Michigan Law Review

Volume 82
Issue 5 *Issue 5&6*

1984

Direct and Indirect Judicial Control of Community Acts in Practice: The Relation Between Articles 173 and 177 of the EEC Treaty

Gerhard Bebr
Commission of the European Communities

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Courts Commons](#), [European Law Commons](#), [Organizations Law Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Gerhard Bebr, *Direct and Indirect Judicial Control of Community Acts in Practice: The Relation Between Articles 173 and 177 of the EEC Treaty*, 82 MICH. L. REV. 1229 (1984).

Available at: <https://repository.law.umich.edu/mlr/vol82/iss5/9>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

DIRECT AND INDIRECT JUDICIAL CONTROL OF COMMUNITY ACTS IN PRACTICE: THE RELATION BETWEEN ARTICLES 173 AND 177 OF THE EEC TREATY

*Gerhard Bebr**

INTRODUCTION

The European Economic Community (EEC) Treaty contains two different judicial controls over the exercise of the powers granted to the Community by the Treaty: (1) a direct control through an action in the European Court of Justice under article 173 to annul a Community act; and (2) an indirect control through reference by a national court to the Court of Justice under article 177 to review the validity of a Community act.¹ Each of these controls is designed to ensure the legal exercise of power by Community institutions. In form, however, they are quite different procedures.

An action for annulment must be brought within two months of the publication or notification of the Community act challenged. In setting forth who may bring such an action, article 173 distinguishes between so-called "privileged" plaintiffs (Member States, the Commission, and the Council) on the one hand, and private parties on the other. A privileged plaintiff has an unlimited right of action that permits it to contest any binding Community act (i.e., a decision, directive, or regulation) without fulfilling any additional requirements. Conversely, a private party may contest only decisions addressed to it, or a decision disguised in the form of a regulation or decision addressed to a third party, which is of "direct and individual concern" to it.² A private party has no right to contest a directive or a genuine regulation.³

In contrast, the indirect control provided by review of a Community act under article 177 is initiated by a national court. When called upon to apply a Community act in litigation, a national court may suspend the proceeding and at *any* time request a review of the validity of *any* Community act by the Court of Justice. Moreover, a court whose decision is not subject to

* Honorary Legal Adviser of the Commission of the European Communities. — Ed.

1. See Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 173, 177, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty].

2. For the meaning and development of the notion of "direct and individual concern" under article 173 of the EEC Treaty as derived from the case law of the Court of Justice of the European Communities, see Stein & Vining, *Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context*, 70 AM. J. INTL. L. 219 (1976), reprinted in *EUROPEAN LAW AND THE INDIVIDUAL* 113 (F. Jacobs ed. 1976). See also G. BEBR, *DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES* 62-85 (1981).

3. This well-settled proposition was recently reconfirmed in *Greek Cannery Assn. v. Commission of the Eur. Communities* (Case No. 250/81), 1982 E. Comm. Ct. J. Rep. 3535, 3540 (ground No. 5).

appeal must suspend the proceeding and request a review.⁴ While a Member State, the Council and the Commission, or a private party can no longer challenge a Community act in an annulment action once the prescribed period for such an action under article 173 has expired, a national court may still do so through an article 177 review proceeding. This situation vividly demonstrates the important role a national court can play in ensuring compliance with Community law. It also illustrates that review under article 177 is a "public" remedy, and not a "means of redress" available to private parties.⁵

The Court of Justice at first viewed the direct and indirect controls as two distinct and independent remedies and developed them accordingly.⁶ However, its more recent jurisprudence suggests some convergence between these two procedures, resulting in the increased importance of the indirect control of review provided by article 177. Two major reasons for this development may be suggested.

First, the paucity of challenges by Member States, the Commission, and the Council to regulations and directives has lessened the importance of article 173. Member States have sought annulment of Council regulations on only three occasions.⁷ This may not be surprising, given that a Member State that participated in the preparation and adoption of a Council regulation can hardly be expected to contest its legality.⁸ Its right of action under article 173 makes sense only insofar as the Council adopts its regulations by a majority vote when provided for by the EEC Treaty.⁹ Where action is taken by a unanimous vote of the Council or without a formal vote,¹⁰ an annulment action by a Member State appears rather unlikely. Just as rare

4. EEC Treaty, *supra* note 1, art. 177.

5. See Srl CILFIT v. Ministry of Health (Case No. 283/81), 1982 E. Comm. Ct. J. Rep. 3415, 3428 (Preliminary Ruling) (ground No. 9); Lagrange, *L'action préjudicielle dans le droit interne des États membres et en droit communautaire*, 10 REV. TRIM. DR. EUR. 268, 272-73 (1974).

6. See University of Hamburg v. Hauptzollamt Hamburg-Kehrwied (Case No. 236/82) (Ct. J. Eur. Comm. Sept. 27, 1983, not yet published) (Preliminary Ruling), *digested in* 1983 ECJR 95; Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel (Case No. 158/80), 1981 E. Comm. Ct. J. Rep. 1805, 1838 (Preliminary Ruling) (ground No. 44); Commission of the Eur. Communities v. Belgium (Case No. 156/77), 1978 E. Comm. Ct. J. Rep. 1881, 1897 (ground No. 25).

7. Only cases under the EEC Treaty are included here. See Italy v. Council of the Eur. Communities (Case No. 166/78), 1979 E. Comm. Ct. J. Rep. 2575; Ireland v. Council of the Eur. Communities (Case No. 151/73), 1974 E. Comm. Ct. J. Rep. 285; Italy v. Council & Commission of the EEC (Case No. 32/65), 1966 E. Comm. Ct. J. Rep. 389.

8. There has been only one case in which a Member State that had voted in the Council for the adoption of a regulation subsequently lodged an annulment action against it. Italy v. Council of the Eur. Communities (Case No. 166/78), 1979 E. Comm. Ct. J. Rep. 2575. The Court admitted the action, taking the view that the conduct of a Member State in the Council is irrelevant to the exercise of the Member State's right of action under article 173. 1979 E. Comm. Ct. J. Rep. at 2596 (ground No. 6).

9. EEC Treaty, *supra* note 1, art. 148 states: "Except where otherwise provided for in this Treaty, the conclusions of the Council shall be reached by a majority of its members." Various Treaty provisions require the Council to act by a unanimous vote under certain circumstances. See, e.g., EEC Treaty, *supra* note 1, art. 75.

10. The Council has taken a *formal* vote in over 100 instances.

as challenges by Member States to Commission regulations or directives¹¹ are Commission actions questioning Council regulations.¹² The rarity of such actions has reduced considerably the practical importance of the direct control of regulations and directives through annulment provided by article 173.

Second, the lack of any right for private parties to seek annulment of regulations and directives under article 173 has encouraged private actions in national courts.¹³ This has, in turn, resulted in an increased number of references under article 177 from those courts to the Court of Justice for review of Community acts, particularly regulations.¹⁴ Such reviews may be requested by a national court only when a Community act must be applied in litigation. Paradoxically, then, it primarily is due to the references of national courts that the Court of Justice has reviewed the validity of regulations and directives. National courts thus have assumed an unexpected and important role in ensuring the legal exercise of Community legislative powers.

This clear shift towards the indirect control of article 177 has had an effect on the relation established by the Treaty between articles 173 and 177. As a result of this development, the Court of Justice may well have reduced some of the differences between the procedures provided for in these Treaty provisions. The present study seeks to examine the "very complex question"¹⁵ of the relation between articles 173 and 177 and, in particular, the extent of the convergence between these separate procedures. This

11. Cases involving Member State challenges to Commission regulations are *Italy v. Commission of the Eur. Communities* (Case No. 12/78), 1979 E. Comm. Ct. J. Rep. 1731, and *Italy v. Commission of the Eur. Communities* (Case No. 11/78), 1979 E. Comm. Ct. J. Rep. 1527. Those involving challenges to Commission directives are *France, Italy, United Kingdom v. Commission of the Eur. Communities* (Nos. 188-90/80), 1982 E. Comm. Ct. J. Rep. 2545, and *Federal Republic of Germany v. Commission of the Eur. Community* (Nos. 52, 55/65), 1966 E. Comm. Ct. J. Rep. 159.

