OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 12 July 1990 *

Mr President,
Members of the Court,

1. The Juzgado de Primera Instancia e Instrucción, Oviedo, has asked the Court to give a preliminary ruling on the interpretation of Article 11 of the First Council Directive 68/151/EEC of 9 March 1968, [1] hereinafter referred to as 'the First Directive'.

Background

2. This reference has been made in the context of a dispute between Marleasing SA, the plaintiff, and a number of defendants including La Comercial Internacional de Alimentación SA (hereinafter referred to as 'La Comercial'). The latter was incorporated in the form of a public limited company by three persons, including the company Barviesa SA, which contributed its own assets. Marleasing, which is an important creditor of Barviesa, contends that La Comercial was in fact set up by Barviesa alone and that the two other founders were men of straw. In its view, La Comercial was created for the sole purpose of putting Barviesa's assets beyond the reach of its creditors. Relying on the provisions of the Spanish Civil Code on the validity of contracts, Articles 1261 and 1275, according to which contracts lacking cause or whose cause is unlawful have no legal effect, Marleasing sought primarily a declaration as to the nullity of the founders' contract on the ground that it was a sham transaction and of the instrument incorporating La Comercial on the ground that it was vitiated by the lack of (lawful) cause. In the alternative, Marleasing sought an order setting aside the founders' contract and instrument of incorporation on the ground that their purpose was to defraud the creditors, and, in the further alternative, a declaration cancelling Barviesa's contribution to the company's assets for the same reason.

In its defence, La Comercial relied, *inter alia*, on Article 11 of the First Directive, which lists exhaustively the cases in which the nullity of a company may be declared. The lack of (lawful) cause, which is the primary ground relied upon by Marleasing, is not included amongst those cases. Accordingly, in La Comercial's view, there can be no declaration of nullity of the company.

3. The court making the reference considers that this case raises the problem of the direct effect of a directive which has not yet been transposed into national law by a Member State. It points out in that connection that, pursuant to Article 395 of the Act of Accession, [2] the Kingdom of Spain was under an obligation to implement the First Directive as from the date of its accession, but this had not yet been done at

* Original language: Dutch.

1 — Council Directive 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 (OJ, English Special Edition 1968 (I), p. 41).

2 — Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23).

the date of the order for reference.[3] The national court therefore submitted the following question to the Court of Justice for a ruling on interpretation:

'Is Article 11 of Council Directive 68/151/EEC of 9 March 1968, which has not been implemented in national law, directly applicable so as to preclude a declaration of nullity of a public limited company on a ground other than those set out in the said article?'

4. The national court correctly proceeds on the assumption that the legal form in which La Comercial was constituted, namely that of a public limited company, falls within the scope of the First Directive.[4] The national court is also correct in assuming that this directive permits a declaration of nullity of such a company only on the grounds listed in Article 11(2). It is quite apparent from the final subparagraph of Article 11 that the grounds of nullity listed in that provision are exhaustive:

'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 question whether the First Directive has direct effect may therefore be relevant for the solution of the dispute in the main proceedings. I shall begin by briefly considering that question and answering it in the negative. Notwithstanding my negative answer, the directive must still serve as a frame of reference for the interpretation of national law (see paragraph 7 et seq. below), but only, of course, within its own field of application (see paragraph 12 below).

A provision of a directive may not be relied upon as such against an individual

5. In its judgment in *Becker*[5] the Court stated that where a provision of a directive is unconditional and sufficiently precise, it may be relied upon by an individual against a Member State which has failed to transpose the directive into national law within the prescribed period. In its judgment in *Marshall*[6] the Court added that that possibility exists only in relation to the Member State concerned and State bodies. It follows from that finding:

'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*' (*Marshall*, paragraph 48, emphasis added).

