Common Market Law Review **28**: 205–223, 1991.

Case C-106/89, *Marleasing SA* v. *La Comercial Internacional de Alimentacion SA*, Judgment of 13 November 1990 (Sixth chamber), not yet reported.

1. Factual background

During national court proceedings, Marleasing SA (the applicant) claimed a declaration as to the nullity of the founders' contract establishing La Comercial Internacional de Alimentacion SA (hereafter 'La Comercial'), one of the defendants. La Comercial, a "public limited company", was founded by three persons. One of these founders was a company, Barviesa, which brought its assets into La Commercial.

Marleasing's claim was based on the Articles 1261 and 1275 of the Spanish Civil Code which render ineffective contracts lacking consideration or lacking lawful consideration. It argued the nullity on the ground that the founders' contract establishing La Comercial was based on the lack of consideration, was vitiated by misrepresentation and was entered into solely for the purpose of putting the assets of Barviesa beyond the reach of the creditors, including Marleasing.

La Comercial argued that the claim should be rejected and hereby relied in particular on the fact that Directive 68/151, Article 11 of which lists exhaustively the cases in which the nullity of a company may be declared, does not include lack of consideration amongst those cases. Article 11 reads:

> "The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions:
> 1. Nullity must be ordered by decision of a court of law;
> 2. Nullity may be ordered only on the following grounds:
> (a) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with;
> (b) that the objects of the company are unlawful or contrary to public policy;

(c) that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company;
(d) failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up;
(e) the incapacity of all the founder members;
(f) that, contrary to national law governing the company, the number of founder members is less than two.
Apart from the foregoing grounds of nullity, a company shall not be subject to any cause of non-existence, nullity absolute, nullity relative or declaration of nullity."

The national court recalled that according to Article 395 of the Act of Accession of Spain and Portugal,[1] Spain was obliged, as from the date of its accession to the European Communities, to implement this Directive. By the date of the order for reference, this transposition had not yet occurred. Therefore, the national court asked whether Article 11 of the First Company Law Directive had direct effect so that it could impede the declaration of nullity of a "public limited company" for other reasons than those mentioned in that Article.

2. Proceedings before the Court

With regard to the possible direct effect of Article 11 of the Directive, the Court recalled its consistent case law according to which a directive could not by itself create obligations for an individual and that, accordingly, its provisions could not be relied on as such against such a person.[2]

However, the European Court found that the national court in fact wanted to know whether it was obliged to construe its national laws in the light of the text and the aim of the Directive. In that respect, the Court referred to its judgment in *Von Colson and Kamann*[3] where it

1. O.J. 1985, L 302/23.
2. Case 152/84, *Marshall* v. *Southampton and South-West Hampshire area health authority*, [1986] ECR 723.
3. Case 14/83, [1984] ECR 1891, para 26.

held that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether it concerns legislation adopted prior to or subsequent to the directive, the national court is required to interpret it as far as possible within the light of the wording and the purpose of the directive in order to achieve the result envisaged by it and to conform with Article 189(3) of the EEC Treaty. Consequently, the obligation to interpret national law in conformity with Article 11 of Directive 68/151 precludes an interpretation of national law on public limited companies such as to allow a declaration of nullity of a public limited company on grounds different from those set out in Article 11 of the said Directive.

As regards the interpretation to be given of Article 11 of the Directive and in particular paragraph 2(b) thereof, the Court found that it was clear from the preamble that the purpose of the Directive was to limit cases of nullity and the retroactive effect of the declaration of nullity "in order to ensure certainty in the law as regards relations between the company and third parties, and also between members" (sixth recital). Moreover, the protection of third parties "must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid" (fifth recital). Consequently, each ground of nullity provided for in Article 11 of the Directive has to be strictly interpreted. In those circumstances, the words "objects of the company" have to be construed as referring to the objects of the company as set out in the instrument of constitution or the statutes.