Member States challenge Commission decisions more frequently. There are over 20 cases in which they have done so.

12. *Commission of the Eur. Communities v. Council of the Eur. Communities* (Case No. 218/82), 1984 COMMON MKT. REP. (CCH) ¶14,019 (Ct. J. Eur. Comm. Dec. 13, 1983), *digested in* 1983 ECJR 126; *Commission of the Eur. Communities v. Council of the Eur. Communities* (Case No. 22/70), 1971 E. Comm. Ct. J. Rep. 263. Two other cases of lesser importance concerned internal matters of staff regulations. *Commission of the Eur. Communities v. Council of the Eur. Communities* (Case No. 70/74), 1975 E. Comm. Ct. J. Rep. 795; *Commission of the Eur. Communities v. Council of the Eur. Communities* (Case No. 81/72), 1973 E. Comm. Ct. J. Rep. 575.

13. *See, e.g., Unione Nazionale Importatori e Commercianti Motoveicoli Esteri v. Council of the Eur. Communities* (Case No. 123/77), 1978 E. Comm. Ct. J. Rep. 845, 852 (grounds 11-12). In an early case, one national court made a reference to the Court because of the inability of a private party to challenge a regulation directly. *W. Beus GmbH v. Hauptzollamt München* (Case No. 5/67), 1968 E. Comm. Ct. J. Rep. 83, 86 (Preliminary Ruling). *See also* Opinion of Mr Advocate General Roemer in *N.V. Internationale Crediet- en Handelsvereniging 'Rotterdam' v. Minister van Landbouw en Visserij* (Nos. 73-74/63), 1964 E. Comm. Ct. J. Rep. 16, 22 (Preliminary Ruling) (delivered Dec. 16, 1963); Opinion of Mr Advocate General Roemer in *Meroni v. High Auth. of the Eur. Coal and Steel Community* (Case No. 10/56), 1958 E. Comm. Ct. J. Rep. 177, 183-84 (delivered Mar. 19, 1958).

14. By the end of 1983, more than 110 references requesting review of the validity of different Community acts, primarily regulations, had been made to the Court of Justice by various national courts under article 177 of the EEC Treaty.

15. This is how the Court of Justice described this question in *University of Hamburg v.*

study begins with an examination of some of the distinctive features of each procedure.

I. THE DISTINCTIVE FEATURES OF THE DIRECT AND INDIRECT CONTROLS

The procedures of articles 173 and 177 both are designed to ensure the legal exercise of Community powers. However, each procedure has somewhat different aims. Leaving aside the general, all-embracing right of action of Member States, of the Commission and the Council, an annulment action under article 173 serves primarily to protect the interests of private parties against illegal decisions. Conversely, review of the validity of a Community act under article 177 guarantees the legal exercise of Community powers consistent with the higher interests of the Community legal order. The differences between these procedures are reflected not only in which parties and institutions may initiate each, but also in the scope of acts subject to review, the circumstances in which each of these procedures may be used, the independence of the remedies afforded by each procedure, and the nature (i.e., adversarial or not) of the respective procedures.

A. *Who May Initiate Each Procedure*

Under article 173 of the Treaty, a private party may bring an annulment action in its own right. A review of the validity of a Community act, on the other hand, may be requested only by a national court. Such a reference frequently is suggested by one of the parties to the litigation; ultimately, however, the national court decides whether or not to make the reference to the Court of Justice.

This difference has a further consequence. In an annulment action under article 173, a private party may charge any ground of illegality that it sees fit to invoke. In a review proceeding under article 177, a private party may only submit observations within the limits of the charges raised by the national court in its reference to the Court of Justice.

B. *Acts Subject to Each Procedure*

Both annulment action and review of validity are directed against Community acts. However, a review of validity of a Community act performs a second function as well: it may concern the application of national measures implementing that act. Thus, should the Court of Justice declare the Community act invalid, the application of national implementing measures by the national court may be excluded as well.

The divergent aims of these procedures are reflected further in the type of Community acts that may be challenged under each. A private party may seek only annulment of decisions under article 173 (although Member States, the Council, and the Commission may seek annulment of any binding Community act). Article 177, however, provides for review of *any* Community act, whether it be legislative or administrative in nature.¹⁶ Indeed,

Hauptzollamt Hamburg-Kehrwieder (Case No. 216/82) (Ct. J. Eur. Comm. Sept. 27, 1983, not yet published) (Preliminary Ruling), *digested in* 1983 ECJR 95.

16. Thus, the Court has reviewed not only the validity of regulations and decisions, but

limiting review under article 177 to certain types of acts would be contrary to the procedure's very purpose, which is to ensure that Community powers are exercised in accordance with the EEC Treaty.

C. *Requirements for Admission*

The requirement in an annulment action that a private party be "directly and individually concerned" before it may challenge a decision addressed to a third party is obviously out of place in the case of a reference by a national court seeking review of a Community act.¹⁷ For the admission of such a reference, it is only necessary that the question of the validity of the act be relevant and decisive to the outcome of the pending litigation.

D. *Independence of Remedies*

A review of validity under article 177 is independent of an action for annulment under article 173. This independence is illustrated particularly well by those situations in which an annulment action has been lodged without success. When this occurs, a national court still may request a review of the validity of the very same act. Thus, if an annulment action by a private party contesting a genuine regulation was declared inadmissible by the Court of Justice pursuant to article 173, a national court could still refer the question of the regulation's validity to the Court under article 177.¹⁸ Even if an annulment action was admitted by the Court of Justice, and later dismissed as unfounded, its dismissal would not prevent a national court from requesting a review of the act in question. In such an instance, the national court well might question the validity of the act on different grounds than the unsuccessful private party.

A successful action that brings about the annulment of an act would, of course, make a reference meaningless. Referring to its judgment of annulment, the Court of Justice could simply find the reference of a national court concerning such an act without object and declare it inadmissible. Another question remains, though: May a national court also request the review of an act if a party to the main action failed to exercise its right to bring an annulment action? In such a situation, it is sometimes argued that the party may no longer question the validity of the act in question before a national court. Several arguments refute this view, however.

First, the national court has the power to refer questions regarding the validity of a decision to the Court of Justice under article 177. Therefore, only the national court's doubts — and not those of a private party — about the validity of an act are relevant. The failure of a private party to bring an annulment action under article 173 may indicate that the private party considers the particular Community act valid. However, that is by no means

also of directives. *See, e.g.,* *Tedeschi v. Denkavit Commerciale s.r.l.* (Case No. 5/77), 1977 E. Comm. Ct. J. Rep. 1555, 1579 (Preliminary Ruling).

17. *See* *Commission of the Eur. Communities v. Belgium* (Case No. 156/77), 1978 E. Comm. Ct. J. Rep. 1881, 1897 (ground No. 25).

18. *See* *Milchwerke Heinz Wöhrmann & Sohn v. Commission of the Eur. Communities* (Nos. 31, 32/62), 1962 E. Comm. Ct. J. Rep. 501, 507-08.

decisive for a national court faced with the decision whether to refer the question of the act's validity to the Court of Justice.

Second, article 177 of the Treaty confers on national courts an exclusive and unconditional right¹⁹ to request a review of validity. It would be contrary to this right if its exercise were conditioned on the procedural conduct of one of the parties to the main litigation.

Third, analogizing to the right of action a Member State has under article 173, it cannot convincingly be argued that because a Member State failed to contest a Community act, its courts can no longer request a review of the validity of the act under article 177. Such a restrictive approach would be inconsistent with the very purpose of the review procedure. Likewise, the use of article 177 to ensure the legal exercise of Community powers should not be dependent on the actions of private parties.