3 — In the meantime the Spanish legislature has approved Law No 19/1989 of 25 July 1989 on the adjustment of commercial legislation to comply with the Community directives (BOE No 178 of 27.7.1989). The provisions concerning public limited companies were subsequently coordinated by Royal Decree No 1564/1989 of 22 December 1989 (BOE No 310 of 27.12.1989). Articles 34 and 35 of that decree regulate the nullity of public limited companies in accordance with the rules as to nullity established by the First Directive. Whether those later provisions are relevant to the dispute in the main proceedings is a matter for the national court, and need not be investigated here.

4 — See Article 1 of the First Directive, as amended by the Act of Accession, according to which the following types of company fall within the scope of the directive: la sociedad anónima, la sociedad comanditaria por acciones, la sociedad de responsabilidad limitada.

5 — Judgment in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraphs 23 to 25).

6 — Judgment in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

That position has since been repeatedly reaffirmed, most recently in the judgment in *Busseni*.[7]

6. In this case La Comercial relies, in its defence against Marleasing's main contention, on a provision of a directive, namely Article 11 of the First Directive, which had not yet been transposed into Spanish law at the date of the order for reference. The prohibition laid down in that article on a declaration of nullity of a company on grounds other than those listed therein is without the slightest doubt unconditional and sufficiently precise to be regarded on principle as directly applicable. In the light of the established case-law of the Court, however, that provision cannot be relied upon by La Comercial against Marleasing in the main proceedings. There is no evidence whatsoever that Marleasing is acting as a State body or public authority, not even in the broad sense in which the Court has interpreted those terms again today.[8]

The obligation to interpret national law in conformity with the directive

7. Although a provision of a directive may not be relied upon against an individual, national courts are still required, as the Court of Justice stated in its judgment in *Von Colson and Kamann*:[9]

'in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [the] directive ... to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189'.

That obligation on the part of the national courts to interpret their national law in conformity with a directive, which has been reaffirmed on several occasions,[10] does not mean that a provision in a directive has direct effect in any way as between individuals.[11] On the contrary, it is the national provisions themselves which, interpreted in a manner consistent with the directive, have direct effect.

8. The obligation to interpret a provision of national law in conformity with a directive arises whenever the provision in question is to any extent open to interpretation.[12] In those circumstances the national court must, having regard to the usual methods of interpretation in its legal system, give precedence to the method which enables it to construe

7 — Judgment in Case C-221/88 *ECSC* v *Busseni* [1990] ECR I-495.

8 — See in that regard my Opinion of 8 May 1990 in Case C-188/89 *Foster* v *British Gas* [1990] ECR I-3313, at p. 3326, and, more generally, my Opinion of 30 January 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Insurance Group* [1990] ECR I-1889, at p. 1912.

9 — Judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26. See also the judgment in Case 79/83 *Harz* v *Deutsche Tradax* [1984] ECR 1921, paragraph 26.

10 — Judgments in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 53, in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 12, in Case 31/87 *Beentjes* v *Netherlands State* [1988] ECR 4635, paragraph 39 and in Case 125/88 *Nijman* [1989] ECR 3533, paragraph 6.

11 — That is why, moreover, the relevant provision of the directive need not be 'unconditional and sufficiently precise' in order to serve as an interpretative criterion; see also, for the same view, the Opinion of Mr Advocate General Darmon of 14 November 1989 (paragraph 15) in Cases 177/88 *Dekker* [1990] ECR I-3941, at p. I-3956 and 179/88 *Hertz* [1990] ECR I-3979.

12 — With regard to that obligation see, amongst others, Y. Galmot and J. C. Bonichot: 'La Cour de justice des Communautés européennes et la transposition des directives en droit national', *Revue française de droit administratif*, 1988, p. 1 et seq, especially at p. 20 et seq.

the national provision concerned in a manner consistent with the directive.[13]

The obligation to give an interpretation in conformity with a directive is, it is true, restricted by Community law itself, of which the directive forms part, and in particular by the principles of legal certainty and non-retroactivity which also form part of Community law. In cases involving criminal proceedings, for example, such an interpretation cannot result in criminal liability unless such liability has been introduced by the national legislation implementing the directive.[14] Nor, similarly, can a directive of itself — that is to say in the absence of national implementing legislation — introduce a civil penalty, such as nullity, in national law. However, that is not the issue here: this case is concerned with a provision of a directive which *excludes* certain grounds of nullity.

