case, in which the High Court declined to refer a question on the validity of two VAT Directives to the ECJ.

2.1.6 Tobacco Advertising Revisited

The invalidity of a directive having immediate consequences in the UK whenever such a directive is implemented under the powers delegated by the ECA has also cast its shadow on the issue of interim protection. This occurred in the Imperial Tobacco case before the English High Court, Court of Appeal and eventually the House of Lords. Already in Chapter 2 reference was made to this case concerning the question whether the Zuckerfabrik criteria as developed by the ECJ for national interim relief against invalid EC measures apply during a directive’s implementation term. The case is worth revisiting

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112 This validity reference of the High Court concerns Directive 2002/2. A similar case is pending before the Court of Session (Outer House) in anticipation of an answer to this question.


115 R. v. Secretary of State and Others, ex parte Imperial Tobacco Ltd and Others, Judgment of the House of Lords of 7 December 2000, [2000] EuLr. p. 70. See also the corresponding judgments of the Court of Appeal of 16 December and of the High Court of 16 December 1998.
since in the national proceedings some interesting statements were made on
the constitutional relationship between the Directive, the ECA and the future
implementing Statutory Instruments.

As stated in Chapter 2, the Secretary of State for Health was prevented from
implementing the First Tobacco Advertising Directive under the powers delegated
by the ECA while the deadline for implementation had not yet lapsed. It may be
remembered that the House of Lords, unlike the Court of Appeal,16 eventually
decided that since the deadline was still running, the matter was outside the scope
of EC law and therefore British conditions for interim relief were applicable.17

Whereas two of the five 'Lords of Appeal in Ordinary' deciding the case, the
Lords Slynn of Hadley and Nicholls of Birkenhead, opined that Zuckerfabrik
applied, the majority argued for English law to be applicable. Whereas the two
dissenting Lords argue from a perspective of broader Community interest in
uniform criteria, the Lords Clyde, Millet and Hoffman cracked the case from the
national angle. They emphasized the status of the directive in British law during
its implementation deadline.

Particularly interesting in this respect is Lord Hoffmann's submission that the
directive 'does not empower' the UK legislator to implement the Directive.
In his opinion the latter obliges the UK to adopt measures but the power to do so
is conferred upon the Secretary of State by Section 2(2) of the ECA and not by
the Directive. It is only because Section 2(2) of the European Communities Act
makes the power to legislate dependant upon the validity of the Directive that
the Directives' validity is collaterally involved. In the words of Lord Hoffmann:

"[T]here is no need, as a matter of Community law, for the executive to avail itself
of Section 2(2) of the European Communities Act or even for Section 2(2) to exist.
The legislative branch of government could discharge the Community obligations
of the United Kingdom by enacting primary legislation." He continues: "Parlia-
ment has chosen to make this power conditional upon the existence of a Commu-
nity obligation and it is for this reason only that the validity of the Directive is
collaterally involved." (...) "European law was involved in the case only by a matter
of a renvoi from Section 2(2) and not in its own right."18

116 The majority of 'Lord Justices of Appeal' did not want to grant the injunction against the decision of the
Secretary of State to implement the Directive under the powers delegated by the ECA, one of the reasons
being that the Zuckerfabrik criteria applied. Laws L.J. however dissented from the other two, arguing
that Zuckerfabrik does not apply to the suspending of the legislative process within the implementation
deadline.

117 The domestic conditions as applied by the High Court (Turner J.), see American Cyanamid Co. v.
Ethicon.

118 He and Lord Millet even go so far as to regard it an acte claire that in these circumstances Zuckerfabrik,
does not apply. Lord Millett: "As long as the national court does not make it impossible to implement the
directive by the end of the implementation term. Community law is not infringed."
It is thus once and for all strongly confirmed by Britain’s highest court that an EC directive has the status of a constitutive factor for the executive’s power to legislate. Hence the question is reduced to one of purely national law and thus national procedural law on interim relief applies, not European law requirements as developed in the Zuckerfabrik case law. All this was stated under the acknowledgement that things would be different if the implementation deadline would have passed already.

It is also interesting to note with some emphasis that Lord Hoffmann also placed the issue in perspective by suggesting that the UK could also have chosen to implement the Tobacco Advertising Directive by means of an Act of Parliament. Clearly, in that scenario the entire discussion on Zuckerfabrik would be futile since there would have been no consequences of the invalidity for such an act and hence the discussion on interim relief would not make much sense, unless perhaps the directive is said to violate a ‘double addressing’ norm.

2.1.7 Devolution Issues

When researching UK law in the new millennium, one cannot avoid anymore the fact that the country has undergone very important changes under the process of ‘devolution’ rendering the constitutional structure of the UK more complex. Such complexity was already there in the sense that the UK, although traditionally classified as a unitary state, harboured nonetheless several distinct legal systems co-existing alongside each other. There was, however, only one legislator, competent for the entire territory of Great Britain (although Northern Ireland enjoyed self-rule from 1921 to 1972).

Besides the legal systems also the court systems differ. When studying British case law, one must bear in mind that the civil jurisdiction in Scotland is exercised by the ‘Court of Session’, with an ‘Inner House’ and an ‘Outer House’, the former hearing appeals from the latter. The superior criminal jurisdiction in Scotland is exercised by the ‘High Court of Justiciary’.

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119 See Chapter 2.
120 See Chapter 4.
121 One should keep in mind that there are thus (still) UK Acts of Parliament and UK Statutory Instruments that apply only to Scotland, Northern Ireland or (very seldom) Wales. In that case this is indicated in the name of the Act or Statutory Instrument. They can be found on the website of Her Majesty’s Stationary Office.
122 It may be remembered that the term ‘United Kingdom’ is shorthand for the United Kingdom of Great Britain and Northern Ireland, whereas the term ‘Great Britain’ refers only to England, Wales and Scotland, excluding Northern Ireland. Only the United Kingdom has international legal personality. Although officially not part of the UK, the Parliament of Westminster can legislate for the Isle of Man and the Channel Islands. However, these ‘crown dependencies’ maintain their own (very old) legislatures.
Explicitly avoiding the notion of federalism, 'devolution' is defined as the 'delegation of central government powers without the relinquishment of sovereignty'. Since 1998 Acts of (UK) Parliament have been adopted to provide Scotland, Northern Ireland and Wales with devolved lawmaking powers although the scope and depth of these powers differ, creating so to speak 'asymmetrical devolution'. As such, devolution to Wales has taken the form of merely 'executive devolution' whereas devolution to Scotland and Northern Ireland can be qualified as 'parliamentary devolution'. As will be demonstrated hereunder, these different types of devolution also reflect on the possible consequences of a directive's invalidity on the different parts of the UK.

2.1.7.1 Scotland

It has been stated earlier in Section 1.2 that one of the ways in which Member States may attribute authority to the EC directive is through the 're-centralization' of lawmaking powers for implementation purposes. It appears that this can indeed happen in the context of Scottish devolved powers.

See for powers devolved to Scotland Sections 29 and 30 and Schedules 4 and 5 of the Scotland Act 1998. The powers devolved under the Act are considerable and include education, local government, housing, tourism, civil and criminal law (that was also different before devolution), economic development, agriculture and sports.

A remarkable difference with a truly federal state such as Belgium is that in post-devolution United Kingdom, there are important 'safety valves' in place when it comes to implementation of EC directives. In the first place, the Secretary of State for Scotland (a post in the UK Government that survived the devolution process) may call to a halt the legislative process in the Scottish Parliament if he believes the Act of the Scottish Parliament to be 'incompatible with any international obligations'. Moreover, the Secretary of State for Scotland may, if he has grounds to believe a proposed

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123 Kortmann differentiates between four types of state structures: unitary, fully federal, regionalized unitary and devolving unitary. However, he admits the risk of oversimplification: **EL Rev.**, 2001, p. 159.


125 Originating obviously in concerns over the UK implementation record. In older literature Drewry still pointed out that one of the reasons for Britain's good implementation record, also when it chose to implement through primary legislation, was the 'unitary character' of the British Constitution, see Drewry (1993), p. 468.

126 See Section and 35. As the Attorney General and the Lord Advocate, he also may do so if he believes the bill encroaches upon reserved matters. See, however, Section 107 Scotland Act providing that **ultra vires** Acts of the Scottish Parliament may be 'remedied'.

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action of the Scottish executive will infringe international obligations 'direct that
the proposed action shall not be taken'. Mirroring this situation, if the Scottish
Executive remains inactive, the Secretary of State for Scotland may also require
positive action, including the presentation of a government bill before the Scot-
tish Parliament.\(^\text{127}\) It is a powerful demonstration of the sovereignty of Parlia-
ment when the latter ensures also the sovereignty of the UK Executive over the
Scottish devolved powers.\(^\text{128}\)

But more important is the fact that the Scotland Act leaves open the possibili-
ity that directive implementation by the UK Government under the ECA continues to apply also in post devolution United Kingdom:

"any function of a UK minister in relation to any matter shall continue to be exer-
cisable by him as regards Scotland for the purposes specified in Section 2(2) of
the European Communities Act 1972."\(^\text{129}\)

When the UK Government is to make use of these retained powers is not deline-
ated. Therefore, as Cygan writes, the decision as to the level of implementation
is essentially of a political order.\(^\text{130}\) Moreover, there are those who point to the
danger of usurping the Scottish lawmaking powers under 'EC justification':

"It is not being used simply as a matter of last resort, providing the United King-
dom government with a way of avoiding imminent infraction proceedings before
the Court of Justice but instead as a means of getting things done conveniently, in
effect bypassing the devolution arrangement."\(^\text{131}\)

When implementation of a directive is ensured for Scotland through action of
the UK government, using its powers under the ECA, obviously the result of an
invalidation of such directive will be that as in the rest of the UK, the imple-
menting statutory instrument would also be *ultra vires* in Scotland.

An example thereof can be found in the regulations implementing Directive
1999/51/EC on marketing dangerous substances.\(^\text{132}\) This Directive, invalidated by

\(^{127}\) See respectively Sections 58(1) and 58(2) of the Scotland Act 1998.

\(^{128}\) This sovereignty of the Westminster Parliament is in any case referred to in the Act itself, see Section
28(7) of the Scotland Act 1998.

\(^{129}\) See Section 57 of the Scotland Act 1998.

\(^{130}\) See Cygan, A., Scotland’s Parliament and European affairs, some lessons from Germany, *ELRev.* 1999,
p. 483 (496). In this contribution he also demonstrates the sharp contrast between this state of affairs and
Germany.

\(^{131}\) See Ross, A., and Crespo, M.S., The effect of devolution on the implementation of European Commu-

\(^{132}\) See The Environmental Protection (Controls on Injurious Substances)(Amendment) Regulations 2001
(S.I. 2001 No. 3141). The underlying Directive was invalidated by the ECJ in C-314/99 The Netherlands v.
Commission.
the ECJ, was implemented under Section 2(2) ECA and, even though it could have been implemented in Scotland under Scottish devolved powers, the regulations extend to Scotland. No justification whatsoever for such action can be found in the Explanatory Note. One merely finds a footnote, referring to Section 57(1) Scotland Act 1998. Obviously these regulations are now ultra vires, also before Scottish courts.

However a directive falling within the areas of devolved policy may be implemented in Scotland by means of an Act of the Scottish Parliament.

An example of implementation of a directive through an Act of the Scottish Parliament is the Water Framework Directive 2000/60/EC. The explanatory note starts with explaining what directives are and what Member states are supposed to do, something that seems to betray the novelty of Scottish directive implementation.133

Directives may also be implemented by statutory instruments adopted by the Scottish Executive. The interesting aspect in relation to possibly invalid directives is that these statutory instruments may be enacted under two types of provisions. They may of course be enacted under powers delegated by an Act of the Scottish Parliament.134 However, they may also emanate from powers delegated by a UK statute. Section 53 states that in the areas of devolved legislative competence Scottish Ministers may operate under powers that would otherwise have been delegated to UK Ministers ('Ministers of the Crown').135 This includes the power to legislate under the powers delegated by Section 2(2) ECA which may thus be exercisable by Scottish Ministers.136

In conclusion, the result of a directive's invalidation may for the UK become a differentiated affair.137 First of all, its implementation may have taken place in...
England under powers delegated under the ECA, but in Scotland by means of an Act of the Scottish Parliament. Such implementation would then be *ultra vires* in England but in Scotland the implementing statute may not suffer any legal consequences. Scottish statutes, unlike UK statutes, are open for judicial review, but the fact that a directive they implement is invalid, will not be ground for review. For that requires that the Scottish statute is *ultra vires* the Scotland Act.\textsuperscript{138} But a directive's invalidity does not trigger that effect. Thus, where the statutory instrument in England would be *ultra vires* the ECA, the Scottish statute would not be *ultra vires* the Scotland Act.

However, if the 'London' Government has exercised its 're-centralising' powers mentioned earlier, the directive's invalidity obviously produces legal effects in Scotland as well. In the first place, the UK Government may have 'ordered' the Scottish Legislature or Executive to implement a directive. After the latter's invalidation, such an order was unjustified and the Scottish statute or statutory instrument that was adopted 'on command' must be deemed to be *ultra vires* the Scotland Act 1998. Secondly, if the UK Government had chosen to exercise its powers under Section 2(2) ECA for Scotland, obviously those UK statutory instruments would also loose their validity on Scottish soil.

A further differentiation may be made within Scottish implementation. If the subject matter of a directive falls within the powers devolved to Scotland (and the UK government does not chose to legislate under its ECA powers) implementation in Scotland may of course be performed by statutory instruments rather than by a Scottish statute. Such Scottish executive legislative powers may hinge upon the continued existence of a directive, in a fashion parallel to UK legislative powers under the ECA. An example of such an act of the Scottish Parliament attributing to a directive the 'authority' of being constitutive for lawmaking powers is the Water Environment and Water Services (Scotland) Act 2003:

"The Scottish Ministers may by regulations provide that the provisions of this Act are to have effect with such modification as the regulations may specify for the purpose of giving effect to any Community obligation of the United Kingdom or of exercising any related right."\textsuperscript{139}

Clearly the provision makes lawmaking powers depend on the validity of a directive. Furthermore, these powers may go so far as to deviate from Scottish statutes, as one notices that it also contains a Henry VIII clause. Thus, invalidity of directives implemented through such delegated Scottish powers will result in Scottish statutory instruments being *ultra vires*.

\textsuperscript{138} See for an example of review of an act of the Scottish legislature, A v. Scottish Ministers [2002] SC 63 (PC).

\textsuperscript{139} See Section 25 of the Water Environment and Water Services (Scotland) Act 2003.
2.1.7.2 Northern Ireland

Northern Irish devolution has a longer, and sadder, history than that of its Scottish and Welsh counterparts. Attempts to install in Northern Ireland a fully-fledged parliament failed and during several periods of time, legislation has in fact been issued by the UK Parliament or the Secretary of State for Northern Ireland. After the Good Friday Agreement in 1998 the Northern Ireland Act was adopted, instituting a Northern Ireland Assembly which has taken up its devolved powers in 1999. In 2000 the devolution was again suspended and this has lasted until the closing date of this study. The Secretary of State for Northern Ireland has repeatedly prolonged the suspension of the Assembly.

The Northern Ireland 1998 Act delineates between transferred, entrenched, excepted and reserved matters. So-called 'entrenched matters' may not be altered or amended by the Northern Ireland Assembly. Amongst these entrenched matters one finds the ECA included. Therefore, the legislative powers of the UK Executive under the ECA may also extend to the territory of Northern Ireland. In this respect the devolution arrangements resemble those for Scotland.

The regime of the Northern Ireland Act, assuming it would be operational, may also add to the differentiated legal effect a directive's invalidation may have in the UK. If a directive would be implemented by the Northern Ireland Assembly or by the Northern Ireland Executive the legal effects of its invalidation depend on the provisions of the Northern Ireland Act 1998 or on provisions of a Northern Ireland statute. In case the Northern Ireland Assembly would have implemented the directive by statute, the invalidation of the directive would not result in that statute being ultra vires the Northern Ireland Act 1998. However, in case of implementation by the Northern Ireland Executive under powers delegated by the Northern Ireland Assembly such implementation may be ultra vires the delegating Northern Ireland statute. This may of course be the case if, under its terms of delegation, a valid EC directive is required, analogous to the terms of the ECA. Unfortunately these explorations of Northern Irish law remain a bit hypothetical since, at the time of writing, the powers of the Northern Ireland Assembly are suspended. Hence there is not much research material in this respect.

140 The legislature for Northern Ireland based upon the Government of Ireland Act 1920. This so-called 'Stormont Parliament' was abolished in 1972. In 1973 the first Northern Ireland Assembly was installed, only to be dissolved in 1974.

141 See the Northern Ireland Act 2000, Section 1.

142 See Article 2 of the Northern Ireland Act 2000.

143 See also Section 6 in conjunction with Section 7 of the Northern Ireland Act 1998. Also the Human Rights Act 1998 is designated as 'entrenched'.

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2.1.7.3 Wales

As said earlier the powers devolved to Wales are of an executive rather than a parliamentary nature. Lawmaking powers of the Welsh Assembly depend on each parent Act of the UK Parliament leading to powers being of uneven scope and depth depending on the whims of Westminster. Sceptics would say that the powers of the Assembly for Wales are roughly the same as those formerly enjoyed by the Welsh Office in London (headed by the Secretary of State for Wales). Thus, the Welsh Assembly only enacts delegated legislation, there being no 'primary' Welsh law.

These Welsh statutory instruments may cover areas such as tourism, culture, highways, health, education transportation, environment, sports and recreation and agriculture.

The different nature of acts of the Welsh Assembly as opposed to those of the Scottish Parliament and the Northern Ireland Assembly is also manifested by the possible effects the invalidity of a directive may have for Wales.

The Government for Wales Act 1998 states that powers may be transferred 'so far as exercisable by a Minister of the Crown'. Orders in Council have indeed transferred in several areas of policy the powers delegated under Section 2(2) ECA to the Welsh Assembly. However, such legislative powers of the Welsh assembly hinge therefore upon the question whether they are 'exercisable' at the central level of legislation. As seen before, the lawmaking powers under the ECA are only 'exercisable' in as far only as they are used to implement a valid 'Community obligation'. Thus, if a Community directive is invalidated, English implementation under the ECA is *ultra vires* and as a further automatic legal consequence Welsh implementation will be *ultra vires* the Government of Wales Act 1998.

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146 See for instance the European Communities (Designation) Order 1999, in particular its Schedule 2 designating for a large part the Common Agricultural Policy to the Welsh Assembly. See for examples of Welsh implementation of EC Directives the Feeding Stuffs (Wales) Regulations 2001 (who partly also depend from the powers delegated to central Government by the Agriculture Act 1970), which could in case of the invalidity lead to difficult problems of partial invalidity. Only depending on the ECA are the Products of Animal Origin (Third Country Imports)(Wales) Regulations 2002 implementing in Wales Directive 97/78/EC. The Plant health (Amendment) (Wales) Order 2001 is an example of directive implementation (of Directive 2000/29/EC) that depends on powers not delegated by the ECA.
2.1.8 Conclusions as to UK Law

In the UK, the executive traditionally enjoys extensive lawmaking powers and this is certainly no different in the context of directive implementation. The executive lawmaking powers delegated by Section 2(2) of the ECA are impressive, particularly as they can be used for the vast majority of directives covering almost any domain and irrespective of the amount of discretion they still leave to national decision takers.

Under this regime, directives are attributed much 'authority' since they constitute executive lawmaking powers. Thereby these powers may lead the executive to amend or withdraw statutory law as the ECA also contains a Henry VIII clause. Consequently, under the ultra vires doctrine, the invalidity of a directive makes the implementing statutory instruments run counter to the ECA.