3. Ruling of the Court

The Court consequently held:[4]

> "A national court in which proceedings have been instituted on a matter falling within the scope of Council Directive 68/151/EEC

4. Provisional translation published in O.J. 1990, C 306/5.

of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, must interpret its national law in the light of the wording and the purpose of that Directive in order to prevent a declaration of nullity of a public limited company from being based on a ground different from those set out in Article 11 of the Directive."

4. The opinion of the Advocate General concerning the scope of the nullity-sanction in Article 11 of the First Company Law Directive

Advocate General Van Gerven recalled first of all (para 12) that Article 11 of the First Company Law Directive only deals with nullity of companies and does not impede on Member State legislation regarding

- nullity of agreements between shareholders
- dissolution of companies
- other actions which third parties can institute like the *actio pauliana*.[5]

The Advocate General also dealt with Article 11(f) of the Directive (minimum number of founders), which was not before the Court but which could provide another possible ground for nullity. It is a matter of national law to provide that (and under which circumstances) there will be nullity of the company in case a founder does not act for his personal account. National law can indeed provide that there will be no nullity at all, or it can restrict the grounds enumerated in Article 11. The national legislator, however cannot extend the grounds of nullity of Article 11 (para 13).

With regard to the interpretation of the phrase "objects of the company" the Advocate General also highlighted the problem of its un-

5. Cf. Art. 1167 of the French and Belgian Civil Code.

certain meaning taking into account the different linguistic versions (see *infra* 5.6).

In the light of the recitals of the Directive, the Advocate General concluded that the grounds of nullity as enumerated in Article 11 need a very strict interpretation. Therefore the ground of nullity "objects of the company" should be limited to the object of the company as established in the statutes (reference to Article 2(1) and Article 3 of the Directive).

5. Comments

5.1 *Importance of the judgment ...*

There are two important principles in this judgment, of which the first one was already partly established in previous case law. Firstly, if national law has not (or imperfectly) implemented an EEC Directive, the judges should interpret this national law as far as possible in conformity with the Directive.[6] The new element in *Marleasing* is the *explicit* statement that this applies with regard to *all* legislation, including legislation adopted *prior* to the Directive. This is not an unexpected development as the Court held in its former cases that the principle applied *in particular* (and therefore not solely) to the provisions of a national law specifically introduced in order to implement a directive.

Secondly, the grounds of nullity of a company as established by the First Company Law Directive are of strict interpretation as they are intended to protect the interests of third parties (second recital of the Directive) and to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity (sixth recital to the Directive). More particularly, the objects of the company (one of the grounds

6. Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891; Case 79/83, *Harz*, [1984] ECR 1921; Case 222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651; Case 80/86, *Kolpinghuis Nijmegen*, [1987] ECR 3969; Case 31/87, *Gebroeders Beentjes*, [1988] ECR 4635; Case 125/88, *Nijman*, 9 Nov. 1989, not yet reported. See also Case 157/86, *Murphy* v. *An Bord Telecom Eireann*, [1988] ECR 673.

of nullity) should be interpreted as meaning the objects such as defined by the statutes of the company and not the reasons which have determined the establishment of the company (e.g. take away money, to the detriment of creditors of the partners).

5.2 ... *or beyond: careless drafting or horizontal direct effect?*

Although in the operative part of its judgment the Court only formulates a duty for the national court to *interpret* its national law in the light of the wording and the purpose of the First Company Law Directive, and although *in casu* the provision of national law (a general principle of contract law) was of a nature such as to allow an interpretation which could depart from the prevailing interpretation, it is submitted that the judgment *may* (although it is probably not intended so) have consequences which go beyond a mere interpretation of national law in conformity with provisions of a directive as already expressed in earlier judgments (since *Von Colson and Kamann*) and could amount to a step in the direction of the acceptance of a horizontal direct effect of directives.

Some support for this assumption can be found in the operative part of the judgment (repeating ground No. 9) of Marleasing:

> "A national court (...) *must interpret* its national law in the light of the wording and the purpose of that Directive in order to prevent a declaration of nullity of a public limited company from being based on a ground *different from* those set out in Article 11 of the Directive."

