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THE IMPACT OF THE INTERNAL MARKET ON
PRIVATE LAW OF MEMBER COUNTRIES

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Abstract

The papers collected in this Working Paper are the fruit of the Seminar ‘The Impact of the Internal Market on Private Law of the Member States’, which was organized by Profs. Fabrizio Cafaggi, Hans-Wolfgang Micklitz, and Norbert Reich at the European University Institute in the spring semester of 2009. The papers collectively aim to improve the understanding of the multi-level interplay between primary EC law and national private law. As such, the authors address the pressing topics of the shifting public – private divide in Community law, the impact of fundamental rights on Internal Market and national private law, the restrictive effect of national private law on the market freedoms, and the duty of national courts to *ex-officio* raise Community law in domestic legal disputes.

Keywords

European private law, Consumer protection, Contract, Public – private divide, Fundamental rights, Internal Market, Procedural autonomy.

Preface

The impact of European Community law on private law is heavily under-researched. So far there is only one single attempt known where Ernst Steindorff analysed the relationship between primary community law and private law. His book 'EG-Vertrag und Privatrecht' dates back to 1996. Unfortunately it has not gained the attention it deserves, in particular with regard to the current debate on a Common Frame of Reference, maybe because it was written in German or it was simply published at a too early date. That is why the dominant main stream legal discourse in and around the major EU project on the future of a (the) European Civil Law (Code) is focusing on a comparative law perspective or/and on the development of the private law *acquis* which is all too often equated with the consumer law *acquis*.

The four contributions from doctoral students of the EUI – all coming from different jurisdictions - which are united in this volume could be understood as a contribution to filling that gap. *Paul Verbruggen* is discussing the Public/Private Law Divide. The current legal debate is all too often dominated by the pre-understanding or shall we say prejudice that it is still possible to draw a clear demarcation line between public and private law. Ludwig Raiser published in 1971 a little booklet again in German which amply illustrates the shifting focus in private law from autonomy to regulation. EU private law is mostly regulatory law and therefore mandatory law, to some extent contradicting the traditional concept of private autonomy. It sets rules in particular markets or with regard to particular groups and cuts across the distinction of public and private law. The author discusses in a more general and a more theoretical perspective the shaky distinction between private and public law as provoked by the “intrusion” of EU law into areas traditionally reserved to private law.

The constitutionalisation of private law ranks high on the agenda. So far the discussion is very much focusing on the development in the Member States. Here one might observe a growing impact of constitutional law, of fundamental rights and human rights which intervene into private law litigation. The relationship between private law and human rights have even become a subject of a major comparative analysis which is about to be published in 2010 by G. Brüggemeier and A. Colombi Ciacchi. *Vassiliki Kosta* demonstrates in her thorough analysis that the European Court of Justice too is making more and more use of fundamental rights in cases of private law relevance. This is even true with regard to litigation that precedes the adoption of the Treaty of Lisbon where the Court made reference to the EU Charter of Fundamental Rights even before it became formally a binding legal instrument.

For more than two decades legal scholars started from the premise that the minimum harmonisation doctrine left much leeway for Member States to adopt and to maintain national rules which go beyond the standard of protection provided for in EC directives. The ECJ nourished these expectations with strong statements in *Buet* and lately in *Doc Morris*. However, time is changing and so is the role and function of minimum harmonisation. In light of the current tendency of the European Commission to foster maximum harmonisation and to turn minimum harmonisation rules into maximum standards, the ECJ seems ready to reconsider its more generous approach. *Susanne Gschwandtner* analyses National Private Law Rules as Restrictions to Market Freedoms. The recent ECJ judgment in *Gysbrechts* triggered a debate as to whether and under what conditions, national rules going beyond the minimum must be regarded as violating the proportionality principle. The author analyses this ground breaking judgment which will probably pave the way for more litigation to come where business might challenge higher national protection standards in consumer law.

Even more complicated is the relationship between substantive and procedural law. The EU has no overall competences in the field of procedural law beyond matters of jurisdiction and recognition of judgments and similar legal acts in cross border litigation. In essence the EU relies on the Member States to enforce EU law. Consequently there is no such thing as EU procedural law, quite in contrast to federal systems as the US, Canada, and Australia. One might therefore be tempted to believe that

Member States' procedural law remains safe from any intrusion of EU law. However, the contrary is true. In its early *Rewe* judgment the ECJ whilst stressing the 'procedural autonomy' of the Member States has pointed out its limits. More importantly in our context is the overall tendency in regulatory private law, implicitly or explicitly, to lay down binding rules which overcome the clear cut boundaries between substantive and procedural law. *Hanna Schebesta* analyses one of the most debated and still controversial issues in EU law, namely the impact of the '*ex-officio*' doctrine under which Member States courts are obliged to raise on their own motion the question whether and to what extent pre-formulated contract clauses violate mandatory EC contract law rules. The author discusses the relationship between the *ex officio* doctrine and the principle of "procedural autonomy" and thereby digs deeply into the future of a European procedural law that supplements national procedural law.

The four contributions shed light on a debate which is about to start and which will continue with ever more intensity. We would hope that the four contributions are widely read and discussed. There is need for more discussion on the relationship between primary Community law and national private law. The Lisbon Treaty and the ongoing legislative activities of the EU will foster the importance of a better understanding of the impact of primary Community law on national private laws.

Hans-W. Micklitz

Norbert Reich

Florence, December 2009

The Public – Private Divide in Community Law: Exchanges across the Divide

Paul Verbruggen*

Introduction

Continental lawyers do not know better than that the law can be divided in two principle domains: public and private law. In their law schools, these domains refer not only to different courses, but also to different laws, competences, and procedures. From a course on the history of law they might even remember that already the Romans were familiar with the basic separation of the public law from the private: public law is the law that is concerned with the position of the Roman state; private law is the law that is concerned with the interest of the individual citizens.¹ Accordingly, it is public law that determines the legal position of individuals vis-à-vis the state and regulates public interest and it is private law that enables individuals to regulate their relationships in an autonomous fashion and in accordance with their own preferences.

While it is true to hold that the public – private divide is one of the oldest conceptual divisions common in European legal cultures,² it would be a fallacy to hold that the divide is sacred in Europe.³ For one, the Anglo-Saxon tradition rejects the idea that public law can be separated from private law. Instead, this tradition departs from the assumption that the law forms a unity: the common law. While common law lawyers concede that a public – private divide might be convenient for educational purposes, it is widely argued that such a distinction cannot be sustained in practice.⁴ Also in the continental tradition the idea of a clear dividing line between the two domains has lost support. Private law arrangements in labour, media, and environmental law have been widely used to regulate public interests.⁵ Equally, public law has encroached on private law terrain by introducing mandatory rules in the fields of consumer, tenant and medical law. Therefore, public law no longer only determines the

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¹ Ulpianus, Dig. 1.1.1.2: Publicum ius est quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem; sunt enim quaedam publice utilia, quaedam privatim.

² O Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party : A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Schriften zur Europäischen Rechtswissenschaft, Sellier. European Law Publishers, München 2007), 56.

³ See for an inspiring account: G Teubner, 'After Privatization? The Many Autonomies of Private Law' (1998) 51 *Current Legal Problems* 393-424 with further references. See also the contributions to the comparative work by M Ruffert (ed), *The Public-Private law Divide: Potential for Transformation?* (British Institute of International and Comparative Law, London 2009). See for an international perspective: A Mills, *Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, Cambridge (United Kingdom); New York 2009).

⁴ D Oliver, *Common Values and the Public-Private Divide* (Butterworths, London 1999) 14. In arguing that an integrated, value-based approach to substance, remedies, and procedures should be adopted rather than a public-private divide Oliver cites Klare, who suggests that '(...) it is seriously mistaken to imagine that legal discourse or liberal political theory contains a core conception of the public-private distinction capable of being filled with determinate content or applied in a determinate manner to concrete cases. There is no "public-private distinction."' K Klare, 'The Public-Private Distinction in Labour Law' (1982) 130 *University of Pennsylvania Law Review* 1358-1361, at 1361, cited in Oliver 1999, op cit, 248.

⁵ In the United Kingdom this trend has been labeled 'new public contracting'. See for a comprehensive discussion: P Vincent-Jones, *The New Public Contracting: Regulation, Responsiveness, Relationality* (Oxford University Press, Oxford 2006).

legal position of individuals vis-à-vis the state, just as private law no longer only concerns the regulation of private individual relationships. This has led scholarship to claim that the public – private divide has become more a matter of accent rather than of strict separation.⁶

But how would the European lawyer approach the public – private divide? Does the basic partition also emerge in the legal framework established over time by the Economic European Communities (EEC), European Community (EC) and European Union (EU)? In this essay it is argued that the claim of the existence of a public – private divide in Community law can be traced back to the absence of competences to harmonize private law at the European level (Section I). However, the public – private dichotomy in Community law has been fading strongly. It is submitted that the convergence of the two unfolds in a two-dimensional, reciprocal fashion as illustrated by figure 1.

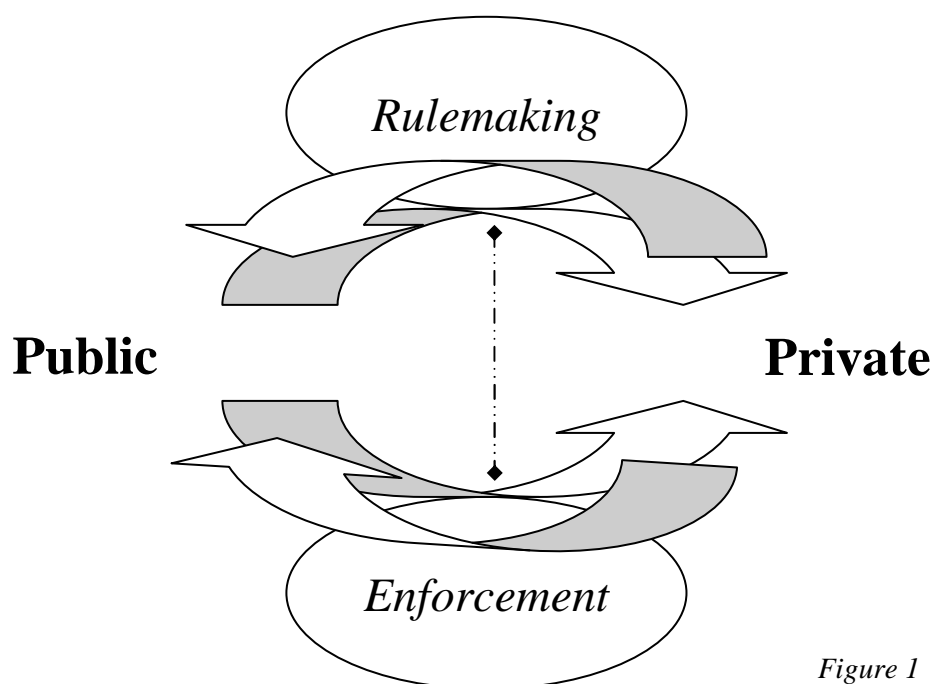


Figure 1

Both from a rulemaking and an enforcement perspective, regulatory functions typically associated to the public or private sector are increasingly assumed by actors on the other side of the divide. What emerges in the Community context is that the public sector seems to increasingly affect private law where it is concerned with the regulation of contractual relations (Section II). At the same time, private law, more often than assumed, takes on a public regulatory function as the Community institutions increasingly rely on contractual arrangements to regulate public interests (Section III). From an enforcement perspective similar exchanges of regulatory functions occur across the divide. In the Community context, public authorities engage in – collective – enforcement strategies and seek to provide more effective remedies for private harm. On the other hand, private enforcement mechanisms – both judicial and extra-judicial – are encouraged in order to attain public policy objectives identified by Community law (Section IV). The essay concludes by holding that a strong mutual permeability of the public and the private exists in Community law.

⁶ See for a critical appraisal of the arguments presented in German and Dutch literature explaining the rationale of the separation between public from private law Cherednychenko 2008, op. cit., Ch. 2.

I. The Initial Public – Private Divide in Primary Community Law

It has been submitted by legal scholarship that primary Community law initially witnessed a rather strong public – private divide as it almost exclusively focused on vertical relations between state and citizen.⁷ From a historical perspective it can indeed be observed that the process of European integration started off as a public international law enterprise almost exclusively addressing the relations between public authorities, at the Community or Member State level, *vis-à-vis* individuals, rather than horizontal relations among individuals. At the birth of Community law in 1957, one of the principal objectives of European integration was to establish a common market via the provision of fundamental freedoms and anti-discrimination rules, thereby liberating individuals from state requirements blocking the creation of the internal market. This message of ‘freedom’ was further echoed in key concepts underlying primary Community law as developed by the European Court of Justice (ECJ) from the 1960s onwards. The doctrines of direct effect⁸ and primacy of Community law over national law,⁹ the principle of mutual recognition of goods lawfully marketed in Member States,¹⁰ and the creation of Member State liability;¹¹ they all stress the focus of Community law on determining the legal position of the state *vis-à-vis* the individual.