The 'authority' attributed to directives in the UK legal system is also expressed by its potential to 're-centralise' lawmaking powers. Also in a post devolution UK, central government may exercise its implementation powers under the ECA in devolved areas of law. Welsh devolved powers may even depend directly on the ECA. Invalidation in this context automatically also has an effect upon these entities with devolved competences.

However, the opposite could also be the case. If implementation is left to Scotland or (hypothetically) Northern Ireland under their devolved powers, it could be that directive implementation remains valid in these parts of the UK. This is particularly so in case these new entities would have chosen to implement by statutory law. Thus, devolution may lead to a differentiated effect of the directives' invalidity within the UK.

In conclusion, UK law gives ample and clear indications as to how it perceives its legal relationship with directives. This was vividly exemplified by the discussion in the House of Lords on the award of interim relief against invalid directives. The relatively generous availability of the application for judicial review procedure allowing for those 'with a sufficient interest' to directly attack statutory instruments in court, further creates opportunity to regard this relationship. All these elements combined may explain why the majority of preliminary questions on validity of directives comes from UK courts.

2.2 The Kingdom of Belgium

Implementation of EC directives in Belgium is interesting in two respects: the country's quite distinct federal state structure and the particular way in which the federal legislator delegates implementation powers to the federal government. After highlighting some general features of Belgian public law, delegation of lawmaking powers at federal level will be discussed. Then the implementation issues will be connected to the federal state structure. This section will end with the possibilities of Belgian courts for scrutinizing implemen-
tation, illustrated by the Francorchamps cases dealing with the implementation of the Tobacco Advertising Directive.

The Kingdom of Belgium is the only truly federal state that will be addressed in this study. It differs from other federal states such as Germany in that it has a unique distinction between ‘Regions’ (the Flemish, Walloon and Brussels-Capital Region) and ‘Language Communities’ (the Dutch, French and German Language Communities). These 6 federated entities, each with their own legislatures and executive bodies, enjoy legislative competences over geographical areas that largely overlap.\(^{(47)}\) Parliamentary legislation of the three language Communities, of the Walloon and of the Flemish Regions are called, quite confusingly, \textit{decrees}. Parliamentary legislation emanating from the Brussels Capital Region is called \textit{ordonnances.} At all levels of government, executive bodies take regulatory measures. As the legislative competences of these federated entities have grown over the consecutive constitutional changes in Belgium\(^{(48)}\) in the last three decades, a considerable amount of EC directives these days is implemented at federated level.\(^{(49)}\)

The governments of the Regions and Communities share the right of initiative with their local parliaments. A difference with the federal government is that members of these local governments may at the same time sit in the local parliament. The governments operate on the principle of collegiality, yet there is a lot of delegation to individual ministers.

A specific feature of Belgian constitutional law is that many rules although not part of the formal, written, constitution form nevertheless part of the substantive constitution. An important source of these ‘constitutional’ provisions are to be found in so-called ‘Special Laws’, organic laws subject to special majority

\(^{(47)}\) The Flemish Region covers the same geographical area as the Flemish Community; the Walloon Region covers a larger area than the French Community in the sense that it also covers the German Language Community (Communauté germanophone). The Brussels Capital Region is particularly complex since on its territory, two more legislators (besides the Brussels Capital Region) can be active: the Joined Community Commission and the French Community Commission. The Joined Community Commission is a legislator competent to exercise competences of the French and Flemish Language Communities on Brussels territory. It has its own parliamentary assembly (Verenigde Vergadering) and its own executive (Verenigd College). To reduce problems these persons are physically the same as those sitting in the Brussels Regional Council and – Government). The French Community Commission executes competences of only the French Language Community on Brussels Territory.


\(^{(49)}\) Then there are provincial and municipal regulations which will not be further discussed even though of course also at this level of rulemaking directives could be implemented.
requirements. The division of competences between the federation and the federated entities, particularly the Regions, is laid down in such Special Laws.

Thus, the Communities have for instance competences in cultural matters such as education, social affairs, monuments, libraries, media and sports, see Articles 127 and 128 of the Belgian Constitution (hereafter: 'B.Const.') and the Special Law of 8 August 1980. The competences of the Regions are entirely laid down in Special Laws. On Regions, the Constitution merely states their existence (Article 3 B.Const.) and that they have competences as established by Special Laws (Article 39 B.Const. and 134 B.Const.). These days the Regional competences are quite substantive, especially in the economic sphere. They include inter alia town and country planning, the environment, agriculture (in as far as not usurped by the EC), regional aspects of economic policy, energy policy, foreign trade and employment policy. Residual competences remain (for the time being; this could change in the future by means of, again, a 'special law') with the federal legislator. There is a type of implied powers doctrine in favour of the federated entities; when necessary for the effective application of their competences they may use competences of the federal legislator as long as this remains marginal and accessory. To make things simpler (or maybe more complicated) the French Community transferred a substantive part of its competences to the Walloon Region whereas on the 'Flemish side' the Flemish Region and the Dutch Language Community have on a personal level 'merged' so that competences of both entities are exercised by the same representative and executive bodies.

The proliferation of competences among so many entities has made certain co-operating structures indispensable in the federal kingdom of Belgium. Mandatory duties to consult or to inform exist and their violation leads to invalidity of decisions. It is crucial to note, especially in the specific context of legal review of legislation in Belgium (see infra), that statutory rules of the feder-

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150 Also, the federated entities make special laws, called special decrees/ordonnances. Special federal laws and special decrees/ordonnances have priority over normal laws respectively normal decrees/ordonnances. The French Community Commission (executing competences of the French Community on Brussels territory) makes decrees or special decrees.
151 They exist also at federated level in the form of special decrees (requiring two thirds majorities) or ordonnances with a special majority (The Brussels Capital Region/Joined Community Commission).
152 An ordinary law attributes power for personal issues in the German Language Region, see 130 B. Const.
153 See Wouters and De Smet (2001), on p. 128.
155 In fact, it even provides an argument for ensuring that the governments of the regions and the federation are of the same political composition.
ated entities\textsuperscript{157} have the same status under Belgian constitutional law as federal statutes. Thus, conflicts between federal laws and decrees or ordonnances of the Regions and Communities are to be considered 'horizontal'.

The latter remark brings into the picture the rulemaking at Belgian federal level. At this level one identifies statutes,\textsuperscript{158} royal (=government) decrees (not to be confused with the 'decrees' (=statutory laws) from the federated entities) and ministerial decrees. Particularly at this legislative level, there is a widespread use of delegation to the executive for the sake of implementation.\textsuperscript{159} Hence, the majority of directives at this level is implemented by royal decree.\textsuperscript{160}

2.2.1 Federal Implementation: Article 108 B.Const.

As in other Member States, implementation at federal level is mainly performed by executive legislation. Powers to adopt such executive legislation can be classified in three groups, namely (1) when established under normal delegated powers under a statute, (2) in case this delegation under (1) is not sufficient/absent, under the general power to execute federal laws as laid down in Article 108 B.Const.\textsuperscript{161} and (3) under powers delegated by a special enabling federal statute. The second and third possibilities are specific for Belgium and deserve some more attention. Article 108 B.Const. reads:

"The King establishes regulations and decrees required for the execution of laws without having the power to either suspend the laws themselves or to dispense with their execution."

For this study, it is important to state that under 'laws' are not included European directives.\textsuperscript{162} If that were so, Article 108 B.Const. would have come close to

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\textsuperscript{157} All six federated entities have a unicameral 'parliament'. The federation has a bicameral parliament consisting of a House of Commons (Kamer van Volksvertegenwoordigers) and a Senate (Senaat).

\textsuperscript{158} After the constitutional amendments of 1993, the federal statutory legislator is partially unicameral. For certain topics the Belgian Senate has lost its role. It could be that in as far as directives are implemented by means of a statute, parliamentary approval usually is swift, see Merckx (1998), p. 217.

\textsuperscript{159} At federated level, there is much less delegation to the executive bodies. This difference could possibly be explained because the 'younger' parliaments hold on more to their newly acquired prerogatives.


\textsuperscript{161} Comparable to the French executive lawmaking powers to execute a loi, as will appear from paragraph 4.2. See also Van Damme (1996), p. 36.

\textsuperscript{162} This is also true for international treaties. There must be at least a federal statute approving such a treaty. See the Report of the Belgian Council of State to the 1996 colloquium of the association of Councils of State, p. 31.
a national delegation concept in the spirit of the British European Communities Act.

Furthermore, the power under this Article is not to be considered as a type of *domaine du règlement*, an aspect of French constitutional law, since the powers under 108 B.Const. must always be linked with an existing federal law and cannot be considered truly 'autonomous'. In that sense, this general governmental regulatory power bears resemblance to the 'semi-autonomous' regulatory powers that also the French Government enjoys for the purposes of 'executing' laws.\(^{163}\) Directives implemented under this power must be deemed implemented on the basis of Article 108 B.Const. in conjunction with a specific federal statute.\(^{164}\) It is autonomous in as far as it does not rely on express delegation in the statute,\(^{165}\) but 'semi' must be added since the power must be deemed necessary for the operation of a specific statute. When researching the databases of Belgian legislation, it is not uncommon to come across directive implementation that partly depends on this semi-autonomous power.\(^{166}\)

The question is how to assess the 'authority' of directives in the Belgian legal system in this respect. If a directive is (partly) implemented by means of Article 108 B.Const, does the directive constitute the executive lawmaking power? On first sight, this would seem not to be the case. It is the federal statute that triggers in the first place the lawmaking power of Article 108 B.Const. Yet, one could argue that such execution is 'necessitated' by the directive and that the directive indirectly triggers the lawmaking powers under Article 108 B.Const.

In that line of reasoning, the directive's invalidation may lead to Belgian implementation being *ultra vires* Article 108 B.Const in conjunction with the statute(s). It would appear that this possibility cannot be excluded but that it is primarily a matter of scrutinising the exact terms of the (executed) statute.\(^{167}\) For, as a Belgian court has stated it, "the Government may draw the consequences that flow naturally from the spirit of the statute".\(^{168}\)

\(\text{\footnotesize 163\ As laid down in Article 21 FC, see infra.}\)

\(\text{\footnotesize 164\ It follows form that system that such government decisions may not diverge from statutory law. See for example Mortelmans (1982), p. 137 describing the procedural safeguards attached to the Belgian delegation laws, allowing for divergence from primary legislation.}\)

\(\text{\footnotesize 165\ It is even 'exclusive' as the legislature may not itself execute statutes, see Pas and Others (2002), p. 241.}\)

\(\text{\footnotesize 166\ Examples are the implementation of Directive 96/92/EC, implemented by Article 108 B. Const. in conjunction with the Statute on the Organization of the Electricity Market, Directive 1999/63/EC: Article 108 B.Const. in conjunction with the Statute on the Safety of Ships, Directive 1999/93: Article 108 B.Const. in conjunction with the Statute on Electronic Signatures and Directive 1999/42/EC: Article 108 B.Const. in conjunction with the Statute on the Stimulation of Entrepreneurship.}\)

\(\text{\footnotesize 167\ Which could lead to the difficult issue of severability since such implementation law need not be solely based on Article 108 B.Const. see for example Royal Decree of 17 February 2002 on the implementation of Directive 1999/42/EC.}\)

2.2.2 Federal Implementation: Enabling Acts

The ‘authority’ attributed to directives is greater in the context of another type of legal bases for federal executive legislation; that of the special enabling acts. At this stage it seems that Belgium shows similarities with the UK in the sense that also in this country a national delegation concept may be applied to the implementation of directives although not in a ‘catch all’ type of law as the British ECA. Thus, there is no general act of delegation even though in the 1960s there were propositions for adopting a general delegation law for compliance with Community obligations. Such a ‘Belgian ECA’ would not be out of line with a more general practice in Belgium to adopt framework legislation in which the legislature delegates wide ranging powers to the executive. Yet, adopting a Belgian equivalent to the ECA was deemed ‘one bridge too far’. The idea was abandoned in favour of adopting special delegation laws for various legislative fields such as regulation of the medical profession. The main difference with systems as that of the UK is that it remains restricted to certain designated legislative areas. Yet, an important similarity is that the existence of a directive is constitutive for the delegated lawmaking power.

Furthermore, such special enabling acts granting extensive lawmaking powers may also contain Henry VIII clauses. Federal royal decrees may diverge from federal statutes for the sake of implementing international/European obligations. The Belgian Council of State has in principle accepted the constitutionality of this practice since it has advised to the legislator to grant the Government such powers in order to comply with international and European obligations. What is more, the Council of State has also opined that such

171 Legal basis for such Henry VIII power is derived from Article 105 B.Const. There is some terminological confusion as to the Gewone Opdrachtwetten, Kaderwetten and Bijzondere Machtenwetten which can be based upon this Article.
172 On the condition that these subordinate laws may not be governing subjects reserved by the Constitution to the primary legislator.
executive measures altering the statute do not have to be confirmed by the statutory legislator (as is mandatory in The Netherlands) since, in the words of one member of the Council:

'such a confirmation seems to be unnecessary in view of the fact that compliance by the government with the EC obligation will be in essence the execution of a 'bound competence' by the latter (translation TV').”}

Indeed, in many instances Belgian statutes do not prescribe statutory confirmation. Thus, statements as these express the investment of a great deal of 'authority' in a directive. It is similar to the UK where executive law adopted under a Henry VIII clause does not have to be replaced by statute either. Yet, it contrasts with The Netherlands where parliamentary confirmation of executive acts adopted under 'Henry VIII clauses' is nowadays deemed to be an absolute minimum requirement under all circumstances (see infra).

In its opinions the Belgian Council of State attempts to strike a balance on the issue of Henry VIII clauses thereby acting as constitutional conscience. On the one hand it accepts their existence as a matter of principle (see supra) but on the other hand it warns against too wide delegation of powers for the purposes of implementation of directives. It has stated that applying the pseudo-statutory powers under Henry VIII clauses may only be used when it can be deemed 'necessary' whereby such 'necessity' must be examined with great care. These concerns of the Council of State can be placed in the more general framework discussed in the beginning of this chapter of guarding against 'democratic leakage'. Yet, it is striking to note that Belgian enabling statutes and their Henry VIII clauses, never contain any qualification of a directive in terms of discretion.

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173 See his interesting article on the functioning of the Belgian Council of State in a European context: Damme, van, M., Het Europees Gemeenschapsrecht in de adviespraktijk van de Afdeling Wetgeving van de Belgische Raad van State, SEW 1996, p. 47, particularly on p. 56. Although on other occasions the Council of State also has shown to be reluctant towards this practice, stating that it is to be considered as 'exceptional in its legal system'. The latter standpoint has been criticised by Lejeune who writes that "One may well wonder whether the Conseil d'État is not demonstrating too much strictness in this matter which underestimates the requirements of transposing European Law". See Lejeune (1995), p. 86.

174 Although in other instances they do, see for example Article 122 of the law on the Reform of Public enterprises, Moniteur belge of 27 march 1991. See also Pas And Others (2002), p. 224.


176 See for example the law of 4 April 1980 just stating there must be 'directives' without mentioning the amount of discretionary powers. A parliamentary confirmation is not required. Moniteur belge of 21 May 1980. On the other hand, the statutes that may be amended by Royal Decree under this provision are identified by name.
Such is also evident from the Council of State's advice on the scope of such 'Belgian Henry VIII clauses'. For example on Article 66 of the law of 9 July 1975 on the control of insurance companies, the only statutory rules that could be changed by the executive for the purpose of implementing directives were those of that enabling act; no other statutory provisions may be altered.\footnote{However, another Act containing a Henry VIII clause, the Law on the Sanctioning of Violations of the European Regulations operating in the Market for Wine does not define which statutes may be amended (nor does it define the exact regulations for whose behalf that could be done). Moniteur belge of 19 March 1986.}

The concerns against democratic leakage also appeared in the discussion between the Council of State (Section Legislation) and the Belgian Government on the adoption of the Royal Decree of 28 October 1996 implementing Directive 90/388/EEC and thereby amending a statute (the Law on Reform of Public Enterprises). The Council of State argued that the recourse to the clause was used for implementation of provisions of the directive that left a great deal of discretion to the Member States. The clause could only be used for 'the strict transposition of Community legislation that leaves national authorities no freedom to manoeuvre within the choice of forms and means (translation TV)'.

The federal government replied that if the Council of State's objections were followed, the government could in fact use the clause only for implementing 'directive provisions that had direct effect'. The Henry VIII clause would be rendered illusory whereas telecommunications directives as the one at issue specifically require swift implementation. The second argument the government relied upon was that fact that the clause at issue was one of the type that provided for mandatory parliamentary confirmation so that if parliament were indeed of the opinion that the government exceeded its powers, it could always make the changes it desired afterwards.

On the issue of the legal consequences of a directive's invalidity the following can be said in this context. As the directive is constitutive for lawmaking powers of the executive, its invalidation renders the Belgian law ultra vires. This is a fortiori the case when for implementation recourse was taken to a Henry VIII clause. Recourse to such powers under enabling acts must be 'necessary' (a term often used in the enabling statutes), such 'necessity' obviously not being present anymore if the directive justifying the use of these powers has been invalidated by the ECJ. For instance Van Damme writes that there is no 'necessity' when there were no international obligations that could justify the use of a Henry VIII clause, giving as an example a directive's provision that only had an optional nature. A fortiori, this would then be true for the situation in which a directive has ceased to exist.\footnote{See Damme, van (1996), p. 57.} Also Mortelmans, when writing on the topic, states that Henry VIII clauses cannot be used to bring about changes in statutory laws that...
are not required by the implementation of Community directives. Furthermore, he adds that delegation cannot be used for implementing acts of the Community that are not binding, for on those fields, “there has been no transfer of competences to the European Communities”. Statements as these confirm that if Belgium had chosen such type of implementation using special delegated powers, the executive measures become *ultra vires* when used for the implementation of an invalid directive.

Also on the federated level is it possible that statutes (‘decrees’) appoint directives as a constitutive factor for considerable executive lawmaking power. Also on this level of governance is it possible that such delegation includes ‘Henry VIII power’ to divert from federated statutes. Yet, it appears that delegating lawmaking powers here is less intense than on the federal level. In that light, it may not be that surprising that a search through legislation databases revealed no instances where executive measures of the federated entities have proven invalid as a consequence of the invalidity of the underlying directive.

This may be illustrated by the implementation by the decision of the Wallonian Executive of 9 April 1992 implementing Directive 89/428/EEC on titanium dioxide, *Moniteur belge* of 16 July 1992. After annulment, the successor Directive is not implemented in a new Wallonian measure. This law has therefore also served as implementation of the new Directive succeeding the old, annulled, Directive which is possible since, in terms of contents, the two Directives are identical.

Such stronger position for the federated legislature is possibly explained by the relatively young age of these federated parliaments. Yet it is possible that in future times delegation of legislative powers at this level of Belgian governance will resemble more the state of affairs at federal level.