9. The question whether an interpretation is in conformity with a directive usually arises in relation to provisions of national law which are specifically intended to implement the directive concerned. That was the case in *Von Colson and Kamann* and in the cases referred to in footnote 10.

However, there is no reason to restrict the requirement that an interpretation must be in conformity with a directive to that situation.[15] That follows, in my view, from the reasoning used by the Court to underpin that requirement. It is based on the consideration that judicial authorities, like the other public authorities of the Member States, are required, in the light of Article 5 of the EEC Treaty, to seek to achieve the result pursued by the directive by *all* appropriate measures within their power. Furthermore, as part of Community law, the directive concerned in principle takes precedence over *all* provisions of national law. That is true in particular in the case of national provisions which, as in this case, relate to the branch of the law covered by the directive, even though they predate the directive and were thus not enacted for its implementation.[16] That ought to be clear now that the Court has held in *Grimaldi*[17] that national courts are required to take a non-binding recommendation into consideration in connection with the interpretation of provisions of national law, even though those provisions do not give effect to the recommendation.

10. Let us apply the foregoing principles to the question under consideration. Since the First Directive had not been transposed into Spanish law at the material time, and the Spanish Law of 17 July 1951 concerning public limited companies lacked a specific rule as to nullity applicable to those

13 — For a recent example see the judgment of the House of Lords of 16 March 1989 in *Litster* [1989] 1 All ER 1134.

14 — Judgment in Case 80/86 *Kolpinghuis Nijmegen*, cited above, paragraph 13.

15 — See also, for the same view, my Opinion of 30 January 1990 in Case C-262/88 *Barber*, paragraph 50.

16 — In the case of national provisions adopted previously, an interpretation in conformity with the directive is normally applicable only as from the expiry of the time-limit for implementation prescribed by the directive (or even as from the entry into force of the directive: see the judgment in *Kolpinghuis Nijmegen*, paragraphs 15 and 16). Events occurring prior to that date continue of course to be governed by the national provisions construed without regard to the directive. In this case, however, the company in question, La Comercial, was incorporated on 7 April 1987, that is to say at a time when the time-limit for the implementation of the First Directive by Spain had already expired (namely on 1 January 1986).

17 — Judgment in Case C-322/88 *Grimaldi* v *Fonds des maladies professionnelles* [1989] ECR 4407.

companies, the prevailing view in legal literature [18] is that the provisions relating to the nullity of contracts are to be applied by analogy. In accordance with that view, Marleasing based its primary claim for a declaration of nullity of the instrument of incorporation of La Comercial on the provisions of the Spanish Civil Code to the effect that contracts lacking cause or whose cause is unlawful have no legal effect.

The national court is thus faced — as I understand it — with a problem concerning the interpretation of company law. The question which arises is to what extent the grounds of nullity under ordinary law can be applied by analogy to public limited companies. It follows, in my view, from the reasoning set out in the preceding paragraphs that the requirement that an interpretation must be consistent with a directive precludes the application to public limited companies of the provisions on nullity under ordinary law in such a way as to permit a declaration of nullity of such a company on grounds other than those exhaustively listed in Article 11 of the First Directive.

The scope of the rules on nullity in the First Directive

11. The question submitted by the national court for a preliminary ruling concerns the grounds of nullity listed in Article 11 of the First Directive. That article must in consequence also be the focus of attention with regard to the interpretation of national legislation in conformity with the directive. From that article, which is set out in full in the Report for the Hearing (in paragraph 2), I shall quote only the two grounds of nullity to be discussed here. The laws of the Member States may provide for nullity to be ordered by decision of a court of law on the following grounds:

'(a) ...