Fourth, the position that review of a decision under article 177 should be excluded when the private party failed to bring an annulment action under article 173 presents particular difficulties when the decision was addressed to a third person. Under article 173, a private party may challenge such a decision only if the decision is of "direct and individual concern" to it. Thus, if a reference for review were excluded because a litigant had not brought an annulment action to challenge a decision of direct and individual concern, a national court first would have to examine the complex question whether the action met the requirements of "individual and direct concern." Only if the national court found that the decision *failed* to meet these requirements could the question of the decision's validity then be referred to the Court of Justice. This situation would place the national court in the difficult position of deciding a highly technical preliminary question, one that poses problems even for the Court of Justice, *before* it could refer the question of the decision's validity to the Court.

Finally, while the view that a reference should be barred when a private party has failed to exercise its right to seek annulment of a decision under article 173 is sometimes based on the need for legal certainty, this argument is unconvincing. While both regulations and directives — acts of Community-wide application²⁰ — may be reviewed under article 177, this review procedure rarely has been subject to attack as undermining the need for legal certainty. Why then should the review of a mere decision cause greater concern in this regard? It is up to the Court of Justice to assess the gravity of the charges and determine the consequences that a declaration of invalidity would have with respect to the important goal of ensuring legal certainty and meeting the legitimate expectations of concerned parties. Article 177 — and this is worth stressing in this connection — is an independent remedy that is not subsidiary to an action for annulment under article

19. EEC Treaty, *supra* note 1, art. 177, gives inferior national courts the *right* to request a preliminary ruling. Moreover, it *obligates* national courts of last instance to request such a ruling when the validity of a Community act is in doubt.

20. EEC Treaty, *supra* note 1, art. 189, states in pertinent part:

Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State.

Directives shall bind any member to which they are addressed, to the result to be achieved, while leaving to domestic agencies a competence as to form and means.

173.²¹ It neither distinguishes among the various acts (i.e., regulations, directives, and decisions) subject to review nor subordinates this review to the requirements of an annulment action or its possible exercise.

In a ruling rendered under article 41 of the European Coal and Steel Community (ECSC) Treaty, the Court of Justice did not make the review of the validity of a decision conditional on an annulment action.²² While the Commission's individual decision, which imposed a Community levy, was addressed to the private party in the dispute, that party's failure to bring an annulment action under article 33 of the ECSC Treaty did not preclude the Court from admitting the reference for review. This ruling suggests that the failure of a private party to exercise its right of action is not relevant to the right or obligation, as the case may be, of a national court to request a review of the very same decision.

E. *Nature of Procedure*

The final difference to be examined here between the direct control of article 173 and indirect control of article 177 concerns the nature of each procedure. An action for annulment under article 173 begins an *adversary* proceeding between the plaintiff and the Community institution that adopted the challenged act. By contrast, the request of a national court for review of a Community act under article 177 initiates a *nonadversary* proceeding that involves interests far greater than those of the parties to the litigation before the referring court.

An examination of the participants in an article 177 proceeding may better convey its true nature. Under article 20 of its governing statute, the Court of Justice must invite not only the parties to the main litigation, but also all Member States, the Commission, and the Council (if the validity of its act is in question) to submit written observations on the issues raised by the national court.²³ This participation by Community institutions and Member States makes it apparent that Community interests, rather than merely those of private parties, are at stake in an article 177 proceeding.

Although an article 177 proceeding is formally nonadversary and thus has no parties in a technical sense,²⁴ it nevertheless contains at least one

21. See Opinion of Mr Advocate General Reischl in *SA Roquette Frères v. Council* (Case No. 138/79), 1980 E. Comm. Ct. J. Rep. 3362, 3367-68 (delivered Sept. 18, 1980).

22. See *Commission of European Coal & Steel Community v. Liquidator of Ferriere Sant' Anna SpA* (Case No. 168/82), 1983 E. Comm. Ct. J. Rep. 1681 (Preliminary Ruling).

23. Under art. 41 of the ECSC treaty *any* national court questioning the validity of an act is obliged to request its review by the Court. The Protocol on the Statute of the Court of Justice of the European Economic Community, Apr. 17, 1957, art. 20, 298 U.N.T.S. 147 (1958), states:

In cases provided for under Article 177 of this Treaty, the decision of the domestic court or tribunal which suspends its proceedings and makes a reference to the Court shall be notified to the Court by the domestic court or tribunal concerned. Such decision shall then be notified by the registrar to the parties in the case, to the Member States and to the Commission, and also to the Council if the act whose validity or interpretation is in dispute originates from the Council.

The parties, the Member States, the Commission and, where appropriate, the Council are entitled to submit to the Court, within a period of two months after the latter notification, memoranda or written comments.

24. See, e.g., *Rheinmühlen Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Fut-*

element of an adversary proceeding. That is, the Community institution that adopted the challenged act is always invited to "defend" its validity.²⁵ Under the Statute of the Court, the Commission is always to be invited to submit written observations and participate in the proceeding, regardless of whether its act is to be reviewed; the Council, however, is similarly invited only if its act is to be reviewed, a situation which underlines its defensive role in the proceeding. This role should not be overemphasized, however. Although the Community institution that adopted a challenged act must be given the opportunity to defend it, its right of defense is not as extensive as that in an adversary proceeding such as an annulment action. Moreover, aside from this right of defense, the procedure under article 177 for review of a Community act lacks any of the essential and characteristic features of an adversary proceeding.

II. CONVERGENCE OF THE GROUNDS OF ILLEGALITY AND INVALIDITY

The jurisprudence of the Court of Justice reveals some convergence of the direct control of article 173 and the indirect control of article 177. This convergence first appeared in the relation between the grounds of *illegality* under article 173 and the grounds of *invalidity* under article 177. While article 177 fails to state the criteria for assessing invalidity, the Court of Justice apparently has extended the grounds of illegality stated in article 173, and interpreted by its case law, to cases brought under article 177.²⁶ It has reviewed the validity of acts in their formal and substantive sense in much the same way as it has done when examining the legality of acts under article 173.²⁷ In any event, the Court has not interpreted the grounds of invalidity *more* restrictively than the grounds of illegality. Yet there would be good reason to do so, considering that a Community act may be declared invalid after it has been applied and enforced by Community and national authorities for a considerable length of time. A declaration of invalidity under such circumstances may raise special problems concerning

termittel (Case No. 6/71), 1971 E. Comm. Ct. J. Rep. 719, 719 (Preliminary Ruling); Firma Kurt A. Becher v. Hauptzollamt München-Landsbergerstrasse (Case No. 13/67), 1968 E. Comm. Ct. J. Rep. 196, 197 (Preliminary Ruling); Hessische Knappschaft v. Maison Singer et Fils (Case No. 44/65), 1965 E. Comm. Ct. J. Rep. 965, 971 (Preliminary Ruling); Order of the Court in Costa v. ENEL (Case No. 6/64), 1964 E. Comm. Ct. J. Rep. 614, 614 (Preliminary Ruling) (issued June 3, 1964).

25. See note 24 *supra*.

26. See Opinion of Mr Advocate General Trabucchi in Deuka v. Einfuhr- und Vorratssstelle für Getreide und Futtermittel (Case No. 78/74), 1975 E. Comm. Ct. J. Rep. 435, 438 (Preliminary Ruling); de Wilmars, *Annulation et appréciation de validité dans le Traité CEE: Convergence ou divergence?*, in EUROPÄISCHE GERICHTSBARKEIT UND NATIONALE VERFASSUNGSGERICHTSBARKEIT — FESTSCHRIFT ZUM 70. GEBURTSTAG VON HANS KUTSCHER 283, 293 (W. Grewe, H. Rupp & H. Schneider eds. 1981).

27. See Opinion of Mr Advocate General Mayras in Bagusat KG v. Hauptzollamt Berlin-Packhof (Case No. 37/75), 1975 E. Comm. Ct. J. Rep. 1339, 1347 (Preliminary Ruling); Opinion of Mr. Advocate General Gand in Firma C. Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Case No. 16/65), 1965 E. Comm. Ct. J. Rep. 891, 893 (Preliminary Ruling); Opinion of Mr Advocate General Roemer in N.V. Internationale Crediet- en Handelsvereniging 'Rotterdam' v. Minister van Landbouw en Visserij (Nos. 73-74/63), 1964 E. Comm. Ct. J. Rep. 16, 20 (Preliminary Ruling).

the goals of ensuring legal certainty and meeting the legitimate expectations of concerned parties.