At their roots, none of these central concepts of Community law address the relations between individuals which are, at least in the continental traditions, typically regulated by private law. The only exception to this initially strong public – private divide in primary Community law is formed by the provisions on competition law, now enshrined in Articles 81 and 82 of the EC Treaty. These provisions directly interfere with the contractual relations of individuals and, more specifically, undertakings since they declare automatically void contractual arrangements, decisions, or concerted practices that have a detrimental effect on trade between Member States and competition.¹² This affects private law intimately.

Save the provisions of EC competition law, it can be held that Community law was thus principally characterised by a ‘vertical structure’,¹³ thereby assuming a rather strong public – private separation in the early stages of European integration. Perhaps the most important reason explaining this dichotomy is the fact that the constituting treaties did not explicitly provide for Community regulatory competences in the field of private law. Private law competences, both from a rulemaking and enforcement perspective, were to remain at the national level, subject to the prerogatives of the Member States.¹⁴ Initially, a private law dimension was therefore principally lacking in primary Community law. As a result, it must be held that the claim of the existence of a public – private divide in Community law can be traced back to the absence of explicit competences to harmonize private law at the European level. It is equally important to acknowledge that a discussion of the public – private separation in Community law therefore also entails a discourse on the scope of Community competences and the extent to which matters of national law are affected. Having this in mind, the

⁷ D Caruso, ‘Private Law and Public Stakes in European Integration: the Case of Property’ (2004) 10 *European Law Journal* 751-765, 752-753 and N Reich, ‘The Public/Private Divide in European Law’ in F Cafaggi and HW Micklitz (eds), *European Private Law after the Common Framework of Reference* (Edward Elgar, Cheltenham forthcoming, 2010). See for a discussion of the terminology ‘public’ and ‘private’ in the European context: M Heidemann, ‘Private Law in Europe-The Public/Private Dichotomy Revisited’ (2009) 20 *European Business Law Review* 119-139.

⁸ Case 26/62 *Van Gend en Loos* [1963] ECR 13.

⁹ Case 6/64 *Costa* [1964] ECR 585.

¹⁰ Case 120/78 *Cassis de Dijon* [1979] ECR 649.

¹¹ Case C-6&9/90 *Francovich* [1991] ECR I-5357.

¹² Article 81(2) EC.

¹³ Reich 2010, *op. cit.*

¹⁴ Still today, after the Treaties of Maastricht (1992), Amsterdam (1997), and Nice (2001) no general competence is assigned to the Community in the EC Treaty to take measures in the field of private law. See also Section II below.

next section discusses how the Community has engaged itself in the field of private law by adopting regulatory measures, thereby essentially fading the dividing line between the public and the private dimensions.

II. Community Law in Private Contract

Arguably, the most apparent changes in the Community public – private divide concern the influence of primary and secondary Community law on private rulemaking. This section sets out a number of ways in which Community law affects private rulemaking by limiting itself to contract law.¹⁵ Even with this caveat in mind, the section does not pretend to be exhaustive as the Community influence on contract law has become hugely intense over the past years.¹⁶ It intends, just like the other sections in the paper, to offer a description of the forest, not the trees.

I. Primary Community Law

Save the prohibitions of EC competition law, private law initially appears to be largely absent in the context of primary Community law. However, in the famous *Defrenne II* case,¹⁷ the ECJ opens an important door for primary Community law to directly exert influence on private law relations through its provision on non-discrimination. In this case, which concerned a dispute between a Belgian airhostess and her employer on the right to equal pay, the ECJ holds that the non-discrimination provision enshrined in Article 119 EEC, now slightly adjusted in Article 141 EC, is directly applicable in contractual relations. The ECJ strongly rejects the argument that Article 119 EEC cannot confer rights to individuals since the explicit wording of this Treaty provision is formally addressed to Member States and not to individuals. It holds that: ‘(...) since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.’¹⁸

It did not take long for the ECJ to extend the application of the Treaty provisions on the freedom of movement also to horizontal relations.¹⁹ The first case, *Walrave*,²⁰ concerned two Dutch nationals acting as ‘pacemakers in cycling racing behind motorbikes’. They objected to a rule of the Union Cycliste Internationale requiring the pacemaker and the cyclist to be of the same nationality to participate in the world cycling championships. The ECJ was asked by the referring court whether Articles 48 and 59 of the EEC on the free movement of workers and services – now Articles 39 and 49

¹⁵ The influence of primary Community on private law reaches beyond contract law alone. Other terrains of private law that have been subject to primary Community law influence include, company law by virtue of the ECJ judgments in Case 81/87 *Daily Mail* [1988] ECR 5483, Case C-212/97 *Centros* [1999] ECR I-1459, Case C-208/00 *Überseering* [2002] ECR I-9919, Case C-167/01 *Inspire Art* [2003] ECR I-10155, and Case C-210/06 *Cartesio*, n.y.r., property law (see for an overview: Caruso 2004, op. cit.) and name law by virtue of the ECJ judgments in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, and Case C-353/06 *Grundkin Paul*, n.y.r. Recently also the influence of Community fundamental rights on contract law has been highlighted. See e.g.: Cherednychenko 2007, op. cit., 204-227 and C Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Private Law in European Context Series, Kluwer Law International, Alphen aan den Rijn 2008).

¹⁶ For example, of pre-contractual information duties (see: H-W Micklitz and N Reich, ‘Cronica de una muerte anunciada: The Commission Proposal for a "Directive on consumer rights"' (2009) 46 *Common Market Law Review* 471-520) and the ending of contracts are not discussed here.

¹⁷ Case 43/75 *Defrenne* [1976] ECR 455.

¹⁸ *Ibidem*, paras. 39.

¹⁹ See also, Cherednychenko 2007, op. cit., 193-204 and Reich 2010, op. cit..

²⁰ Case 36/74 *Walrave and Koch* [1974] ECR 1405.

EC – preclude such a sporting rule. The ECJ held that in judging the validity of rules of associations or organisations which do not come under public law, the national court has to take into account these Treaty provisions by virtue of their direct effect.²¹

The precedent set by *Walrave* in the field of sporting rules, has been confirmed in the wider area of employment relations by the rulings in *Bosman*,²² *Deliège*,²³ *Angonese*.²⁴ More recently, the judgments in *Viking*²⁵ and *Laval*²⁶ have shown that that the influence exerted by Community law on private law relations is most apparent in employment relations.²⁷ In *Viking* the ECJ had to deal with collective actions of the Finnish Seafarers Union and the International Federation of Transport Workers following the decision of the Finnish company Viking Line, which operates a ferry between the cities of Helsinki and Tallinn, to outflag its operations from Finland to Estonia. This way Viking Line could benefit from the lower minimum wage regime in the latter Member State and impose this regime on newly appointed crew members. In *Laval* the ECJ faced the situation in which a Swedish union for construction workers had boycotted a building site operated by Laval, a Latvian construction company. Laval operated this building site by employing posted workers from Latvia. The Swedish union had requested Laval to pay the workers according to Swedish law, but this was refused by Laval. The boycott that followed the refusal forced Laval to end the constructions and withdraw its workforce.

It follows from the ECJ judgments, which were delivered only one week after each other, that not only the free movement of workers (Article 39 EC) but also the freedom of establishment (Article 43 EC) and the freedom to provide services (Article 49) can apply directly in horizontal relations. Or as the ECJ explicitly holds: ‘it must be borne in mind that, according to settled case-law, Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.’²⁸ In *Viking*, the ECJ argues that this must be so since working conditions are governed in some Member States by law and in others by collective agreements, limiting the application of Articles 39, 43, and 49 EC to acts of public authority would risk creating inequality in their application.²⁹ In *Laval* the ECJ justifies the horizontal application of Article 49 EC by holding that the removal of obstacles to the freedom to provide services ‘would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.’³⁰

²¹ Ibidem, para. 16-25.

²² Case C-415/93 *Bosman* [1995] ECR I-4921, para. 83.

²³ Case C-191/97 *Deliège* [2000] ECR I-2549, para. 47.

²⁴ Case C-281/98 *Angonese* [2000] ECR I-4139, para. 32.

²⁵ Case C-438/05 *Viking* [2007] ECR I-10779.

²⁶ Case C-341/05 *Laval* [2007] ECR I-11767. See for case comments together with *Viking*: ACL Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’ (2008) 37 *Industrial Law Journal* 126-148 and D Wyatt, ‘Horizontal Effect of Fundamental Freedoms and the Right to Equality after *Viking* and *Mangold*, and the Implications for Community Competence’ *Croatian Yearbook of European Law and Policy* (University of Zagreb, Zagreb 2008).

²⁷ See also Reich 2010, op. cit..

²⁸ Case C-438/05 *Viking* [2007] ECR I-10779, para. 33.

²⁹ Ibidem, para. 34.

³⁰ Case C-341/05 *Laval* [2007] ECR I-11767, para. 98.

While it is disputed what implications the Viking and Laval cases have for the horizontal effect of Article 28 EC,³¹ it can be submitted here that it follows from the case law discussed above that the principal technique through which primary Community law exerts its influence on private law relations is the doctrine of direct effect. Direct effect has been employed by the ECJ to enable individuals to rely on Treaty provision in private law relations. It has also allowed the ECJ to strike down private law arrangements that oppose the Treaty provisions on non-discrimination, free movement, and competition.

2. *Secondary Community Law*

The influence of secondary Community law on contract law is vast. Rather than using the doctrine of direct effect to eliminate the obstacles for the creation of the internal market, also referred to as 'negative integration', positive integration via the adoption of harmonisation Directives has been the chief instrument through which contract law has been submitted to Community law influence. This is not to say that this more policy oriented type of influence has been free from critique in scholarly literature. In fact, the competences of the Community to adopt such a positive approach to integration are still subject to critique. As Weatherill observes, still the EC Treaty does not provide the Community legislator with a general competence to operate in the field of private law.³² Although particular legal bases have been introduced via the Treaties of Maastricht³³ and Amsterdam³⁴ and can be employed to adopt EC legislation that affects private law, a general competence is lacking. This stance of primary Community law lies at the root of the doctrinal critique on the efforts by the European Commission to unify the private law³⁵ and the scholarly debate on the recently published 'Draft Common Frame of Reference'.³⁶ The Commission has also conceded that areas of private law cannot be harmonised in the near future, or even never.³⁷

³¹ Reich 2010, op. cit. and Wyatt 2008, op. cit., 15-20.

³² S Weatherill, 'European Private Law and the Constitutional Dimension' in F Cafaggi (ed) *The Institutional Framework of European Private Law* (Collected Courses of the Academy of European Law Oxford University Press, Oxford 2006) 79.

³³ Article 153 EC on consumer protection was introduced by the Treaty of Maastricht and allows the Community under 3(b) to adopt measures to promote of the interests of consumers and to ensure a high level of consumer protection which support, supplement and monitor the policy pursued by the Member States. Article 153 EC has, however, largely remainder a dead letter and has not been used a legal basis for Community measures affecting private law.

³⁴ Article 65 EC empowers the Community to take measures in the field of judicial cooperation in civil law matters as far as they are necessary for proper functioning of the internal market.

³⁵ See e.g.: W Van Gerven, 'The ECJ Case-Law as a Means of Unification of Private Law?' in AS Hartkamp (ed) *Towards a European Civil Code* (3rd edn, Ars Aequi Libri, Nijmegen 2004).

³⁶ Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) (ed), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame Of Reference (DCFR)*. Interim Outline Editions (Sellier. European Law Publishers, Munich 2009). See for a comprehensive overview of the critique on the Study Group and its predecessor the Acquis Group: C Twigg-Flesner, 'The Acquis Principles: An Insider's Critical Reflections on the Drafting Process' in C Baasch Andersen and M Andeneas (eds), *Theory and Practice of Harmonisation*, (forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342713#>.

³⁷ Commissioner Vitorino: 'Il existe certains domaines du droit civil en du droit pénal, tant en ce qui concerne le fond que la procédure, que ne seront pas harmonisés pendant très longtemps entre les membres de l'Union européenne, et peut-être même jamais', quoted in: O. Remien, *Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice*, CMLR (2001) 63. I thank Jan-Jaap Kuipers for providing me with this reference.

Despite the absence of a general competence to regulate private law, the Community has exerted major influence on national contract law through secondary legislation, mainly EC Directives. Articles 94 and 95 EC have been the paramount legal basis for this development.³⁸ As a result of the adoption of the EC Directives on doorstep selling³⁹ and consumer credit⁴⁰ in the 1980s, and the EC Directives on package travel,⁴¹ unfair terms in consumer contracts,⁴² timesharing,⁴³ distance contracts,⁴⁴ and consumer sales⁴⁵ in the 1990s, national contract law has been supplemented by mandatory EC rules, thereby substantially re-shaping its character. This development has continued over the past years via the EC Directives on electronic commerce,⁴⁶ consumer financial services,⁴⁷ unfair commercial practice,⁴⁸ and the recent proposal for an EC Directive on consumer rights.⁴⁹ This list indicates that the process of harmonisation in the field of consumer contract law has indeed been intense. The result is said to be that national contract law has been invaded, rather haphazardly, by European standards.⁵⁰ However, this intrusion might be even deepened by interpretations given to the provisions in the EC Directives by the ECJ. For example, in the cases *Océano*⁵¹ and *Claro*,⁵² which concerned the interpretation of the EC Directive on unfair terms in consumer contracts, the Court held that it could interpret ‘general’ criteria found in Community legislation.⁵³

³⁸ Weatherill 2006, op. cit., 80 and C Twigg-Flesner, *The Europeanisation of Contract Law. Current Controversies in Law* (Routledge - Cavendish, London/New York 2008) 25-33.