Even admitting that one should refrain from drawing general conclusions from one isolated ground or even the operative part of a judgment, the result of *Marleasing* is that the Court, in a reply to a preliminary reference, determines *in concreto* how the national Court has to interpret a provision of the national law in order to comply with the provision of a Directive. It may be that in some cases the reduction the national court operates could hardly be qualified as an "interpretation" according to its own legal order (does Marleasing suggest that

"interpretation" of national law within the meaning of *Von Colson and Kamann* is a Community concept?)[7] The reference by the Court in ground 9 to national provisions relating to public limited companies (in the operative part, however, only national law in general is mentioned) is illustrative in this respect, since such provisions are generally of a more precise nature than the provisions of the Spanish Civil Code which were at the heart of the discussion in the case. An interpretation in conformity with a directive, consisting in a reduction of the traditional scope of application of a provision of national law, could thereore very easily amount to an interpretation *contra legem* which, up until now, has been ruled out as a possible interpretation for the application of the *Von Colson and Kamann* doctrine.[8]

In this respect (and leaving aside the possible evolution towards the acceptance by the Court of (an even unlimited) horizontal direct effect of Directives), attention should also be paid to a recent judgment in the area of equal treatment of men and women. In *Dekker*[9] the Court decided that an *employer* (including a private employer) is in direct contravention of the principle of equal treatment embodied in Articles 2(1) and 3(1) of Council Directive 76/207/EEC[10] if he refuses to enter into a contract of employment with a candidate whom he had decided was suitable for the post in question where such refusal is based on the possible adverse consequences for him of employing a pregnant woman as a result of rules adopted by the public authorities on unfitness for work

7. In the Report for the hearing, the Commission defends the following thesis:

> "Il se pourrait que, sous l'effet de ce mécanisme, l'interprétation du droit national conformément au droit communautaire prime les règles d'interprétation communément admises dans l'ordre interne, mais, en raison précisément du principe de la primauté du droit communautaire, il y aurait lieu de considérer comme prohibée toute règle d'interprétation pouvant faire obstacle au résultat voulu par les auteurs d'une directive."

At page 12 of the mimeographed version.

8. Opinion Advocate General Van Gerven in Case C-262/88, *Douglas H. Barber* v. *Guardian Royal Exchange Assurance Group*, [1990] 2 CMLR 513, para 50; Point of view of the Commission in *Marleasing*, see Report of the Hearing.

9. Case C-177/88, *E.J.P. Dekker* v. *Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 8 Nov. 1990, not yet reported.

10. Council Directive 76/207/EEC of 9 Feb. on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. 1976, L 39/40.

which treat inability to work because of pregnancy and confinement in the same way as inability to work because of illness. In its preliminary reference the national judge had not addressed the circumstance that the employer was indeed a private law institution. Although the European Court was not seized with a question on the horizontal effect of the Directive, it is remarkable that it made such a general statement without any further differentiation as to the quality of the parties in the litigation.

A possible explanation for the latter decision could be that, although *Community law* does not confer on private individuals the rights against other private individuals which would derive from a Directive (and which are not expressly provided for under national law), possibly *national law* (as exemplified by the attitude of a national court, as in *Dekker*, which does not raise the question of direct effect when referring, in a private litigation, a question about the interpretation of a provision of a Directive to the Court of Justice) could confer on him such rights.[11] This might also be the ultimate explanation why the Court consistently holds (and most recently in *Marleasing*, ground 6) that a Directive cannot *in itself* be invoked against a private individual.

Once again, the language the Court uses in *Marleasing* was probably determined by the facts which allowed such an interpretation. Moreover, one could argue that the duty to interpret in a certain way presupposes that interpretation itself is possible, which is not so with regard to a clear and unambiguous legal provision.