The grounds of invalidity and illegality, as reflected in the case law of the Court, are not only identical but also interdependent. There is a mutual, reciprocal relation between them. Thus, in rulings under article 177, the Court frequently refers to reasoning contained in judgments rendered in adversary proceedings under article 173. Furthermore — and this is quite significant — the Court has developed a ground of invalidity in review proceedings that is now of great importance in annulment proceedings: it has recognized the protection of the fundamental rights of individuals, not formally guaranteed by the EEC Treaty, as a general principle of the Community legal order in review proceedings under article 177,²⁸ and has subsequently adopted this principle as a ground of annulment as well.²⁹

Further convergence of the review procedure with the annulment procedure may be noted in the Court of Justice's practice of raising, on its own motion, grounds of invalidity in addition to those already charged by the referring national court.³⁰ In *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel*,³¹ a German court questioned the validity of a Council regulation on the grounds that it infringed the principles of equality, freedom of competition, and proportionality. Acting on its own motion, the Court examined the validity of this regulation as to its statement of reasons, and on this ground declared it invalid.³² In *SA Roquette Frères v. French State — Customs Administration*,³³ a French court requested, pursuant to

28. See *Testa v. Bundesanstalt für Arbeit* (Nos. 41, 121, 796/79), 1980 E. Comm. Ct. J. Rep. 1979, 1996-97 (Preliminary Ruling) (ground No. 18); *Pecastaing v. Belgium* (Case No. 98/79), 1980 E. Comm. Ct. J. Rep. 691, 716 (Preliminary Ruling) (ground Nos. 21-22); *Hauer v. Land Rheinland-Pfalz* (Case No. 44/79), 1979 E. Comm. Ct. J. Rep. 3727, 3744-45 (Preliminary Ruling) (ground No. 15); *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case No. 11/70), 1970 E. Comm. Ct. J. Rep. 1125, 1134 (Preliminary Ruling) (ground No. 4); *Stauder v. City of Ulm* (Case No. 29/69), 1969 E. Comm. Ct. J. Rep. 419, 425 (Preliminary Ruling) (ground No. 7).

29. See *Heintz van Landewyck Sàrl v. Commission of the Eur. Communities* (Nos. 209-15, 218/78), 1980 E. Comm. Ct. J. Rep. 3125, 3248 (ground No. 81); *National Panasonic v. Commission of the Eur. Communities* (Case No. 136/79), 1980 E. Comm. Ct. J. Rep. 2033, 2057 (ground No. 18). Cf. *Valsabbia v. Commission of the Eur. Communities* (Nos. 154, 205, 206, 226-28, 263-64/78 and 31, 39, 83, 85/79), 1980 E. Comm. Ct. J. Rep. 907, 1010-11 (ground Nos. 88-89); *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the Eur. Communities* (Case No. 4/73), 1974 E. Comm. Ct. J. Rep. 491, 507 (ground No. 13).

30. See *Strehl v. Nationaal Pensioensfonds voor Mijnwerkers* (Case No. 62/76), 1977 E. Comm. Ct. J. Rep. 211, 217 (Preliminary Ruling) (ground No. 10); *N.V. Internationale Crediet- en Handelsvereniging 'Rotterdam' v. Minister van Landbouw en Visserij* (Nos. 73-74/63), 1964 E. Comm. Ct. J. Rep. 1, 14 (Preliminary Ruling).

31. (Case No. 158/80), 1981 E. Comm. Ct. J. Rep. 1805, 1832 (ground No. 19) (Preliminary Ruling).

32. 1981 E. Comm. Ct. J. Rep. at 1832, 1834.

33. (Case No. 145/79), 1980 E. Comm. Ct. J. Rep. 2917 (Preliminary Ruling). For comments on this case, see Brown, *Agrimonetary Byzantinism and Prospective Overruling*, 18 COMMON MKT. L. REV. 509 (1981); Laurent, *La complexité des montants compensatoires source de perturbation dans la coopération judiciaire instituée par l'art. 177 du traité de Rome*, 101 GAZ. PAL. DOCTR. & CHRON. 165 (1981); Usher, *Invalid Monetary Compensation and Prospective Compensation*, 6 EUR. L. REV. 116-19 (1981); Note, 1981 D.S. Jur. 168.

article 177, an interpretation of article 40 of the EEC Treaty³⁴ and some provisions of Council Regulation No. 974/71, which imposed monetary compensatory amounts on agricultural products.³⁵ Specifically, the French court sought a ruling on the methods that the Commission employed in calculating these amounts. However, the Court stated that "[t]he questions . . . indirectly request an appraisal of the *validity* of the provisions of the regulations whereby the Commission established the compensatory amounts"³⁶ Following its well-settled case law, the Court ruled that it is for the referring national court to decide whether or not the questions raised were relevant for the pending litigation. But the Court reserved for itself the power, as it has done in other cases, "to extract from all the information provided by the national court those points of Community law which, having regard to the subject-matter of the dispute, require interpretation, or whose validity requires appraisal."³⁷

While the Court of Justice's practice of raising grounds of illegality in annulment proceedings on its own motion has been accepted generally, its similar practice with respect to grounds of invalidity in review proceedings has been criticized sharply as inconsistent with the cooperative relationship between the Court and national courts as established by article 177.³⁸ Such a practice, it is argued, infringes upon the jurisdiction of the referring national court, and is contrary to the delimitation of competence between the Court of Justice and national courts contained in article 177, which distinguishes between the interpretation and review of Community acts by the Court of Justice and their application by national courts. Differences between annulment and review proceedings may suggest that the Court's practice of raising grounds on its own motion is more defensible in the former situation than in the latter. In an annulment proceeding, the Court merely goes beyond the charges invoked by the plaintiff, rather than by a referring national court as in a review proceeding. Moreover, in an annulment proceeding, the Court not only interprets but also applies Community law and decides the case; in a review proceeding, the national court applies Community law as interpreted by the Court and rules on the litigation. In raising grounds of invalidity on its own motion, the Court may push the examination of the validity of an act further than requested by the referring national court. The differences between the annulment and review procedures thus give rise to delicate considerations of the proper role of the Court of Justice.

Nonetheless, considering the fundamental objective of a review of validity, the power of the Court to raise grounds of invalidity on its own motion should be defended firmly. Indeed, this practice is particularly important in

34. EEC Treaty, *supra* note 1, art. 40, sets forth the means by which the Community is to establish a common agricultural policy.

35. Council Regulation (EEC) No. 974/71, On certain measures of conjunctural policy to be taken in agriculture, Arts. 1-2, [Eng. Special Ed. 1971(I)] O.J. EUR. COMM. (No. L 106/1) 257-58 (May 12, 1971).

36. *Roquette Frères*, 1980 E. Comm. Ct. J. Rep. at 2936 (ground No. 6) (emphasis added).

37. 1980 E. Comm. Ct. J. Rep. at 2935 (ground No. 7).

38. Judgment of July 15, 1981, Trib. inst., Lille, 1982 D.S. Jur. 10, 11-12 note J. Boulouis; Judgment of May 9, 1980, Conseil d'État, 36 A.J.D.A. Jur. 539, 540 note C. Jordan.

a review proceeding because this proceeding is an objective one, seeking, above all, to ensure the *legal* exercise of Community powers. If the Court of Justice were limited in its review to the charges formally raised by the referring national court, it would be precluded from performing fully one of its most fundamental functions. This result cannot be the meaning of cooperation as envisaged by article 177. The requirement that Community powers be exercised in legal fashion, which is to be guaranteed by the review procedure, obviously must carry much greater weight than strict respect for the wording of references from national courts.