³⁹ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, 31).

⁴⁰ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, 48).

⁴¹ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.12.1992, 59).

⁴² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.04.1993, 29).

⁴³ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, 83).

⁴⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, 19).

⁴⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, 12).

⁴⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17/07/2000, 1).

⁴⁷ Directive 2002/65/EC European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services (OJ L 271, 9.10.2002, 16).

⁴⁸ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, 22).

⁴⁹ Proposal for a Directive European Parliament and of the Council on Consumer rights on 8 October 2008, COM(2008) 614 final.

⁵⁰ As Twigg-Flenser notes, the image emerges of ‘islands, or blots, of European law within national contract law’. Twigg-Flenser 2008, op. cit., 10.

⁵¹ Case C-240 to 244/98 *Océano* [2000] ECR I-4941.

⁵² Case C-168/05 *Claro* [2006] ECR I-10421.

⁵³ However, in Case C-237/02 *Hofstetter* [2004] ECR I-3403, the ECJ refused to interpret on its own motion whether a contractual term was unfair and referred the case back to the national court concerned.

But also outside the field of consumer contract law, Community influence on contract law is powerful. Secondary Community legislation on non-discrimination in employment relations proves to be a good example here. The EC Directives on fixed-term contracts,⁵⁴ on racial equality⁵⁵ and equal treatment in employment and occupation⁵⁶ have been interpreted by the ECJ in the cases of *Mangold*,⁵⁷ *Maruko*,⁵⁸ and *Coleman*⁵⁹ in a manner that directly impacts on the horizontal relations between employee and employer.

A second example concerns Community legislation on 'services of general economic interests' (SGEI). The Commission refers to SGEIs as

'(...) services of economic nature which the Member States or the Community subject to specific public service obligations by virtue of their general interest. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications.'⁶⁰

While this definition is much disputed in the literature,⁶¹ the regulation of SGEI through secondary Community legislation directly affects key issues of contract law. The Universal Services Directive⁶² in telecommunications, the Electricity Market Directive⁶³ and the Regulation on Railway Passenger Rights⁶⁴ all grant the customer of the services the right to contract with the supplier. Consequently, the supplier's freedom of contract, a basic principle of private law, is limited. Closely linked to this right to have access to SGEIs is the affordability of the service. Here too secondary Community legislation imposes new restrictions on contract law. The EC Directives concerning the supply of energy,⁶⁵ gas,⁶⁶ postal,⁶⁷ and telecommunication services⁶⁸ all require that the services are made available at a

⁵⁴ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, 43).

⁵⁵ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, 22).

⁵⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, 16).

⁵⁷ Case C-144/04 *Mangold* [2005] ECR I-9981.

⁵⁸ Case C-267/06 *Maruko* [2008] ECR n.y.r.

⁵⁹ Case C-303/06 *Coleman* [2008] ECR n.y.r.

⁶⁰ European Commission, 'White Paper on Services of General Economic Interest' COM(2004) 374 final, 12.5.2004, 22.

⁶¹ See e.g.: U Neergaard, 'Services of General (Economic) Interest and the Services Directive – What Is Left Out, Why and Where to Go?' in U Neergaard, R Nielsen and L Roseberry (eds), *Services Directive : Consequences for the Welfare State and the European Social Model* (DJØF Pub, Copenhagen 2009) and T Prosser, *The Limits of Competition Law. Markets and Public Services* (Oxford University Press, Oxford 2005), Chapter 5.

⁶² Article 20(2) at 1 of Directive 2002/22/EC of the European Parliament and of the Council of 24 April 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Services Directive) (OJ L 108, 24.4.2002, 51).

⁶³ Article 3 with Annex A at (a) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ L 176, 15.7.2003, 37).

⁶⁴ Article 19(1) of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, 14).

⁶⁵ Article 3(2) of Directive 2003/54 of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ L 176, 15.7.2003, 37).

⁶⁶ Annex A(g) of Directive 2003/55 of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ L 176, 15.7.2003, 57).

⁶⁷ Article 12 of Directive 2008/6 of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, 3).

‘reasonable’ or affordable’ price. The Universal Services Directive even lays down a price control mechanism for the tariffs charged by the supplier of the services.⁶⁹ Besides access and affordability, secondary Community legislation extends also to issues of choice and transparency, quality, and continuity.⁷⁰

A final example concerns the Air Passenger Regulation.⁷¹ The Regulation aims to ensure a high level of air passenger protection. Accordingly, air passengers are granted minimum rights in situations where they are denied boarding or the flight is delayed or cancelled. These include rights to compensation, reimbursement, care, redress, and information,⁷² thereby regulating issues which were formerly at the discretion of the contracting parties.⁷³

III. Private Contract in Community Law

While the developments set out in Section II show that primary and secondary Community law have intensely affected national contract law, this section argues that private regulation, for its part, deeply affects public law terrains in the European context. By this is not meant the mere use by the Community of private law instruments such as contracts to establish labour relations with its employees or acquire real estate to house its offices. Instead, what is discussed here is the use of contractual arrangements by the Community as a means to attain public policy interests.⁷⁴

Since the turn of the millennium, the EU has strongly committed itself to using self- and co-regulation as a regulatory strategy to ensure goals identified in various policy areas. In its 2002 ‘Better Regulation’ programme,⁷⁵ these regulatory approaches, which are essentially based on contract, are employed as an alternative to formal EU legislation. It is presumed that the use of self- and co-regulatory arrangements allows for greater regulatory flexibility and expertise, cost-efficiency, and compliance.⁷⁶ Wishes to decrease the volume of EU regulation and the administrative red tape

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⁶⁸ Article 3(1) Universal Services Directive.

⁶⁹ Article 10(1) Universal Services Directive.

⁷⁰ See for a comprehensive assessment of these issues: P Rott, ‘A New Social Contract Law for Public Services? Consequences from Regulation of Services of General Economic Interest in the EC’ (2005) 1 *European Review of Contract Law* 323-345 and H-W Micklitz, ‘Regulatory Strategies on Services Contracts’ (2008) EUI working papers. LAW No. 2008/06 <<http://cadmus.iue.it/dspace/handle/1814/7993>> accessed 15 August 2009.

⁷¹ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004).

⁷² Some of provisions granting these rights were unsuccessfully challenged on the basis of invalidity in the IATA decision (Case C-344/04 IATA [2006] ECR I-403).

⁷³ Case law in the area is evolving fast. See for an overview of the recent case law: H-W Micklitz, ‘Rechtsprechung zum Europäischen Verbraucherrecht in den Jahren 2006, 2007 und 2008: Vertrags- und Deliktsrecht One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’ (2009) 19(9) *Europäisches Wirtschafts- und Steuerrecht* 353-369, 357-360.

⁷⁴ This analysis draws on an earlier publication of mine: P Verbruggen, ‘Does Co-Regulation Strengthen EU Legitimacy?’ (2009) 15 *European Law Journal* 425-441.

⁷⁵ See for a general description of the programme http://ec.europa.eu/governance/better_regulation/index_en.htm. See for critical discussions on the EU Better Regulation programme: JB Wiener, ‘Better Regulation in Europe’ (2006) 59 *Current Legal Problems* 447-518; R Baldwin, ‘Is Better Regulation Smarter Regulation?’ (2005) *Public Law* 485-511; BE Olsen and KE Sørensen (eds), *Regulation in the EU* (Thomson / Sweet and Maxwell, Copenhagen 2006); S Weatherill (ed), *Better regulation* (Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford ; Portland Or. 2007) and M Kaeding, *Better regulation in the European Union : lost in translation or full steam ahead : the transposition of EU transport directives across member states* (University of Leiden, Leiden 2007).

⁷⁶ See e.g. Commission (EC), ‘European Governance’ (White Paper) COM (2001) 428 final, 25 July 2001, 21, Commission (EC), ‘Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment’ (Communication) COM (2002) 412 final, 17 July 2002, 8,

associated with it have also encouraged the use of self-regulation to the detriment of traditional EU legislation.⁷⁷ Therefore, the guidelines for impact assessments carried out by the European Commission now explicitly include the consideration of using self-regulation as the appropriate policy option as a means for regulation.⁷⁸

Self-regulation emerges in different forms. If state involvement is absent and only private actors are concerned in establishing regulatory rules, this is typically called 'pure' or 'voluntary' self-regulation'.⁷⁹ An example of such self-regulation is the creation of disciplinary rules by a professional, industry, or sports association that are administered by the association itself. Often, however, self-regulatory arrangements are not wholly free of state interests. Public authorities tend to facilitate the creation, implementation, or enforcement of such rules as well. If both private and public actors are concerned with the different stages of the regulation process, i.e. standard-setting, monitoring, and enforcement, this form of self-regulation is often referred to as 'co-regulation'.⁸⁰

Self- and co-regulation appeared in the European context already more than 25 years ago. The involvement of private actors in public regulatory processes was already witnessed in the European Communities (EC) during the 1980s, when the Commission decided to adopt a 'New Approach' to the harmonisation process as a method to boost the development of the internal market. This new approach promoted the use of standards in order to remove 'technical barriers to trade'.⁸¹ As a result, the Community merely stipulated the 'essential requirements' in its legislation and left it to private standard-setting bodies – CEN and CENELEC – to adopt technical standards for the products concerned. This shift away from the traditional hierarchical governance structure can also be seen in the development of a common European social dialogue from the mid-1980s and the use of agreements between the Commission and industries as a strategy to ensure Community objectives in the field of environmental law in the 1990s. Examples of these environmental agreements are the

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Commission (EC), 'Action Plan on Simplifying and improving the regulatory environment' COM (2002) 278 final, 11-13.

⁷⁷ By initiating the Better Regulation programme the EU aspires to decrease the administrative costs caused by regulatory burdens with 25% by 2012 and has embraced the use of private forms of regulation as a strategies to achieve that goal. Similar aspirations exist in other parts of the world. See: Organisation for Economic Co-operation and Development, *From red tape to smart tape: administrative simplification in OECD countries* (OECD, Paris 2003).

⁷⁸ See in this respect the Impact Assessment Guidelines 2005 <http://ec.europa.eu/governance/impact/docs/key_docs/sec_2005_0791_en.pdf> accessed 15 August, 23-24. Currently these guidelines are under review. The new guidelines, which intend to give greater importance to private regulation, will be available this year. See <http://ec.europa.eu/governance/impact/consultation/ia_consultation_en.htm> accessed 15 August. See also A Meuwisse and L Senden, 'European Impact Assessment and the Choice of Alternative Regulatory Instruments' in J Verschuuren (ed) *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation* (Martinus Nijhoff Publishers, Leiden, Boston 2009) on the question to what extent private regulation is in fact proposed as the appropriate strategy after the Commission's impact assessments.

⁷⁹ See e.g. A Ogus, 'Rethinking Self-Regulation' (1994) 15 *Oxford Journal of Legal Studies* 97-108, J Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24-551996, op. cit.; R Baldwin and M Cave, *Understanding regulation: theory, strategy, and practice* (Oxford University Press, Oxford ; New York 1999). See for the official EU definition of self-regulation: European Parliament, Council and Commission Interinstitutional Agreement (EC) on better law-making [2003] OJ C 321/1, 31 December 2003, at para 22 which reads: Self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).

⁸⁰ F. Cafaggi, 'Rethinking Private Regulation' and C. Scott, 'Self-Regulation and the Meta-Regulatory State' both in F. Cafaggi (ed), *Reframing Self-Regulation in European Private Law* (Private Law in European Context Series, Kluwer Law International, 2006); L Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?' (2005) *Electronic Journal of Comparative Law* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943063> accessed 15 August 2009 and; E Svilpaite, 'Legal Evaluation of the Selected New Modes of Governance: The Conceptualisation of Self- and Co-Regulation in the European Union Legal Framework' (2007) *NewGov Project Paper* <http://www.eu-newgov.org/database/DELIV/D04D69_Limits_of_self-regulation.pdf> accessed 15 August 2009.