### 2.2.3 Other Procedural Requirements

Apart from Henry VIII clauses, legislative procedural requirements are in principle upheld in Belgium in the context of implementation. A good example is the mandatory advice of the Council of State, Section Legislation, for proposed laws, *decrees/ordonnances* and for regulatory acts of executive bodies (federal and federated). This duty to submit proposals to the Council

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180 See Articles 20 and 78 of the Special Law on the Reform of the Institutions, Articles that are equivalent to Articles 105 and 108 B.Const.
181 Legal basis of this decision of the Wallonian Government was the Wallonian decree on waste of 5 July 1985 (later amended).
for an *a priori* check on their legality must be respected, also in the context of implementation. For failure to ask such mandatory opinion, Belgian judges can pronounce the invalidity of such an act as long as it concerns executive legislation (but not statutes, see *infra*).\(^{183}\)

However, a special accelerated advice procedure, ‘High Urgency Advice’ (*Hoog dringeningheid*) may be applied to bills proposed by government (*voorontwerpen*). The, more rudimentary, advice of the Council of State is than limited to examining only the questions of competence, legal basis and procedure.\(^{184}\) The term within which advice must be given may be reduced to 30 days or, when properly motivated, 5 working days. The high urgency is applied in quite a number of Belgian implementation laws whereby the state of ‘urgency’ is motivated by reference to a particular directive, sometimes also with reference to the fact that the Commission had already started 226 proceedings against Belgium.\(^{185}\)

Examples are the federal ministerial decree implementing Directive 94/43/EC referring to that directive as justification for the fast track (Decree of 12 February 1996, *Moniteur belge* of 20 April 1996); and the federal ministerial decree of 8 December 1998 implementing *inter alia* Directive 97/57/EC referring in the preambles to the fact that the Commission had already started an infringement procedure (it had already issued a reasoned opinion). For both these decisions, advice was rendered within 5 working days. Another example of a high urgency procedure can be found in the Royal Decree of 23 October 1989 implementing Laying Hens Directive 88/166/EEC, *Moniteur belge* of 11 November 1989. A one month term was applied in Royal Decree of 20 March 2001 implementing the annulled Directive 1999/51/EC (application of 84(1) section 1, *Moniteur belge* of 1 May 2001.

Vande Lanotte writes that if a (rudimentary) advice was given under the ‘high urgency procedure’ where this would *at a later stage* appear to have been unjustified, ordinary Belgian courts can strike down such executive legislation.\(^{186}\)

Another topic that may be mentioned is sub-delegation. Sub-delegation to an individual Minister can only take place for measures regarding the ‘details

\(^{183}\) See Van Damme (1996), p. 49.

\(^{184}\) The procedure for high urgency advices (*Hoogdringeningheid*) is laid down in Articles 84 and further of the Coordinated laws on the Council of State of 12 January 1973, last amended in 2000. Such high urgency may not be invoked if it concerns a proposition for a royal decree that will alter a statute, see Art. 3bis of the Co-ordinated laws on the Council of State.

\(^{185}\) As also noted by Merckx, see Merckx, H., De implementatie van de Europese regelgeving in België, *Res Publica*, 1998, p. 213, (277). He also mentions the proposals to ‘cap’ all consultative procedures in Belgium for the sake of implementation. This discussion has not yet resulted in concrete legislation.

of policy'. This is a typical basic principle of Belgian constitutional law: the federal government and the governments of the federated entities operate in principle on the basis of collegiality. The Council of State, however, has emphasized that, in the context of implementing European directives, this principle does not have to be upheld in all its vigour. It thereby expressed again concerns on 'democratic leakage': the directive concerned may not provide the Member States with much discretion. If this condition is fulfilled a Belgian minister, federal as well as federated, may regulate beyond 'details'.

2.2.4 'Re-Centralization' under EU Pressure?

There is one aspect of Belgian constitutional law that remains untouched by implementation duties, namely the division of internal competences. At this point there is a stark contrast between the legislative powers of the federated entities in Belgium and the lawmaking powers devolved under British constitutional law. As stated earlier, Belgium has a very unique federal state structure, particularly complex since it is composed out of three 'Regions' (Gewesten/Régions) and three 'Communities' (Gemeenschappen/Communautés) all having wide ranging legislative competences. When dealing with the issue of changing lawmaking at the national level for implementation purposes, there may, besides the trend of 'simplification' and 'governmentalization' in federal states also be a trend of 're-centralisation' for implementation purposes. In fact such 're-centralization' for implementation purposes has indeed been pleaded by several authors on Belgian constitutional law.

Mortelmans for example concludes that within the process of constitutional reform of Belgium, granting the 'Regions' more powers will bring many a directive in their sphere of competence. However, he pleads that the transposition of these directives should remain within the competence of the federal legislator, for "it would be pointless to delegate to the federated states 'pseudo-powers'".

A vision as expressed here would certainly be true for scenario's in which directives leave Member States and thus also their constituent federated parts, no discretionary powers. Yet, where that is not the case, legislative competences that were attributed to the Regions or the Communities would unjustifiably be usurped by the federal authorities. For Belgium this situation remains hypothetical since the Constitution does not provide for such 're-centralisation' of powers.

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See Van Damme (1996), on p. 63. Again, however, the Council of State expresses a concern for democratic leakage.


for the sake of implementation. The international and European responsibilities for Belgium are dealt with on a foro interno, foro externo principle. Therefore, responsibility for implementing a directive whose subject matter falls within the competences of the federated entities remains with those entities.

A statement as that of Mortelmans mentioned above relates to the pointlessness of granting competences that ‘merely’ empower the federated states to implement directives. As said earlier, that argument may be weak when considering directives leaving important political choices to the implementing legislator. Yet, there is another argument that may be put forward for re-centralisation: that of minimizing the risk that the federal state is being held accountable for the insufficient or late implementation by the federated entity. Irrespective of the extensive powers federated entities as the Belgian Regions and Communities may have (both internally and externally) the ultimate state responsibility for failure to implement is incumbent upon the Belgian federation. In Belgium this is acknowledged by providing the one and only exception in which the federal legislator ‘takes over’. Under Article 169 B. Const. a substitution mechanism is put into place allowing for the federal legislator (either statutory or executive) to implement ‘international or supranational obligations’ in areas where normally federated entities are competent in order to avoid (further) international responsibility for the Belgian federal state. Such measures cease to have effect the moment the Region or Community has fulfilled its European obligations.

For this study, it is important to note therefore that if the substitution mechanism is used to implement a directive which would later be annulled the invalidity of the latter must have repercussions for Belgium. The federal ‘substitution law’ would unjustifiably have prejudiced the internal division of legislative competences. The Cour d’Arbitrage, the constitutional court with the

191 Neither does it allow for such ‘re-centralization’ in the external sphere. Also in that context, Regions and Communities are competent in those areas where they are internally competent following the in foro interno, in foro externo principle. That is rather exceptional as in other federated states, such as for instance Germany, the component parts have more limited external competences, see Article 32 of the German Basic law.

192 Which works both ways: the federated entities that are competent internally, are competent in that field externally to conclude international treaties, see Article 167 (4) B. Const.

193 Whereby it is interesting to note that sometimes the directive’s legislative background is taken into consideration for deciding at internal level which entity (federation/region/Community) is competent to implement (partially or totally) into Belgian law that directive. See Van Damme (1996), p. 34/35.

194 Wouters and De Smet argue that there is a discrepancy at this point in international law and that the latter should acknowledge the importance of federated entities at international level, see Wouters and De Smet (2001) on p. 121.

195 See the Special Law of 5 May 1993 working out the modalities of the substitution mechanism.

196 But before the internally competent entity would have fulfilled its implementation obligations.
competence to strike down statutory legislation when it violates the division of federal and federated competences, could be asked to annul such legislation.

Yet, it must be noted that such a scenario is somewhat hypothetical. Before this ‘substitution mechanism’ may take effect, draconian conditions must be fulfilled. Interestingly, it has been argued that these heavy conditions express a fear of the Belgian federated entities against re-centralisation of their powers:

"Elles sont l'expression d'une méfiance vis-à-vis de ce qui pourrait être l'occasion d'une recentralisation plus ou moins larvée."

The most important of these conditions is that Belgium must have been condemned by the ECJ. In other words, this mechanism to avoid liability takes effect only when that liability is already a fact. It has up till now never been used and in the future its application will likely remain exceptional.

2.2.5 Belgian Courts and Implementation

Belgian statutory law is to a large extent immune from judicial scrutiny. Federal statutory laws as well as statutes from the federated entities (‘decrees’) that implement an invalid directive are therefore not, as any other statute, challengeable before Belgian courts, at least not for infringing the Belgian Constitution. In that sense the Belgian legal system resembles that of the Netherlands in that the legislature itself is deemed to be the ultimate authority on the constitutionality of statutes.

It was said before that sometimes Belgian Henry VIII clauses require that executive measures taken on that basis, only remain valid until parliamentary confirmation. If such confirmation has occurred, Belgian ordinary courts have no longer the possibility to review their validity.

There is one important exception: the Court of Arbitration (Arbitragehof / Cour d'Arbitrage) can be qualified as a constitutional court with limited capacity. Statutes can be reviewed by this court on their constitutionality but only in relation to a limited set of norms. The first set of constitutional, reviewable, norms are

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198 See Wouters and De Smet (2001), p. 156.
199 Only ordonnances of the Brussels capital region / Joint Community Commission are reviewable. Ordinary courts may declare them ‘non-applicable’ in case of violation of the Constitution (unless it concerns those provisions of the Constitution over which the Court of Arbitration exercises competence) and the special federal law governing the Brussels institutions, see Craenen, (1998), p. 15.
the Articles 10, 11 and 24 B.Const. dealing with non-discrimination, protection of minorities and certain principles governing education.\(^{201}\) The second set of reviewable norms governs the division of competences between the Federation, the Regions and the Communities (in both vertical and horizontal conflicts). The court can give rulings on these matters in the course of a type of ‘preliminary reference’ by other (ordinary) courts to the Court of Arbitration\(^{202}\) or through a direct review procedure that can be started by private citizens having ‘justified interests’ or by public authorities.\(^{203}\)

### 2.2.5.1 The Francorchamps Cases Revisited

Thus, the only two constructions under which the established invalidity of a directive can lead to a Belgian statute being annulled by the Court of Arbitration is if implementation of that directive has provoked a violation of the discrimination and education clauses mentioned above or of the division of competences. Both aspects are touched upon in the two Francorchamps cases,\(^{204}\) in which the Court of Arbitration deals with the statutory implementation of the Tobacco Advertising Directive in Belgian law.

#### 2.2.5.2 The Annulled Federal Law on Tobacco Advertising

The first case where the Court of Arbitration had to deal with implementation of the Tobacco Advertising Directive dates from the days where this Directive was still valid. At issue was a federal statute implementing the Directive\(^{205}\) and challenged by several private undertakings and the Walloon Government. The case deals with both sets of norms whose violation can induce the Court of Arbitration to annul a Belgian statute: Articles 10 and 11 of the B.Const were invoked but also the competences issue was raised. The division of competences was not violated. Even though the federal law prohibits commercials on TV and Radio for tobacco products (regulating the media is a competence of the Communities)\(^{206}\) the federal law was upheld for the regulation of tobacco advertising.

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\(^{201}\) A special law may expand this list of reviewable articles, see Article 142(2)(3) B.Const.

\(^{202}\) If these courts happen to be courts of last resort, they are always obliged to refer the validity question to the Court of Arbitration. Supposedly, by analogy to the EC system under Article 234 EC, lower courts that want to dis-apply a statute also must refer a preliminary question to the Court of Arbitration.

\(^{203}\) See 142(3) B. Const.

\(^{204}\) Arbitragehof/Cour d'Arbitrage, judgment No. 102/99 of September 30, 1999. The case was discussed by Verhoeven, A.. The application in Belgium of the duties of loyalty and co-operation, F.I.D.E. congress, Helsinki, 1-3 June 2000, p. 35 (62).


\(^{206}\) See Articles 127 and 130 B.Const and the Special Law of 8 August 1980.
tobacco advertising was a specific competence still under federal control. More interesting were the complaints about Articles 10 and 11 of the Constitution.

Articles 10 and 11 B.Const were said to be violated by the specific fact that the federal legislator also introduced the ban on tobacco advertising on sport events at world level, a term of the Directive that obviously covers the racing circuit in Francorchamps and the 'Grand prix' Formula 1 competition held there every year. The Directive gave Member States the option to defer the application of the ban for such events until 2006. Interestingly, the Court of Arbitration ruled that the federal government had violated Articles 10 and 11 B.Const, by not making use of the option in the Directive to introduce a transitory period until 2006.

The case provides a good example of how under the umbrella of Articles 10 and 11 B.Const. the Court of Arbitration judges on several other fundamental freedoms. Here Articles 10 and 11 B.Const. were for this purpose read in conjunction with the freedom to pursue a trade. The latter freedom can only be impinged upon if there is a good reason to do so and if the measure concerned is proportional to the objective (in casu the protection of the health of the Belgians). The measure in question that would force Francorchamps out of business would be highly inefficient if in other countries the events would still be allowed until 2006 pursuant to the options in the Directive. Therefore, Belgian TV spectators tuning in on such sports events organized abroad would still be confronted with tobacco advertising. Only Belgians watching in person Formula 1 races, organized in Belgium, would be effectively outside the 'grip' of tobacco advertising.

The ruling is particularly interesting since the reasoning of the Court of Arbitration hinges for a large part on the fact that, as long as other Member States had the option to allow for such types of events to be sponsored by the tobacco industry (until 2006), the economic and social losses as a consequence of such sports events moving out of the Country would be 'unproportional' under Belgian constitutional law.

As said, the case dates from before the annulment of the Directive by the ECJ. Yet, the existence of the Directive is crucial, for a total ban on advertising for sports events at world level after 2006 would not be unconstitutional. Only the introduction of such a ban earlier violated the Constitution because the duties imposed by the Directive were not yet 'absolute'. However, after annulment of the Directive, the introduction of a ban would also not be 'absolute' in

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207 Other complaints concerned the Region competences (Article 39 B.Const and the Articles 6, par. 1, VI and IX of the Special Law of 8 August 1980) but they were not addressed as such.

208 See Arbitraghof/Cour d' Arbitrage, judgment No. 102/99 of 30 September 1999, paragraph B 23.1.

209 See Arbitraghof/Cour d' Arbitrage, judgment No. 102/99 of 30 September 1999, paragraph B 23.1 of the Court's ruling. One factor that is also mentioned at this stage is the absence of any other type of 'compensation'.
2006 or afterwards. The situation would again be one of the Belgian federal legislator forcing the Francorchamps race-circuit out of the country without any European justification to do so. Arguably, this would again lead to a violation of Articles 10 and 11 B.Const. It would seem a new round of challenges to this federal law could be expected, this time challenging the introduction of the ban in 2006 pursuant to an invalid directive.

This Tobacco Advertising litigation does not stand on its own. In another case the Court of Arbitration dealt with the federal implementation of Directive 93/89/EEC on road transport and the discretion this directive left Member States. It left Member States the option to grant road tax exemptions to certain users of heavy trucks. The Court held that the federal legislator had used this option of the Directive in a discriminatory fashion and therefore annulled the implementing law, again not for reasons of invalidity of the Directive (that was already pronounced by the ECJ earlier under preservation of effects) but because the Belgian legislator had used its 'directive freedoms' in a manner inconsistent with Articles 10 and 11 of the Belgian Constitution.\(^\text{210}\)

Thus, it may be inferred from this case that, under the 'authority' of directives, Belgian federal (statutory) legislation could be adopted that would in the absence of that directive, violate Articles 10 and 11 B.Const.

2.2.5.3 The Annulled Walloon Decree on Tobacco Advertising

The second case before the Court of Arbitration, again concerning the Francorchamps racing circuit is concerned primarily with the division of competences between the federal legislator and the Walloon Region.\(^\text{211}\) Where earlier the hypothesis was ventilated of re-centralisation occurring in federal states faced with duties to implement directives, in this case the Walloon Regional government had tried to do exactly the opposite. It took the opportunity of implementing the Tobacco Advertising Directive to regulate on certain matters that were (still) reserved to the Belgian federal legislator. It was established in the decision of 1999, discussed above, that regulating tobacco advertising was a federal competence.

\(^{210}\) See Arbitragehof/Cour d'Arbitrage, judgment No. 118/2003 of 17 September 2003. This is an example of a legality review of a Belgian statute under the preliminary reference procedure (the request being issued by a Court of first instance in Arlon). The Court of Arbitration was also asked under this procedure to review the legality of the federal law approving the Treaty between Belgium and some other EU Member States to implement Directive 93/89/EEC, again on compatibility with Articles 10 and 11 of the Belgian Constitution. This time the Court did not conclude to a violation of the Constitution, see Arbitragehof/ Cour d'Arbitrage, judgment No. 122/2002 of 7 March 2002.

Yet, the Walloon Region (one of the plaintiffs in the 1999 case) stubbornly implemented this Directive by decree whereby it made use of the optional transitory period that the Directive left to the Member States for temporarily (until 2006) allowing big sports manifestation sponsored by tobacco companies (read: the Formula 1 championships held in Francorchamps).\(^{212}\) However, regulating advertising for tobacco products was a federal competence and for that reason the Flemish Region challenged the Wallonian Decree.\(^{213}\) Although the Court of Arbitration had ruled earlier that the federal law of 1997 could not validly forbid these manifestations there and then (without making use of the option in the Directive to defer to 2006), the competence to implement the Directive was still exclusively federal.

The Walloon Region defended itself by referring to the fact that these transitory periods emanated from the Directive.\(^{214}\) This argument was obviously flawed since discretion left by the directive does not change the internal Belgian division of competences as explained above in Section 2.2.3. Not surprisingly, the Court of Arbitration did not follow this Wallonian defence. The Court of Arbitration ruled that the Directive could not replace federal implementation of the Directive with regional implementation. Any doubts as to the validity of the Directive were therefore not relevant for determining the issue of the division of competences between the central and regional legislator in Belgium.\(^{215}\) Thus, the Court of Arbitration annuls the Wallonian Decree for infringing upon the Belgian constitutional attribution of powers, not because this Decree purported to implement the previously annulled Tobacco Advertising Directive.

This second Francorchamps case illustrates the independence of statutory laws (of the federated entities) in Belgium from the validity question. Secondly,
it also illustrates the fact that under the directive's 'authority' no re-centralisation takes place in Belgium for implementation purposes. The federal implementation simply rested on federal competence, not on a re-centralised power generated by the Directive.\footnote{216}

2.2.5.4 Review of Executive Legislation

Apart from the limited review performed by the Court of Arbitration, statutory laws (of the federation or of the federated entities) are not reviewed on their constitutionality. Executive legislation, however, can be reviewed by the Administrative Section of the Council of State \textit{(Afdeling Administratie van de Raad van State)}\footnote{217} which can formally annul such legislation.\footnote{218} Its rulings have effect \textit{erga omnes} and \textit{ex tunc}.

The Council of State may annul an executive decision at federal level or at federated level on several grounds including '\textit{ultra vires}' and 'violation of important formalities'. The latter ground includes an unjustified recourse to the 'high urgency procedure' for a Council of State advice. As to the vires ground, it was stated earlier that many federal statutes contain clauses that delegate powers to the executive for implementation purposes where the directive is a constitutive factor, this being particularly so if such a clause also has a 'Henry VIII character'.

What is interesting to note in that respect is that at federated level such a type of enabling clause is less common than at federal level. A possible reason for this reluctance of Regional/Community Parliament to delegate much lawmaking powers to the executive may lie in the fact that the relatively young parliaments of the federated entities 'value their powers'.\footnote{219} An interesting difference is thus that if an invalid directive was implemented at Region/Community level, the implementation legislation will less likely be \textit{ultra vires} than if implemented at federal level.\footnote{220}

\footnote{216}The only exception in Belgian law being the invalid directive that would have been implemented through the 'substitution mechanism' (described above).

\footnote{217}The other function of the Council of State has also been discussed earlier: that of advising the legislator on drafts for federal laws, decrees and ordonnances. This function of the Council of State has not received much attention in legal writing, as opposed to the judicial function of the Council, see Damme, M. van, \textit{Het Europees gemeenschapsrecht in de adviespraktijk van de afdeling wetgeving van de Belgische Raad van State}, \textit{SEW}, 1996, p. 47.

\footnote{218}As one interviewed Flemish legislative draftsman has confirmed.