III. CONVERGENCE OF THE EFFECTS OF AN ANNULMENT AND A DECLARATION OF INVALIDITY

The recent jurisprudence of the Court of Justice concerning the respective legal effects of an annulment and of a declaration of invalidity displays a striking convergence of these two remedies, despite the different Treaty provisions governing each of these remedies. The Treaty clearly states that the Court has the power to declare an act null and void.³⁹ Consequently, the Court has held that the annulment of an act has a general and absolute effect that destroys the legal existence of the act from its very beginning, i.e., *ex tunc*.⁴⁰ Thus, no national authority or Community institution may apply and enforce such an act, and no private party may invoke it. However, article 174 permits a deviation from this general rule. Under this provision, the Court may restrict the effect of the annulment of a regulation — a step that the Court has taken only in exceptional circumstances.⁴¹

In contrast to the explicit power of the Court to declare an act void under the annulment procedure, the EEC Treaty is silent with respect to the legal consequences of a declaration of invalidity. Article 177 merely empowers the Court to review the validity of a Community act referred to it by a national court. The Treaty contains no further provisions concerning this procedure.

A declaration of invalidity thus raises several fundamental questions whose answers have been only cautiously and gradually developed by the Court, to wit: What is the effect of a declaration of invalidity, specifically, its scope of application (relative or absolute) and its effect in time (*ex tunc* or *ex nunc*)? Which authority is competent to determine the further possible consequences of such a declaration — the Court, the Community institution concerned, or the referring national court? And, finally, what are the consequences of a declaration of invalidity for national measures implementing and applying the Community act declared invalid? These are the questions examined in the remainder of this Article, and, as will be seen, the approaches taken to date further demonstrate the continuing convergence of the annulment and review procedures.

39. See EEC Treaty, *supra* note 1, art. 174.

40. See Commission of the Eur. Communities v. Council of the Eur. Communities (Case No. 22/70), 1971 E. Comm. Ct. J. Rep. 263, 278-79.

41. See, e.g., Commission of the Eur. Communities v. Council of the Eur. Communities (Case No. 81/72), 1973 E. Comm. Ct. J. Rep. 575, 586.

A. *Binding Effect of a Declaration of Invalidity*

That a declaration of invalidity by the Court of Justice binds the referring national court has hardly ever been questioned. The only point that remained doubtful for some time was whether or not such a declaration could have an effect reaching beyond the instant case. In its original interpretation, the Court merely declared an act invalid without specifying the effects of such a declaration.⁴² This may have been due to a belief on the part of the Court that the effect of a declaration of invalidity should be confined to the given case. In limiting the binding effect of such a declaration to the given case, the Court also might have been anxious to avoid a possible assimilation with an annulment of an act. In the past, the Court scrupulously insisted on a neat separation between the two remedies. Among the various statements on this point, the opinion of Advocate General Gand is particularly representative of the view originally held:

A careful distinction must be drawn between the extent and the effects of an annulment of a measure on application under Article 173, and a declaration of invalidity under Article 177. In the first case, the action is initiated by a person who enjoys a right to appeal; it is subject to a strict time-limit, to avoid prolonging the period of doubt. The wide effects of a successful appeal are balanced by the restrictions on its admissibility. A national court or tribunal, on the other hand, can at any time request a ruling on the validity of a measure against which the time for appealing has long since expired. It refers a dispute to you in order to enable it to decide a case before it, and it is sufficient if the effects of your judgment are confined to the framework of that case. Were we to do otherwise and give general effect to the declaration of invalidity, we would, in effect, be reviving a right of action time-barred under Article 173⁴³

42. See, e.g., *Express Dairy Foods v. Intervention Bd. for Agricultural Produce* (Case No. 130/79), 1980 E. Comm. Ct. J. Rep. 1887, 1899 (Preliminary Ruling); *S.A. Buitoni v. Fonds d'Orientation et de Régularisation des Marchés* (Case No. 122/78), 1979 E. Comm. Ct. J. Rep. 677, 685 (Preliminary Ruling); *Yoshida GmbH v. Industrie- und Handelskammer Kassel* (Case No. 114/78), 1979 E. Comm. Ct. J. Rep. 151, 169 (Preliminary Ruling); *Yoshida Nederland B.V. v. Kamer van Koophandel en Fabrieken voor Friesland* (Case No. 34/78), 1979 E. Comm. Ct. J. Rep. 115, 136 (Preliminary Ruling); *Firma Milac, Gross- und Aussenhandel Arnold Nöhl v. Hauptzollamt Saarbrücken* (Case No. 131/77), 1978 E. Comm. Ct. J. Rep. 1041, 1051 (Preliminary Ruling); *Société Les Commissionnaires Réunis v. Receveur des Douanes* (Nos. 80-81/77), 1978 E. Comm. Ct. J. Rep. 927, 947 (Preliminary Ruling); *Manzoni v. Fonds National de Retraité des Ouvriers Mineurs* (Case No. 112/76), 1977 E. Comm. Ct. J. Rep. 1647, 1656 (Preliminary Ruling); *Ölmühle Hamburg AG v. Hauptzollamt Hamburg Waltershof* (Nos. 119-20/76), 1977 E. Comm. Ct. J. Rep. 1269, 1287 (Preliminary Ruling); *Granaria BV v. Hoofprodukschap voor Akkerbouwprodukten* (Case No. 116/76), 1977 E. Comm. Ct. J. Rep. 1247, 1266 (Preliminary Ruling); *Bela-Mühle Josef Bergman KG v. Growers-Farm GmbH* (Case No. 114/76), 1977 E. Comm. Ct. J. Rep. 1211, 1221 (Preliminary Ruling); *Strehl v. Nationaal Pensionenfonds voor Mijnwerkers* (Case No. 62/76), 1977 E. Comm. Ct. J. Rep. 211, 218 (Preliminary Ruling); *Effem GmbH v. Hauptzollamt Lüneburg* (Case No. 95/75), 1976 E. Comm. Ct. J. Rep. 361, 368 (Preliminary Ruling); *Rey Soda v. Cassa Conguaglio Zuccherio* (Case No. 23/75), 1975 E. Comm. Ct. J. Rep. 1279, 1306 (Preliminary Ruling); *Petroni v. Office national des pensions pour travailleurs salariés* (Case No. 24/75), 1975 E. Comm. Ct. J. Rep. 1149, 1161 (Preliminary Ruling); *Niemann v. Bundesversicherungsanstalt für Angestellte* (Case No. 191/73), 1974 E. Comm. Ct. J. Rep. 571, 580 (Preliminary Ruling).

43. Opinion of Mr Advocate General Gand in *Firma C. Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case No. 16/65), 1965 C.J. Comm. E. Rec. 1099, 1109-10 (Preliminary Ruling) (delivered Oct. 28, 1965) [Author's translation — Ed.].

Nonetheless, convergence between the effect of an annulment and that of a declaration of invalidity practically was unavoidable in the long run. It is inconceivable that the Court of Justice, once it declared an act invalid, would later reverse its declaration on the reference of another national court. In *International Chemical Corporation v. Amministrazione delle Finanze dello Stato*,⁴⁴ the Court recognized the general effect of a declaration of invalidity. Here a national court, dealing with a Council regulation that the Court had already declared invalid, inquired whether this declaration had an effect *erga omnes* (i.e., general) or whether it was binding only on the referring court.⁴⁵ In holding that a declaration of invalidity has a general effect, the Court stated:

[A]lthough a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which brought the matter before the Court, it is *sufficient reason* for any other national court to regard that act as invalid for the purposes of a judgment which it has to give.⁴⁶

The restrained formulation that a declaration of invalidity is "sufficient reason" for other national courts to regard the act as invalid suggests that the effect of such a declaration is indeed general, but formally not absolute.