⁸¹ Technical harmonisation and standardisation: a new approach, COM(1985), 19 (Not published in the Official Journal).

recommendations concluded by the Commission with the European, Japanese, and Korean car manufactures' associations to reduce the emission of carbon dioxide by cars,⁸² and four agreements on energy efficiency on household applications which were endorsed by the Commission by exempting them from applicable EC competition law rules.⁸³

More recently, the regulatory strategies of self- and co-regulation has been applied in various pieces of secondary EC legislation, affecting different sectors. Examples include the regulation of services,⁸⁴ listing in financial markets,⁸⁵ e-commerce,⁸⁶ product safety,⁸⁷ payment services,⁸⁸ and television broadcasting.⁸⁹ When employing a broad definition of co-regulation even the Lamfalussy procedure in insurance and financial services, technical standardisation, and the regulation of SGEI could be qualified as co-regulatory.⁹⁰

The EC Directive on Unfair Commercial Practices (UCPD) merits special attention.⁹¹ In this Directive, which aims to increase consumer protection in the area of commercial practices, private norms that have been established in commercial practices serve as a basis for the definition of what unfair

⁸² Commission Recommendation 1999/125/EC of 5 February 1999 on the reduction of CO₂ emissions from passenger cars, OJ 1999, L 40/49; Commission Recommendation 2000/303/EC of 13 April 2000 on the reduction of CO₂ emissions from passenger cars (KAMA), OJ 2000, L 100/55; and Commission Recommendation 2000/304/EC of 13 April 2000 on the reduction of CO₂ emissions from passenger cars (JAMA), OJ 2000, L 100/57. See for a discussion: J Verschuuren, 'EC-Environmental Law and Self-Regulation' in H Somson and others (eds), *The Yearbook of European Environmental Law* (Oxford University Press, Oxford 2000) 106-107.

⁸³ E Best, 'What Does Co-Regulation Really Mean?' (2008) *Eipascope* 11-16, 15.

⁸⁴ Article 37(1) of the European Parliament and Council Directive (EC) 2006/123 of 12 December 2006 on services in the internal market [2006] OJ L376/36. See for a wider discussion of self- and co-regulation in services contracts: Micklitz 2008, op. cit.

⁸⁵ Directive 2001/34.

⁸⁶ Article 16 of the European Parliament and Council Directive (EC) 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

⁸⁷ Article 4 of the European Parliament and Council Directive (EC) 2001/95 of 3 December 2001 on general product safety OJ L11/4.

⁸⁸ The Single Euro Payments Area (SEPA) programme is a self-regulatory initiative by the European Payments Council (EPC) which aims to make all electronic payments across the euro area, e.g. by credit card, debit card, bank transfer or direct debit, as easy as domestic payments within one country are now. The European Payments Directive (Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC Text with EEA relevance) provides the necessary legal framework for SEPA, as well as for better payments in all EU countries. See: <http://ec.europa.eu/internal_market/payments/sepa/index_en.htm>.

⁸⁹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (the Audiovisual Media Services Directive) lays down a regime strongly relying on the self-regulatory capacities of the economic operators, social partners, non-governmental organisations or associations concerned in the media sector. The Directive 'encourages the use of co-regulation and self-regulation' (recital 36) and as such media content can be regulated through norms established by private actors, provided that they are accepted by the main stakeholders and secure effective enforcement of the standards. See: <http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=2343>. See for a comparative study of self- and co-regulation in Europe: Hans-Bredow-Institute for Media Research, 'Study of Co-Regulation Measures in the Media Sector. Study for the European Commission, Directorate Information Society and Media' (2006) Final Report <http://ec.europa.eu/avpolicy/docs/library/studies/coregul/final_rep_en.pdf>, accessed 15 August 2009.

⁹⁰ Micklitz 2008, op. cit., 23-25.

⁹¹ The European Parliament and Council Directive (EC) 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22.

commercial practices are.⁹² This means that the scope of the UCPD is defined, *inter alia*, on the basis of private norms developed through commercial practices. Articles 10 and 11 of the UCPD further promote the use and enforcement of codes of conduct, i.e. private law arrangements established by a group of companies or industry representatives, at the Member States as a complementary means to combat unfair commercial practices. Whilst the UCPD does not oblige Member States to employ self- or co-regulatory mechanisms to protect consumers against commercial practices that harm their economic interests, it certainly does acknowledge their importance in achieving consumer protection at the national level.⁹³

The image that thus emerges is of a Community legislator that increasingly acknowledges the regulatory role private actors and private law arrangements can play in regulating public policy objectives, such as consumer protection. This mixing of regulatory instruments blurs the traditional public – private divide in an inevitable fashion. An important factor explaining this development is the lack of capacity of public actors to effectively regulate today's corporate business standards by way of traditional public law rules.⁹⁴ The complexity and speed at which products and services are developed can make regulation obsolete the moment it is enacted. Consequently, a clear shift can be observed in the extent to which rules established by the private sector fill the regulatory space previously assigned to public regulation.

IV. Community Law and the Enforcement of Private Rights

Sections II and III set out how the public – private divide in Community law has faded when looking through a rulemaking lens. This section argues that the divide, albeit less vividly, also loses strength from an enforcement perspective as enforcement functions typically assumed by the public or private sector are now increasingly allocated on both sides of the divide. Within the Community context, the collective enforcement of consumer rights and private enforcement in EC competition law constitute important illustrations of how public and private enforcement strategies become increasingly mixed and interdependent.

1. Collective Enforcement of EC Consumer Rights

Due to the principle of procedural autonomy,⁹⁵ the collective enforcement of consumer rights secured by Community law has been regulated at the Member State level. Here, two basic models exist.⁹⁶ Collective enforcement has been assigned to, on the one hand, public actors under mechanisms of

⁹² Article 6(2) UCPD.

⁹³ See for a discussion co-regulation in the UCPD: G Howells, 'Co-regulation's Role in the Development of European Fair Trading Laws' in H Collins (ed) *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer Law International, The Hague 2004) and G Howells, 'Codes of Conduct' in G Howells, H-W Micklitz and T Wilhelmsson (eds), *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate, Aldershot 2006).

⁹⁴ See e.g.: J Braithwaite and P Drahos, *Global business regulation* (Cambridge University Press, Cambridge 2000).

⁹⁵ The principle of procedural autonomy is considered a fundamental principle of Community law and stipulates, in short, that substantive rules enacted by the Community rely for their effectiveness on the national procedural rules and enforcement structures of the Member States. See for a comprehensive discussion of this principle: W Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *Common Market Law Review* 501-536 and T Tridimas, *General Principles of EU Law* (2nd edn Oxford University Press, Oxford 2006) 418 ff. See also Cases C-432/05 *Unibet* [2007] ECR I-2271, paras. 37 – 44 and C-286/06 *Impact*, n.y.r., paras 42-49 in which judge Lenaerts as Rapporteur sets out very comprehensively the case law on the principle.

⁹⁶ C Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A Framework for Collective Redress in Europe* (Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford 2008) Ch 2. See for a different approach: F Cafaggi and H-W Micklitz, 'Introduction' in F Cafaggi and H-W Micklitz (eds), *New Frontiers of Consumer Protection. The Interplay Between Private and Public Enforcement* (Intersentia, Antwerp and Portland 2009).

administrative control and, on the other, private actors under mechanisms of collective judicial control. The United Kingdom, for example, has consigned the agency of the Office of Fair Trading (OFT) as the principle regulator and enforcer of consumer rights. Consequently, the OFT plays a pivotal role in the enforcement of consumer protection law. The role of private actors, such as consumer organisations or associations, is restricted both in scope and in effect.⁹⁷ Also the Nordic countries employ a strong public collective enforcement model by having in place the institution of the *Ombudsman*.⁹⁸ In Germany and Austria, on the other hand, private organisations and associations are the key players in consumer enforcement actions (*Verbandsklagen*) and it is the action taken by these interest groups that constitutes the dominant enforcement mechanism.

However, what emerges in the field of collective enforcement of EC consumer rights is that the distinction between the respective functions assumed by public entities and agencies and private consumer organisations, is fading. As has been observed by various scholars, often complementarities between public and private enforcers exist; Member States do not exclusively rely on one mechanism, but often balance a dominant system with other mechanisms to control the risks associated to consumer products and services.⁹⁹

Community law reinforces this combination of public and private collective enforcement strategies. A good example¹⁰⁰ to illustrate this mixing of functions across the public – private divide in the enforcement of Community law is the development in the United Kingdom of the relationship between the OFT and consumer associations after the implementation of the Injunctions Directive.¹⁰¹ As a result of the implementation, consumer associations have been empowered to seek injunctions under the Unfair Contract Terms Regulation 1999.¹⁰² This recognition of standing has, however, not increased private litigation at the expense of the OFT, but has set off a dynamic negotiation process between the OFT, consumer, associations and trade organisations. While the implementation has thus not altered the dominance of the OFT as the collective enforcer of consumer rights, consumer associations have now a tool at their disposal to pressure the OFT to take positive action against certain practices.¹⁰³

In the Netherlands, similar developments have emerged after the establishment of a Consumer Authority (*Consumentenautoriteit*) in 2007.¹⁰⁴ The Authority's enforcement powers cover matters related to e-commerce, unfair contract terms, consumer sales, distance contracts, timesharing, package

⁹⁷ Hodges 2008, op. cit., 19.

⁹⁸ Ibidem, 27 and K Viitanen, 'Enforcement of Consumers' Collective Interests by Regulatory Agencies in the Nordic Countries' in W Van Boom and M Loos (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority* (European Studies in Private Law European Law Publishing, Groningen 2007).

⁹⁹ See the contributions in F Cafaggi and H-W Micklitz (eds), *New Frontiers of Consumer Protection. The Interplay Between Private and Public Enforcement* (Intersentia, Antwerp and Portland 2009) and W Van Boom and M Loos (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority* (European Studies in Private Law, European Law Publishing, Groningen 2007).

¹⁰⁰ Example taken from F Cafaggi and H-W Micklitz, 'Administrative and Judicial Collective Enforcement of Consumer Law in the US and the EC' (2007) EUI working papers. LAW No. 2007/22 <<http://cadmus.iue.it/dspace/handle/1814/6980>> accessed 15 August 2009, 13.

¹⁰¹ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L66, 11.6.1998, 51).

¹⁰² SI 1999 No. 2083.

¹⁰³ Cafaggi and Micklitz 2007, op. cit., 13, with further references.

¹⁰⁴ Established by the Consumer Protection Enforcement Act 2007 (Wet Handhaving Consumentenbescherming). See for a general discussion: ELM Vos and SW Ammerlaan, 'De Consumentenautoriteit: Nieuwkomer op Druk Speelveld' (2008) 34 *Justitiële Verkenningen* 66-83, 67.

travel, doorstep selling, trans-border consumer conflicts, and advertising.¹⁰⁵ In exercising its powers, the Authority has adopted contractual agreements with the national consumer association and the business organisation responsible for the self-regulation of the Dutch advertising sector,¹⁰⁶ which both acquired a right to seek injunctive relief before a civil court after the implementation of the Injunctions Directive. Also these cooperative agreements on enforcement action indicate the trend to mix and share enforcement responsibilities between public and private actors.

Community law has also pushed to alter the dominant collective enforcement approach employed at the Member State level to protect consumer rights. The Regulation on Cooperation in Trans-Border Enforcement¹⁰⁷ designates 'competent administrative authorities' and 'public bodies' with the task of enforcement and cooperation in the collective interest of consumers.¹⁰⁸ As a result, Member States have no choice but to allocate the enforcement tasks to a public actor. Countries such as Germany and Austria, which traditionally rely on the private enforcement action undertaken by private consumer associations, will therefore have to change their approach to the collective enforcement of consumer rights. By strengthening the role of public authorities in the collective enforcement of consumer rights, the Community not only directly interferes with the enforcement strategies in place in the Member States, but also adds to the exchange of functions across the public – private divide. It remains to be seen whether the Community legislator will continue to push for a strong reliance on public mechanisms in the collective enforcement of consumer rights in areas outside trans-border enforcement. However, it can be expected that development in this area will appear over time is clear as collective enforcement has recently become a prime concern in the EU consumer policy in the period 2007-2013.¹⁰⁹

2. *Private Enforcement of EC Competition Law*

Similar developments of mixed enforcement strategies have emerged in the field of EC competition law, more specifically, in the area of redress actions for the violation of EC competition law rules. Also here the Community seeks to combine public and private enforcement mechanisms and allocate enforcement functions to both the public and the private. In its Green¹¹⁰ and White Paper¹¹¹ on the matter, the Commission expresses its wish to promote private enforcement of EC competition law. Resource constraints and prioritisations at the Commission and national competition authorities'

¹⁰⁵ Article 2.2 read in conjunction with Appendix A and B of the Consumer Protection Enforcement Act 2006.

¹⁰⁶ http://www.consumentenautoriteit.nl/Over_de_Consumentenautoriteit/Samenwerkingsprotocollen/Samenwerkingsprotocollen_in_het_kader_van_effectief_en_doelmatig_toezicht Accessed 15 August 2009

¹⁰⁷ Article 4(2) of Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 364, 9.12.2004, 1).

¹⁰⁸ See also: W Van Boom and M Loos, 'Effective Enforcement of Consumer Law in Europe' in W Van Boom and M Loos (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority* (European Studies in Private Law European Law Publishers, Groningen 2007) and Cafaggi and Micklitz 2007, op. cit., 13.

¹⁰⁹ EU Consumer Policy strategy 'Empowering consumers, enhance their welfare, effectively protecting them' COM (2007) 99 final.