(b) that the objects of the company are unlawful or contrary to public policy;

(c) ...

(d) ...

(e) ...

(f) that, contrary to the national law governing the company, the number of founder members is less than two'.

In addition to Article 11 of the First Directive, Article 12 must also be borne in mind. That article governs the effects of nullity. Once again, I shall quote only the provisions which are relevant to this case:

'1. ...

18 — On that point, the Commission refers to J. Garrigues: *Curso de Derecho Mercantil*, I, Madrid, 1982, p. 435 et seq. See, for that matter, Article 50 of the Spanish Commercial Code, which provides that commercial agreements — according to Article 116 of that code, a (trading) company constitutes a commercial agreement — are governed by the rules of ordinary law, except where otherwise provided by special rules.

2. Nullity shall entail the winding-up of the company, as may dissolution.

3. Nullity shall not of itself affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's being wound up.

4. The laws of each Member State may make provision for the consequences of nullity as between members of the company.

5. ...'

12. Article 11 of the First Directive can of course be of assistance to the national court in interpreting its own national legislation only in so far as the dispute before it relates to the nullity of a (limited) company. None of the other matters raised in Marleasing's primary or alternative claims before the national court is affected by the directive.

That is true particularly as regards Marleasing's action to set aside Barviesa's contribution to La Comercial's capital in so far as that contribution was allegedly made in order to defraud Barviesa's creditors. Such a claim is not affected by the rules on nullity laid down by the First Directive.

Nor, it seems to me, does a (preliminary) contract between shareholders — in so far as it is to be distinguished from the actual instrument of incorporation — of itself fall within the ambit of the rules on nullity established by the directive, at least in so far as the cancellation of the contract does not automatically lead to the nullity of the company.

Finally, the First Directive does not contain any rules governing the dissolution of companies, since I assume that the dissolution of a company normally has no retroactive effect and the commitments entered into by the company prior to its dissolution therefore remain valid.

13. On the other hand, in so far as Marleasing's claim seeks a declaration of nullity of La Comercial as such, it does fall within the scope of Articles 11 and 12 of the First Directive. In so far as the national court is under an obligation to take those provisions into consideration when interpreting its own national law (see above, paragraph 7 et seq.), it must deal with the question whether the ground of nullity referred to in Article 11(2)(b) of the directive covers the case of a company purportedly set up with the aim of placing the founders' creditors at a disadvantage. This, therefore, is a question involving the interpretation of the directive itself (an interpretation which, in turn, must be taken into consideration in the interpretation of national law).

Before considering that question of interpretation, which is a controversial one in some Member States, I should point out that in interpreting national company law the national court could perhaps also have had recourse to some of the other grounds of nullity set out in Article 11. The most obvious ground is the one referred to in Article 11(2)(f), according to which a

Member State *may* provide for the nullity of a company where, contrary to its national law, the number of founder members is less than two (which means that the State rules out the possibility of a one-man company, either altogether or in the case of certain types of companies [19]). Marleasing contended in the main proceedings that La Comercial was set up exclusively by Barviesa and that the other signatories of the instrument of incorporation were men of straw.

Notwithstanding that contention, the ground of nullity in Article 11(2)(f) has not been raised before the Court either in the written observations or at the hearing. Nor is it clear from the order for reference whether at the material time Spanish civil or commercial law contained any rules in that regard and if so what rules, and whether nullity was the penalty for contravening them. I do not therefore propose to consider this ground further and shall confine myself to the observation that it depends on national law, to which Article 11(2)(f) expressly refers — if it provides that there must be (at least) two shareholders to set up a company — whether and to what extent the presence of founder members not acting on their own account may entail the nullity of the company. [20] The national legislature may refrain from adopting, or adopt only in part, the grounds of nullity set out in Article 11, and consequently restrict its field of application. However, it may not extend either the number or the scope of those grounds.