5.3 *A "passive" horizontal direct effect: perhaps a better solution?*

Taking into account the uncertain fate of national rules which have to be interpreted in conformity with EEC Directives, undertakings and individuals are in a very uncomfortable position. If they do act in accordance with national law (which has not or which has badly implemented an EEC Directive), there is a risk that a national judge will "interpret"

11. Wytinck, P., "'Apfelmus' of 'appelmoes'? Over de belemmering van het communautair vrij verkeer van goederen d.m.v. de taal van (levensmiddelen)etiketten en de positie van de rechtsonderhorige", (1990) *Revue de Droit Commercial Belge*, 939–940.

its national laws in such a way that their behaviour will amount to an infringement of national law (as interpreted in conformity with the Directive) or that they will lose a right which they traditionally held under national law.

On the other hand, if an undertaking acts in accordance with the (not yet or badly implemented) Directive, there is a risk that national judges will not go as far as to allow this behaviour by way of a "lenient" interpretation of its national laws.

Of course, this is a problem of differential application by national judges of an EEC principle. On the other hand, as the principle itself is contingent upon what different national laws allow, such a result could have been expected.

However, there is another possible solution. Could a "passive" horizontal direct effect not be allowed in some circumstances? Let us recall the basis statements of the Court when excluding horizontal direct effect of provisions of Directives. First of all in the *Marshall* case the Court held "that a directive may not of itself *impose obligations* on an individual and that a provision of a directive may not be relied upon as such against such a person".[12] In later decisions it was said in other words

> "A directive which has not been transposed into the internal legal order of a Member State may not therefore give rise to *obligations on individuals* either in regard to other individuals or, a fortiori, in regard to the State itself".[13]

Can one infer from these extracts that an individual can *never* rely on a directive against another individual? It has been submitted that a horizontal direct effect should be allowed and is not excluded by existing EC case law in a situation where an individual, by invoking a directive to safeguard rights which this directive endows upon him, does not

12. Case 152/84, *Marshall* v. *Southampton and South-West Hampshire area health authority*, [1986] ECR 723, para 48. Emphasis added.

13. Case 14/86, *Pretore di Salo* v. *Persons unknown*, [1987] ECR 2545, para 19; Joined cases 372–374/85, *Traen*, [1987] ECR 2141, para 24; Case 80/86, *Kolpinghuis Nijmegen*, [1987] ECR 3969, para 9. Emphasis added.

put an obligation on the individual against which the Directive is invoked.[14]

Marleasing is precisely such a situation. The applicant in this case only asked that others would respect its right of not being subject to the sanction of nullity in a situation not enumerated in the First Company Law Directive. By invoking that right, it did not put any "obligation" on other individuals but it invoked an *exception* in defence to a claim by the other party. It cannot be denied that the recognition of such right entails an "obligation" on third parties to respect such rights. But it would seem that this "obligation" is totally different from the kind of obligation the Court mentions in the two extracts just cited. Therefore, accepting a "passive" direct effect would not be contrary to the *Marshall* case law.

It must be admitted that in situations were the correct application of a provision of a directive does not entail a "positive obligation" on a private individual, but only obliges him to respect the right which another private individual derives from said provisions, national judges may also be more easily prepared to accept the *Von Colson and Kamann* rule of an interpretation in conformity with a directive. In this respect it should be born in mind that there is as yet no clear line in national court decisions as to the extent to which they will apply the *Von Colson and Kamann* rule (see section 5.4). Moreover, *Von Colson and Kamann* leaves undertakings in a state of lack of legal certainty which could in some circumstances be remedied by applying a "limited" or "passive" direct effect.

Advocate General Van Gerven has dealt with the idea of (horizontal or) third party effect of directives in his opinion in the *Barber* case.[15] With regard to the *Marshall* principle the Advocate General considered the following:

> "The question of the horizontal direct effect of a provision in a directive has therefore been recast as whether it is possible for an individual (namely Barber) to rely on a Member State's failure to