¹¹⁰ Green Paper - Damages actions for breach of the EC antitrust rules COM(2005) 672 final. See for a discussion: T Eilmansberger, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action' (2007) 44 *Common Market Law Review* 431-487 and C Hodges, 'Competition enforcement, regulation and civil justice: What is the Case?' (2006) 43 *Common Market Law Review* 1381-1407.

¹¹¹ White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165 final and the Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust rules SEC(2008) 404. See for a critical discussion: Editorial Comments, 'A little more action please! - The White Paper on damages actions for breach of the EC antitrust rules' (2008) 45 *Common Market Law Review* 609-615.

offices lead to a hole in competition law enforcement.¹¹² At the same time, the ECJ delivered its judgements in the cases of *Courage*¹¹³ and *Manfredi*,¹¹⁴ in which it held that ‘any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.’¹¹⁵ The Commission thus claims that both practical and legal developments have created a need to have in place at the Member State level enforcement arrangements that allow the individual to effectively seek redress for competition law infringements before national courts.

However, according to the Ashurst-study¹¹⁶ such national arrangements hardly exist. In fact, many legal and procedural obstacles remain at the Member State level. The central aim of the White Paper is therefore to put forward policy choices to ensure that victims of infringements of EC competition law have access to effective redress mechanisms so that they can be fully compensated for their losses.¹¹⁷ Therefore full victim compensation is the main objective of the White Paper. A secondary aim of the White Paper is the deterrence of anti-competitive behaviour. Here, the Commission applies the following reasoning: if private actions are successful and victims are compensated for their losses by the infringers, this will deter companies to breach competition law in the future.¹¹⁸

What the Commission tries to do in the White Paper is twofold. First, it seeks to establish complementarities between private and public enforcement mechanisms, as is the case in the collective enforcement of consumer rights, in order to create a more holistic approach to competition law enforcement. It is clear that in this combination, public enforcement remains the dominant strategy. Or as the Commission holds: ‘Another important guiding principle of the Commission’s policy is to preserve strong public enforcement of Articles 81 and 82 by the Commission and the competition authorities of the Member States.’¹¹⁹ Second, and perhaps more interesting, the Commission attempts to employ private enforcement as a regulatory device. It seems to assume that the threat of civil liability leads to better compliance with competition rules and will deter companies from infringing these rules in the future.¹²⁰ In that case, private enforcement is employed to pursue public policy objectives of the Community, namely the promotion and protection of free competition.¹²¹ It thus emerges in the context of private enforcement of EC competition law that the public – private divide in Community law is again challenged. Private actors engage, though only to a limited extent, in a function that was previously, at least in the Community law tradition, managed solely by public authorities.

¹¹² Hodges submits that there is no empirical evidence to substantiate this thesis of the Commission. See Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A Framework for Collective Redress in Europe*, 175-178.

¹¹³ Case C-453/99 *Courage* [2001] ECR I-6297, para. 24.

¹¹⁴ Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para. 59.

¹¹⁵ See for a comprehensive discussion of the cases: N Reich, ‘The ‘*Courage*’ Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?’ (2005) 42 *Common Market Law Review* 35-66 and N Reich, ‘Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights’ (2007) 44 *Common Market Law Review* 705-742.

¹¹⁶ Ashurst, ‘Study on the conditions for claims of damages in case of infringement of EC competition rules: Comparative Report’ (2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 15 August 2009

¹¹⁷ COM(2008) 165 final, 3.

¹¹⁸ Arguably, deterrence is more of an effect of full victim compensation rather than an aim if it is understood in this way. The Green Paper’s main aim was the deterrence of competition infringements. See: COM(2005) 672 final, 3-4.

¹¹⁹ COM(2008) 165 final, 3.

¹²⁰ In the literature, both in Europe and in the United States, the proper role of civil liability in regulation is very much debated. To offer an overview of this debate is beyond the scope of this paper, however.

¹²¹ Article 3(1)(g) EC and Article 4(1) and (2) EC.

Conclusion

It has been argued in this essay that the traditional public – private divide still vivid in the minds of continental scholars is rapidly fading in the context of Community law. It has been submitted that this convergence of the public and the private currently unfolds in a two-dimensional fashion, namely via the axes of rulemaking and enforcement. The strong influence of both primary and secondary Community law on national contract law, the emergence of contractual arrangements as a regulatory instrument, the collective enforcement of EC consumer rights, and the private enforcement of EC competition law have been used as illustrations to underpin this thesis. What emerges at this point is that one can not speak anymore of a strong public – private divide in Community law. Instead, it seems more appropriate to talk about the *mutual permeability* of public and private law in the Community context.¹²²

¹²² Compare W Van Gerven, 'Mutual Permeability of Public and Private Law at the National and Supranational Level' (1998) 5 Maastricht Journal of European and Comparative Law 7-24.

Internal Market Legislation and the Private Law of the Member States

The Impact of Fundamental Rights

Vasiliki Kosta*

I. Introduction

“The relationship between private law and human rights law is complex”¹. This observation is to be posed at the beginning of any analysis of this subject matter in any context. Its accuracy becomes evident when examining the debates on the topic in the various legal systems in which they have arisen, and most prominently in that of Germany – the ‘leader’ of this debate. The topic that is here alluded to can be labeled the ‘constitutionalisation of private law’ if this label is employed loosely to describe the fact that fundamental rights considerations can have an influence on private law².

This discourse on the interaction between private law and fundamental rights³ can be analysed from two perspectives. One is to pose the question *how* do fundamental rights impact on private law. The answer to this, and therefore also its complexity, depends on the context in which it is examined. The other perspective would be to debate potential (problematic) features of this impact. For example, one fundamental, recurring and not context-specific theme is the broader question of a conflict between fundamental rights on the one hand, and freedom and autonomy, which is expressed by private law on the other.⁴ The relevant question is here whether freedom and autonomy is “understood as being more than an ability to act according to the values of basic rights”⁵. And if so, where does it find its limits.

This paper is entrusted with the task of examining the first mentioned area of inquiry, namely, identifying the mechanisms by which fundamental rights can have an impact on private law. It will do so by taking the EC legal order, and within that the internal market, as its focus. More specifically, an attempt will be made to analyse how fundamental rights considerations may influence the shaping as well as application of internal market legislation, which then in its turn can have an impact on the private law of Member States.

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¹ This is the opening sentence of L. Fastrich’s piece, ‘Human Rights and Private Law’, in K. S. Ziegler (ed.) *Human Rights and Private Law – Privacy as Autonomy*, (Hart Publishing, Oxford and Portland, Oregon, 2007), p. 23.

² It is not used in order to enter the discussion whether private law is being subsumed within constitutional law, as read by Collins. Accordingly, it is also not debating whether private law (in the EC context) becomes a branch of applied constitutional law as articulated by Kumm. H. Collins, ‘Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalisation’, *LSE Law, Society and Economy Working Papers 6/2007*, p. 17, available at www.lse.ac.uk/collections/law/wps/wps.htm; M. Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 (4) *German Law Journal* 341, p. 359.

³ The terms ‘human rights’ and ‘fundamental rights’ are used interchangeably in this paper.

⁴ The question is raised by L. Fastrich, n. 1, pp. 28 ff.

⁵ L. Fastrich, *ibid*, p. 29.

The starting point of the analysis is that fundamental rights have gained increasing importance in the regulation of the internal market through legislative harmonisation and, since they do so irrespective of whether the instrument is of a private law nature (or not) or capable of affecting private law relationships (or not), this will inevitably reflect on the domestic legal orders which have to implement the legislation.

In order to illustrate their actual and potential impact in this context, three possible ways by which the EU fundamental rights discourse enters private law through internal market legislation will be discussed. These shall be illustrated on the basis of an area, which goes to the heart of private law and has been subject to legislative harmonisation in the internal market, namely, EC consumer (contract) law⁶.

II. Three Ways to Enter Private Law

The three possibilities⁷ that will be discussed below concern firstly, the obligation that all EC legal instruments, including internal market legislation have to respect fundamental rights, since their validity depends on that. This means also that the way private law relationships are regulated at the EC internal market level has to be in compliance with EU fundamental rights. The significance of recent practice of the institutions, aimed at complying with this obligation, for consumer contract law legislation will be therefore the first subject of analysis. The second one relates to the fact that measures of the Member States can be reviewed for compliance with EC internal market legislation that also contains fundamental rights considerations. This may have important implications for disputes between private parties where one of them relies on EC law in order to achieve disapplication of a domestic measure. The final possibility that will be discussed is the review of national laws, which are implementing EC internal market legislation in the light of fundamental rights.

Before entering into the further details of the discussion, a few brief remarks on the notion ‘EU fundamental rights’ are in order. It is very well known that the EU institutions are bound to respect fundamental rights on the basis of two sources – the general principles doctrine⁸ and, ever since the Maastricht Treaty, Art. 6(2) EU. This provision is in essence a codification of the former. In providing on that basis for protection of fundamental rights, the ECJ makes use of three sources, in order to identify those: The constitutional traditions common to the Member States, international treaties, especially the ECHR, and the Nice Charter of Fundamental Rights, at least since the Court’s first reference to it⁹. This theme has been rehearsed exhaustively many times and need not be repeated here.

One observation deserves however special attention, namely the fact that ‘EU fundamental rights’ are defined, in part at least, by a reference ‘back’ to the national constitutional orders. Indeed, the constitutional traditions common to the Member State are one of the sources of identification of EU fundamental rights. Another form that this ‘reference back’ can take is when the Court grants

⁶ Note also, “...the background context to much of the harmonisation programme affecting private law is embedded in the sphere of consumer policy.” S. Weatherill, ‘Constitutional Issues – How Much is Best Left Unsaid’, in S. Vogenauer and S. Weatherill (eds.), *The Harmonisation of European Contract Law*, (Hart Publishing, Oxford and Portland, Oregon, 2006), p. 91.

⁷ See also an overview of “Possibilities for the Effect of EU Fundamental Rights in Private Law Under the Current Case Law of the Court of Justice” O. Cherednychenko, ‘EU Fundamental Rights, EC Fundamental Freedoms and Private Law’, in (2006) *European Review of Private Law* 24, pp. 45 – 51.

⁸ Case 11/70, *International Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1970] ECR 1125.

⁹ Case C-540/03 *European Parliament v Council of the European Union* (decision on the family reunification directive 2003/86/EC) [2006] ECR I-6535.

discretion to the Member states so as to accept – as it does in some situations – the national standard of fundamental rights protection under EC law. In this situation, divergence amongst the Member States is tolerated. *Promusicae*¹⁰ is an example for that; it will be discussed below (at 3.). The point to bear in mind is that whatever the influence of the EU fundamental rights on the national private law, it is not an influence of an entirely exogenous concept. What is however dictated from the outside to the national order is the fact that it *will* take place under certain circumstances. Those will be analysed in what shall follow.

1. The First ‘Entrance Gate’

Fundamental rights are directly binding upon the EC legislator, when drafting legislation, including private law rules, since respect for those is a prerequisite for the legality of secondary EC law¹¹. There are two modes of ensuring that this duty is observed. One functions *ex ante*, i.e. it attempts to prevent a violation from occurring. The form that it takes is that the legislature checks for compliance with fundamental rights during the drafting process. The other is the classic *post hoc* form of protection through judicial review of the legislation¹². The focus of the present analysis shall be on the former, which is usually not the center of attention in discussions on how fundamental rights considerations may influence private law.

Fundamental Rights scrutiny of EC/EU legislation during its drafting stage has been more systematically applied after the adoption of the Charter of Fundamental Rights¹³, even though the legislator has demonstrated awareness of the matter also earlier in time. An indication for that is to be found in instruments, which have been adopted before adoption of the Charter, and include statements of compatibility with fundamental rights as guaranteed by the ECHR and/or as general principles of Community law¹⁴. Still, it is clear that the adoption of the Charter was a turning point in this process and that despite its lack of legally binding force. A year after its proclamation, the then Commission President Romano Prodi and Justice and Home Affairs Commissioner, António Vitorino declared in a Decision of 13 March 2001¹⁵, that all legislative proposal be first scrutinised for compatibility with the Charter “as part of the normal decision-making process”¹⁶. This decision which was mainly “internal”, and not widely known (not even within the Commission itself)¹⁷ was replaced by a Commission

¹⁰ Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, [2008] ECR I- 271.

¹¹ Case 44/79 *Hauer v. Land Rheinland-Pfalz*, [1979] ECR 3727. This obligation resting on the legislator is not different from that existing in national legal orders of Member States like Germany, the Netherlands, Italy and England, see C. Mak, *Fundamental Rights in European Contract Law – A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, (Kluwer Law International BV, the Netherlands, 2008), pp.50-51.

¹² Internal market instruments recently reviewed by the Court for potential fundamental rights violations, e.g.: Directive 77/388/EEC (6th VAT Directive) in C-460/07 *Sandra Puffer v. Unabhängiger Finanzsenat, Außenstelle Linz* ruling of 23 April 2009, Directive 2003/33/EC (Tobacco Advertising) in C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* [2006] ECR I - 11573, Directive 2001/29/EC (Good Clinical Practice in conduct of clinical trials on medicinal products) in C-479/04 *Laserdisken ApS v Kulturministeriet*, [2006] ECR I-08089.