\footnote{220}Such possible regional differentiation as to the consequences of a directive's invalidity one could also notice in post-devolution UK. An interesting difference is, however, that in the UK devolved powers seem to be more often delegated to the devolved executive.
As far as direct judicial review is concerned, a thorough search through the databases of the Belgian Council of State has not produced any judgments that purported to annul any Belgian executive measures for reasons of underlying invalid directives.\textsuperscript{221}

For \textit{locus standi} before the Council of State, one must pass an 'interest' test as well as respect a (rather short) deadline of 60 days to commence proceedings. These impediments can be circumvented by provoking an indirect review of executive measures. This is possible as ordinary courts can pronounce the non-applicability of subordinate legislation.\textsuperscript{222} In case one would unquestionably have had \textit{locus standi} before the Council of State, recourse to ordinary courts (for example because the 60 days deadline has passed) is not excluded.\textsuperscript{221} Therefore, it should in theory be possible that the invalidity of executive legislation is invoked, rendering it non-applicable in a particular case. Such incidental invalidity of Belgian law could then be attributable to the invalidity of the underlying directive. Again, a search through the databases of the different ordinary courts revealed no instances where the invalidity of a directive has had repercussions for Belgian law.\textsuperscript{224}

With the exception of the \textit{Meyhui} case before the Commercial Court in Bruges, the only case ever in which a Belgian court has referred a preliminary question to the ECJ on the validity of a directive (Directive 69/493/EEC on Crystal Glass). However, in this case it was not the constitutional relationship between this Directive and the Belgian implementing legislation that was the reason for the reference but rather the possible violation of Article 28 EC by the Directive (and thus also by the Belgian implementing law).\textsuperscript{225}

It is difficult to explain this low record of invalidations by Belgian courts of implementation legislation. A search though Belgian implementation law reveals that in certain instances an invalidated directive was attributed the 'authority' of constituting legislative power, of permitting a 'high urgency' advice procedure before the Council of State and of justifying recourse to a Henry VIII clause.\textsuperscript{226}

\textsuperscript{221} See http://www.raadvst-consetat.be/Nl/home_nl.htm.

\textsuperscript{222} See Article 159 B.Const. Despite competence of ordinary courts, the Council of State always retains a (subsidiary) competence. See Mortelmans (1982), p. 150.

\textsuperscript{223} In that sense the Belgium legal system does not know a 'TWD' rule as applicable under EC law.

\textsuperscript{224} A good database is provided by http://www.cass.be/juris/jurn.htm covering all ordinary courts in Belgium except the Council of State (see supra). A search using either key-words, the numbers of the annulled directives and the numbers of the ECJ cases in which they were annulled has proven unsuccessful.

\textsuperscript{225} C-51/93 Meyhui v. Schott Zwiesel Glasswerke AG. See also Chapter 4, Section 3.4.2.

\textsuperscript{226} The latter two phenomena can be found combined in the Ministerial Decree of 12 February 1996 implementing the invalidated Pesticides Directive 94/43/EC, \textit{Moniteur belge} of 20 April 1996.
2.2.6 Conclusions as to Belgian Law

In Belgium, directives are attributed considerable legal 'authority', particularly at federal level. They are often a constitutive factor for executive rule-making, possibly bypassing statutory law under Henry VIII clauses and may justify an accelerated advice procedure before the Council of State. Yet such 'authority', although considerable, appears not as great as in the UK. Enabling acts are more limited in scope than the British ECA and Belgian law regularly requires a statutory confirmation of legislation made under Henry VIII powers. These and other facts illustrate that there is more concern for 'democratic leakage' in Belgium than in the UK. Therefore it seems a simple matter of time before this relationship between Belgian implementing law and the directive will give rise to interesting case law before the Belgian Council of State or ordinary courts, possibly involving preliminary validity questions as in the UK.

However, 'authority' attributed to directives by Belgian constitutional law does not extent to any 're-centralization' of powers. Hence, the validity of a directive could not in principle have repercussions upon the division of competences between the federal and the six federated entities. In as far as such a shift in the division of competences has taken place under the pretext of directive implementation, implementation law, including statutes, may be quashed, as demonstrated by the second Francorchamps case before the Arbitragehof/Cour d'Arbitrage.

2.3 The French Republic

The contours of the present Fifth Republic of 1958 can be attributed to what were considered to be the flaws of the Fourth Republic of 1946. The latter was characterised by a weak position of the government and the head of state and broad powers for parliament. De Gaulle, then strongly opposing this république des députés was much relieved when in 1958 the Fifth Republic saw the light of day, having a more executive and presidential nature than its predecessor. Apart from a stronger position of the President,\textsuperscript{227} the constitution of the Fifth Republic envisaged a strict separation of legislative competences between Government and Parliament, to be guarded by the Constitutional Council (Conseil Constitutionnel) whose jurisdiction comes close to that of a constitutional court, although also the Council of State (Conseil d'État) may be attributed such quality. This aspect of a vertical division of powers seems par-

\textsuperscript{227} Since 1962 the President is directly elected, which of course added further to his power and influence. The constitutional amendment necessary for the introduction of the directly elected President was based on the referendum of Article 11 of the FC, something which the Conseil d'État at the time opposed. The procedure for constitutional amendment is laid down in Article 89 of the FC and was in the eyes of the Conseil d'État circumvented by this referendum of 1962.
ticularly important for this study since it could have important repercussions for how France implements EC directives and therefore deserves a closer look.

2.3.1 A Vertical Division of Competences

One might expect that the French Constitution (hereinafter ‘FC’) granting wide powers to the executive facilitates to a large extent the swift implementation of Community directives. For one of the eye-catching features of this Constitution is its vertical division of powers (or at least its attempt to do so) between legislature and executive (the latter referred to as ‘the Prime Minister’). It describes in Article 34 FC the legislative competences of Parliament (Assemblée and Sénat), the so-called domaine de la loi.

These parliamentary competences include *inter alia* the making of ‘rules’ on civil rights and fundamental freedoms, nationality, determination of felonies and misdemeanours, criminal procedure, the assessment bases, rates, and methods of collecting taxes of all types. The *loi* shall likewise determine the regulations concerning the electoral systems of the parliamentary assemblies and local assemblies, company nationalizations and transfers of company ownership from the public to the private sector.

Furthermore, the *loi* determines the ‘fundamental principles’ of *inter alia* the general organization of national defence, local government, education, rules governing property rights, civil and commercial obligations, labour and trade union law and social security.\(^\text{228}\)

The complementary Article is Article 37(1) FC designating the areas not reserved to the legislature: the domaine du règlement. Article 21 FC attributes this pouvoir règlementaire autonome to the ‘Prime Minister’ (=Government).\(^\text{229}\)

If the Government wants to safeguard its autonomous lawmaking powers, against possible encroachment by Parliament, it has three possibilities to do so before the Constitutional Council: after the submission of a parliamentary proposal or amendment (Article 41 FC).\(^\text{230}\) between the adoption of the loi and

\(^{228}\) For the complete list of competences, see Article 34 FC. Amongst these one finds the provision that ‘Finance acts shall determine the financial resources and obligations of the State, subject to the conditions and reservations laid down in an organic act’, as well as the provision that ‘the provisions of this article may be developed in detail and amplified by an organic act’.

\(^{229}\) It reads: “Sous réserve des dispositions de l'article 13, il (=the Prime Minister) exerce le pouvoir réglementaire.” This has to be distinguished from the other power attributed to him in Article 21: “Il assure l'exécution des lois”, which will be discussed hereafter.

\(^{230}\) Article 41 FC not only provides the weapon the Government can use against what it claims is an invasion of what it thinks belongs to the domaine du règlement. It can also be used for when the legislature is allegedly impinging upon the delegation to rule by ordonnance ex Article 38 (1) FC.
its promulgation (Article 61(2) FC) and, in an *ex post* review, after promulgation of the *loi* (Article 37(2) FC). Under the latter procedure the Government can ask the Conseil Constitutionnel to ‘de-legalise’ laws adopted by Parliament that encroach upon the autonomous governmental lawmaking competences (see *infra*).\(^{231}\)

The delimitation of legislative competences is less clear-cut as it seems.\(^{232}\) First of all, it must be noted that the list with competences as enumerated in Article 34 FC is not limitative. Other areas of policy not mentioned in Article 34 FC may also fall within the *domaine de la loi*.\(^{233}\) On the whole, the legislative competence of the French Parliament is therefore determined by (1) Article 34 FC, (2) the other provisions in the Constitution that require a *loi*, (3) constitutional practice and (4) the *principes généraux du droit*.\(^{234}\) Under the latter category, parliamentary competences are created in the sense that the law can only by *loi* derogate from these principles. As the exact content of these *principes* themselves is not very well delimited, neither is the scope of the statutory competences in this field.\(^{235}\) Moreover, it seems that the Conseil Constitutionnel, the guardian of the constitutional division of powers, generally adopts interpretations that favour parliamentary rather than governmental competences.\(^{236}\)

Within the *domaine du règlement* one (still) finds competences such as regulating rules on civil and administrative procedure.\(^{237}\)

As to constitutional practice, the *domaine du règlement* has lost even more ground due to the the fact that Government can ‘relinquish’ its autonomous

\(^{231}\) It should be emphasized that the power to defend the *domaine du règlement* is a facultative power. The Government may therefore renounce its rights to defend it. This is a major argument against a ‘substantive concept of law’ in favour of a ‘formal concept of law’, see Reestman (1996), p. 129.

\(^{232}\) Some even argue that the legislative competences have reached the level as enjoyed by Parliament under the Fourth Republic (from 1946 to 1958), see Prakke (1998), p. 254.

\(^{233}\) Thus, Articles 66 and 72 require a *loi*. Furthermore, only a *loi* may derogate from the general principles (*principes généraux du droit*), see Reestman (1996), p. 113 and 120.

\(^{234}\) Not to be confused with the *principes fondamentaux reconnus par les lois de la République*, which form part of the set of constitutional norms (*bloc de constitutionnalité*) to which also Parliament must adhere. All executive legislation however, must be in conformity with the *principes généraux du droit*, see the ruling of the Conseil Constitutionnel of 26 June 1969.

\(^{235}\) Up till now, the Conseil has acknowledged two such principles: that silence of the administration implies a negative decision and that legislation cannot have retroactive effect. See Reestman (1996), p. 119.

\(^{236}\) Such interpretation was possible due to the vagueness of Article 34 FC, see Reestman, J.-H., *Constitutionele toestand in Frankrijk*, De Conseil Constitutional en de grondwettigheid van wetten en verdragen, Ars Aequi Libri, Nijmegen, 1996, p. 115/116.

\(^{237}\) Although here too the Conseil Constitutionnel has formulated exceptions, see Reestman (1996), p. 125.
comptences, allowing for Parliament to legislate within the domaine du règlement. The three possible judicial defence tactics mentioned above under which Government can safeguard its competences against parliamentary legislative activity are all optional. Moreover, both the Conseil Constitutionnel and the Conseil d'État have accepted this situation. This can be illustrated by the use in practise of the Prime Minister's power under Article 41 FC to have the Conseil Constitutionnel declare a bill or amendment to be infringing the 'domaine du règlement': the last time it has been used was in 1980.

These two developments, the narrow judicial interpretation of the domaine du règlement and the constitutional practice of Parliament encroaching upon what is left of it, have together reduced significantly the pouvoir réglementaire autonome and thus also its significance for EC implementation purposes.

Indeed, when searching the databases on French legislation, it is striking to see that implementation of directives by means of Article 37 FC seems rare. Three examples can be found in Décret 92-587 of 26 June 1992, Décret 99-556 of 2 July 1999 and Décret 2001-451 of 25 May 2001. Significantly, all three décrets also depend partially on other legal bases (lois). For the last décret mentioned, the prime Minister used the procedure of Article 37 (2) FC to ask the Constitutional Council to first 'delegalize' certain legislative provisions trespassing on the domaine du règlement.

Legislative governmental power, either on the basis of Article 37 FC or executing/implementing legislation (see infra), is exercised in the first place by the Government. Yet, French executive power is in fact dominated by another important actor: the directly elected President of the Republic. Crucial in this respect is Article 13 FC stating that the President signs (and thus he can veto) all ordonnances (see infra) as well as all governmental regulations that have passed (and not must pass) the Council of Ministers. There have been occasions...

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229 See Prakke (1998), p. 254: the initiative of such 'trespassing legislation' could have come from the Prime Minister himself.


232 Who is therefore not directly answerable to Parliament. Moreover, it is forbidden for him or her to appear in Parliament. The President communicates to Parliament by means of 'messages'.

233 He is the leading figure of the executive power in France and in that sense, Article 20 (1) FC is misleading when it states that "[t]he Government shall determine and conduct the policy of the nation". The President also shares very substantial powers with the government in foreign policy (Article 52 FC).
where the Presidential veto has been exercised, particularly in times of 'cohabitation' when the President shares power with a government with a different political agenda.

Therefore, it may be important to know which decrees were deliberated in the Council of Ministers (décrets délibérés en Conseil des ministres) and those that were not (décrets simples). Where the first type of decree must bear the President’s signature, the latter only requires that of the Prime Minister and the other responsible minister(s). Formally, only for a limited amount of decrees the Constitution requires deliberation in the Council of Ministers, yet many decrees that could have been passed as a décret simple went through the Council of Ministers and thus bear the President’s signature. That is not surprising when one realises that it is the President, as chairman of the Council of Ministers, who sets its agenda. Subsequent amendments or the abrogation of these ‘Presidential decrees’ can even be issued by the President without having to pass through the Council of Ministers, as long as they are counter-signed by the Prime Minister.

The distinction between décrets simples and décrets délibérés en Conseil des ministres does not run parallel to the distinction between executive rules adopted under the pouvoir autonome of article 37 FC and such rules adopted under 21 FC (see infra). A number of directives is implemented by means of these 'Presidential decrees' but of the total number of décrets implementing directives they seem to form a relatively small part. The majority of implementing decrees are décrets simples.

2.3.2 Execution and operationalization of ‘rules’ and ‘principles’

The picture of the executive lawmaking powers in France is by far not complete when merely looking at the limited domaine du règlement of Article 37 FC. They expand well beyond that, although in a more classic, sub-

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244 What is mandatory in any case is that ordonnances and propositions for statutes must pass the Council of Ministers.

245 This practice of the President signing a décret simple, has been endorsed by the Conseil d'État reaffirming the Presidential power in the French executive branch. When the President and Government are from the same political party, this need not be problematic. However a situation that is less ideal, either for the President or for the Government is that of a cohabitation: the President having to work together with a Government based upon a political majority in the Assemblee Nationale that is of another political colour. This happened under the presidencies of both Mitterand and Chirac.


ordinate, fashion. Thus, the French Government also adopts laws in execution and operationalization of statutes. Furthermore, rulemaking powers may also be delegated to individual ministers. Therefore, in terms of governmental lawmaking power, a more important constitutional provision than Article 37 FC on the *pouvoir autonome* is Article 21 FC. This Article embodies another remarkable feature of French constitutional law, the ‘semi-autonomous’ power to execute, complement and implement the *loi*.

When observing the *domaine de la loi* one notices that the competences of Parliament fall into two categories: rules (*règles*) and fundamental principles (*principes fondamentaux*). In areas where Parliament is to adopt the fundamental principles, the elaboration of these principles remains with the Executive. The previously mentioned Article 21 FC states that the ‘Prime Minister (=the Government) ensures the implementation of enactments’, which includes lawmaking power.

In terms of competences, one would expect this to lead to disputes between the French Government and Parliament on the classification of ‘fundamental principles’ as opposed to ‘rules’ and on the delimitation of the ‘fundamental principles from what must be deemed to be their ‘implementation’. Indeed, the Conseil Constitutionnel has dealt with these issues and has indicated that the difference between rules and fundamental principles depends on the subject matter to be regulated. As such, it has placed certain matters that one could easily regard as ‘details’ within the scope of the ‘fundamental principles’ and thus in the *domaine de la loi*.

As far as the category of ‘rules’ is concerned, when Parliament is to adopt these on a certain subject mentioned in Article 34 FC, governmental lawmaking power is not excluded. It is generally accepted that the French Government also has the generic power, without specific delegation being required, to adopt executing measures necessary for the operation (the *mise en œuvre*) of the ‘rules’ as determined by Parliament. This has obviously made the delimitation between the ‘rules’ and ‘fundamental principles’ less crucial.

A remaining difference is that, unlike the power to work out in detail the ‘fundamental principles’, the power to further elaborate ‘rules’ is not exclusively governmental; Parliament may also attribute it to another public authority.

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249 Not to be confused with the previously mentioned *principes généraux du droit* (of which only Parliament may deviate and which thus expand the competences enumerated in Article 34 FC) nor with the *principes fondamentaux reconnus par les lois de la République* forming part of the *bloc de constitutionnalité*.


253 This follows from one of the unwritten rules of French constitutional law.

The powers of the French Government under Article 21 FC to enact décrets complementing parliamentary legislation may be called 'semi-autonomous' since, although they depend on the existence of a loi (in simple terms: there must be something to complement) they do not depend upon express delegation as would be customary in for example The Netherlands or the UK. As Picard states:

"Even though some statutory provision would request the government to provide more details, this would not be a delegation of legislative power, but the precise attribution of a regulatory power, the principle of which is already enshrined in the Constitution." 

The governmental powers to legislate (within the domaine de la loi) are therefore determined by two factors: the existence of a loi and its provisions on the one hand and on the other hand the necessity to complement the loi so that it can operate effectively. Constitutive for the lawmaking power is therefore that the statute calls for further regulation, either implicitly or explicitly. Under these 'semi-autonomous' powers, the French Government can also implement directives. Sometimes, when the Government implements a directive under its power to execute a loi, the loi concerned may itself specifically refer to the Governmental powers under Article 21 FC.

An example is the statute on recognition of diplomas, linking the governmental powers under Article 21 FC to directive implementation: "Nul ne peut accéder a la profession d'avocat s'il ne remplit pas les conditions suivantes: (...) 2. Etre titulaire sous réserve des dispositions réglementaires prises pour l'application de la directive 89/48/CEE." The constitutional basis for French implementation are the combined factors of this statute and Article 21 FC.

One may notice the resemblance with the executive lawmaking powers the Belgian federal Government enjoys under Article 108 B.Const., discussed in the previous section.

The question arises whether the invalidity of a directive affects French implementation enacted under the powers of Article 37 FC or under Article 21 FC. In the first scenario of implementation under the pouvoir autonome réglemen-

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256 Naturally, this governmental legislation based on Article 21 FC may not contradict the loi it complements, see Picard (2000).

257 Loi No. 90-1259 of 31 December 1990. This law is also an example of France resorting to the implementation technique of referral.
taire (for directives whose content matter falls within the domaine du règlement) there are obviously no consequences of the invalidity of such a directive. The invalid directive was not constitutive for the governmental lawmaking power.

But what if a governmental decree, executing parliamentary 'rules' or complementing parliamentary 'fundamental principles', later appears to be implementing an invalid directive? Since Article 21 FC is the 'legal basis' for such legislation it would seem at first glance that such legislation does not hinge on the continuing existence of a directive. However, it may be wondered if, by the fact that there is no EC directive anymore, the governmental decree may still be deemed 'necessary' to complement the statute concerned. It would seem that this depends first and foremost upon the terms used in the statute. In the example mentioned above of the French law on diplomas, the hypothetical annulment of Directive 89/48/EEC would mean that the powers used to 'complement' this loi are not 'necessary' anymore and thus vitiated by incompétence (see infra).

2.3.3 Implementation by Arrêté

Individual ministers have no regulatory powers other than those specifically delegated to them by law or decree (thus concerning both the domaine de la loi or the domaine du règlement). Not surprisingly, many directives are implemented in France by means of such ministerial decrees or arrêtés ministériels.