14. Wytinck, op. cit. *supra* note 11, 939.
15. Case C-262/88, *supra* note 8.

> comply with a directive which is binding upon it in proceedings against another individual (namely Guardian), or conversely whether the last-mentioned individual may take advantage of a Member State's default in order to deprive another individual (his employee) of a lawful advantage based on Community law. That is the question of the effect of the provisions of a directive with regard to third parties (...).
>
> Does that case law have to be extended in the sense that even an individual who is in no way connected with the public authorities may not derive any advantage in his relations with other individuals from a Member State's default and must therefore refrain from relying on a (statutory or contractual) provision which is contrary to the directive? It cannot be ruled out that the '*nemo auditur*' principle (or doctrine of estoppel) may be interpreted as a general prohibition on taking advantage of another's default, *once* that principle is endowed with such a wide effect, as in the aforesaid case law, that it no longer relates to 'personal' default on the part of the Member State in its capacity as *law*maker.
>
> Having regard to the Court's case law, however, I do not propose that this further step be taken (...).
>
> To extend also to relationships governed purely by private law the application of the principle of 'nemo auditur *propriam* turpitudinem allegans' on the basis of a Member State's default, so that it loses its original meaning altogether, strikes me as inappropriate – unless the Court wishes to override its decision in *Marshall* – since that would come very close to endowing the provisions of a directive with full horizontal direct effect (even though such an extension could be distinguished in theory)."

It is submitted that these reservations of the Advocate General do not exclude a "passive" direct effect. The Advocate General dealt with "third party" effect in a general way. The situations where "passive" direct effect could apply are much narrower than the general situation of "third party" effect and should therefore be distinguished from it.

Moreover, as mentioned above, accepting a "passive" direct effect of provisions of directives would not – in contrast with a general third party effect – encompass overriding the decision in *Marshall*, because it does not result in a general horizontal direct effect (which has indeed been excluded by the Court). The acceptance of this doctrine would not entail in a *Marshall* situation that an employee could invoke the rights

derived from the directive in question, in a claim against a private employer.

That there is a problem of distinction also in a case of a passive direct effect is true to a certain extent. However, where a national Court or Tribunal doubts this, it could refer a preliminary question to the Court. The advantage of this approach is, first of all, the guarantee that directives will be applied and interpreted in a uniform fashion; secondly, private undertakings are in a much more comfortable position.

Marleasing is only one of the cases where the theory of "passive" direct effect could be useful. Another case where it could be applied, is currently pending.[16] This case involves parallel import of bottles of water by an individual merchant Peeters. The Belgian distributors of the brands of water that were imported, tried to obtain an injunction claiming that Peeters could no longer sell these products. The basis for their claim was a rule in a Belgian Royal decree providing that the language of a label must be the language of the Region where the product is sold[17] (NB: Belgium has four linguistic areas!). The Belgian judges referred a preliminary question to the Court of Justice on the interpretation of Article 30 EEC and Article 14 of Council Directive 79/112/EEC.[18] The latter provision holds that Member States shall prohibit the sale of foodstuffs within their territory if the compulsory indications provided in the Directive "do not appear in a language easily understood by purchasers, unless other measures have been taken to ensure that the purchaser is informed. This provision shall not prevent such particulars from being indicated in various languages." National courts in The Netherlands and Belgium have applied this provision in the sense that they disregarded such a national provision if the information on the label in another language could still be easily understood by consumers.[19]

16. Case C-369/89, *ASBL PIAGEME* v. *PVBA Peeters*, O.J. 1990, C 35/12; See on this case extensively Wytinck, op. cit. *supra* note 11, 925–946.

17. Art. 10 of the Royal decree of 2 Oct. 1980 (relatif a l'étiquetage des denrées alimentaires préemballées), *M.B.* 11 Oct. 1980, 11776, now replaced by a similar provision: Art. 14 of the Royal decree of 13 Nov. 1986, *M.B.* 2 Dec. 1986, 16317.