According to the Court, any national court may request the review of an act already declared invalid.⁴⁷ This right of national courts to make a subsequent reference applies "in particular if questions arise as to the grounds, the scope and possibly the consequences of the invalidity established earlier."⁴⁸ By permitting subsequent references, the Court seeks, it seems, to maintain a subtle difference between the effect of a declaration of invalidity and that of an annulment. Whereas an act declared invalid still may be reviewed, this is clearly not the case with an annulment. Once the Court has declared an act null and void, it ceases to exist in a legal sense. This result excludes *a priori* any subsequent annulment action (which would be unlikely in any event given the two-month time period within which such actions must be brought). Compared with a declaration of invalidity, then, an annulment has a truly absolute effect. The importance of this subtle difference should not be overestimated, however. The Court may admit a renewed reference not so much to reexamine the invalidity of an act but to rule on some of the ancillary questions of such a declaration — for example, its possible effect on a national measure implementing the act or its further consequences.

The Court thus has clarified a rather equivocal jurisprudence respecting the distinctive functions of the annulment and review procedures, which

44. (Case No. 66/80), 1981 E. Comm. Ct. J. Rep. 1191 (Preliminary Ruling). For a comment on this case, see Usher, *Declaration of Invalidity Under Article 177 EEC: of General Effect?*, 6 EUR. L. REV. 284 (1981).

45. See 1981 E. Comm. Ct. J. Rep. at 1213.

46. 1981 E. Comm. Ct. J. Rep. at 1215 (ground No. 13) (emphasis added).

47. See 1981 E. Comm. Ct. J. Rep. at 1215 (ground No. 14).

48. 1981 E. Comm. Ct. J. Rep. at 1215 (ground No. 14). The term "grounds" here is not used in the technical sense of a ground of invalidity, but rather refers to the reasoning supporting the ruling. This may be deduced from the original Italian version of the Court's ruling, which speaks of "motivi." The French text uses the expression "motifs."

had previously suggested that a declaration of invalidity was to be given merely relative, and not general, effect. In giving declarations of invalidity general effect, the Court has promoted two fundamental Community goals. First, the general effect of such declarations strengthens the fundamental objective of article 177 to ensure the uniform application of Community law throughout the Community.⁴⁹ Second, such general effect comports with the "imperative requirement" of legal certainty, which would be seriously endangered if another national court were to apply a Community act that had already been declared invalid.⁵⁰

B. *The Temporal Effect of a Declaration of Invalidity*

While the Court of Justice recognized the general binding effect of a declaration of invalidity in *International Chemical Corporation*,⁵¹ it disclosed little about the temporal effect of such a declaration. Obviously, a declaration of invalidity operates *prospectively* to terminate the validity of the Community act in question and exclude its future application. Delicate and somewhat controversial questions are raised, however, by the possible *retroactive* effect of such a declaration, particularly with respect to ensuring legal certainty and meeting the legitimate expectations of concerned parties.

The controversy on this point is reflected in the changing views of the Advocates-General. Early on, they advocated giving declarations of invalidity only an effect *ex nunc*, *i.e.*, prospectively from the date that the Court declared an act invalid.⁵² This position clearly was meant to preserve a neat distinction between an action for annulment and a review of validity.⁵³ Later on, however, the Advocates-General argued that declarations of invalidity should be given an effect *ex tunc*, *i.e.*, retroactively to the time of enactment of the act. In dealing with the effect of a declaration of the invalidity of a Commission regulation that had imposed a monetary compensatory amount collected by national authorities, where reimbursement was sought by a party before the referring national court, Advocate General Capotorti briefly observed that "where the invalidity of a Community regulation has been established by the Court, it operates *ex tunc*."⁵⁴ Advocate General Reischl went even further, maintaining that a declaration of invalidity has the same effect as a judgment of annulment, and

49. See 1981 E. Comm. Ct. J. Rep. at 1215 (ground No. 11).

50. See 1981 E. Comm. Ct. J. Rep. at 1215 (ground No. 12).

51. See notes 45-47 *supra* and accompanying text.

52. See Opinion of Mr Advocate General Gand in *Firma C. Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case No. 16/65), 1965 E. Comm. Ct. J. Rep. 891, 899 (Preliminary Ruling) (delivered Oct. 28, 1965).

53. See Opinion of Mr Advocate General Warner in *Manzoni v. Fonds National de Retraite des Ouvriers Mineurs* (Case No. 112/76), 1977 E. Comm. Ct. J. Rep. 1657, 1661-62 (Preliminary Ruling) (delivered Sept. 20, 1977); Opinion of Mr Advocate General Trabucchi in *Hauptzollamt Bielefeld v. König* (Case No. 185/73), 1974 E. Comm. Ct. J. Rep. 621, 623; Opinion of Mr Advocate General Roemer in *Getreide and Futtermittel Handelsgesellschaft v. Hauptzollamt Hamburg Altona* (Case No. 31/70), 1970 E. Comm. Ct. J. Rep. 1065, 1071.

54. Opinion of Mr Advocate General Capotorti in *Express Dairy Foods v. Intervention Bd. for Agricultural Produce* (Case No. 130/79), 1980 E. Comm. Ct. J. Rep. 1903, 1909 (Preliminary Ruling) (delivered May 6, 1980).

thereby implying that such a declaration *must* be given retroactive effect.⁵⁵

So far the Court has preferred to follow a rather pragmatic approach, taking into account the particularities of each case. It thus is difficult to deduce a clear rule from the Court's jurisprudence. In most cases, the Court simply has declared an act invalid without stating the temporal effect of such a declaration.⁵⁶ In a few cases, the Court has declared a regulation invalid and, at the same time, obliged the Community institution that adopted it "to take any necessary measures compatible with Community law."⁵⁷ In general, then, the Court seems to leave it to the competent Community institution to draw the necessary conclusions as to the effects of a declaration of invalidity, including its temporal effect.

Exceptions nonetheless may be found in the Court's decisions in *Société Coopérative "Providence Agricole de la Champagne" v. Office National Interprofessionnel des Céréales*,⁵⁸ *Sàrl Mâiseries de Beauce v. Office National Interprofessionnel des Céréales*,⁵⁹ and *SA Roquette Frères v. French State — Customs Administration*.⁶⁰ In these cases the Court restricted the temporal effect of declarations that invalidated a regulation in a manner analogous to that provided for annulments under article 174. These cases concerned the proper method of calculating monetary compensatory amounts on certain derived agricultural products under Commission Regulation No. 652/76. The Court found that the Commission had exceeded the discretion conferred on it by the Council Regulation No. 974/71, and therefore declared the Commission regulation invalid to that extent. The Court added, however, that private parties could not claim reimbursement for charges already paid under the invalid portion of the Commission regulation.⁶¹ By giving its declaration of invalidity prospective effect only, the Court upheld the prior validity of the regulation and thereby provoked a controversy that will be examined below in connection with the powers of the Court under article 177. For the moment, simply observe that because the Court considered it necessary to state explicitly that its declarations of invalidity in these cases only operated prospectively, the general rule seems to be that such declarations operate retroactively as well.

55. See Opinion of Mr Advocate General Reischl in *International Chem. Corp. v. Amministrazione delle Finanze dello Stato* (Case No. 66/80), 1981 E. Comm. Ct. J. Rep. 1224, 1229 (Preliminary Ruling) (delivered Jan. 21, 1981).

56. See note 43 *supra* and accompanying text.

57. See *Royal Scholten-Honig Ltd. v. Intervention Bd. for Agricultural Produce* (Nos. 103, 145/77), 1978 E. Comm. Ct. J. Rep. 2037, 2081 (Preliminary Ruling) (ground No. 86); *SA Moulins et Huileries de Pont-à-Mousson v. Office National Interprofessionnel des Céréales* (Nos. 124/76 and 20/77), 1977 E. Comm. Ct. J. Rep. 1795, 1813 (Preliminary Ruling) (ground No. 28); *Albert Ruckdeschel & Co. v. Hauptzollamt Hamburg St. Annen* (Nos. 117/76 and 16/77), 1977 E. Comm. Ct. J. Rep. 1753, 1772 (Preliminary Ruling) (ground No. 13).

58. (Case No. 4/79), 1980 E. Comm. Ct. J. Rep. 2823 (Preliminary Ruling).