One of the numerous examples of an arrêté implementing a directive is that of 1 March 1990 implementing Directive 89/428/CEE (the First Titanium Dioxide Directive), based on the law No. 76-1133 and on décret nr. 77-1133 implementing that law. After annulment of the Titanium Dioxide Directive by the ECJ, a new Directive was adopted, Directive 92/112/EEC (The Second Titanium Dioxide Directive). It is striking to see that the latter was deemed implemented by the same arrêté, at least according to the communications of the French Government to the European Commission. Consequently, the old arrêté was not affected by the annulment of the First Titanium Dioxide Directive. This observation is confirmed by a search through the French case law database revealing no annulment of the arrêté.

Likewise, the question may be asked what the repercussions are for the arrêté ministériel implementing an invalid directive. Unlike governmental lawmaking powers, ministerial regulations must always be based upon some form of delegation in a similar fashion as in the other countries discussed here. In the

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238 Thus, also in areas where Parliament enjoys legislative powers (the domaine de la loi), there are widespread delegated powers to the executive. See Mény (1988), p. 281.

statute or decree, the existence of a (particular) directive may be formulated within the terms of delegation of regulatory powers to the individual minister. It would seem that it therefore depends upon the parent statute or décret whether or not courts may quash an arrêté for being ultra vires as a consequence of the invalidation of a directive.

2.3.4 Facilitating Implementation: The Ordonnance

Evidently, the French Government cannot implement every directive via its lawmaking powers under Article 37 FC or Article 21 FC. As observed earlier, exclusive parliamentary lawmaking powers, the domaine de la loi, are more widespread as they first appear. As a necessary corollary, many directives fall within the parliamentary legislative competence. This may pose restrictions on the swiftness and efficiency with which France implements directives. Whenever directives are (partly) covered by the domaine de la loi, a lengthy legislative procedure must be followed, involving both Assemblée and Sénat. Obviously, when dealing with directives leaving little discretionary room to national policy-makers such a time consuming procedure may be frustrating.

The legislative process can be considerably stalled when Sénat and Assemblée differ of opinion. The proposal can then go back and forth between the two Houses (the so-called navette) but in the end it is the Assemblée that can impose its will. The Government has instruments to speed up the process, in particular the instrument of the vote bloqué: requesting Parliament to put the proposal to the vote and either approve or reject it without further amendments.

The French Parliament and Government, anxious to reconcile implementation (deadlines) with parliamentary procedure, resorted to ‘Laws on Diverse Provisions for the Adaptation to Community Law (les projets de loi portant Diverses Dispositions d’Adaption au Droit Communautaire, the ‘DDADC’). These ‘law-compilations’ used for the simultaneous swift parliamentary implementation of several directives proved not very successful for Parliament, already overloaded with work.\footnote{See Sauron, J.-L., Modalités et Méthodes de Transposition des Directives, p. 35 (55): “Enfin, cette stratégie des DDADC se heurtant à la surcharge de l’ordre du jour des assemblées parlementaires en France, le gouvernement envisage le recours à la procédure des ordonnances”. In 2003 two DDADC were adopted facilitating the transposition legislative of 13 directives, see Philip, Ch., (ed), Premier rapport annuel sur la transposition des directives, Rapport d’information No. 1009, July 2003, p. 20.}

Therefore, the Government resorted to another solution to swiftly legislate within the domaine de la loi. However, a specific feature of French constitutional law is that Parliament cannot delegate the regulation of matters in the domaine de la loi to Government. The only escape is provided by the Constitution in
Article 38: the rule by ordonnance. Whereas the French Government may at all times (tacitly) allow Parliament to legislate on matters falling within its domaine du règlement (see supra), Parliament is only granted the possibility of temporarily allowing Government to legislate on matters within its domaine de la loi under this specific ordonnance procedure.  

The procedure is that the Government asks Parliament to pass a law (loi d’habilitation) granting it powers to regulate by ordonnance on areas reserved to the loi. These ordonnances may legislate in the domaine de la loi and, as a necessary corollary, may also alter or withdraw existing statutes. At this point a comparison could be made with the English phenomenon of the ‘Henry VIII clause’.

The system of executive rule by ordonnance has its constitutional limitations. Besides the fact that on each ordonnance an advice of the Conseil d’État is mandatory and that they must always pass the Council of Ministers, their use must be strictly conditioned. Parliament, when approving such law empowering the Government to legislate in its field of competence, must strictly lay out the possible scope of the rule by ordonnance. This follows also from case law of the Conseil Constitutionnel who, when reviewing the constitutionality of a loi d’habilitation, imposed strict conditions to such an enabling statute. Parliament must therefore strictly define the areas in which Government is allowed to intervene by ordonnance and indicate which areas of its competence are affected by such governmental intervention.

The background of these constraints to the use of ordonnances is obviously inspired by concerns of ‘democratic leakage’. Translated to the issue of directive implementation this necessarily means that the directives concerned are to be identified by name and are not to leave too much discretion to the parliamentary legislator. The ‘democratic leakage’ that might otherwise occur through implementation by ordonnance, was identified by Sauvon when he considered the following to be problematic:

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[261] It must be stressed that Article 38 FC is the only framework within which Parliament may delegate to the government the power to regulate on the domaine de la loi, as is evident for example in CC, 5 January 1988, judgment No. 88-233 DC, Rec., p. 9.

[262] As in Belgium and France, the Conseil d’État is thus a body with an advisory as well as a judiciary function. Advice from the Conseil d’État is mandatory inter alia for propositions coming from the government (projets de loi) and not for proposals from the legislature (propositions de loi). Apart from ordonnances its advice is also mandatory for proposals for a décret en Conseil d’État and whenever legislation calls for its advice.

[263] And thus bear the signature of the President, see Article 13 FC.

"la contrainte de ne pas transposer par cette voie que des ‘textes techniques’ pour éviter l’accusation d’éviter des débats politiques lourds sur des textes importants." 265

Whether indeed the legislator takes into account the fact that the directives concerned do not involve ‘difficult political debates’ but only topics on which not too much debate may be expected (textes techniques) remains to be seen. For indeed, many directives whose content matter falls within the domaine de la loi have been implemented in French law by an ordonnance. Although this implementation identifies precisely for which directives the government may put its delegated powers to use, one may wonder whether all directives mentioned in the loi d’habilitation only leave matters of limited importance to be decided nationally.

An example of an empowering act specifically drafted for the purpose of enabling Government to implement directives is the law of 3 January 2001 ‘portant habilitation du Gouvernement à transposer, par ordonnances, des directives communautaires et à mettre en œuvre certaines dispositions du droit communautaire’. 266 It is basically a long list with about 30 directives and regulations (the latter apparently in need of national ‘flanking measures’). Ordonnances had to be ratified no later than ten months after promulgation of the empowering act. Based on this law is for example Ordonnance No. 2001-273 of 28 March 2001 implementing Directive 1999/62/EC which was later ratified by the law No. 2001-1011 of 5 November 2001. In 2003 the Conseil Constitutionnel accepted that a loi d’habilitation may also indicate future directives whose adoption may be expected during its life span. 267

Unlike governmental lawmaking powers under Articles 37 FC and 21 FC, legislation by ordonnance may be qualified as delegation of lawmaking powers. 268 Yet, unlike delegation of such powers to an individual minister (see supra) or unlike delegation to government in other countries studied here such as the UK and (in most cases) The Netherlands and Belgium, this type of delegation is rather specific since it can be only temporal (pendant un délai limité). 269 The ordonnance automatically loses legal validity the moment the time-limits as set by the empowering parent act have lapsed unless by that time a proposal for ratifica-

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265 See Sauron, p. 55.
267 See CC, 26 June 2003, judgment No. 03-473 DC.
268 See Picard (2000).
269 See Constantinides-Megret, C., Le rôle des pouvoirs publics nationaux dans la mise en œuvre du droit communautaire, Revue du Marché Commun, 1967, p. 218. This can be compared with the procedural guarantees concerning the use of Henry VIII clauses in Belgium and The Netherlands where this requirement is sometimes (Belgium) or, at least on paper, always (The Netherlands) attached to the delegation to government of statutory law making powers.
tion has been submitted to Parliament. Thus, the **ordonnance** loses legal effect if Parliament has not adopted statutory law to confirm the ordonnance within a given period of time. As long as they have not been confirmed they may be challenged before the **Conseil d'État** for reason of 'excès de pouvoir' meaning that they go beyond the scope of the empowering statute (see infra). This changes the moment the **ordonnance** is ratified by Parliament. It then 're-enters' the **domaine de la loi** and its constitutionality may from that moment on be reviewed only by the **Conseil Constitutionnel** and not anymore by the **Conseil d'État** (see infra).

In sum, a **loi d'habilitation** attributes 'authority' to a directive in that it triggers Governmental lawmakers. Yet, this 'authority' is more modest than in other countries considering the limited life span of the ordonnances and the strict conditions the **Conseil Constitutionnel** has imposed upon their use. When that 'authority' disappears after invalidation of the directive, the ordonnance becomes an unjustified usurpation of the **domaine de la loi** since it would be **ultra vires** the **loi d'habilitation**. However, if this directive were to be invalidated after its implementing ordonnances have been ratified by Parliament, legal consequences of its invalidity are not to be expected (see infra).

### 2.3.5 French Courts and Implementation

#### 2.3.5.1 Review of French Statutes: The **Conseil Constitutionnel**

Consequences of invalidity of a directive in France are obviously determined by the question whether or not it was implemented by **loi**, the autonomous regulatory power of the Government, other executive lawmakers.
powers or by ‘ordonnance’. It would seem that in the first two cases, there is no
direct reason for a French court to invalidate a règlement or for the Conseil Con-
stitutionnel to see a reason for declaring the loi unconstitutional.

As said earlier, the loi can only be reviewed by the Conseil Constitutionnel
on its constitutionality and only under certain conditions. The ‘ordinary laws’
as opposed to ‘organic laws’ can be reviewed by this organ, but only on the
request of certain indicated persons or institutions, excluding private individu-
als. Review of statutes (as well as of international treaties) by the Conseil
takes place a priori.

The bloc de constitutionnalité is the entire set of norms to which statutes must
adhere. It includes of course the 1958 constitution (and its rules on the division
of competences) but also the Preamble of the Constitution of 1946 (of the Fourth
Republic), the Declaration of 1789 to which the latter refers, Organic Laws and
Ordonnances and the Legal Principles Recognized by the Laws of the Republic.
The constitutionality test itself excludes the compatibility with treaties since these
do not form part of the Constitution. However, in (more or less) monist France,
ordinary courts with civil, criminal or administrative jurisdiction exercise this
review.

274 Review by the Conseil of the constitutionality of organic laws is mandatory. Also review of standing orders of both Houses of Parliament is mandatory, see Art. 61 (1) FC.

275 These are the President, the Chairmen of either House of Parliament (Assemblée and Sénat) or 60 members of either House. See Art. 61 (2) FC. The latter possibility, introduced in 1974, has contributed to an increase in the number of references to the Conseil Constitutionnel since its main effect was to provide the opposition parties a judicial route to challenge legislation they disapproved of. In 1992 the parallel possibility was created for submitting treaties to the Conseil Constitutionnel, see Article 54 FC.

276 Also the a priori review of treaties is facultative, see Article 54 FC. If, however, the verdict is that the treaty is incompatible with the French Constitution, ratification or approval cannot take place unless the Constitution is first amended. In that sense France can hardly be called monist pur sang. Examples of treaties that proved unconstitutional were the Treaty of Amsterdam and the Treaty of Maastricht. See also Remy-Granger (2001), on p. 53.

277 Although it may happen that a statute is reviewed after its entry into force, namely at the occasion of a review (a priori) of a second statute amending this first and unreviewed statute, see CC, 25 July 1989, judgment No. 89-256.

278 That is not to say that the Conseil uses a highly formalistic concept of ‘constitution’ since it does regard the preamble of the Constitution of 1946 (of the Fourth Republic), the ‘Déclaration des droits de l’homme’ from 1789, ‘the fundamental principles of the law of the Republic’ as well as organic laws to be part of the French Constitution, in the substantive sense of the word.

Review *a posteriori* of statutes is possible in one particular case only, namely when the statutory legislator has trespassed (possibly with the tacit consent of the Government) upon the *domaine du règlement*. Than the Government can change such law by decree if the Conseil Constitutionnel has earlier, on the request of the Prime Minister, declared that this law indeed impinges upon the autonomous legislative powers of Government.\(^{280}\)

Hypothetically, a *loi* implementing an invalidated directive can be reviewed *ex post* under Article 37 (2) FC. However, if indeed the *loi* regulates matters falling in the *domaine du règlement*, any legal consequences arise independently from the fact hat it implements an invalidated directive.\(^{281}\) For if Parliament had indeed trespassed on the *domaine du règlement*, for implementation purposes, the Government could at all times 'delegalize' that *loi* irrespective of the directive's validity.\(^{282}\) This is supported by a search through the body of case law of the Conseil Constitutionnel that has not revealed any instances in which a *loi* was invalidated for reason of implementing an invalidated directive. This immunity of the *loi* implementing an invalidated directive provision is confirmed by case law of ordinary courts in relation to the 'Sunday Rest Clause', a provision of the Working Time Directive that was annulled by the ECJ.

The 'Sunday Rest Clause' (Article 5 (2) of Directive 93/104/EEC on the organization of working time, annulled by the ECJ in Case 84/94) was implemented in the *Code du travail*, a *loi*. When employers were sued for not complying with this statute, the Cour de Cassation pointed in an *obiter dictum* to the clause in the Directive, even though it was by that time already annulled by the Court.\(^{283}\)

When in a later similar case, a specific point was made of the annulment of the Sunday Rest Clause by the ECJ, the Cour d'appel rejected this defence, stating that: "cette annulation ne pose pas pour principe la licité du travail le dimanche, mais rappelle que l'inclusion dans la période de repos hebdomadaire est laissée à l'appréciation des Etats Membres, de sorte que l'article L 221-5 demeure applicable."\(^{284}\)

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\(^{280}\) See Article 37 (2) FC. This procedure was applied in order to implement directive 92/43/EEC, see Décret No. 2001-451, *Journal Officiel* of 27 May 2001, p. 8505.

\(^{281}\) In that sense, such a situation would resemble that of the second Franorchamps case before the Belgian Court of Arbitration. See also Section 1.10 on implementation that is invalid for exclusively national reasons.

\(^{282}\) It is not unlikely that the Government, in the process of implementation, uses Article 37 (2) to 'delegalise' previous statutes. However, it only exercises its basic right of protection of the *domaine du règlement*. Again, if the directive would later appear to be invalid, that règlement cannot be said to infringe any constitutional norm.

\(^{283}\) See *Cour de Cassation, Chambre criminelle*, of 5 October 1999, No. 98-83533 and several more cases before this court with the exact same ruling.

\(^{284}\) See *Cour de Cassation, Chambre criminelle* of 11 January 2000, No. 98-84408, where this reasoning of the cour d'appel was confirmed.
A better illustration of the absence of a European per se rule (see Chapter 3) is hard to imagine.

2.3.5.2 Review of Executive Legislation: The Conseil d'État

The Conseil Constitutionnel only reviews statutes, treaties, standing orders of either House of Parliament and organic laws. It cannot review the legality of subordinate legislation nor, quite interestingly, executive legislation emanating from the domaine du règlement. For that the Conseil d'État, the highest administrative court in France, is competent although in its turn, it may not review statutes. It is judge in first and last instance in cases concerning the annulment (recours en annulation) of decrees, ordonnances and arrêtés ministériels (ministerial decrees with general application), in short: it reviews all executive legislation originating in either Articles 37, 38 or 21 FC. Thus, the present constitutional constellation makes the Conseil d'État the judge most likely to be confronted with validity questions on French legislation implementing (invalid) directives since the majority of the directives are implemented at governmental level and not by means of a loi.

For completeness' sake it must be noted that some acts of the French administration are excluded from judicial review: the mesures d'ordre interne, dealing with the internal affairs of an administrative organization, and the actes du gouvernement, decisions of a highly political nature whose legal review would not be appropriate. Amongst the latter are the decrees promulgating a law or the decisions on signing or ratifying an international treaty. However, actes de gouvernement are not likely to serve as measures implementing EC directives. Event though it has been stated already many times in this study that many a directive leaves political decision taking to the Member States, such decisions will not likely qualify as of a


286 But only the ordonnances ex Article 38 FC, not those based upon Article 92 FC.


289 The tendency in France is to limit the scope of both types of acts enlarging the right to bring complaints before a court. See Bell, J. and Others, Principles of French Law, Oxford University Press, Oxford. 1998, p. 179-180.
sufficient level of 'sensitivity' that in the implementing process, France will resort to *actes de gouvernement*.

If, however, that would be the case, the position of private plaintiffs vis-à-vis invalid directives would be pitiful, as demonstrated by the Danielsson case concerning the decision of the French government to do nuclear tests in Polynesia, an *acte de gouvernement*. Whereas the EURATOM-decision of the Commission to approve of such tests was not contestable by private plaintiffs due to *locus standi* problems, the French decision itself could not be contested before national courts since it was an *acte du gouvernement*. Since there was no *locus standi* before French courts either, the decision of the Commission could not be contested by means of a preliminary reference from a French court.

The *recours en annulation*, the direct legal action available to contest executive legislation before the *Conseil d'État*, is in general the action designed to uphold the principle of legality. One variety of this action, the *recours pour excès de pouvoir*, encompasses at least the review of the question whether the administration acted within the hierarchy of written law. An example would thus be the review of the allegation that the government trespassed upon the *domaine de la loi*.

This aspect of the legality review under the *excès de pouvoir* resembles greatly the English concept of *ultra vires*. However, the *recours* expands beyond a control of conformity with higher written law into a control with unwritten law: the *principes généraux du droit*. These principles can be a test of validity for all executive legislation giving them according to some 'a constitutional status' for the executive, also when legislating under Article 37 FC (in the *domaine du règlement*) cannot divert from these principles. They include the right to judicial review, the separation of powers and the principle of equality before the law. Furthermore, the entire *bloc de constitutionnalité*, applied by the Constitutional Council to review statutes, is of course also applicable to the review of executive legislation by the Conseil of State.

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290 See Chapter 2 'Legal review of Directives' and the ruling of the President of the CFI in the Danielsson case: T-219/95R Marie-Thérèse Danielsson and Others v. Commission.

291 Therefore, if France would resort to an *acte de gouvernement*, excluding all forms of possible legal challenge of the implementing measure, one may wonder seriously if France is not violating, as a matter of Community law, the General Principles of Community Law that apply to implementation legislation. See further Chapter 2 on 'Legal Review of Directives' and Chapter 4 'Incidental European Consequences'.


295 Statutes are not reviewed on conformity with the *principes généraux*. However, they must adhere to the *Principes Fondamentaux Reconnus par les Lois de la République*, the 'PFRLR.'
One of the grounds that can be invoked to substantiate a *recours en excès de pouvoir* is *incompétence* which resembles the UK concept of substantive *ultra vires*. An example would be a governmental *décret* encroaching upon the *domaine de la loi*. Another ground can be the *vice de forme*, resembling the UK concept of 'procedural *ultra vires*', meaning that an administrative act is vitiated by an essential procedural requirement. \(^{296}\) Both *incompétence* and *vice de forme* regard the formal validity of an act of the administration. Further review falls under the third and broadest of the grounds for review: the *violiation de la loi* whereby *loi* includes the earlier mentioned *principes généraux du droit*.\(^{297}\)

Thus, review of *ordonnances*, *décrets* and *arrêtés* that implement an invalid directive is not unlikely. As such, there is no controversy about French administrative courts, especially the *Conseil d'État*, regarding the validity of EC law.\(^ {298}\) The latter has never regarded national measures executing Community laws as not being susceptible for judicial review as demonstrated by its ruling in *Union des minotiers de Champagne*, the first case where the Conseil has performed this 'Community court function'\(^ {299}\) and more specifically in the GIE *Vipal* case.\(^ {300}\) In fact, the Council of State seems to take its role as *juge de la validité des actes communautaires* seriously. As such, it accepted to review the legality of Regulation 856/84 in the context of the review of two *arrêtés ministériels* that were founded on a *décret* and in *Demesa* it reviewed measures executing an allegedly invalid Commission Decision.\(^ {301}\) More importantly, in *État de Sarre* it became evident that the *Conseil d'État* in principle may also look into validity issues concerning directives. In this case it had dismissed an argument related to the invalidity of a Directive, but for reasons other than of principle.