18. On the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, O.J. 1979, L 33/1.

19. E.g. "1 Liter koffeinhaltige Limonade" was accepted as meaning "1 Liter

The interesting point about this case is that the *Von Colson and Kamann* rule is inapplicable (with regard to the interpretation of the Belgian provision in the light of Article 14 of Directive 79/112/EEC) unless the Court would accept an interpretation *contra legem*. Although the case could possibly be decided on the basis of Article 30 (and the principle of proportionality), it could also be a good test-case, illustrating the kind of situation where a "passive" direct effect would render the position of undertakings much more comfortable. On 11 December 1990, Advocate General Tesauro presented his Opinion. He proposed an answer to the question such that Article 14 of Directive 79/112/EEC should be interpreted in the sense that it is opposed to a national rule imposing the use of one particular language without leaving the possibility that another language – which can be easily understood by the consumers – can be used or that the consumer information may be guaranteed in another way. It is unfortunate that the Advocate General did not deal with the problem of the resulting *contra legem* interpretation, although it should be admitted that this may be due to a decision of a Belgian court[20] setting aside the Belgian provision on the basis of the incompatibility with Article 14 of the said Directive. As only part of that decision has been published, it is unclear whether the Belgian Court dealt with the issue of the competence of national courts to set aside national legislation that is incompatible with EEC directives.[21]

5.4 *The difficulties of national courts in applying* Von Colson and Kamann

National courts have reached different conclusions in applying (or not applying) the principle of interpretation in conformity with a directive.[22]

caffeïnehoudende limonade" (Corr. Mechelen, 28 Sept. 1987, (1988) *Journal des Tribunaux*, 48 with annotation; On the basis of Art. 30 EEC it was held by a judge in The Netherlands that "Apfelmus" was clear enough to mean "Appelmoes". (Reference from Van Bunnen, "L'emploi des langues dans l'étiquetage et le droit communautaire", (1988) *Journal des Tribunaux*, 41–42).

20. Referred to in note 19 *supra* and also referred to in footnote 5 of Opinion of the Advocate General.

21. Moreover, as is pointed out in footnote 5 of the Opinion of the Advocate General, this decision of the Belgian Court is appealed against.

22. See also Prechal, "Remedies after *Marshall*", 27 CML Rev. (1990), 451–474, at

For example, the House of Lords has been prepared to accept the *Von Colson and Kamann* principle to a certain extent, namely as far as national acts are specifically implementing an EEC Directive.[23] However, it has refused to do so with regard to national legislation enacted before the adoption of an EEC Directive (and thus not intended to give effect to that Directive) on the grounds that this would be most unfair.[24]

Following the *Von Colson and Kamann* case, German courts have rendered diverse judgments concerning the question on what basis damages could be awarded to women against an (individual) employer for violation of sex-discrimination legislation. While some courts were prepared to accept an additional ground for liability (so as to satisfy the requirement that a sanction put on an infringement must be effective in order to have a deterrent effect)[25] other courts refused to do so:

> "Es könne grundsätzlich nicht Aufgabe der Gerichte sein, gerade in Kraft getretene Gesetze, die möglicherweise misslungen seien, zu ergänzen order in anderer Weise fortzubilden (...). Darüber hinaus könne auch der Grundsatz des Vertrauensschutzes für den in Anspruch genommenen Arbeitgeber nicht ganz ausser Betracht gelassen werden".[26]

5.5 *Limitation of the nullity of companies*

Apart from its significance in relation to the duty on the courts of the Member States to interpret their national laws in conformity with EEC

468–472; Curtin, "The province of Government: Delimiting the Direct Effect of directives in the Common Law context", (1990) EL Rev. 195 et seq., at 220–222.

23. See e.g. *Pickstone* v. *Freemans*, 30 June 1988, [1989] *A.C.* 66; [1988] 3 CMLR 221; *Lister* v. *Forth Dry Dock & Engineering Co. Ltd.*, 16 March 1989, [1989] 2 CMLR 194.

24. *Finnegan* v. *Clowney Youth Training Programme ltd.*, 17 May 1990, [1990] 2 CMLR 859; *Duke* v. *Reliance Systems ltd.* (H.L.), 17 Feb. 1988, [1988] *A.C.* 618; [1988] 1 CMLR 719.