14. Hence the question raised by way of a reference for a preliminary ruling is, essentially, how Article 11(2)(b) is to be interpreted. In the light of the facts central to the dispute in the main proceedings, this case turns on the meaning of the phrase 'the objects of the company'. The phrase 'unlawful or contrary to public policy', also in Article 11(2)(b), is not at issue. Nevertheless, let me point out that the concept of 'public policy' has frequently been raised in the Court's judgments in another connection, namely in connection with Article 48(3) of the EEC Treaty. In that context the Court has stated that although the scope of that concept cannot be determined unilaterally without being subject to control by the Community institutions, nevertheless it may vary from one country to another and from one period to another and it is therefore necessary to leave the national authorities an area of discretion 'within the limits imposed by the Treaty and the provisions adopted for its implementation'. In any event, says the Court, that concept presupposes 'the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat . . . affecting one of the fundamental interests of society'. [21] As for the term 'unlawful', it refers, in my view, to a conflict with a mandatory or unconditional statutory prohibition or with public morality (to the extent that it does not fall within 'public policy'). The concept of

19 — In the meantime the Council has adopted the Twelfth Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited liability companies (OJ 1989 L 395, p. 40).

20 — Frequently a distinction is drawn in that connection between persons who, without seeking to evade a mandatory rule, properly act in their own name but on account of another as trustees, nominees or under a borrowed name, and persons who act as men of straw with a view to evading a mandatory rule such as the rule that a natural or legal person may have only one set of assets.

21 — Judgment in Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, paragraphs 33 to 35.

'public morality' has also been discussed in the Court's case-law, particularly in connection with Article 36 of the EEC Treaty, where reference has also been made to the existence of a discretion on the part of the national authorities within the limits of Community law.[22] The limits set by Community law with regard to all of those concepts are essentially those contained in the First Directive.

15. This case is therefore concerned with the interpretation of the phrase 'the objects of the company'. That task is all the more delicate in view of the divergences on that point between the different language versions of Article 11(2)(b).[23] According to the Dutch version of that provision, a declaration of nullity of a company may be made where its 'werkelijke doel' (actual objects) are unlawful or contrary to public policy. Must the phrase 'doel van de vennootschap' (in the French version: 'objet de la société') be understood as meaning exclusively the company's objects as described in its instrument of incorporation or its statutes, or must it be understood as referring also to the activity actually carried on by the company or even the aim actually pursued by means of the company (in the sense of 'le but de la société')?[24] Only in the latter case can the national court take the view, without interpreting its national law in a manner inconsistent with the directive, that a declaration of nullity of a company can be made if it was incorporated for the (sole) purpose of placing the founders' creditors at a disadvantage, as Marleasing contends in the main proceedings.

In some Member States the ground of nullity set out in Article 11(2)(b) has given rise to divergent interpretations on this very point.[25] That is not surprising in the light of the discussions and compromises between the Commission and the experts of the Member States in connection with the adoption of Article 11.[26] In other Member States, however, scarcely any attention has been paid to that ground of nullity or, for that matter, to the entire system of nullity established by the directive.

The reason for that very uneven level of interest is not easy to determine. The existence in some countries of a preliminary (judicial or administrative) review in connection with the incorporation of joint-stock companies (see Article 10 of the directive) may undoubtedly preclude the

22 — Judgment in Case 121/85 *Conegate* v *HM Customs and Excise* [1986] ECR 1007, paragraphs 14 to 16.

23 — In the Dutch version, reference is made to 'het werkelijk(e) doel van de vennootschap'. In the German version, the words used are '(der) tatsächlich(er) Gegenstand des Unternehmens'. In the French version ('l'objet de la société') and in the Italian version ('(il) oggetto della società') the company's objects are not qualified in any way. That is also true of the other language versions drawn up by the Council following the adoption of the directive, including the Spanish version ('(el) objeto de la sociedad'), which are equally authentic.

24 — These three concepts are used side by side in the 1968 Convention on the mutual recognition of companies and legal persons: see footnote 32.