¹³ Of 18.12.2002 OJ C 364/1.

¹⁴ Examples of internal market legislation include Directive 97/36/EC of 30 June 1997 amending Council Directive 89/552/EEC regulating television broadcasting activities, Recital 15; Directive 95/46/EC on data protection, Recital 10; Directive 98/44/EC on the legal protection of biotechnological inventions, Recital 43.

¹⁵ Decision on the Application of the Charter of Fundamental Rights of the European Union. SEC (2001) 380/3.

¹⁶ *Ibid.*, see also HL EU Committee, ‘Human Rights Proofing EU Legislation’, 16th Report, session 2005 – 2006, p. 11, para. 10.

¹⁷ HL EU Committee Report, *ibid.*, p. 12.

Communication in 2005¹⁸, which did not bring about any fundamental change however. Building on the existing mechanisms, it was concerned with raising awareness among all the actors in the law-making process to take due account of fundamental rights. The aim was to “lock in a culture of fundamental rights in EU legislation”¹⁹. The methods by which this ‘culture’ was to be ‘locked in’ include impact assessments proposed before the preparation of the draft legislative text, explanatory memoranda accompanying the proposal of the Commission, and recitals in the preamble of the act as adopted, confirming that it respects the Charter of Fundamental Rights. This latter practice warrants a closer look. Already the 2001 Decision introduced those statements, which take the following standard form²⁰:

“This act respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.”

When certain rights and/or individual principles of the Charter are specifically involved, a second sentence may be added:

“In particular, this [act] seeks to ensure full respect for [right XX] and/or to promote the application of [principle YY]/ [Article XX and/or Article YY of the Charter of Fundamental Rights of the European Union].” ”

Following the 2001 Decision, some thirty-four pieces of internal market legislation²¹ have been adopted, which contain this compliance statement; and problems relating to whether these recitals are (in)-accurately reflecting the motivations behind the choices of the legislator²², as well as compliance with the Charter, *in fact*, are still to be tackled.

The question to be posed for our purposes however is what impact – if any – this practice has had on the content of EC legislation, which is of a private law nature, and more specifically on consumer contract legislation.

The relevant instruments, all of which have an internal market legal basis, are: Directive 90/314/EEC (Package Travel)²³, Directive 93/13/EEC (Unfair Terms in Consumer Contracts)²⁴, Directive 85/577/EEC (Doorstep Selling)²⁵, Directive 87/102 repealed by Directive 2008/48/EC (Consumer Credit)²⁶, Directive 94/47/EC (Timeshare) repealed by Directive 2008/122/EC²⁷, Directive 97/7/EC (Distance Selling)²⁸, Directive 1999/44 (Consumer Sales)²⁹, Directive 2002/65 (Distance Marketing of Financial Services)³⁰, Directive 2005/29 (Unfair Commercial Practices)³¹.

¹⁸ Commission Communication, Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: methodology for systematic and rigorous monitoring, 27 April 2005, COM(2005)0172.

¹⁹ President Barroso cited in Commission Press Releases IP/05/494.

²⁰ HL EU Committee Report, n. 17, p. 25.

²¹ The legal bases I have considered here are Arts. 93 EC, 94 EC, 95 EC, and the free movement provisions.

²² Voggenhuber Report of the European Parliament of 12.2.2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals; Commission Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights, Brussels, 29.04.2009 COM(2009) 205 final (Commission Report).

²³ OJ L 158/59, 23.06.1990.

²⁴ OJ L 095/29, 21.04.1993.

²⁵ OJ L 372/31, 31.12.1985.

²⁶ OJ L 133/66, 22.05.2008.

²⁷ OJ L 33/10, 03.02.2009.

²⁸ OJ L 144/19, 04.06.1997.

²⁹ OJ L 171/12, 07.07.1999.

³⁰ OJ L 271/16, 09.10.2002.

³¹ OJ L 149/22, 11.06.2005.

The evident development is that whereas the older legislation does not contain any reference to fundamental rights or the general principles of Community law, the more recent pieces of legislation, since 2005, contain the compliance with the Charter recitals. Those are, the Unfair Commercial Practices Directive³², the amended Consumer Credit Directive³³, as well as the amended Timeshare Directive³⁴, all of which include the general statement of compatibility³⁵. The imminent question is then what such an affirmation of the legislation being compatible with the Charter actually implies. There are arguably several possibilities (which may also apply cumulatively).

The first possibility is that it is merely a statement reassuring that the rules contained in the instrument do not infringe any provision, or the specifically named ones, of the Charter. The Consumer Credit Directive is an example for that. In addition to the general statement of compliance, its recital 45 also provides that “this Directive seeks to ensure full respect for the rules on protection of personal data, the right to property, non-discrimination, protection of family and professional life, and consumer protection pursuant to the Charter...”.

Another possibility is that the legislator is signaling to the Court that the latter shall take due account of relevant Charter articles when called to provide for an interpretation of certain provisions of a given instrument. The Opinion of the Advocate General in *Eva Martín Martín*³⁶ can serve as an illustration. The case concerned an interpretation of the Doorstep Selling Directive 85/577 and the question whether a national court can act *ex officio* (even though national law does not provide for such in this situation) and declare a contract covered by the Doorstep Selling Directive void, if the consumer has not been informed of her right to withdrawal. The Advocate General observed that the Charter of Fundamental Rights, particularly Art. 38 EC, can serve as a guide in interpreting the relevant provisions of the Doorstep Selling Directive³⁷. It has to be of course acknowledged that this Directive predates the Charter and does therefore not contain any reference to it; but then it must also be observed that the Advocate General did not make strong use of it (besides this observation the Charter was not invoked again in the reasoning) and it is open to question whether that would have been different had the Directive contained such a reference.

The third possibility is to suggest that the legislation itself and the rules it lays down gives expression to fundamental rights, and it does so in accordance with the Charter³⁸. The area of consumer law is however particularly tricky in this context. This is so in view of the fact that consumer protection is included in the Nice Charter itself and that it finds a particular form of expression therein. Art. 38 of the Charter reads: The “Union policies shall ensure a high level of consumer protection.” This wording, as well as the explanatory statements relating to the first proposal for including consumer protection in the catalogue, suggests that the provision at issue embodies a principle as opposed to a subjective right³⁹ (CONVENT 34 of 16 May). According to Art. 51(1) CFR the latter are to be

³² Recital 25.

³³ Recital 45.

³⁴ Recital 24.

³⁵ Note the Commission’s ambition to use more targeted as opposed to general recitals in future, Commission Report, n. 22, p. 7.

³⁶ Opinion Advocate General Trstenjak in Case C-227/08 *Eva Martín Martín v EDP Editores, S.L.*, of 7.05.2009.

³⁷ AG Trstenjak, *ibid*, para. 44.

³⁸ See also discussion on the *Promusicae* case discussed below at 3.1.

³⁹ Subsequent suggestions ranging from a complete rejection of the proposal, which had a different formulation, to an inclusion of it as a subjective right were rejected. See on this evolution J. Meyer (Hrsg.), *Charta der Grundrechte der Europäischen Union*, Nomos Kommentar, 2. Auflage, pp. 414-415.

respected while the former are to be *observed*.⁴⁰ This means that “principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed”⁴¹. The key to understanding the distinction between the two is therefore that principles, as opposed to rights, “do not [...] give rise to direct claims for positive action by the Union’s institutions or Member State authorities”⁴².

This point is illustrated by the latest piece of consumer protection legislation containing a Charter-compatibility-statement. That is the Commission proposal for a Directive on consumer rights⁴³. It intends to revise the directives on doorstep selling, unfair contract terms, distance contracts and consumer sales and guarantees. The standard general formula is to be found in recital 66 of what is to constitute the text of the legislation; In addition to that, the Commission has affirmed in the text accompanying the proposal that “...[it] achieves a high level of consumer protection in consumer contracts.”⁴⁴ On the basis of that, the conclusion is reached that “...the proposal complies with Fundamental Rights, in particular Art. 38 of the Charter of Fundamental Rights”⁴⁵.

However, if this is all that is needed in order to comply with Art. 38 CFR, two issues arise. The first one is the fact that there does not seem to be much added value in elevating consumer protection to the status of a fundamental right by including it in the Charter, because of the already existing obligation spelled out in Art. 153 EC. This provision stipulates that the interests of consumers shall be promoted and that a high level of consumer protection shall be secured. Clearly, the incentive to protect and promote this interest is provided for by elevating it to the status of a Community policy. Nonetheless, there might be one difference resulting from the fact that consumer protection has been elevated to such a status, and that is so if the following argument is accepted: it has been already stated that consumer protection is a principle and therefore, according to Declaration No. 12 cited above⁴⁶, does not give rise to direct claims for positive action. Despite that however, an argument could be made that the clause concerned has the capability of guaranteeing – to borrow from German legal scholarship⁴⁷ - “sozialrechtliche Anliegen mit Verfassungsrang” (socio-legal concerns of a constitutional status)⁴⁸; in which case it would be possible to argue that legislative inaction would constitute (in the German context a violation of the Constitution and) in the EU context a violation of the Charter, particularly in view of the obligation spelled out in Article 51(1), which obliges the Member States and the European Union to “promote the application” of the rights contained therein. Given however the theoretical nature of this argument, which is unlikely to be pursued in practice, the inclusion of Art. 38 CFR appears redundant, precisely because it does not add anything to what is already laid down in the Treaty.

⁴⁰ See the explanation of Art. 52(5) CFR given in Declaration no. 12 concerning the explanation relating to the Charter of Fundamental Rights, annexed to the Treaty Establishing a Constitution for Europe.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Commission ‘Proposal for a Directive of the European Parliament and of the Council on consumer rights’, Brussels, 08.10.2008 COM(2008) 614/3; 2008/xxxx (COD); on a discussion of the review of the European consumer law acquis, C. Mak, ‘Fundamental Rights and the European Regulation of iConsumer Contracts’, available at <http://ssrn.com/abstract=1219863>, pp. 8-9.

⁴⁴ COM proposal, *ibid*, p. 3.

⁴⁵ Ibid.

⁴⁶ *Supra*, n. 40.

⁴⁷ What follows is taken from E. Eichenhofer, *Sozialrecht*, (Mohr Siebeck Verlag, Tübingen, 5th ed., 2004), p. 62

⁴⁸ Ibid. My translation.

The second issue, which arises, is the difficulty of assessing when is the level of consumer protection, which is sought to be achieved, ‘high enough’ so as to be able to make the claim that the requirement contained in Art. 38 CFR is satisfied, and consequently that inclusion of the recital confirming compatibility with the Charter is justified. In light of this impossibility, a declaration of compliance with this particular provision of the Charter appears a rhetorical exercise, rather than a statement with legal significance.

The above observations demonstrate that the Charter does not bring about any major change in the area of consumer protection. Therefore, the practice of declaring that legislation complies with Art. 38 CFR does not seem to provide for enhanced fundamental rights protection in the legislation, either. Pre-legislative scrutiny of consumer law instruments can however have a substantive effect on the content of legislation when those are checked as to their compatibility with other subjective rights of the Charter (see first possibility described above). Although, it has to be conceded, this is only so provided the system of compliance check with the Charter is effective and does not constitute mere lip-service – something that is not entirely clear.

2. The Second ‘Entrance Gate’

The second way by which fundamental rights can enter private law situations through internal market instruments is when Member State measures are tested against internal market legislation, which (also) gives protection to a specific fundamental right. The recent ECJ decision *Dynamik Medien*⁴⁹, on iConsumer contracts shall guide the discussion. The case concerned the interpretation of the e-Commerce Directive 2000/31/EC⁵⁰ and Art. 28 and 30 EC.

The two parties involved, Dynamic Media and Aventis Media were both German companies providing i-Consumer services, namely, the selling of video and audio media on the Internet. The former mentioned company imported Japanese cartoons in form of DVD and videocassettes from the United Kingdom to Germany. Those were examined by the British Board of Film Classification and labeled ‘suitable for 15 years and over’. However, they were not subject to any examination in Germany. Avides Media brought proceedings in the German court against its competitor Dynamic Media for interim relief in order to prevent it from selling such media. The argument was that the German Law on the protection of young persons prohibits the sale by mail order to image storage media, which have not been examined in Germany in accordance with the German law and bearing an age-limit label from a ‘competent authority’.

The question posed to the ECJ was whether the relevant German provision constituted a restriction to the free movement of goods, and if so whether it was justified under Art. 30 EC, having regard to the e-Commerce Directive. As a preliminary observation, the Court noted that the situation did not fall within the scope of the directive since that states explicitly that it does not govern the requirements applicable to goods as such⁵¹. The same was true for the Distance Selling Directive 97/7/EC. As a result, the German measure had to be assessed by reference to Arts. 28 and 30 EC, since “...the national rules relating to the protection of young persons at the time of the sale of goods by mail order have not been harmonised at Community level...”⁵².

⁴⁹ C-244/06 *Dynamik Medien Vertriebs GmbH v. Avides Media AG* [2008] ECR I-9609.