59. (Case No. 109/79), 1980 E. Comm. Ct. J. Rep. 2883 (Preliminary Ruling).

60. (Case No. 145/79), 1980 E. Comm. Ct. J. Rep. 2917 (Preliminary Ruling).

61. See, e.g., *Roquette Frères*, 1980 E. Comm. Ct. J. Rep. at 2947 (ground No. 53).

C. Which Authorities Determine the Consequences of Annulment and Invalidity?

1. Power of the Court

When annulling a regulation the Court also may, under article 174, determine the further effects of such an annulment. The Treaty explicitly confers this exceptional power on the Court only when it *annuls* a regulation under article 173. However, as already noted, the Court made analogous use of this power when it declared a regulation *invalid* under article 177 in "*Providence Agricole de la Champagne*," *Maïseries de Beauce*, and *Roquette Frères*.⁶²

The referring French court, the Tribunal d'Instance de Lille, refused to follow the Court's preliminary ruling precisely because it felt that the Court had exceeded its power.⁶³ First, it contested the power of the Court to determine the consequences of a declaration of invalidity through use of article 174 by analogy. In the opinion of the French court, the ruling lacked legal foundation because the Court was without authority to do this. Second, the French court felt that such a ruling — which, it stressed, reviewed the validity of the regulation even though the Court of Justice was not explicitly requested to do so⁶⁴ — could not modify the respective functions of the Court of Justice and national courts established by article 177. Consequently, national courts, the French court claimed, retained their competence to determine what effects a declaration of invalidity by the Court of Justice may have in the national legal order. Thus, the Tribunal of Lille, as well as other French courts, categorically deny the existence of the Court of Justice's authority to rule on the consequences of a declaration of invalidity.

This position challenges the fundamental jurisdiction of the Court of Justice. The double function performed by the Court's analogous application of article 174 to declarations of invalidity should be understood. First, it serves as an indispensable means for ensuring the uniform application and validity of Community acts. Second, it is an important element in strengthening the indirect judicial control provided by article 177 and thus fostering the rule of law.

Before more specific grounds that justify the analogous application of article 174 in the case of declarations of invalidity are advanced, however, a general observation should be made. Compared with the Treaty provisions governing the procedure for annulment, article 177 is very general. It seems, therefore, entirely appropriate for the Court to analogize to other Treaty provisions to make the review procedure embodied in article 177 workable and efficient.

62. See notes 59-61 *supra* and accompanying text.

63. See Judgment of July 15, 1981, Trib. inst., Lille, 1982 D.S. Jur. 10, 11-13 note J. Boulouis. In this regard, see also Judgment of Jan. 19, 1983, Cour d'appel, Douai, 103 Gaz. Pal. Jur. 292 (1983); Judgment of Feb. 23, 1982, Trib. admin., Orléans (*Maïseries de Beauce*, not yet reported); Judgment of Trib. admin., Châlons-sur-Marne (*Providence Agricole de la Champagne*, not yet reported).

64. For this reason, in Judgment of Jan. 19, 1983, Cour d'appel, Douai, 103 Gaz. Pal. Jur. 292 (1983), the Court considered the preliminary ruling of the Court of Justice to be a mere recommendation. A greater challenge to the Court's jurisdiction under article 177 hardly can be imagined.

In particular, the analogous application of article 174 to declarations of invalidity made under article 177 may be defended on several grounds. To begin, a declaration of invalidity and its consequences are obviously closely related.⁶⁵ Both are matters of Community law and thus fall under the jurisdiction of the Court of Justice. Any interpretation of the Treaty that seeks to claim, under whatever pretext, exclusive jurisdiction for national courts to determine the consequences of declarations of invalidity clearly is incompatible with the fundamental requirement of the uniform application and validity of Community law. In reasserting its exclusive jurisdiction to determine the temporal effect of a preliminary *interpretive* ruling, the Court of Justice stated in *Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l.*:⁶⁶ "The fundamental need for a general and uniform application of Community law implies that it is for the Court of Justice *alone* to decide upon the temporal restrictions to be placed on the interpretation which it lays down."⁶⁷ This consideration is equally valid with respect to the power of the Court to determine the effects of a declaration of invalidity — as the Court somewhat timidly stated in *International Chemical Corporation*.⁶⁸

A second ground on which the analogous application of article 174 may be defended is that, if the Court may declare a Community regulation invalid under article 177, it would be inconsistent to deny it the lesser power of determining the effects of such a declaration, including its temporal effect. The function served by declarations of invalidity would be endangered seriously if national courts could draw different conclusions than the Court of Justice as to the legal consequences of such declarations.

Third, since a declaration of invalidity has, in principle, a retroactive effect,⁶⁹ it seems indispensable that the Court should have a power with respect to such declarations analogous to that exercised by it under article 174 with respect to annulments. Indeed, there would appear to be even weightier reasons for having it in the case of a declaration of invalidity. A regulation may be declared invalid at any time, even after it has been applied and enforced for a considerable period of time. This raises more complex problems than a mere annulment, which necessarily takes place in a relatively short time after enactment of the regulation and requires the Court to follow a pragmatic approach emphasizing the goal of the uniform application and validity of Community law as much as that of legal certainty.

Fourth, since a declaration of invalidity has a general effect throughout the Community, its further legal consequences should be general and uni-

65. See Waelbroeck, *May the Court of Justice Limit the Retrospective Operation of its Judgments?*, 1 Y.B. EUR. L. 115, 122 (1982).

66. (Case No. 61/79), 1980 E. Comm. Ct. J. Rep. 1205 (Preliminary Ruling).

67. 1980 E. Comm. Ct. J. Rep. at 1224 (ground No. 18) (emphasis added). This view was reaffirmed in *Amministrazione delle Finanze dello Stato v. S.a.s. Mediterranea Importazione, Rappresentanze, Esportazione, Commercio* (Case No. 826/79), 1980 E. Comm. Ct. J. Rep. 2559, 2573 (Preliminary Ruling) (ground No. 9), and *Amministrazione delle Finanze dello Stato v. S.r.l. Meridionale Industria Salumi* (Nos. 66, 127-28/79), 1980 E. Comm. Ct. J. Rep. 1237, 1261 (Preliminary Ruling) (ground No. 11).

68. See *International Chem. Corp. v. Amministrazione delle Finanze dello Stato* (Case No. 66/80), 1981 E. Comm. Ct. J. Rep. 1191, 1215 (Preliminary Ruling) (ground No. 14).

69. See notes 53-62 *supra* and accompanying text.

form as well. This result can only be ensured if the Court of Justice declares what those consequences are. It would contradict article 189 to recognize the uniform applicability and validity of a regulation without ensuring the uniform effects of a declaration of its invalidity by the Court.

Finally, the argument has been raised that the analogous application of article 174 to article 177 declarations of invalidity should be prohibited because any other result would allow the Court of Justice to not only interpret Community law, but also to apply it, a power article 177 reserves to the referring national court.⁷⁰ This argument misrepresents the actual function of the analogous application of article 174, however. A preliminary ruling of the Court, whether interpreting a Community rule or declaring an act invalid, of course, may predetermine the outcome of litigation pending before the referring national court. But this fact does not mean that the Court applies Community law or even that it decides such a litigation. A preliminary ruling that finds a Community rule to have a direct effect also predetermines the final outcome of litigation, as it obliges the referring national court to forgo the application of contrary national law. And yet no referring national courts have found that such rulings by the Court have deprived them of their jurisdiction to apply Community law and thus decide the litigation. Given this, and the other arguments previously set forth, an analogous application of article 174 to declarations of invalidity under article 177 is justified fully.

2. *Obligations of the Community Institutions*

Article 176 of the EEC Treaty obliges the Community institution whose act has been *annulled* by the Court to "take the measures required for the implementation of the judgment of the Court of Justice."⁷¹ This obligation applies to the annulment of *any* binding Community act. Does a Community institution have a similar obligation when one of its acts is found *invalid*? The Treaty lacks any provision on this point, so the analogous application of article 176 to declarations of invalidity should be considered.