25 — For instance in Belgium and France (but also in Germany and Italy — see the references in footnote 30): see, in particular, L. Simont: 'Les règles relatives à la publicité, aux nullités et aux actes accomplies au nom d'une société en formation', in *Les sociétés commerciales*, Jeune barreau, Bruxelles, 1985, p. 102 et seq; R. Houin: 'Chroniques de législations et de jurisprudence françaises — Sociétés commerciales', *Revue trimestrielle de droit commercial*, 1970, p. 736 et seq. In France the prevailing view seems to be that the French Law on companies, which was brought into line with the directive by Ordonnance No 1176 of 20 December 1969, leaves intact the grounds of nullity under ordinary law (amongst others 'la cause illicite') which are not expressly excluded by Article 360. Some authors (see, amongst others, Y. Serra: *Chronique*, Dalloz, 1973, p. 17 et seq.) have raised the question whether those French rules are contrary to the First Directive. In Belgium's Dutch-language legal literature and case-law, in particular, the broad meaning is advocated, having regard to the Dutch version of Article 11(2)(b) of the directive (see footnote 23): see, in particular, J. Ronse *et al*: *Overzicht van rechtspraak (1978-85) Vennootschappen, Tijdschrift voor Privaatrecht*, 1986, p. 885 et seq. and the very recent judgment of the Rechtbank van Koophandel, Hasselt, of 28 May 1990, not yet reported.

26 — Discussed in E. Stein: *Harmonization of European Company Laws*, 1971, p. 299 et seq.

application of the rules on nullity. The more formal nature of the instrument of incorporation, which has the effect of 'detaching' it from the underlying contractual relationship to a greater extent in some Member States than in others is another possible reason which is especially relevant in this case.

16. In any event, it is clear from the rules on nullity in the First Directive and also from the other rules set out therein concerning the disclosure and validity of commitments entered into by a company that the objective of 'protecting the interests of third parties' (second recital in the preamble to the directive) must be reinforced in an expanded market as regards companies which have no safeguards they can offer to third parties other than their assets (first and third recitals in the preamble). The rules on nullity themselves, reflecting the need 'to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity', are designed 'in order to ensure certainty in the law as regards relations between the company and third parties, and also between members' (sixth recital in the preamble).[27]

In those circumstances, it seems clear to me that each ground of nullity, even taken on its own, must be given a narrow interpretation with a view to protecting the interests of third parties — that is to say the company's creditors — and that a declaration of nullity as a result of infringements arising from the contractual relationship between the members of the company or between the members and the company is a penalty which must be avoided as far as possible. That does not rule out either the possibility or desirability of penalizing such infringements in a different manner which does not jeopardize the existence of the company and is less detrimental to its creditors.

Accordingly, I consider that the phrase 'the objects of the company' in Article 11(2)(b) of the directive must be understood as meaning the company's objects as described and disclosed in the instrument of incorporation or the statutes (see Article 2(1)(a) and also Article 3 of the directive).[28] Only where the objects, in that sense, 'are unlawful or contrary to public policy' can a declaration of nullity of the company be made. An aim for which the company was incorporated but which is not stated in the instrument of incorporation or the statutes, for example to defraud the members' creditors,[29] cannot have that consequence: such illegality or conflict with public policy (for instance, with the rule concerning the unity of the founders' assets) must be dealt with otherwise than by a declaration of nullity (see paragraph 19 below).

17. The foregoing observations must be qualified by an important consideration. Both the German and Dutch versions of Article 11(2)(b) specify that a company's objects are to be understood as the actual

27 — As regards the effects of nullity *vis-à-vis* third parties, they are regulated in a mandatory manner by the directive (see, in particular, Article 12(2) and (3), quoted in paragraph 11 above). The effects as between the members themselves may be determined by the laws of each Member State (Article 12(4), also quoted above).

28 — The phrase 'objects of the company' is also used in Article 9(1) of the First Directive: see, on that point, E. Stein, op. cit, p. 282 et seq. In that provision as well, the phrase must be understood as referring to the company's objects as described in the instrument of incorporation or the statutes, having regard to the special status of legal persons under the law.