⁵⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market, OJ 2000 L 178, p. 1.

⁵¹ Art. 2(h)(ii) of the e-Commerce Directive, *Dynamik Medien*, n. 49, para. 22.

⁵² *Dynamik Medien*, *ibid*, para. 22.

One may reasonably question the relevance of this case for our purposes. After all, the situations, which are of interest here, are those where national measures are reviewed in light of secondary EC law and not the EC Treaty itself. The case is nevertheless relevant for the following two reasons.

The first one serves only illustrative purposes. It is the fact that there might be *potential* for regulating on the basis of the internal market the extent to which fundamental rights standards (here the rights of children) should be taken into account when regulating this type of i-Consumer contracts. This would happen if there is an assessment at the policy level that the latter malfunctions in light of too much diversity, so that action is considered to be necessary.

The second, more important, reason is the fact that the directive did play a role in the Court's ruling, in that it served to identify the protection of the rights of children as a legitimate ground of derogation, which can be invoked in order to justify a restriction to a free movement provision. It has to be conceded however that the directive was not the only consideration, but also, and even more importantly so, the fact that the protection of the rights of the child was acknowledged to constitute a fundamental right and general principle of EC law. The Court initiated its reply on the question of justification by recalling that the protection of the rights of the child is recognised in various international instruments concerning the protection of human rights, which it takes into account when applying the general principles of Community law doctrine⁵³. It then noted that it is also enshrined in Art. 24(1) of the Charter of Fundamental Rights and lastly, that it is recognised by the e-Commerce Directive.

Reference to the relevant provision of the e-Commerce Directive accentuates however the fact that fundamental rights and public policy considerations were merged in this reasoning. Art. 3(4) of the directive, provides that the protection of minors can feature as a legitimate public policy ground for restricting the free movement of information society services⁵⁴, and therefore as a derogation provided for in the Treaty. This is similar to the Services Directive⁵⁵, which makes full reference to the Court's list of 'overriding requirements in the public interest in its recital 40, where public policy is expressly mentioned. Recital 41 further states "The concept of 'public policy' as interpreted by the Court of Justice, covers (...) issues relating to human dignity [and] the protection of minors (...)". However, by recognising the fundamental rights basis of this requirement, the Court distinguished it from other grounds of public policy, resulting in the application of a different methodology. The Court employed here the *Schmidberger*-formula⁵⁶, which serves to alter, to a certain extent, the presumptions applicable in the free movement law, by creating an explicit presumption of justification. This is something that does not normally apply with respect to the Treaty derogations or mandatory requirements, which – as exceptions to the free movement rule – are to be interpreted narrowly. This is important for the outcome of the case. To recall the present constellation: One private party alleges the invalidity of a state measure as a defence against another private party's claim. The allegation is made on the basis of the EC's free movement provisions. When, as it is here, these provisions clash with domestic fundamental rights considerations, the kind of impact the internal market rules will have on the rights and obligations of the two private parties in dispute, will crucially depend on how the relationship between the competing interests of free movement rules and fundamental rights is defined

⁵³ Ibid., para. 39.

⁵⁴ The question whether Art. 3(4) would apply to the situation at issue if the Directive were to cover also free movement of goods is left aside. See AG Mengozzi negating this in his Opinion to this case at paras 21 – 33.

⁵⁵ Directive 2006/123/EC on Services in the Internal Market, OJ 2006 L 376/36.

⁵⁶ Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich [2003] ECR I-5659, "fundamental rights is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the EC Treaty, such as the free movement of goods", para. 75, emphasis added.

– be it at the judicial or the legislative level. In the present case, considerable discretion was granted to the Member States on the basis of the *Omega*⁵⁷ precedent.

The way the relationship between fundamental rights and the free movement provisions is defined in the Court’s jurisprudence will also have an impact on how legislation will be formulated, which is adopted in response to that jurisprudence. The Services Directive is exemplary for that. This instrument, which builds on and complements the existing *acquis* on the free movement of services, includes a so-called ‘saving clause’, which does make clear that fundamental rights are subject to special consideration in this instrument:

“This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law...”⁵⁸

The question, giving rise to debate is what does ‘saving’ or ‘does not affect’ in this context mean. The phraseology suggests a total exclusion from the reach of the Directive, identical to Art.2, which expressly excludes certain sectors from its scope of application.⁵⁹ Hence, barriers to free movement, created by national fundamental rights considerations would not fall within the scope of the Directive. The further query is then whether that can also imply a total exclusion of fundamental rights from the scope of EC (primary) free movement law. This can be negated on the basis of two arguments. The first one is based on empirical grounds, namely, the ECJ’s approach in *Viking*⁶⁰ and *Laval*⁶¹, where it confirmed, citing *Schmidberger* and *Omega*, that the exercise of fundamental rights – here the right to take collective action – did not fall outside the scope of the free movement provisions⁶². The second argument is that any right, even those in relation to which the Community institutions do not have specific powers, has to be reconciled with the “Community integration process”, and consequently is not shielded from a conflict with EC law.⁶³ Hence, “absolute immunity that (...) result[s] in the mere acknowledgment of the compatibility with Community law of whatever a Member State lays down on the subject”⁶⁴ is precluded. This view is further supported by recital 15 of the Services Directive, which reads “This Directive respects the exercise of fundamental rights applicable in the Member States and as recognised in the Charter (...), *reconciling them with the fundamental freedoms laid down in Art. 43 and 49...*”⁶⁵.

⁵⁷ Case C-36/02 *Omega Spielhallen- und Automatenaufstellung v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609.

⁵⁸ Services Directive, n. 55, Art. 1(7).

⁵⁹ C. Barnard, ‘Employment Rights, Free Movement Under the EC Treaty and the Services Directive’, Edinburgh Europa Institute, Mitchell Working Paper Series, 5/2008, available at http://www.law.ed.ac.uk/file_download/series/44_employmentrightsfreemovementundertheectreatyandtheservicesdirective.pdf, pp. 21-22.

⁶⁰ Case C-438/05 *The International Transport Workers’ Federation and the Finnish Seamen’s Union v Viking Line ABP and OU Viking Line Eest*, [2007] ECR I-10779.

⁶¹ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, [2007] ECR I- 11767.

⁶² Barnard, n. 59, p. 23.

⁶³ G. Orlandini, ‘Right to Strike, Transnational Collective Action and European Law: Time to Move On?’, Jean Monnet Working Paper 8/07, available at: <http://www.jeanmonnetprogram.org/papers/07/070801.pdf>, p. 30; see also on this point J. H. H. Weiler, ‘Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights’, in N. A. Neuwahl and A. Rosas, *The European Union and Human Rights* (Martinus Nijhof Publishers, The Hague/Boston/London, 1st ed., 1995), p. 65 – 66.

⁶⁴ Orlandini, *ibid*.

⁶⁵ Emphasis added.

On this account, in a situation where one private party argues, on the basis of the free movement provisions, the invalidity of a state measure against another private party's claim, that latter party cannot invoke national fundamental rights in order to bar the impact which the free movement provisions could have on the dispute. Rather, the free movement provisions have to be conciliated with the fundamental rights claim. Once the Court has undertaken this balancing exercise between the competing interests, the fundamental rights standard, which is acceptable under Community law, is provided for. This will then have then a *de facto* impact on the national private law situation.

If fundamental rights have to be reconciled with the free movement rules, and if the ECJ will be the final instance ruling on the matter, what point is there then for the legislator to enact a 'saving clause' such as that of Article 1(7) of the Services Directive? It is submitted that the function of such a clause is that the legislator, by doing so, indicates to the Court, which will eventually have to undertake that exercise, that there is a need to place great weight on the protection of fundamental rights in the internal market context; it serves to accentuate their special position. This finds then acknowledgment in the Court's application of the *Schmidberger*-formula, as employed in the *Dynamik Medien* case.

3. *The Third 'Entrance Gate'*

The last situation to be discussed is when national laws implementing EC measures are reviewed for compliance with EU fundamental rights. In order to exemplify this point, the recent *Promusicae*⁶⁶ decision on consumer privacy shall be analysed, since fundamental rights played in that judgment a pivotal role in assessing the respective rights and duties of two private parties whose dispute fell within the scope of (secondary) EC internal market law.

The facts were as follows: Promusicae, a non-profit-making organisation of producers and publishers of musical and audiovisual recordings applied for a preliminary court order against Telefónica, an internet service provider. The measure involved disclosure of personal data of Telefónica clients who used the KazaA file exchange program providing access in shared files of personal computers to material in which members of Promusicae held exploitation rights. The request was made in order to bring civil proceedings against the persons concerned for engaging in unfair competition and infringing intellectual property rights. After the preliminary measure was ordered, Telefónica appealed, arguing that under the relevant national Law 34/2002 on information society services and electronic commerce ('the LSSI') which implemented Directive 2000/31/EC, this type of data was only allowed to be communicated for criminal investigations or for the purpose of safeguarding public security and national defence, but not for civil proceedings. Promusicae counter-argued that the LSSI must be interpreted in light of three EC Directives which concern 1) the free movement of information society services (e-Commerce Directive 2000/31/EC⁶⁷) 2) the protection of copyright (Directive 2001/29/EC⁶⁸) 3) the enforcement of intellectual property rights (Directive 2004/48/EC⁶⁹), as well as Art. 17 (2) and 47 of the Charter of Fundamental Rights (CFR).

In light of the above, the ECJ was called to reply to the question whether EC law, particularly the listed directives, read in light of the two Charter provisions, *require* Member States to lay down an obligation to communicate personal data in the context of civil proceedings, in order to ensure effective protection of copyright⁷⁰. Several aspects of this case are of particular interest for the present discussion.

⁶⁶ Supra, n. 10.

⁶⁷ OJ L 178/1, 17.07.2000.

⁶⁸ OJ L 167/10, 22.06.2001.

⁶⁹ OJ L 195/16, 02.06.2004.

⁷⁰ Promusicae, n. 10, para. 41.

The first one is the fact that the Court raised in its reasoning the issue of data privacy out of its own motion. Thus, whereas fundamental rights arguments had been raised by the referring court only in support of one of the parties in dispute, the ECJ transformed the dispute by also identifying a fundamental rights argument in support of the other party.

The Court created this situation by bringing the e-Privacy Directive 2002/58/EC⁷¹ into play. Art. 5(1) of the Directive provides for a general confidentiality obligation for owners of an electronic database, which can be restricted on the basis of Art. 15(1) to safeguard national security, defence, public security and the prevention, investigation, detection and prosecution of crimes. This list does clearly not cover situations where a private party requests disclosure of information in order to bring civil proceedings. However, the Court decided to read into this, apparently exhaustive list, another ground, namely ‘the protection of rights and freedoms of others’. It did so on the basis of the Data Protection Directive 95/46/EC⁷². This Directive is the more general instrument on data protection in EC law, and lists in its Art. 13 also grounds of restriction, including ‘the protection of rights and freedoms of others’. The fact that Art. 5(1) of the ePrivacy Directive refers to Art. 13 of the Data Protection Directive was relied on by the Court to make the argument that ‘the protection of rights and freedoms of others’ can be relied on under the ePrivacy Directive in order to restrict the general confidentiality obligation; even though, this does not follow logically from a straightforward construction of the provision. However, it also found that Art. 15 does *not* provide for an *obligation* to do so⁷³.

After arriving at this finding, the Court proceeded to the second step of its examination. It scrutinised whether the three directives relating to IP rights protection and relied on by Promusicae in the national proceedings *required* the Member States to lay down such an obligation of disclosure. Again, the answer was in the negative. Each of the three instruments contains a provision advancing explicitly “that such protection cannot affect the requirements of the protection of personal data”⁷⁴, and none of the three instruments, or the TRIPS Agreement require the Member States to lay down an obligation to communicate personal data in the context of civil proceedings⁷⁵.

The fact that the answer could not be found in any of the relevant directives led the Court to analyse the situation in fundamental rights terms. This brings the discussion to the second issue, which has to be addressed. That is that the Court conceived the three copyright directives on the one hand, and the ePrivacy Directive on the other as specifying EU fundamental rights, which have to be reconciled.

As regards the ePrivacy Directive, this approach is not very surprising for two reasons. Firstly, the EC’s data protection regime is strongly influenced by an international human rights treaty, namely the Council of Europe’s Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data⁷⁶. Furthermore, the explicit wording of this directive, similar to the general Data Protection Directive, makes clear that it is aimed at harmonising divergent fundamental

⁷¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector OJ L201/37, 31.07.2002.

⁷² Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L281/31, 23.11.1995.

⁷³ Promusicae, n. 10, paras. 54 and 55.

⁷⁴ Ibid., para. 57, those are Art. 1(5)(b) of Directive 2000/31/EC, Art. 9 of Directive 2001/29/EC and Art. 8(3)(e) of Directive 2004/48/EC.

⁷⁵ Ibid., paras. 57-60, the specific provisions that were interpreted as not laying down such an obligation are Art. 8(1) of 2004/48/EC, Arts. 15(2) and 18 of Directive 2000/31/EC, Arts. 8(1) and (2) of Directive 2001/29 and Arts. 41, 42 and 47 of the TRIPS Agreement.