Early on, the Court of Justice merely declared an act invalid. It neither stated the temporal effect of such a declaration nor mentioned any possible obligation of Community institutions to adopt measures made necessary by such a declaration.⁷² More recently, in some rulings, the Court has obliged Community institutions to adopt such measures.⁷³ The Court's more recent

70. See Boulouis, *supra* note 39, at 12; Labayle, *Le Conseil d'État et le renvoi préjudiciel à la C.J.C.E.*, 39 A.J.D.A. DOCTR. 155, 168 (1983).

71. EEC Treaty, *supra* note 1, art. 176.

72. See, e.g., Firma Meiko-Konservenfabrik v. Federal Republic of Germany (Case No. 224/82) (Ct. J. Eur. Comm. July 14, 1983, not yet published) (Preliminary Ruling), *digested in* 1983 ECJR 85; *In re Cousin* (Case No. 162/82), 1983 E. Comm. Ct. J. Rep. 1101, 1122 (Preliminary Ruling); Atalanta Amsterdam v. B.V. Produktschap voor Vee en Vlees (Case No. 240/78), 1979 E. Comm. Ct. J. Rep. 2137, 2150-51 (Preliminary Ruling); Buitoni S.A. v. Fonds d'Orientation et de Régularisation des Marchés (Case No. 122/78), 1979 E. Comm. Ct. J. Rep. 677, 685 (Preliminary Ruling); Yoshida GmbH v. Industrie- und Handelskammer Kassel (Case No. 114/78), 1979 E. Comm. Ct. J. Rep. 151, 169 (Preliminary Ruling); Yoshida Nederland B.V. v. Kamer van Koophandel en Fabrieken vor Friesland (Case No. 34/78), 1979 E. Comm. Ct. J. Rep. 115, 136 (Preliminary Ruling).

73. See note 58 *supra* and accompanying text.

stand may be related to the broader effect that declarations of invalidity now are given. Giving a wide and far-reaching effect to such declarations raises more complex problems than when the effect is confined to a concrete case. Consistent with the goal of legal certainty, a Community institution whose act is declared invalid should be obliged to adopt any measures necessary to effectuate the declaration.

*Royal Scholten-Honig Ltd. v. Intervention Board for Agricultural Produce*⁷⁴ and *Albert Ruckdeschel & Co. v. Hauptzollamt Hamburg-St. Annen*⁷⁵ are the first rulings in which the Court stated that Community institutions have such an obligation. In the latter case the Court — instead of declaring the Council regulation at issue invalid — simply found it incompatible with the principle of equal treatment. It did so because the regulation discriminated against certain producers by failing to include them among the parties entitled to claim a production refund. In this instance, a declaration of invalidity would have been of little help to the party concerned, for it still would not have received the refund. For this reason, the Court declared the regulation incompatible with the fundamental Community principle of equal treatment, but preserved its validity. In this context, the Court stated:

[I]t is for the competent institutions of the Community to adopt the measures necessary to correct this incompatibility.

The need for a reply to this effect . . . is borne out by the existence of several courses of action which would enable the two products in question once again to be treated equally . . .⁷⁶

In *International Chemical Corporation*, a leading case in this area, the Court was most emphatic on this point, observing that "those responsible for drafting regulations declared to be invalid (the Council or the Commission) are bound to determine from the Court's judgment the effects of that judgment."⁷⁷ This formulation bears a striking resemblance to the wording of article 176. However, the Court so far has avoided referring explicitly to this Treaty provision even while apparently applying it by analogy to declarations of invalidity.

3. *Obligations of the National Courts*

Two aspects of the effects and consequences of a declaration of invalidity in the national legal order must be distinguished clearly. One aspect concerns the declaration of invalidity and its temporal effect, matters of Community law within the *exclusive* jurisdiction of the Court of Justice under article 177. The other aspect relates to the consequences such a declaration may have for national measures enacted pursuant to a Community

74. (Nos. 103, 145/77), 1978 E. Comm. Ct. J. Rep. 2037, 2081 (Preliminary Ruling) (ground No. 86).

75. (Nos. 117/76 and 16/77), 1977 E. Comm. Ct. J. Rep. 1753, 1772 (Preliminary Ruling) (ground No. 13). For commentary on this case, see Nicolaysen, Case Note, 13 EuR 50 (1978); Wyatt, *Non-discrimination under the CAP*, 3 EUR. L. REV. 329 (1978).

76. 1977 E. Comm. Ct. J. Rep. at 1772 (ground No. 13); see also *Moulin et Huileries de Pont-à-Mousson v. Office National Interprofessionnel des Céréales* (Nos. 124/76, 20/77), 1977 E. Comm. Ct. J. Rep. 1795, 1813 (ground No. 28).

77. *International Chem. Corp. v. Amministrazione delle Finanze dello Stato* (Case No. 66/80), 1981 E. Comm. Ct. J. Rep. 1191, 1216 (ground No. 16) (Preliminary Ruling).

act found invalid, which is clearly a matter for national courts to decide according to national law. This latter situation very much resembles those instances where a national court has to determine the effect on provisions of national law which is contrary to a Community rule having direct effect. Thus, in *Firma Gebrüder Lück v. Hauptzollamt Köln-Rheinau*,⁷⁸ which dealt with the consequences of the direct effect of article 95 of the EEC Treaty for conflicting national law, the Court ruled that it was up to the national courts "to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law."⁷⁹ This also is confirmed clearly by the Court's ruling in *Rey Soda v. Cassa Conguaglio Zuccherero*.⁸⁰ Here an Italian court inquired as to the consequences that a declaration of invalidity had for a national legislative measure adopted to implement the regulation found invalid. "It is first of all for the national authorities," reasoned the Court, "to draw the consequences in their legal system of the declaration of invalidity made under Article 177 of the EEC Treaty."⁸¹

CONCLUSION

The recent jurisprudence of the Court has undoubtedly reinforced the indirect judicial control provided by the review of Community acts under article 177. As far as regulations and directives are concerned, this indirect control practically has surpassed in its importance the direct judicial control of annulment under article 173. It is only because of the indirect control that the validity of these acts has been reviewed at all. Despite occasional, unsuccessful attempts by private parties to bring annulment actions challenging regulations, the direct control mostly has been confined to decisions of the Commission addressed either to Member States or private parties.

The increased importance of the indirect control of article 177, in general, is to be welcomed. First, by recognizing the general effect of a declaration of invalidity the Court has promoted the rule of law within the Community legal order. Second, it has, within the limits of the procedure provided by article 177, indirectly extended the judicial protection of private parties against invalid Community normative acts by permitting the national courts, before which these parties appear, to seek review of the acts in the Court of Justice. Third, the Court has dispelled doubts as to the effects of a declaration of invalidity, and has strengthened the uniform application and validity of Community law.

The increased importance of the indirect control article 177 provides, however, raises some problems that should not be underestimated. In particular, the retroactive effect of a declaration of invalidity, which the Court seems to favor at present, may cause some difficulties. Giving retroactive effect to a declaration of invalidity, particularly where a regulation that has been applied widely by national courts for some time is involved, may create more complex problems than the annulment of an act that has been in

78. (Case No. 34/67), 1968 E. Comm. Ct. J. Rep. 245 (Preliminary Ruling).

79. 1968 E. Comm. Ct. J. Rep. at 251.

80. (Case No. 23/75), 1975 E. Comm. Ct. J. Rep. 1279 (Preliminary Ruling).

81. 1975 E. Comm. Ct. J. Rep. at 1306 (ground No. 51).

force for a relatively short period of time. When declaring an act *invalid*, the Court necessarily will have to consider the legitimate expectations of affected parties and the goal of legal certainty to a greater extent than in the case of an annulment. For this reason, and because the annulment of a regulation is very rare due to the inaction of Member States, the Court may be expected to apply article 174 by analogy more frequently in the case of declarations of invalidity than it has done so far.