29 — The protection offered to third parties by the First Directive is restricted to specified third parties, namely the company's creditors, and does not extend to third-party creditors of the members. The reason for the special protection afforded to the company's creditors lies in the fact that, in the case of joint-stock companies, they have no safeguard other than the company's assets: see the third recital in the preamble to the directive.

(in Dutch 'werkelijke' and in German 'tatsächlich') objects of the company. In my view that is a useful clarification which is not contradicted by the other language versions. It demonstrates that if the company's real activity, as carried on from the outset, is unlawful or contrary to public policy, the ground of nullity provided for in Article 11(2)(b) can be relied upon, even though that activity is not in accordance with the company's presumably lawful objects as described in the instrument of incorporation or the statutes.[30] Here are some examples: (a) the company's objects as specified in the instrument of incorporation or the statutes are the operation of a hotel, whilst it is apparent in practice that this means operating an (illegal) gaming room or allowing (the criminal offence of) prostitution; (b) the company's objects, as set out in the instrument of incorporation, are the production and exportation of steel tubes, whilst under that veil the company (unlawfully) produces and supplies weapons.

The activity must be one which was carried on from the outset.[31] If a company whose objects are lawful only subsequently carries on unlawful activities, contrary to its objects, that cannot give rise to the nullity of the company but may lead to its dissolution if national law so provides.

18. The qualification set out in the previous paragraph, which I think is a useful one and finds support in the German and Dutch versions of Article 11(2)(b), does not strike me as being incompatible with the protection of the interests of third parties. It helps to prevent third parties from being misled by an activity which is falsely stated as an object in the instrument of incorporation or in the statutes but which from the outset does not correspond to reality. Furthermore, the activity actually carried on, unlike the intentions by which the members were guided in setting up the company, can normally be ascertained by third parties who enter into transactions with the company. Finally, if such a qualification is not made the ground of nullity in Article 11(2)(b) is emptied of a considerable part of its substantive content since the prohibition, so restricted, of objects which are unlawful or contrary to public policy is then easily circumvented by stating objects in the instrument of incorporation or the statutes of the company which are lawful but spurious.[32]

30 — See, for that view, amongst others J. Van Ryn en P. Van Ommeslaghe: 'Examen de jurisprudence (1972 to 1978), les sociétés commerciales', *Revue critique de jurisprudence belge*, 1981, who on p. 241 suggest that a heated controversy in that regard — to which the French legislation also gives rise (see R. Houin, op. cit., at p. 736 et seq.) — should be resolved as follows: 'regard should be had not only to the company's objects as set out in the statutes but also to the activities actually carried on under that veil'. See also L. Simont op. cit., No 28, who adds that the possibility of nullity as a result of unlawful activities in practice is all the more appropriate since in accordance with Article 9(1) of the First Directive the company is also bound by acts which are *ultra vires*. The same view would appear to be taken in German legal literature: see Gessler, Hefermehl, Eckardt and Kropff: *Aktiengesetz*, 1986, pp. 275 and 276. In Italian legal literature, on the other hand, views are divided: see A. Borgioli: *La nullità della società per azioni*, 1977, p. 414 et seq., and the references for and against in footnote 126 on p. 414.

31 — See, for that view, in particular, F. Galgano: 'La società per azioni', *Trattato di diritto commerciale e di diritto pubblico dell'economia*, VII, 1984, p. 101; J. Ronse: *De vennootschapswetgeving*, 1973, p. 76, and L. Simont, op. cit., No 28.