The German *Land* of Saarland asked the *Conseil d'État* to review a decision of the Strasbourg Administrative court to annul two *arrêtés* allowing the dumping of radioactive material. One of the legal arguments was that Directive 80/836/EURATOM was invalid. However, the *Conseil d'État* replied that even though the invalidity of this Directive could indeed affect the validity of a *décret*, that *décret*...
in its turn did not serve as the legal basis for the two arrêtés at issue. Hence the issue of the validity of the Euratom Directive was not further addressed (and no preliminary reference was made). 302

The interesting aspect of the État de Sarre decision is that it demonstrates that an obstacle for review of directives may arise if the décret in question may not have been enacted with the specific purpose of implementing the allegedly invalid directive, but it may all the same 'serve as part of its implementation'. In this judgment the Conseil d'État refused to look into the validity of the directive because the contested national law did not implement this directive. A contrario, such legal challenge must be deemed possible if the law were adopted with specific implementation purposes. Indeed, in later cases, the Conseil has addressed the issue of the validity of a directive in relation to French implementation law. 303

Case law such as État de Sarre reflects perfectly the absence of a European per se rule as well as the absence of a French per se rule. If French law is not adopted for the mise en œuvre of a directive (for example if it is pre-existing law), it cannot be challenged for its validity is independent from the validity of the directive. Furthermore, it is not sufficient that the national act is in the champs d'application of the European act. The former must really be regarded as a measure adopted pursuant to duties imposed by the latter. 304 If that is not the case, French law at issue is not likely to be tainted with legal defects that originate in 'legal authority' vested in a directive that later has proven invalid. Such independence, in terms of legality, of the directive could be regarded as a manifestation of what French law calls the théorie du décret écran.

The théorie du décret écran had been applied in the Cooperative Agricole de Rennes case in order to regard as unsusceptible for review an individual administrative act that was based not directly on an EC regulation but rather on a French legislative

302 CE, 27 April 1998, Etat de Sarre, judgment No. 169014: "considérant que le décret du 20 Juin 1966 ne constitue pas la base légale des arrêts attaqués, que dès lors, le moyen tire de l'invalidité de la directive que le décret a pour objet de transposer est, en tout état de cause, inopérant. See also Cassia, P., Le juge administratif et la validité des actes communautaires, 35 RTDE (1999), 409 (431).

303 See CE, 24 November 2003, UNACOM, judgment No. 250304. An association of hunters challenges décret No. 2002-1000: "qu'il aurait été pris pour mise en œuvre en droit français de la Directive 79/409/CEE". This Directive was said to be invalid for lack of legal basis in the Treaties. However, since it was at the time obviously validly adopted on Article 308 EC (the old 235 EEC), the Conseil refused to refer a validity question to the ECJ. See for a case on the compatibility of a directive with Article 308 EC, CE, 25 May 1990, Fédération Rhône-Alpes de protection de la nature, D. 1991.J.114.

304 See Cassia (1999), p. 431 and further, arguing that this case runs counter to the ruling of the CFI in Greenpeace where such an action is deemed to be available, suggesting that being in the champ d'application suffices. See further Chapter 2 'Reviewing an Instrument with a 'dual nature'.

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measure that ensured the operationalization of that regulation. While attacking the legality of the individual administrative act, the exception of illegality was raised against that regulation, but could only be directed against the national legislative act that ensured its operationalisation. As a consequence, the action would be inadmissible, if the décret itself is not tainted with any legal problems as such.

The exact scope of the théorie du décret écran appears uncertain. Yet, it would seem that when a directive is implemented in French law without the directive having been a constitutive factor for lawmaking power, such French law can indeed be said to operate as a ‘shield’ protecting the directive from indirect challenge before French courts. The major exception thereto would of course be the scenario involving ‘double addressing norms’ as discussed in Chapter 4. An example of this latter scenario is the Techna decision. Here, national law implementing a directive is challenged although the case does not contain any references to legal defects emanating from French law. Yet, the ground for review (inter alia the right to property) is a ‘double addressing norm’ allegedly violated by the implemented directive.

In Techna, the validity is challenged of décret 2003-751 implementing Directive 2002/2/EC. The plaintiff argued before the Conseil d'État that the Directive, imposing the obligation to include information on labels, went so far as to deprive him of his ‘business secrets’ such as recipes. This allegedly rendered it invalid for infringing the principle of proportionality. Also the legal basis of the Directive was challenged. Since a preliminary question on validity of this Directive was already referred to the ECJ by the High Court in the UK, the Conseil d'État seemed convinced of a fumus boni iuris and decided to suspend the operation of the décret while waiting for an answer of the ECJ.

The above mentioned cases all concerned the review of directives being implemented by means of arrêtés or décrets, but as discussed earlier, ordonnances too are an important legal instrument for implementation. In the timeframe between promulgation and ratification of an ordonnance, it is an acte réglementaire meaning the Council of State (and not the Constitutional Council) may review its legality. The enabling acts authorising the French government to implement directives by ordonnance (thus directives covering areas of policy

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106 See CE, 29 October 2003, judgment No. 260768. What is also striking is that in this case, the Zuckerfabrik criteria are not as such mentioned, although the French criteria for interim relief seem to correspond with them. Since the UK High Court has already referred the question (see C-453/03, pending), the Conseil d'État declined the request to do so too. See also Section 4.1.
that are normally reserved to the parliamentary legislator) always mention the specific directives that may be implemented by ordonnance. This practice follows from the general requirement that the enabling act must adequately define the scope of the delegated competences. Consequently, if a directive, implemented by means of an Ordonnance, is later annulled by the ECJ, one would expect it to be in its turn subject to an annulment by the Council of State. Indeed, proof thereof is provided in the A.D.E.M. case.

A number of municipalities initiated a recours pour excès de pouvoir before the Conseil d'État against Ordonnance 2001-321 implementing Directive 92/43/EEC. The ordonnance altered several provisions of a statute. Although the invalidity of the Directive could have resulted in the ordonnance being void, it was at the time of the proceedings already ratified by Parliament. Hence, this legal action was now without purpose (‘est devenue sans objet’). Had the plaintiffs been earlier, the Conseil d’État might have been induced to refer a preliminary question on the validity of the Directive.

Not surprisingly, the case law of the Council of State has not revealed any legality problems concerning décrets emanating from the domaine du règlement (Article 37 FC) implementing an invalid directive. As was the case with the statutes, this type of executive legislation is founded on an autonomous basis and is not in any way dependent upon a directive as a constitutive factor. As the loi, the règlement autonome is a means of implementation that will not be affected by the invalidity of the underlying directive as such. Hence, actions for incompétence being brought before the Conseil d’État are not likely to occur.

2.3.5.3 Some Remarks on Locus Standi

When conducting a search through the case law of the Conseil d’État in how it deals with direct annulment proceedings against implementation legislation, one notices that there seem to be not too many restrictions in terms of locus standi. Indeed, this is confirmed by literature on the subject. Whereas the Council of State dismisses in general terms the actio popularis in French administrative law, it nevertheless adopts a quite generous position on locus standi vis-à-vis the recours en annulation of executive legislation. Unlike the draconian requirements that private plaintiffs face under 230 EC the recours en annulation against executive legislation before the Council of State is easily construed, probably even more easily than in the UK. For example, when a

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308 See for example the ruling of the High Court in R. v. Rose Theater Trust Ltd [1990] 1 All ER 954 and of the Court of Session in Scottish Old People’s Welfare [1987] SLT 179.
group of individual plaintiffs is organized for the occasion in an association and the latter does not state its objectives too wildly, a sufficient \textit{intérêt pour agir} will soon be assumed.\[^{109}\]

Thus, the authorization of the French Minister of Health to allow the sale of the morning after pill, a regulatory measure of general application, could be challenged by the 'Association pour l'objection de conscience a toute participation a l'avortement' for violating the ECHR.\[^{10}\]

To make things even easier, there is also the procedural possibility to ask the Prime Minister to abolish an \textit{acte règlementaire}. Against his refusal, one can complain before the \textit{Conseil d'État}.\[^{3}\] And as if that is not generous enough, there is the \textit{exception d'illégalité}, the most usual route of judicial review for regulatory measures.

2.3.5.4 Lower Administrative Courts and Ordinary Courts: The Exception of Illegality

The French legal system has a strongly upheld division of two jurisdictions: ordinary jurisdictions (\textit{l'ordre judiciaire}) and administrative jurisdictions (\textit{l'ordre administratif}). Even though the Council of State is the court that deals exclusively with direct actions against executive legislation (\textit{recours pour excès de pouvoir}), the lower administrative courts may also be confronted with validity questions when a plaintiff invokes the so-called \textit{excéption d'illégalité} in order to invalidate an individual administrative act.\[^{31}\] In case the invalidity of a directive results in the illegality of a regulatory implementation act, the \textit{excéption d'illégalité} may be successfully invoked. Therefore, one could say that the Council of State shares its power to review executive legislation in France with the lower administrative courts,\[^{31}\] as long as one keeps in mind that the legal effects

\[^{109}\]See Brown (1998), p. 166/167 and 181: in this aspect the \textit{recours en annulation} differs from the \textit{recours de pleine juridiction}.

\[^{10}\]CE, 21 December 1990, \textit{l'associaion pour l'objection de conscience à toute participation à l'avortement and Others}, No. 111417 (incidentally: the claim was denied).

\[^{3}\]See the report of the \textit{Conseil d'État} for the 15th colloquium of Councils of States. An example hereof is CE, 3 February 1989, \textit{Alitalia}, dealing with incorrect implementation.

\[^{31}\]Moreover, the two month time limit that must be respected for a direct \textit{recours pour excès de pouvoir}, does not apply. Of course, this limit does have to be complied with for the \textit{recours pour excès de pouvoir} of the individual act challenged before the \textit{tribunal administratif}. Obviously, these procedural arrangements bear strong resemblance to those laid down in Article 241 EC.

\[^{31}\]In fact, the availability of the \textit{exception d'illégalité} before lower courts compensates for the fact that the \textit{Conseil d'État} refuses to apply a directive directly against an individual administrative act, see the Report of the French delegation for the 15th colloquium of European Councils of State.
differ.\textsuperscript{14} A successful annulment by the \textit{Conseil d'État} leads to the act being null and void \textit{erga omnes} whereas the \textit{exception d'illégalité} being invoked successfully before a lower administrative court has only effect \textit{inter partes}.\textsuperscript{15}

Furthermore, the \textit{exception d'illégalité} may also be invoked before other than administrative courts in France, the \textit{jurisdictions judiciaires}.\textsuperscript{16} At this point, French law draws a distinction between criminal jurisdiction and civil jurisdiction. Whereas the criminal courts may decide the validity issue by themselves, the civil jurisdictions must refer a \textit{question préjudicielle} to the administrative judge. Thus, the administrative courts do not have a monopoly on the determination of legality of executive legislation but share it with criminal courts.\textsuperscript{17}

This aspect of French law makes it adamant to regard the jurisprudence of the criminal jurisdictions in France in order to establish whether any invalidity of a directive may have raised the \textit{exception d'illégalité}.\textsuperscript{18} An example of a criminal court investigating the validity of implementation legislation is provided by the ADBHU case.\textsuperscript{19}

The Association des brûleurs des huiles usagées (ADBHU) claimed before the \textit{Tribunal de Grande Instance de Créteil} that Directive 75/439/EEC was invalid. This Directive was at the time implemented in France by Decree 79-981 and two \textit{arrêtés}

\textsuperscript{14} See the report of the French \textit{Conseil d'État} for the 1996 colloquium of the assembly of European Councils of State, p. 174: "un tribunal administratif a qualité pour apprécier à l'occasion d'un litige sur le fond duquel il est compétent, la légalité d'un décret ou d'un acte réglementaire."

\textsuperscript{15} See for an example of such a case concerning a directive (and Article 94 EC): CAA Paris, 23 March, SA LCA, req. No. 98PA02843 and 98PA02844.


\textsuperscript{17} See Brown (1998), p. 147 and 179.

\textsuperscript{18} See for two cases where the validity of Community law plays a subordinate role before a criminal jurisdiction: \textit{Cour de Cassation (Chambre criminelle)}, 96-83661 of 5 March 1998 (no invalidity of the Commission Decision that emanates from the Second Hormones Directive (Directive 88/146/EEC) and \textit{Cour de Cassation (Chambre criminelle)}, 92-81421 of 21 February 1994 (in which the judge mentions the judgment of the ECJ in C-202/88 in as far as that judgment confirmed the validity of Directive 88/301/EEC. French law was in conflict with this valid Directive and therefore non-applicable.

\textsuperscript{19} See for an example of such a case concerning a directive (and Article 94 EC): CAA Paris, 23 March 1998, SA LCA, req. No. 98PA02843 and 98PA02844.

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of the same date. This *exception d'illégalité* led the court to refer a validity question concerning the Directive to the ECJ, stating that the directive's invalidity would result in the French legislation being 'devoid of any legal basis'.

### 2.3.6 Conclusions as to French Law

At first glance, French constitutional law, appears to provide the executive with more far-reaching lawmaking powers than for instance in Belgium or The Netherlands because of its remarkable feature of a *domaine du règlement*. When studying it more carefully, one comes to the conclusion that the executive indeed *does* enact much legislation, although not emanating from the *domaine du règlement*. Most executive legislation implementing directives in France relies ultimately on statutory law in which context Article 21 FC seems pivotal.

When assessing the 'authority' vested in directives in the French legal order, it is therefore important to identify the relationship between directives and the semi-autonomous' governmental laws based upon Article 21 FC. Is the legislative power to implement directives under 21 FC *constituted* by such directives? The answer to that question depends on the terms of the statute and the authority it attributes to a directive. That is even more so for ministerial rules which, unlike governmental lawmaking, always depend upon express delegation provisions. The terms of such delegating provisions will determine whether the *arrêté ministériel* is *ultra vires* after annulment of a directive. Case law of the Council of State and of ordinary courts have demonstrated that in certain cases there may indeed be legal repercussions for *décrets* or *arrêtés* if they prove to implement an invalid directive. Furthermore, French law attributes 'authority' to directives when it allows the Government to implement the directive by *ordonnance*. Interestingly, this appears to be the only instance where French executive legislation may amend or withdraw statutory law for implementation purposes (albeit only for a limited period of time). Thus, apart from the *ordonnance* French law displays no techniques analogous to the British, Belgian or Dutch (see *infra*) Henry VIII clauses.

As far as legal review is concerned, one is inclined to think that not too many of the annulled directives were implemented under terms that made the French legislation become ultra vires. At least, there is no case law indicating this. This paucity of case law, and consequently the paucity of French preliminary references on validity of directives, cannot be attributed to the *théorie du décret écran* as quite a number of decrees may be affected by a directive's invalidity.

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130 As was already mentioned in Chapter 2, see Case 240/83 *Procureur de la République* v. *ADBHU*, on p. 533.
Furthermore, *locus standi* requirements under French administrative law are not insurmountable and, even if that were so, there are plenty of opportunities to have the question of validity of French implementation law indirectly addressed by invoking the *exception d'illégalité*.

### 2.4 The Kingdom of The Netherlands

Dutch law is less outspoken when it comes to the matter of attributing 'authority' to directives. The still prevailing general idea in the Netherlands is that the 'normal' route has to be followed whenever European directives must be implemented. Point of departure is observance of all legislative safeguards that govern the field to which the EC directive applies. Yet, also in the Netherlands certain changes have been made to the law-making process in order to legislate more swiftly for the sake of directive implementation.\(^{321}\) These changes will be addressed hereunder for they may determine the relationship between the directive and its implementation and thus also the consequences of the directive's invalidity.

Dutch central legislation consists of the following three principal categories: at the top of the hierarchy, there is of course statutory law (*Wet in de formele zin*; literally: 'formal law'), enacted by the Government and Parliament acting in concert.\(^{322}\) At the secondary level, one finds the Order in Council (*Algemene Maatregel van Bestuur*),\(^{323}\) legislation emanating from Government and, thirdly, there is the Ministerial Decree which may also be regulatory in nature.

An important feature that The Netherlands share with the UK is that there is no constitutional review of statutes whatsoever, despite one regularly hearing voices pleading for the introduction thereof. That renders the implementation through statutory law less interesting in the context of this study since legal consequences of an invalid directive, if any, cannot be pronounced by a Dutch court on statutes implementing an invalid directive.

This can be illustrated with the Biotechnology Directive, challenged unsuccessfully by The Netherlands before the ECJ.\(^{324}\) The Directive was to be implemented

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\(^{321}\) Although not resulting in the swiftness some had hoped for, see Moor-van Vugt, de, A.J.C., Bonnes, J.M., Voermans, W.J.M. and Bekkers, V.J.M., Implementatieproblemen, gekissebis in het vooronder?, *NJB*, 1992, p. 601-607. Whether or not such measures have been effective, I will not address.

\(^{322}\) Article 81 of The Netherlands Constitution ('NLC').

\(^{323}\) The term Order in Council will be used for convenience purposes, yet it must be noted that 'Council' in Dutch context refers to 'Council of Ministers' whereas in the UK context it refers to the Privy Council. British Orders in Council therefore need not be discussed by a *plenum* of all UK ministers, unlike their Dutch counterparts.

by a statute (amending the Patent Law 1995). In a parliamentary debate on this issue, the Government stated that patents for biotechnological inventions would be granted on the basis of this statute and not on the basis of the Biotechnology Directive and that consequently "there will be no effects whatsoever on the validity of any biotech-patents after the Directive would be annulled".\textsuperscript{125}

2.4.1 Implementation in The Netherlands

As in all Member States, most Dutch implementation takes the form of subordinate legislation, mostly orders in Council and Ministerial decrees.\textsuperscript{126} One of the very basic principles of Dutch constitutional law is that of legality in relation to legislative powers of the administration.\textsuperscript{127} All Orders in Council and Ministerial decrees must therefore be based upon proper delegation that can (ultimately) be led back to a statute.

The Constitution does attribute certain lawmaking powers upon Government that do not depend upon prior delegation by statute but these are subject to an important limitation (they cannot be sanctioned by penal provisions) and it is now part of 'political custom' to use it only with the greatest restriction.\textsuperscript{128}

Nevertheless, the potential scope of application of these autonomous governmental lawmaking powers is quite large. Apart from the restriction not to use them under sanctioning of penal provision they may apply to any type of policy as long as the Constitution has not attributed such policy areas exclusively to the statutory legislator, such as taxation.\textsuperscript{129} A more important restriction is of course that the statutory legislator may not have 'occupied' that particular field of policy because Orders in Council, including independent Orders in Council, may not conflict with statutes (unless they are based upon a Henry VIII clause, see infra). In that sense

\textsuperscript{125} See the Nota naar aanleiding van het verslag, Proceedings of the House of Commons, 1999-2000, 26568, No. 5, on p. 4, where it was also stated that things would be different if the ECJ were to find the Directive violating any international treaties, thus referring to the possibility of a 'double addressing norm'. See also Proceedings of the House of Commons, 1999-2000, 26568, No. 5, on p. 5 where the Government states that any damages consisting out of patents being repealed would not be a result as such from the invalidity of the Directive but of the consequent amendment of the Dutch statute.

\textsuperscript{126} In Dutch language respectively: Algemene Maatregelen van Bestuur and Ministeriële Besluiten, see also Donner, J.P.H. and Others, Community directives, effects, efficiency and justiciability. SEW, 1998, p. 122 - 136. See Besseling (2002), p. 109: about two thirds of the implementation of EC directives is by subordinate legislation.