25. See e.g. *Bundesarbeitgericht* Hamburg, 14 March 1989, [1990] NJW Heft 1, 65.

26. *Landesarbeitsgericht* Köln, 26 May 1986, as referred to in Colneric, "Gleichberechtigung von Mann und Frau im europäischen Gemeinschaftsrecht", (1988) BB 968 et seq., at 973.

directives in private litigations, *Marleasing* will undoubtedly have consequences for the practice of company law.

It is the second judgment of the Court of Justice regarding the rules on the nullity of companies contained in Section III of the First Company Law Directive 68/151. Article 11(1) of the Directive provides that nullity must be ordered by decision of a court of law. Article 11(2) contains an exhaustive list of grounds of nullity (see section 1 *supra*). Article 11, *in fine*, provides that apart from these grounds of nullity, a company shall not be subject to any cause of non-existence, nullity absolute, nullity relative or declaration of nullity.

In its first judgment on the interpretation of these provisions, the *Ubbink Isolatie case,*[27] the Court of Justice decided that the rules concerning the nullity of companies laid down in Section III of the Directive apply only where third parties have been led to believe by information published in accordance with Section I (providing for formalities in regard to disclosure of essential information on the company to third parties) that a company within the meaning of the Directive *exists*. In other words if no formal disclosure of the "company" has been made as provided for by the Directive, the "company" may be held as non-existent by national law, e.g. because disclosure is a condition for the existence of the company[28] or because some other constitutive formalities (as in the Netherlands: execution of an authentic instrument of constitution and a ministerial authorization) have not been fulfilled.

In *Marleasing* the Court had to deal with the scope of one of the grounds of nullity mentioned in Article 11(2) of the First Company Law Directive, namely (b): "that the objects of the company are unlawful or contrary to public policy". A precise interpretation of the grounds of nullity of Article 11(2) of the Directive (quoted in section 1, *supra*) is of paramount importance since the grounds listed are exhaustive (see hereabove).

It is precisely the ground mentioned in Article 11(2)(b) which has in the past given rise to divergent interpretations. If the notion of "the ob-

27. Case 136/87, *Ubbink Isolatie BV* v. *Dak- en Wandtechniek BV* [1988] ECR 4665.
28. This is the case in most of the Member States (see the Opinion of the Advocate General Da Cruz Vilaça, para 16).

jects of the company'' is interpreted broadly as meaning the real object of the company, rather than the objects of the company as set out in the instrument of constitution or the statutes, than the cases of nullity, depending on the applicable national law, are potentially very numerous: companies constituted (solely) with the aim to avoid e.g. the application of the law of succession or taxes or, as in *Marleasing*, for the purpose of putting the assets of a person beyond the reach of the creditors, could still be declared void.

Although such an interpretation is clearly supported by the Dutch and the German version of Article 11(2)(b) of the Directive (referring to the ''real object'' of the company), the Court has rejected it. Only if the objects of the company as established in its statutes are unlawful or contrary to public policy, is a declaration of nullity possible. An intermediary position was defended by the Advocate General: if a company whose ''objects'' are lawful, exercises, from its inception, an activity which is unlawful, then Article 11(2)(b) can still apply. The Judgment of the Court however does not contain this nuance.

The judgment means that the Dutch and German versions of the Directive (the other original versions, the French and Italian do not refer to the ''real object'') are probably erroneous. The Court's strict interpretation is based on the very clear statement in the 5th recital of the Directive that ''the protection of third parties must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into the name of the company are valid''.

Marleasing means that the broad interpretation which has been defended by some Belgian, German and Italian authors (quoted by Advocate General Van Gerven in notes 30 and 31 of his Opinion) will have to be abandoned.

However the consequences of the judgment are probably less dramatic than the exclusion henceforth of the nullity sanction in case of a company with a lawful ''object'' but with an unlawful activity or purpose would suggest.