32 — It is noteworthy that Article 9 of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons (Supplement 2/1969 — Bull. EC), which was signed shortly before the adoption of the First Directive, refers to a broader concept of the (company's) objects. It encompasses not only the 'company's objects' and the 'activity actually carried on' but also 'the purpose' (rendered in the French version as 'objet', 'activité effectivement exercée' and 'but' respectively). When one of those three is contrary 'to the principles or rules which the State concerned regards as matters of public policy as defined in private international law', that State may refuse to recognize a foreign company. That difference between Article 9 of the Convention and Article 11(2)(b) of the First Directive is no doubt connected with the specific purpose of the directive, which is to restrict the nullity of companies in order to protect the interests of third parties. For the reasons given above, however, that restriction may not go so far as to exclude from the company's objects the 'activity actually carried on (from the outset)' as well, although it may exclude the 'purpose' of the founders of the company, which is unknown to third parties.

19. The practical significance of the suggested definition of the ground of nullity referred to in Article 11(2)(b), which, though restrictive, is not excessively so, should not be overestimated. For the creditors of a debtor who has contributed his assets to a company with a view to removing those assets from their grasp — a possibility that does not come within that definition — a declaration of nullity of the company would offer only limited protection. The legal effects of a declaration of nullity must, after all, be consistent with the provisions of Article 12 of the First Directive, cited above (paragraph 11). This means that nullity entails the winding-up of the company, in the same manner as dissolution. It also means that nullity does not of itself affect the validity of the company's commitments. The rules in the directive thus leave intact the separate assets of a company which has been declared void, with the result that in principle the members' creditors cannot recoup themselves out of the goods contributed to the company by the members.

As stated earlier (paragraph 12), the First Directive does not affect other penalties provided for by national law in those circumstances, and the creditors retain, for instance, the possibility of bringing an action to set aside in their interests any *capital contribution* made in disregard of their rights.[33] Such an action will usually be more effective in protecting their interests than a declaration of nullity of the company itself.

33 — This point would appear to be undisputed. Only one reference: P. Van Ommeslaghe: 'La première directive du Conseil du 9 mars 1968 en matière de sociétés', *Cahiers de droit européen*, 1969, at p. 657.

Summary

20. To recapitulate, I have come to the following conclusions. Article 11 of the First Directive does not have direct effect as between individuals, with the result that La Comercial cannot rely directly on the exhaustive list of grounds of nullity set out in the directive against Marleasing's claim. However, the national court is under an obligation to interpret its national company legislation in conformity with the directive whenever such legislation is open to divergent interpretations. This would appear to be the case where, with regard to the nullity of (public limited) companies, general concepts of the law of contract are applied by analogy, first because such concepts are open to interpretation, and secondly because application by analogy is only one possible method of interpretation. In such a case, it seems to me, the national court can easily, when applying national law, apply the exhaustive list of grounds in Article 11 and possibly — should a declaration of nullity of the company nevertheless be made — the restriction on the retroactive effect of nullity pursuant to Article 12 of the First Directive.

The ground of nullity in Article 11(2)(b) must be understood as encompassing only unlawful objects or objects contrary to public policy which are set out in the instrument of incorporation or the statutes or are shown by the activity actually carried on by the company from its inception. The aim pursued by the founder members in setting up the company, where it is not expressed in the manner indicated above, does not come within the company's objects

in that sense. However, that does not prevent national law from enabling creditors of founder members whose interests have been detrimentally affected from availing themselves of other remedies (such as the action to set aside transfers made in order to defraud creditors) which — in the light of the limited effect of a declaration of nullity — are usually just as effective and which the directive leaves intact.

Conclusion

21. In the light of the foregoing considerations, I propose that the question submitted for a preliminary ruling should be answered as follows:

'(1) Article 11 of Council Directive 68/151/EEC of 9 March 1968 cannot be relied upon as such against an individual. However, the national court must interpret its national legislation in the light of the wording and the purpose of that provision of the directive and, where a declaration of nullity is made, in the light of Article 12 of that directive.

(2) The phrase "the objects of the company" in Article 11(2)(b) of Directive 68/151/EEC must be interpreted as meaning the objects as described in the published instrument of incorporation or statutes of the company, or as shown by the activity actually carried on by the company from its inception.'