\textsuperscript{127} Ever since HR 13 January 1879, W 4330 (the Meerenberg judgment).

\textsuperscript{128} See Article 89 NLC.

\textsuperscript{129} See Article 104 NLC., in fact laying down the principle of 'no taxation without representation', see also Van der Pot-Donner (1989), p. 588. Yet, this principle has in practice proved untenable and subordinate legislators have imposed taxes, under the proviso of later approval by the statutory legislator.
this autonomous lawmaking power may not be identified with the Domaine de la loi as enjoyed by the French Executive.\textsuperscript{310}

Despite the fact that it is politically 'not done' to legislate by means of an independent Order in Council, one may well wonder whether recourse to such a legislative instrument could not be justified in the context of directive implementation. In the discussions that have taken place in The Netherlands on how to swiftly implement directives under preservation of certain constitutional values, one does not hear much argument in favour of a 'revival' of the independent Order in Council for implementation purposes (of course under the proviso that such would only be used for directives leaving not much discretion). If directives were to be implemented by means of these autonomous Orders in Council, the consecutive invalidation of such a directive would be without legal effects. In that sense it would resemble implementation in France under lawmaking powers emanating from the domaine de la loi.

Apart from the requirement of being based upon statutory law, the Order in Council also encompasses the safeguard of having to pass in draft by the Council of State, which is, as in France and Belgium, also in The Netherlands an organ with both an advisory and a judicial function. A third requirement is that their drafts have to be discussed in the Council of Ministers.\textsuperscript{311}

These latter two requirements do not apply to the third type of legislation, perhaps most frequently used for directive implementation, the Ministerial decree. The Dutch Constitution does not mention the Ministerial decree, nor does it prescribe any procedure for its adoption, yet they are in terms of quantity the most commonly used type of subordinate regulation in the country. As Orders in Council they must be based upon a statute or, most likely, upon an Order in Council that is in its turn based upon a statute (sub-delegation), pursuant to the principle of legality.\textsuperscript{312} It seems that implementation through the 'normal' routes for subordinate legislation leads to a great deal of ministerial power. This phenomenon may also be detected outside the context of implementation of EC legislation. Nevertheless, the implementation process strengthens this development.

Although seemingly unproblematic, the normal procedure risks to be stretched beyond its limits. The use of delegated powers to implement EC directives can

\textsuperscript{310} Independent Orders in Council these days are most likely to be used for 'internal' regulation, meaning only binding public authority themselves without the intention to bind citizens (external effect).

\textsuperscript{311} They also differ from Ministerial Decrees in the mode of their publication: they are published in the Dutch Bulletin of Statutes and Orders (Staatsblad) whereas the Ministerial decree is published in the Official Gazette (Staatscourant).

\textsuperscript{312} Ministerial decrees based upon an 'autonomous' Order in Council are naturally even more rare than the autonomous orders themselves.
become more extensive than the original delegating statute ever intended it to be.\textsuperscript{333} When extensive use is made of a delegated power in order to implement the directive, it is not unlikely that the statute, delegating this power to the lower level of administration, will no longer provide the structural elements of the regulated matter.\textsuperscript{334} The principle of the primacy of the legislature is then again affected. Moreover, if such practices lead to delegated legislation that goes beyond the scope of its statutory basis it could even be considered \textit{ultra vires}.\textsuperscript{335} However, then one is dealing with invalidity \textit{a priori}: such legislation is invalid anyway, irrespective of the invalidation of the underlying directive.

Considering that implementation in The Netherlands usually takes place at subordinate level, and that there is a strongly entrenched principle of legality, it becomes interesting to examine the terms under which lawmaking powers are delegated. In particular, the question arises whether the directive is a ‘constitutive factor’ for such delegated lawmaking powers, either for the Dutch Government (Order in Council) or for individual Ministers (Ministerial Decrees).

In many cases delegated lawmaking powers (either to Government or to individual Ministers) are not dependent upon the directive as a constitutive factor. If implementation takes place through such powers, there are no legal consequences of the invalidity of the directive for subordinate implementation legislation.

An example is the Dutch implementation of Directive 94/43/EC on plant protection products. This directive, invalidated by the ECJ in the \textit{Pesticides case}\textsuperscript{336} was implemented by subordinate legislation (an Order in Council) that was based upon Section 3a of the Pesticides Act 1962 that simply grants the Government the powers to further elaborate the matters regulated in that Act. When Directive 97/57/EC was adopted in order to replace its annulled predecessor (but retaining the same content), the exact same Dutch subordinate legislation was notified to

\textsuperscript{333} See for instance Parliamentary Proceedings of the House of Commons, 1998-1999, 26200 VI, No. 65, on page 3: ‘intensive use of the delegation-instrument should only be possible in case of implementation with limited national discretion’.

\textsuperscript{334} There are also ‘framework’ statute laws that contain not much more then the authorization to legislate on a lower level everything that is needed for the implementation of EC law, for example the EC Framework Act on public tenders (\textit{Raamwet EEG-voorschriften aanbestedingen}), Staatblad 1993, 212. It has been argued that this practice has the advantage that everything is regulated on one level and not partly on statute law level, partly on a lower level, so that the legislation becomes more accessible (Proceedings of the House of Commons, 1998-1999, No. 20038, p. 6).


\textsuperscript{336} C-303/94 European Parliament v. Council.
the Commission as implementing this new Directive which could be regarded as proof that the earlier implementation has not suffered any legal consequences of the invalidity of the Pesticides Directive.

However, more and more statutes in The Netherlands contain delegation sections that do attribute to directives (and usually other international and European binding decisions) a constitutive quality. Thus, one would assume that such executive lawmaker powers are subject to the continuing existence of the directive they purport to implement into Dutch legislation.

This assumption appears incorrect when looking at the Dutch implementation of the Titanium Dioxide Directive, partly implemented by powers delegated under the Surface Waters Pollution Act to an individual minister. Interestingly, after annulment of the Titanium Dioxide Directive and the consequent adoption of the new Directive (Directive 92/112/EEC, having the same contents as the annulled Directive), these Ministerial regulations were communicated again to the Commission as the correct implementation of the new Directive 92/112/EEC. There apparently had not been any legal consequences of the annulment of the First Titanium Dioxide Directive.

The example of the implementation of the Titanium Dioxide Directive brings into the picture another aspect of Dutch implementation. The statute that was the basis of the Ministerial regulations implementing the Titanium Dioxide Directive also provided that where the Dutch Government may enact Orders in Council, this power to do so is exercised not by the Government (by Order in Council), but by an individual Minister. Thus, not only may the Directive be a constitutive factor for the lawmaker power as such, it may also determine the level where this executive lawmaker power is exercised. Lawmaking ‘descends’ one level in order to facilitate directive implementation.

Perhaps the best example thereof may be found in the Dutch ‘Sanctions Act 1977’ (Sanctiewet 1977). It delegates extremely wide ranging powers to the Government to execute treaties and regulations. At the same time, it very liberally delegates powers to the ministerial level in cases of mere execution of binding decisions of

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337 Another part of the Directive was in fact implemented under delegated lawmaker powers for which the Directive was not constitutive, namely Section 8.44 of the Environmental Management Act (see the Besluit Emissie-eisen voor titaniumdioxide-inrichtingen, Bulletin of Laws and Decrees, 1993, 324.
338 See the Ministerial Decree of 22 December 1989, Bulletin of Laws and Decrees (Staatsblad), 1989, 618.
339 Which may be mandatory or discretionary. An example of the latter is Section 61 of the Fertilizer Act.
340 See Article 21.6 of the Environmental Management Act (Wet Milieubeheer), Article 1a of the Act on the Pollution of Surface Waters (Wet Verontreiniging Oppervlaktewateren), and, most recently, the changes made to the Sanctions Act 1977 (Sanctiewet 1977) and the Act on Imports and Exports (In- en Uitvoer-wet).
international organizations, e.g. an EC directive. Most striking is the fact that by these delegated powers, rules may be set that deviate from statutory law, even if they were sub-delegated to the ministerial level.

As said earlier, the procedure for enacting a Ministerial decree is not endowed with the same safeguards as for adopting an Order in Council. Whenever statutory law delegates powers to a certain level of authority, it has in mind the safeguards inherent to that specific level. Invalidation of a directive thus implemented does not raise the issue of ultra vires delegation but of ultra vires sub-delegation.

Thus, Dutch law may attribute considerable ‘authority’ to directives. They may be designated as constitutive for the executive lawmaking power, may justify sub-delegation to individual ministers and waiver mandatory consultation (see infra). Finally, they may justify recourse to ‘Henry VIII clauses’ although the latter issue is quite controversial in The Netherlands (see infra).

Hereby the safeguards against ‘democratic leakage’ are not uniform and appear even a bit haphazard. Some statutory provisions delegate lawmaking powers if there is an ‘obligation’ emanating from international or European law, others determine that such lawmaking powers may only be exercised when they purport exclusively to implement such obligation. Furthermore, the scope of delegation may differ considerably. Whereas some statutes only delegate rule-making powers to implement a specific directive mentioned by name others go so far as to delegate such powers for all directives that may from time to time touch upon a certain policy issue. There are no statutes that attempt to define the amount of discretionary powers left by directives to The Netherlands.

In one particular aspect Dutch law attributes a great deal of ‘authority’ to directives and it does so in an overarching way potentially covering all Dutch implementation. The Dutch General Administrative Code (Algemene wet Bestuursrecht) provides that in all cases where there is a legal obligation to ask for an opinion, to consult or to inform advisory bodies, such an obligation does not apply if the measure is intended to ‘only implement’ an EC directive. The

147 Being in this case the Aliens Act. See supra.

148 See Articles 2 and 4 of the Sanctions Act. These Ministerial rules may even be to the detriment of aliens in case sanctions require that their access to or residence in The Netherlands is denied.

149 For a Ministerial decree, there is for example no obligation to ask the Council of State (Raad van State) for advice nor does it have to pass in draft the Council of Ministers.

150 See for instance Section 2a (2) of the Surface Waters Pollution Act and Section 21.6 of the Environmental Management Act: ‘uitsluitend strekken tot’

151 See Section 33(6-8) of the Media Law (that also contains a Henry VIII clause).

152 See Section 18 of the Tobacco Law and Section 120 of the Housing Act.

153 It then becomes facultative. Only the advice of the Council of State remains mandatory although it has been suggested in Parliament that that too should be abandoned. See also the Dutch Legislative Guidelines, number 336.
level of lawmaking is irrelevant since the rule even applies to the preparation of statutes. Some authors in Dutch legal doctrine have protested against this alteration of lawmaking procedures or at least they have warned against using it too liberally, warning against ‘democratic leakage’.

Interestingly, this rule can even be combined with other techniques for swift implementation. A measure, normally laid down by an order in council, could be taken by an individual Minister who is then also released from his obligation to ask an advisory body for its opinion. For example, the proposed Article 3.1 of the Law on Environmental Protection envisaged such a combination: the deviation from higher law by ministerial decree was accompanied by a waiver of the duty to pre-publish the decree.

It is the ‘authority’ that Dutch law attributes to the directive that justifies the waiver of mandatory consultations. Hence its invalidation by the ECJ is bound to have legal repercussion in The Netherlands. Although not constitutive for the lawmaking powers as such, the adopted measures do violate a procedural requirement that was legally mandatory. Dutch courts may strike down such executive legislation which later appears to have violated such requirements.

2.4.2 The Dutch ‘Henry VIII Clause’

Generally, directives are implemented by amendment of the type of legislation that previously governed the policy area, yet there may be exceptions. If a higher type of legislation withdraws or amends the previously enacted subordinate legislation in order to adapt it to a directive there is of course no problem. Yet, a constitutional issue, heavily debated, has arisen if implementation takes the ‘other direction’: if the directive is implemented by means of subordinate legislation that amends or repeals higher-ranking law. Such a phenomenon, for convenience purposes designated here as a ‘Henry VIII
clause’ may not be very controversial in the UK and less controversial in Belgium but has proven to be quite a ‘hot potato’ in The Netherlands.

In The Netherlands ‘Henry VIII clauses’ have been introduced in statutory law. Dutch statutes may contain a provision allowing some or all of their provisions to be set aside by Government through an Order in Council. There has been quite some controversy about this alternative lawmaking procedure, be it long after its first introduction into the Dutch legal system. In the course of this debate, the Dutch Government has developed conditions for its use, one of these being the obligation to replace the subordinate law as soon as possible by legislation at the appropriate level.

The controversy arose when the proposal for the new Telecommunications Act 1998 was submitted to the Senate (after its approval by the Lower House of Parliament). The drafters of this law had provided it with a standard procedure for quick implementation whereby the executive could in the future set aside provisions from this new Act.

Interestingly, this technique had already been used on several other occasions. In 1960 it was put down in a statute, apparently without any problems in either House of Parliament. Why it never led to any debates before is unclear.

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353 Or, in some cases, to an individual Minister.
354 Or, especially if such power is given to an individual Minister to deviate by Ministerial decree from an Order in Council.
355 The practice of official ministerial announcements that the Minister will simply no longer apply a statutory provision resembles this technique. It has been done several times with the former Dutch Law on Telecommunications, an act that, as Hins states ‘could not be read without a manual anymore’. See Hins, W., An Ambiguous Story about the supremacy of EC law, report from the Netherlands, in: Vandamme, T.A.J.A. and Reestman, J.-H., Ambiguity in the Rule of Law, the Interface between National and International Legal Systems, Europa Law Publishing, Groningen, 2001, p. 83. The discussion in Parliament is impressive by standards of length; the Parliamentary proceedings concerning this topic consist up till now of more than 100 pages, to be found under number 26200-VI, No. 65 (about implementation in general) and under number 25533 on the new Telecommunications Act 1998.
356 In a legal-historic context, this is interesting since there was a discussion in The Netherlands after World War II on whether or not the decisions taken by the Government in exile (which would also deviate from older statute law) needed approval after the war by the then re-established Dutch Parliament.
358 Certain Members of Parliament were shocked when they found out that at least 11 existing laws contained similar provisions as the one contained in the proposal for the Telecommunications Act 1998. Parliamentary proceedings of the Senate, 1999-2000, 26200 VI, No. 165 on p. 5. Although these laws were approved by Parliament before, these MPs demanded a review in the light of the present debate.
may be due to simple unawareness at the time, but it may also reflect a present revival of consideration for the constitutional quality of legislation and the primacy of the legislator. If a Senator opposing this technique was confronted with the fact that in the past both Houses of Parliament approved several of these laws he exclaimed 'mea culpa, mea maxima culpa' but then stressed that Parliament, if wrong, can repair its mistakes.\footnote{See the remarks of Senator Jurgens (Labour party), Parliamentary proceedings of the Senate, 2000, 26200-VI, nr 65, 2-64.} What then followed was a structural debate on the balance between swift implementation of EC directives and national constitutional values. Or to put it in terms of this study: a debate on how much legal 'authority' should be attributed to directives in Dutch law.

The Henry VIII clause gave rise to the Dutch constitutional question whether this legislative technique, swift as it may be, constituted unauthorized attribution of powers.\footnote{A second issue that arose was that of transparency.} Opponents claimed an infringement of the Constitution because this technique involves attribution rather than delegation of legislative powers. If the Government could set aside statutory law it had in fact become a statutory legislator, a status the Constitution never gave it.\footnote{Except perhaps in times of war, since in World War II the Government in exile made several 'laws' conflicting with pre-existing statute law. But then, of course, there was no Parliament in function.} The power to amend statutory law belongs to the primary legislature, i.e. to the government and parliament acting in concert, as provided for by Article 81 of the Dutch Constitution. By contrast, advocates of the Henry VIII clause, such as the Dutch Government, argued that it had to be considered as a type of delegation, not as attribution.

One should not think that this legislative technique is applied only in very technical legal areas and then seek the reasons for its earlier acceptance there. Already in 1965, it was introduced in Article 49 of the Law on aliens (Vreemdelingenwet). This reads: "In order to implement (...) a binding decision of an international organization, it is possible by means of an Order in Council (...) to deviate from this law."\footnote{Important condition is that it may only be in favour of foreigners. Changes to the detriment of foreigners have to be laid down in the law itself.} This possibility has indeed been used to implement EC directives,\footnote{Which happened in the Aliens Decree, (Vreemdelingenbesluit), an Order in Council.} leaving Parliament with little influence.\footnote{This aspect of the Aliens Act was already in 1979 heavily criticized by Swart. The provision has, however, not changed since 1965. See Swart, A.H.J., "De rol van het Parlement bij uitvoering van verdragen", NJB. 1979, p. 264.} Interestingly the Students Residence Directive was implemented by this Henry VIII clause in the Law on Aliens. Since the ECJ preserved the legal effects of this Directive at its annulment, the use of the Henry VIII clause could not be challenged before Dutch courts (see infra).
The debate ended with the Government indicating that it would, when proposing bills for statutes containing Henry VIII clauses, stick to certain 'guidelines'. The most interesting of these guidelines is probably the intention to not use such clauses when they leave the Member States a 'considerable amount of discretion'. This condition intends to tackle the issue of 'democratic leakage'.

Another 'guideline' worth mentioning is that the use of Henry VIII clauses must always be temporal, a safeguard that to some extent also exists in Belgium and France. Indeed, some of the existing Dutch Henry VIII clauses that did not contain such a duty to replace subordinate legislation with the proper statutory provisions have now been brought 'up to date'. For this study, it is clear that inserting such provisions in Henry VIII clauses has an effect upon the possible invalidity of the Directive. The implementation legislation becomes 'immune' so to speak and will not suffer any consequent effects if the directive is invalidated after the Order in Council has been replaced by statute.

### 2.4.3 Dutch Courts and Implementation

Where a directive was constitutive for lawmaking powers, had justified a simplification of legislative procedure or the use of a Henry VIII clause, the question imposes itself as to how Dutch courts could respond to such an incidence. Considering the growing importance of such 'alternative lawmaking' one would expect the invalidation of a directive to have effects upon such implementation in The Netherlands. Yet, even though the question of validity of a directive could therefore be crucial, it has not often arisen in Dutch court rooms. As a matter of fact, since 1958 there have only been two instances where a Dutch court has referred a preliminary question on validity to the ECJ.

These two references emanated from the Dutch Antillian Dairy Case and the Jippees Case. In the Dutch Antillean Dairy Industry case a preliminary validity question was asked by the Industrial Appeals Tribunal (College van Beroep voor het Bedrijfss-

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365 Although there are some argue not sufficiently, see Besselink (2002), p. 127, taking a more strict standpoint on the matter and arguing that democratic leakage may still occur when using this criterion.

366 See for instance the previously mentioned Article 49 of the old Law on Aliens, which did not require this and has been repealed. The Henry VIII clause in the New Aliens Law 2000 (Section 109) is in line with the Government guidelines.

367 Although in the exceptional case where a Ministerial decree sets aside an Order in Council for implementation purposes, and is later replaced with a proper Order in Council, it could of course still be the case that the power to adopt the later Order in Council still depends upon the validity of the directive of the terms of delegation attributing constitutive status to this directive. Also mandatory consultations may have been waived.

368 See respectively C-106/97 Dutch Antillian Dairy Industry Inc. v. Rijksdienst voor de keuring van Vee en Vlees and C-189/01 Jippees and Others v. Minister van Landbouw, Natuurbeheer en Visserij.
leven) concerning Directive 92/46/EEC on the marketing (health) requirements for raw milk.\textsuperscript{369} The Directive would allegedly be invalid because of \textit{inter alia} breach of the principle of proportionality and of Articles 2, 4 and 5 of the WTO Agreement on Sanitary and Phyto-Sanitary Measures.