In the first place it must be stressed that the Council Directive only concerns the (limited) companies listed in its Article 1. Member States can (as e.g. Belgium did) extend the regime of Article 11 of the Directive to all companies, but if they have not done, *Marleasing* only has conse-

quences for the forms of companies listed in the Directive. Secondly, as the Advocate General has rightly pointed out, the restrictive interpretation of Article 11 of the Directive, containing the grounds of nullity of the company, neither excludes other actions which third parties, like creditors, can institute when a company is constituted with the aim to put assets out of their reach (*actio pauliana* and even the nullity of the consideration) nor the nullity of agreements between shareholders. Finally Advocate General Van Gerven referred to Article 11(2)(f) of the Directive, in virtue of which the nullity of the company may be ordered on the ground that, contrary to the national law governing the company, the number of founder members is less than two. In other words the Directive does not preclude national law from providing that creditors can request the nullity of a limited company which their debtor has constituted with the complicity of a straw man and with the sole purpose of putting his assets out of their reach.

5.6 *The problem of differences in linguistic versions*

Finally, an interesting point is raised in *Marleasing* with regard to the differences in the linguistic versions of Article 11(2)(b) of the First Company Law Directive, referring to "the objects of the company". The French version ("l'objêt de la société") and the Italian version ("oggetto della societa") are equal. The Dutch and the German version (respectively "het *werkelijke* doel van de vennootschap" and "(der) *tatsächliche* Gegenstand des Unternehmens") are slightly different. The words in italics are considered by the Advocate General as useful clarifications – not contradicted by the other languages – for they show that if a company, from its inception, exercises an activity which is unlawful or contrary to public policy, then Article 11(2)(b) can apply although this activity is not in conformity with the statutes of the company. Example: the statutes mention that a hotel will be run, while in reality the (forbidden) exploitation of a brothel is involved.

At this point it may be interesting to refer to a decision of the Court of First Instance of the EC, which underlines that the unclear meaning of a word (i.e. a word that is capable of being interpreted in different

ways) in a particular language (even if this is the language used by all parties during the proceedings) has to be read in the light of the other clear linguistic versions.[29] This principle has previously been applied by national courts. Thus e.g. Judge Warner argued that where the words of an English statute

> "are reasonably capable of more than one meaning, an English court must, in construing them, apply the presumption that Parliament does not intend to act in breach of the United Kingdom's international obligations".[30]

However, the same judge also said that

> "if the words of a statute passed to fulfil an international obligation of the United Kingdom are so clear and unambiguous that they are capable of only one meaning, the terms of the international treaty or other instrument imposing that obligation cannot be invoked to modify that meaning".

The judgment of the Court of First Instance of the EC does not cover this situation.

6. Conclusion

Marleasing confirms (and extends) the *Von Colson* doctrine of the Court of Justice that even in a private litigation, a national court should interpret provisions of national law in the light of the wording and the purpose of a Directive which covers the legal issue at stake.

However, some of the considerations of the judgment might (if read detached from the underlying facts) be seen as a step to the recognition of horizontal direct effect of provisions of a Directive which, after the

29. Case T-42/89, *von Wartemberg* v. *European Parliament*, 31 Jan. 1990, not yet reported.

30. English High Court, Chancery Division, *National Smokeless Fuels Ltd* v. *Commissioners of Inland Revenue*, [1986] 2 CMLR 227. See, however, English Court of Appeal, *Phonogram ltd.* v. *Brian Lane* [1982] 3 CMLR 615, para 13.

expiry of the time limit for its implementation has not (or not correctly) been implemented into the national legal order.

The authors submit that the case law of the Court of Justice (as expressed in *Marshall*) does not exclude the recognition of a "passive" horizontal direct effect of provisions of Directives in the circumstances described above, to the effect that a private individual could invoke such provisions to oppose the application of a national provision invoked by another private individual.

Marleasing has also clarified the meaning of the words "objects of the company" in Article 11(2)(b) of the First Company Law Directive. They should be understood to mean the objects as established in the statutes, rather than its real object. This limitation of the possibility for a third party to obtain a declaration as to the nullity of a company does not prevent third parties from bringing other claims against the unlawful constitution of a company.

J. Stuyck*
P. Wytinck**

* Professor European Law, K.U. Leuven & K.U. Nijmegen, Member of the Brussels Bar.
** Assistant K.U. Leuven, Member of the Brussels Bar.