In the \textit{Jippes} case, the issue was raised of the validity of Directive 85/511/EEC prohibiting the vaccination of farm animals against foot and mouth disease. Mrs Jippes claimed before the Industrial Appeals Tribunal that the Directive was \textit{inter alia} violating the General Principle of Community Law on animal welfare.\textsuperscript{370} In both these cases one finds no elaboration in the national proceedings on the constitutional relationship between these Directives and their Dutch implementation. A possible explanation could be that in both cases the Directives were said to violate what is earlier named a 'double addressing norm'.\textsuperscript{371}

Several possible reasons may underlie the paucity of such preliminary validity references. First of all Dutch statutes implementing an invalid directive are, as a matter of Dutch law, immune to review. Even if the invalidity of the directive would trigger in some way the incompatibility of such a statute with the constitution (a scenario that one has seen in Belgium in relation to the implementation by statute of the Tobacco Advertising Directive), that cannot give rise to legal proceedings before Dutch courts.\textsuperscript{372}

When primary legislation is at issue, courts only review the conformity of statutes with provisions of international treaties or of resolutions of international organizations.\textsuperscript{373} Thus, as often pointed out in Dutch legal writing, one looks at a very a-symmetrical situation in which a Dutch judge can review the conformity of statutes with international treaties but not with the Dutch Constitution. The background of this 'positive discrimination of international law' lies on the one hand in the old beliefs in the quality of the legislator and on the other hand in the idea that the courts should not involve themselves with legislative activity, that should

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\textsuperscript{369} Directive 92/46/EEC laying down the health rules for the production and placing on the market of raw milk, heat treated milk and milk based products.

\textsuperscript{370} More in particular, it's Article 3. The Convention was approved by means of Council Decision 78/923/EEC.

\textsuperscript{371} See Chapter 4, as far as C-189/0 \textit{Jippes}, is concerned, this statement is of course under the proviso that the principle of animal welfare would have remained applicable to national implementation law after annulment of the directive.

\textsuperscript{372} The same is true for the Kingdom Statute (the constitution of the, more or less federal, Kingdom of the Netherlands comprising besides the European part also the constituent parts of the Dutch Antilles and Aruba) which, in the hierarchy of norms, is even superior to the Constitution of the (European) Netherlands. Also review of primary legislation in the light of general principles of law is excluded, see the Dutch Supreme Court (\textit{Hoge Raad}) in the Harmonisatiewet case, HR 14 April 1989, NJ, 1989, 469.

\textsuperscript{373} See article 94 and 120 NLC.
remain reserved to the Crown and the two Chambers of Parliament. However, fewer and fewer people are nowadays convinced of the 'quality of the legislator'.

However, that cannot account for the fact that preliminary validity references are so few in number since the majority of directives is implemented by means of subordinate legislation. Under Dutch administrative law, subordinate legislation can be reviewed on its conformity with higher norms such as the Constitution or statutory law (in particular the 'parent act') and legal principles, mainly arbitrariness or willekeur.

One issue that may possibly be relevant for the topic of this study, is that sometimes review of secondary legislation may prove to be boiling down to a constitutional review of the primary law, for instance if the parent act delegates lawmaking powers to the executive where this is prohibited by the Constitution.

Yet, although review is possible, there is a substantial procedural hurdle that may in effect limit the number of cases where implementation is being judicially scrutinized (and which may account for the paucity of validity references). This is the absence under Dutch administrative law of a direct review action against legislative measures, in Dutch commonly denominated as 'generally binding provisions' (algemeen verbindende voorschriften). The General Administrative Code (Algemene wet bestuursrecht) provides excludes such provisions from appeal or judicial review (bezwaar en beroep).

This exclusion from direct review by administrative courts is not without criticism. In fact, the original plan was to lift the ban to review general acts from the 1st of January 1999. That has later been abandoned until further notice. It is gene-

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374 Koopmans wrote in this respect: "Confidence in the wisdom of representative bodies which had characterized Dutch political culture for a considerable period of time seemed to erode." Equally, Dutch Senator Jurgen uttered heavy criticism on the (much higher) value that is attributed to primary legislation in relation to 'executive' regulations. See Jurgen (1993), p. 1381.

375 On paper the administrative courts may exercise a more substantial review than civil courts, but in legal practice, they decline to do so. Both civil courts and administrative courts apply the principle of arbitrariness, comparable to a sort of 'Wednesbury test' as applied in UK courts, see Zwart, T., and Goudappel, F., Judicial Review Exercised by Ordinary Courts and Administrative Courts in The Netherlands, a Comparison, ERPL, 2000, p. 665.

376 See Boon (1999), pp. 22-23.

377 See Article 8:2 under a. of the General Administrative Code: "Geen beroep kan worden ingesteld tegen een besluit inhoudende een algemeen verbindend voorschrift".

rally held that the real reason for the exclusion is that Dutch courts should not obstruct the executive authorities in pursuing their policy that could be paralyzed if all their general acts were open to legal review.\textsuperscript{379} Criticism against the ban on review is provided by Vermeulen who stresses the importance of the legality of an act becoming clear at an early stage. Such early clarity is enhanced by a direct possibility for administrative courts in The Netherlands to review legislative acts.\textsuperscript{380} Another example of criticism was promoted by Het Lam who stressed that in certain specific laws, review of general acts was already made possible.\textsuperscript{381}

What remains is indirect review by arguing in administrative proceedings against an individual decision the invalidity of the regulations on which such a decision was based, \textit{(exceptie van onverbindendheid)}.\textsuperscript{382} It is debatable whether or not the courts are to perform under all circumstances such a legality review \textit{ex officio}.\textsuperscript{383} What is certain, however, is that they must do so if an earlier court has established the inapplicability in an earlier judgment.\textsuperscript{384}

For legal finesse, it must also be added that the situation where an administrative court declares the implementation legislation inapplicable is not identical to the situation where such legislation is to be declared void \textit{(buitenwerkingstelling)}. The latter type of judgment may be pronounced by courts but only in more extreme cases where the inapplicability is unmistakable \textit{(onmiskensbaar onverbindend)}.\textsuperscript{385}

Researching the Dutch (administrative) case law databases has not revealed any instances where this 'judicial avenue' has been explored for the challenging of implementation legislation tainted with legal defects resulting from the invalidity of a directive.

\textsuperscript{380} Zie Vermeulen (2001), p. 211.
\textsuperscript{381} See Het Lam (1999), p. 896. He mentions Article 16 (2) of the Ambulance Transportation Act (\textit{Wet ambulancevervoer}), Article 17(1) of the Meat Inspection Act (\textit{Vleeskeuringswet}), Article 17(1) of the Medicine Pricing Control Act (\textit{Wet op de Geneesmiddelenprijzen}) and the new Electricity Act 1998 (\textit{Elektriciteitswet} 1998).
\textsuperscript{382} This indirect review mechanism of course bears a great deal of resemblance to its European counterpart, the plea of illegality under Article 241 EC.
\textsuperscript{385} See Dutch Supreme Court, the \textit{LSV} case, judgment of 1 July 1983, \textit{NJ}, 1984, 360. See also Boon (1999), p. 88 and 135 and Ten Berge and Widdershoven (2001), p. 315. One of the circumstances is that there is no other form of relief available.
Indirect review may also be performed by Dutch criminal courts. The implementation legislation may be violated, possibly on purpose, and the validity question can consequently be put before the courts as legal defence. If accepted, such a defence will lead the court to pronounce the invalidity *(onverbindendheid)* of the regulations and honourably discharge the defendant.

A third possibility is that of taking recourse to Dutch civil courts, instituting a tort action against the Dutch State. In that scenario the tort consists of the adoption of subordinate legislation that is allegedly invalid. In principle, as long as the plaintiff argues infringement of rights that civil courts (the judiciary) must protect, the latter will consider themselves competent. This is the only direct action against unlawful legislation, be it that the object is obtaining damages rather than to have the legislation quashed. In fact, the instances where relief by civil courts is pursued against the Dutch State often involve tort actions against regulatory measures. Unlike indirect administrative review, there is no need for the plaintiff to await a directly challengeable executive act. After adoption of the implementation legislation he can immediately start a tort action before a civil court. As before administrative courts, the ground for tort may be inapplicability *(onverbindendheid)* of the regulations, following from the violation of a higher norm. When dealing with civil courts, there is in Dutch law a subtle difference between legislation being invalid *(onverbindendheid)* and being tortuous *(onrechtmatigheid)*. Before civil courts the former serves as the basis for the latter and courts will necessarily assess the validity of the legislation before granting any damages.

It has been argued by some that *onverbindendheid*, with its effects *erga omnes* and *ex tunc* (see for the *erga omnes* effect the earlier observation on the validity question being an *ex officio* issue if earlier courts have pronounced their invalidity) may have too many repercussions for the legal community, particularly those people

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186 Acting in tort action, it must be stated that ‘guilt’ is in these types of tort actions against the Dutch state not a requirement of any significance, see De Savornin Lohman (1988), p. 1: “het vaststellen en uitvoeren van onverbindende wetgeving is onrechtmatig. (...) Het schuldvereiste speelt in dit verband nauwelijks een rol.” An action against primary legislation is again not possible, unless the ground for invalidity would be violation of EC law and certain international law norms.

187 Although, despite this competence, they will dismiss the claim as inadmissible if the plaintiff could have obtained relief before an administrative tribunal or the administrative chamber of the court of first instance, see also Kortmann (2001), p. 259.

188 This is generally accepted by The Netherlands Supreme Court *(Hoge Raad)* in 1969, see NL, 1969, 316. See also the standard *Landbouwvliegers* case, HR 16 May 1986, AB, 1986, 574. See also Boon and Others (1999), p. 133.


191 The other ground being infringement of the principle of arbitrariness *(willekeur)*.
not party to the tort-proceedings against the state and that the tortuous quality
vis-à-vis certain persons who commence proceedings should play a more inde-
pendent role, meaning that the government regulations need not be pronounced
(implicitly) to be inapplicable by the civil court. There is an interesting parallel to
be drawn here between the Dutch legislator and the EC legislator. As was argued
before, EC legislation may make the Community liable for damages under Article
288 EC but that does not necessarily mean that such legislation is to be with-
drawn.

It is thus established that, whenever subordinate implementation legislation was
adopted under provisions attributing to a directive the authority of an act justifying
a change in legislative procedure, such legislation is open for indirect review
by the administrative, criminal and civil courts. As of yet, there have not been
any instances yet where a Dutch court was confronted with a validity question
relating to Dutch accelerated implementation.

One situation that 'came close' concerned the Dutch implementation of the
Laying Hens Directive (86/113/EEC). This Directive regulating the, at times
emotional, issue of the maximum sizes for cages for laying hen batteries intro-
duced norms (minimum sizes for battery cages) that were a bit more strict than
the pre-existing norms laid down in the Law on Laying Hens Batteries, a statute.
The Directive was implemented by an Order in Council, amending the norms laid
down in the statute, thus resting upon a Henry VIII clause. No legal problem arose
after annulment for two reasons, the first was that the Dutch implementation
process was (despite the Henry VIII clause) so slow that before adoption of the
Order in Council, the Laying Hens Directive was already annulled by the ECJ and

1. He advocated tortuous as a qualification far more suitable than void in many cases where legislation
was concerned. More in particular, he wrote: "If there is a conflict with a higher ranking law, be it on
the basis of substance or procedure (emphasis added), this defect should not result in nullity of the lower
legislation" (translation TV). He continues, however, stating that the incorrectness of the legislative
procedure may result in a tort by the Dutch state. He sees many disadvantages to the nullity of legisla-
tion, some of which resulting from its retroactive effect and its effect erga omnes.

193 See De Savornin Lohman (1988), p. 3: "Dat strijd met een hogere regeling tot onverbindendheid kan leiden
vloeit min of meer vanzelf voort uit ons constitutionele recht met zijn hierarchische structuur. Yet, he argues
that some norms may not be sufficiently serious so as to lead to the declaration of the regulation being
void by civil courts but rather that such norms being violated would merely render the state liable for
paying certain damages as a consequence of this violation.

194 See the Laying Hens Minimum Requirements Act (Wet houdende vaststelling van minimumeisen voor het
houden van legkippen), in particular its Section 4(4) containing the Henry VIII clause. Bulletin of Laws
and Decrees (Staatsblad), 1984, 272.
replaced by Directive 88/166/EEC having the exact same content as its predecessor.  

But assuming that implementation was in time, the Order in Council would still not be tainted with any defects following the annulment of the Directive. Reason is that the Henry VIII clause in the parent statute was formulated in a neutral way stating simply that 'other laws or subordinate legislation may introduce stricter norms' not mentioning that such stricter norms would be necessitated by directive implementation (or other international requirements). Thus, the clause was formulated in a way that the Laying Hens Directive was not a 'constitutive factor' for executive lawmakers.

Another case that came close was the implementation of the Students Residence Directive. Since the Order in Council implementing this invalidated Directive was based upon powers for which the Directive was constitutive (there had to be a 'binding decision of an international organization'), the Order was ultra vires. Yet, as previously discussed in Chapter 4, the ECJ had preserved the effects of this Directive so the validity issue did not arise.

Where the implementation of the Laying Hens Directive and Students Residence Directive 'came close' to being invalid, the Dutch regulations implementing the Titanium Dioxide Directive, discussed earlier, were definitely invalid.

It seems inevitable that sooner or later the first Dutch preliminary references on the validity of directives may be expected where the invalidity is connected with the directive's legal 'authority' under Dutch law. Firstly, the judicial opportunities for challenging implementation legislation, although not as accessible as in for instance the UK or France, are present. Secondly, a great deal of directives is implemented in ways that attribute to the directives the 'authority' of a constitutive factor for lawmaking or the justification for the waiver of mandatory consultation. The best, but perhaps disappointing, reason for this not to have happened up till the conclusion of this study must be attributed to 'chance'. Several reasons could be thought of in this respect. It could simply be that parties to proceedings or courts themselves are not aware of the status of

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195 There is one laconic statement in the explanatory memorandum to the Order in Council on this mater: it refers to the annulled Laying Hens Directive "as confirmed by Directive 88/166".

196 Even though the explanatory memorandum to the Order in Council states that it was for this purpose that the Henry VIII clause was adopted, see the Battery Cages Order of 22 July 1988, Bulletin of Laws and Decrees (Staatsblad), 1988, 418.

197 Such legislative drafting seems very inadequate. One could even say that it could cause 'democratic leakage' outside the context of directive implementation.

198 See the Order in Council of 23 June 1992 amending the Aliens Decree (Vreemdelingen Besluit), Bulletin of Laws and Decrees (Staatsblad), 1992, 329.

199 A non-judicial, factual reason for the fact that no one has ever taken recourse to court could be the fact that the regulations in practice applied to one single undertaking only.
implementation law after invalidation of a directive. Another possible scenario is that there is at the time no possible litigant with an interest in challenging implementation legislation. Yet another possibility is that potential litigants foresee that the Community legislator will soon replace the invalidated directive.

2.4.4 Conclusions as to Dutch Law

Dutch law has over the years attributed more and more 'authority' to directives. Thus, a great deal of directive implementation in The Netherlands is performed by subordinate legislation delegated under terms that designate a directive as a constitutive factor. Furthermore, under Dutch law, directives may officially justify sub-delegation, waiving mandatory consultation requirements and even the recourse to Henry VIII clauses. Yet, the discussion on exactly how much 'authority' should be attributed to directives has not yet been settled in The Netherlands. In particular, the discussions on the use of Henry VIII clauses in Dutch law show in this respect interesting links with possible 'democratic leakage' which this development may entail.

A result of increasingly vesting 'authority' in directives has resulted in the situation where quite a lot of Dutch implementation is either ultra vires the moment the directive is invalidated and/or has violated essential procedural requirements (if it appears that a mandatory consultation was waived unjustifiably).

Nevertheless, as yet no Dutch court referred for that reason preliminary validity questions. Although there are judicial opportunities for challenging (mostly indirectly) executive legislation, no instances are known where Dutch courts have invalidated the implementation of invalid directives. It would seem that this could best be explained by being simply a matter of coincidence.

3 Conclusions as to National Law

The discretion as to choosing 'forms and means' under Article 249 EC is determined heavily by national constitutional and administrative traditions and cultures. And so it should be since such a legal constitutional difference is exactly what Article 249 EC is said to respect and thus what the instrument of a directive is said to respect, rendering it a more proportional form of EC legislation. This diversity has been demonstrated in the previous sections dealing with the 'authority' attributed to directives in national law and consequently, the potential legal effects of their invalidation.

Thus, differences in legal legislative culture are reflected in the amount of authority attributed to directives. In that sense, it is no co-incidence that in a

400 Although in some cases also in Belgium such 'replacement' was not required, see Section 4.2.
country such as the UK, the regime of the ECA attributes much 'authority' to the directive. Rather than triggering the use of executive power to implement, under the ECA the directive triggers the constitution of executive lawmaking power. The fact that directives are allowed to trigger so much executive competence must be seen against the background of a legal system in which the executive enjoys large competences by tradition.

On the amount of 'authority' attributed to directives under the ECA one could place the critical note that it does invite to 'democratic leakage'. In UK law less considerations for this issue were found than in Belgium, France and The Netherlands. Again, this is possibly explained by the traditional position of the UK executive in the UK constitutional constellation. Therefore, executive lawmaking powers are the most widespread in the UK where directives on almost any kind may be implemented by the Government or even an individual Minister without having regard to the amount of discretion such a directive still leaves to the Member States to decide. Furthermore, the UK also stuck out on the issue of Henry VIII clauses. Besides the fact that this mechanism is more commonly used in the UK than in the other countries studied, it is only in the UK never accompanied by the duty to consequently replace such implementation legislation with proper statutory law.

The directive's authority is also considerable in the other legal systems. In Belgium and the Netherlands too it may be a constitutive factor for executive lawmaking powers. In fact, they only differ from the British ECA in that they are of a more limited scope, usually on a sectoral basis and that they are not always of a 'Henry VIII' nature. Here too the directive may constitute executive lawmaking power. Furthermore, it may justify the alteration of legislative procedure as was particularly evident in The Netherlands.

At first sight French law appears to attribute the least amount of 'authority' to directives. However, at a closer look that authority could be 'hidden' in the considerable executive lawmaking powers under Article 21 FC that may be said to be, indirectly, triggered by the directive.

Authority attributed to directives may also take the form of re-centralisation of lawmaking powers. Under UK law that may indeed be the case. In the UK such re-centralisation determines the consequences of the directive's invalidity. By contrast, the UK also demonstrates that where no re-centralisation took place, it is up to the devolved entities to decide on the 'authority' that is attributed to directives. Hence, the invalidation of a directive may result in differentiated consequences in the different parts of the UK. In Belgium, the latter differentiating scenario is even more likely. In that country re-centralisation is not a possible exponent of the authority attributed to directives (unless in very extreme circumstances). The matter of attributing such authority is therefore determined by the federated entities.

The more 'authority' is attributed to directives in the various legal systems, the more implementation law proved 'vulnerable' for invalidity of directives. As
such, all British implementation law adopted under powers delegated by Section 2(2) of the ECA becomes ultra vires that Act. This fact in combination with the reasonably accessible procedure of 'application for judicial review' may account for the observation that the large majority of preliminary references on validity of directives comes from UK courts. Yet, this seemed to be only part of the explanation since in the other countries too, the directive is attributed considerable 'authority'. Moreover, in those countries too executive implementation legislation is open to judicial review by courts, either directly (Belgium, France) or only indirectly (The Netherlands).

One is inclined to think that one of the reasons for this difference in quantity of legal proceedings on (allegedly) invalid directives is that there is simply more 'awareness' in the UK, both of judges and of plaintiffs, of the constitutional relationship between the directive and its implementation. From a point of view of national procedural safeguards, which after all often have a long and honourable tradition, such as the principle of legality, it may be regretted that in the other countries this awareness appears to be absent.