⁷⁶ Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, in force: 1 October 1985.

rights standards of the Member States regarding data privacy (here in the e-communication sector⁷⁷). One aspect that is worth noting in the Court's reasoning however is that it established in this case the fundamental status of the right to protection of personal data almost exclusively on the basis of the Charter of Fundamental Rights, which enshrines data privacy in its Art. 8. This important development appears to constitute the widest use that has been made of the Charter so far, in the sense that the Court does not rely primarily on international treaties or constitutional traditions common to the Member States in order to affirm the fundamentality of the right.

As regards the IP rights regime, the fact that it is conceived, as one making EU fundamental rights effective is rather noteworthy. It is true that the Charter gives recognition to this right in Art. 17 on the right to property. It does so by providing in the second paragraph that "Intellectual property shall be protected". It is equally true that Directive 2004/48EC makes reference to its compatibility with the Charter, and more specifically with Art. 17(2) in recital 32. However, it is also worth highlighting that Directive 2001/29/EC on the protection of copyright does not make such reference to the Charter. Even though it does acknowledge in recital 3 that "[t]he proposed harmonisation (...) relates to compliance with the fundamental principles of law and especially of property, including intellectual property". Furthermore, it is also to be noted that the Court, already before *Promusicae*, had gone so far as to hold that "...intellectual property rights, including copyright, (...) form part of the right to property"⁷⁸. Yet unlike in the present case, it did not state explicitly that it is a fundamental right and a general principle of Community law. Perhaps this approach was influenced – in addition to the recognition of IP rights in the Charter, which must have been an incentive – by developments under the European Convention of Human Rights. The ECtHR "allowed Europe's intellectual property system to evolve largely unfettered by human rights concerns"⁷⁹ in dismissing, until recently, intellectual property rights claimants who alleged a violation of the right to property as protected by Art. 1, Prot. 1 of the ECHR. This has changed on the basis of three decisions issued from 2005 – 2007, in which copyright as well as trademarks were acknowledged to be protected under the Convention's right to property⁸⁰. Against this background, classifying the IP rights system as one of fundamental rights irrespective of whether they are conferred such status also at the national level must have appeared easier justifiable. The result is however, that the Court apprehended the question whether personal data should be disclosed in order to protect IP rights as one of conflicting fundamental rights. This approach is imposed on the national level, and that is so even if IP rights do not enjoy a fundamental status there.

This leads the analysis to the final issue, and that is that the Court did not give substantive guidance as to how the conflict between the two rights is to be resolved, but managed to circumvent this difficult task. It did so by firstly pointing out that the mechanisms for reconciling the conflicting rights are to be found on the one hand in the directives themselves, which stipulate the limits to their scope of protection, and on the other hand in the national provisions which transpose those instruments⁸¹. Since the provisions of the directives are however couched in general terms, the Court of Justice acknowledged that the Member States have the necessary discretion in formulating the transposition measures. Taking this as its point of departure, it gave to the referring Court the following 'guidance': when transposing the directives as well as when the domestic courts and authorities are interpreting

⁷⁷ ePrivacy Directive, n. 76, Art. 1: "This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community".

⁷⁸ *Laserdisken*, n. 12, para 65.

⁷⁹ L. R. Helfer, 'The Innovation Frontier? Intellectual Property and the European Court of Human Rights', 49:1 *Harvard International Law Journal* (2008), p. 3

⁸⁰ Helfer, *ibid.* with reference to *Dima v Romania*, App. No. 58472/00, (2005); *Melnichuk v Ukraine*, App. No. 28743/03 (2005); *Anheuer-Busch Inc. v Portugal*, App. No. 73049/01 (judgment of 11 October 2005).

⁸¹ *Promusicae*, n. 10, para. 66.

national law in light of those, an interpretation has to be relied on which allows for a “fair balance to be struck between the various fundamental rights protected by the Community legal order”⁸². Furthermore, they must “make sure that they do not rely on an interpretation of them which would be in conflict with th[e] fundamental rights [protected by Community law] or with the other general principles of Community law.”⁸³

This means that the concrete impact, as resulting from EC law, on the private law relationship is here that it has to be assessed as one of conflicting fundamental rights. This results already from the above; but what that means in substance is left to the national order. This is certainly a remarkable outcome for a situation in which two *harmonisation* regimes (the data privacy and the IP rights regime) are involved. The ambiguity of the outcome is certainly not triggered by the wording of the relevant legislation, but by the Court’s reading of it as can be seen from the discussion on Art. 15(1) ePrivacy Directive discussed above. The suggestion has been made that this approach can be explained by the fact that two rights of the ECHR are involved on a points “on which there is no authority from Strasbourg”⁸⁴. Therefore, “...the Court of Justice is apparently prepared to place the widest possible construction on the ECHR, in its fear of a subsequent unfavourable ruling from the ECtHR.”⁸⁵ Be that as it may, the point that is relevant for our purposes, is that variance among the Member States is allowed. The implication is that this form of ‘constitutionalisation’ of national private law through EU directives is mandatory, yet the form it takes can differ across the domestic legal orders of the EU.

III. Conclusion

The discussion undertaken in this paper served to illustrate that there is already a strong impact of EU fundamental rights on private law through the legislation of the internal market. This is not only due to the fact that the regulation of the has and is capable of including areas that “go to the heart of private law”; but also because EU fundamental rights are gaining rising importance in the regulation of that area, whereby the legislator when drafting, and the Court when interpreting the legislation, do not distinguish between public and private law.

This paper sought to highlight this development by discussing the following: Firstly, the fact that those rights are increasingly sought to be taken into account in the drafting of legislation, which includes legislation in the field of a private law like the directives on consumer contract law (first ‘entrance gate’); and the consequences that may result from this. Secondly, the question of the relationship between the free movement provision and fundamental rights as assessed by the ECJ, which can then trigger legislative harmonisation, and can be decisive as to determining rights and obligations of private parties at the domestic level (second ‘entrance gate’). Finally, the impact caused when internal market directives are interpreted as instruments that serve to specify EU fundamental rights (third ‘entrance gate’). Those become relevant when implemented in national law and pleaded in a private law dispute.

It results from the analysis that the Charter of Fundamental Rights has played a limited role with regard to legislative scrutiny of consumer legislation, and especially the inclusion of recitals confirming compatibility with Art. 38 CFR appear entirely superfluous. It proves to play a more important role with respect to the qualification of a certain right or interest as being of a fundamental

⁸² Ibid., para. 68. As confirmed in case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2 Telecommunication GmbH.

⁸³ Ibid.

⁸⁴ P. Oliver, ‘The Protection of Privacy in the Economic Sphere before the European Court of Justice’, 46 Common Market Law Review 1443, p. 1483.

⁸⁵ Ibid.

nature for the purposes of EU law. That is important for how its relationship to a free movement provision will be assessed – be it by the Court or the legislator – but also for how internal market instruments can be conceived.

It results also from the discussion undertaken above that discretion can be granted to the Member States when applying EU fundamental rights in national private law situations (*Dynamik Medien* and *Promusicae*). This means that variations as to what the substantive impact will be are allowed. Therefore, the approach in *Promusicae* appears to lead to a purely formal “European constitutionalisation”⁸⁶, which does not affect the substantive autonomy of national private law.

⁸⁶ Cherednychenko, n. 7, p. 60.

National Private Law Rules as Restrictions to Market Freedoms

Susanne Gschwandtner *

1. Introduction

By its recent judgment in the *Gysbrechts*¹ case the European Court of Justice (ECJ) tackles the interpretation of minimum harmonisation clauses in directives. Contrary to earlier case law, the ECJ now seems to take a new approach to this question. The ECJ had qualified a Belgian provision by which a rule of Directive 97/7/EC on the protection of consumers in respect of distance contracts was implemented in a “more stringent way” as an unjustified obstacle to Article 29 EC because it was violating the principle of proportionality. Whereas minimum harmonisation has been recognized as a suitable instrument for Community legislation in consumer protection matters for the past decades it now seems to be put into question by the new approach taken by the AG and the ECJ in *Gysbrechts*.

This paper tries to analyse the *Gysbrechts* case in the light of the previous case law and to examine the further implications of the opinion of the Advocate General (AG) and the ECJ on national private law rules in consumer contract law as well as the importance of the case for the relationship between minimum harmonisation and primary law in general.

2. The Starting Point of the Debate - The *Gysbrechts* Case

2.1. The Facts

In *Gysbrechts* the ECJ had to deal with the question whether a Belgian provision adopted in the framework of the distance selling directive and the corresponding administrative practice of the Belgian authorities was still “compatible with the Treaty”, namely with Article 29 EC.

Mr. Gysbrechts is the owner of Santurel, an undertaking specializing in the wholesale and retail sale of food supplements. A large part of their business is made through e-commerce, namely via Internet. Santurel offers their goods on the WWW and orders can be placed directly over the website of the company. The ordered goods are then sent to the customer by mail, be it within Belgium or outside of Belgium, depending on the residence of the customer.

Following the complaints of a customer resident in France who was sued for failure of payment of goods ordered, Santurel changed their general terms and conditions on their website in 2001. In particular, orders from outside Belgium could now only be paid by credit card and the card details (including the credit card number as well as the validity period of the card) had to be filled into an order form on the website at the time the order was placed with Santurel. However, the Belgian Economic Inspection Board considered the amendment inadequate and brought administrative charges against Santurel and Mr. Gysbrechts as their managing director for violation of Article 80 (3) of the Belgian Law on consumer protection. According to that law, no deposit or any form of payment may be required from the consumer in distance selling contracts before the end of the withdrawal period of seven working days.

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¹ See case C-205/07: reference for a preliminary ruling under Article 234 EC from the Hof van Beroep te Gent in criminal proceedings against Lodewijk Gysbrecht and Santurel Inter BVBA, Judgment of the ECJ of 16 December 2008, hereinafter referred to as “*Gysbrechts*”.

According to the Economic Inspection Board, this provision had to be interpreted such as to prohibit Santurel from actually asking for the customer's credit card details at the point the order was made on the website. The Economic Inspection Board found that this mere information would enable Santurel to make use of the credit card details before the end of the period of withdrawal and could therefore prevent the customer from effectively making use of this right as it was established in the directive on distance contracts and implemented into Belgian national law.

However, Mr. Gysbrechts appealed against the decision of the Economic Inspection Board, stating that such an interpretation of the Belgian law would constitute an unjustified obstacle to the free movement of goods as it would put the seller at a major disadvantage. In particular, a Belgian trader might encounter difficulty in obtaining payment for goods already shipped to another country if no payment details are provided by the customer beforehand. Therefore the measure was likely to prevent sellers from offering their goods for cross-border sale.

The competent Belgian court then referred the case as a preliminary question to the ECJ, asking if the Belgian law on consumer protection constituted a measure having equivalent effect in the sense of Articles 28-30 EC and if this measure had to be qualified as an obstacle to the free movement of goods laid down in the EC Treaty.

2.2. *The AG's Opinion and the ECJ's Judgment*

It is important to notice that this case differs from most other cases the ECJ had to deal with concerning the free movement of goods. In *Gysbrechts* the Court was not confronted with the (more famous) question whether a measure was compatible with Article 28 EC and thus with a situation dealing with the free movement of goods *into* a member state. They rather had to decide on a situation of cross border trade *outside* of a member state, therefore applying Article 29 EC on restricting measures to exports.

There is considerably less jurisprudence on Article 29 EC than on Article 28 EC. In the very early case law in which the Court had to deal with measures hindering exports the Article 28-regime was applied to Article 29 EC as well.² However the Court changed its view already in the *Groenveld*-case³ of 1979. The ECJ ruled that a measure will only fall within the scope of Article 29 EC if the following conditions are met: (i) the object or effect of the measure is the restriction specifically of patterns of exports; (ii) the measure gives rise to a difference in treatment between the domestic trade of a member state and its export trade; and (iii) by virtue of the measure, a particular advantage is provided for national production or for the domestic market of the state in question, at the expense of the trade or production of other member states.⁴

² See Brigola, 2009, at 480.

³ See case C-15/79 – P.B. Groenveld BV vs. Produktschap voor Vee en Vlees.

⁴ See Groenveld, at paragraph 7.

Contrary to these criteria developed in *Groenveld* which have been applied by the Court to similar case law until recently, the AG uses a completely new approach to the examination of measures having equivalent effects as quantitative restrictions on exports in her opinion in *Gysbrechts*.⁵ The AG does not see the *Groenveld*-criteria being fulfilled in the *Gysbrechts*-case and suggests modifying the existing case law concerning Article 29 EC. Basically she suggests abandoning the *Groenveld*-jurisprudence and applying the same criteria for qualifying a rule as an unjustified obstacle to the free movement of goods to Article 29 EC as to Article 28 EC (like they have been established above all in *Dassonville*, *Cassis de Dijon* and *Keck et Mithouard*). This is a relatively wide interpretation, which as such has not been used by the Court yet except for the very early case law on Article 29 EC.⁶

The first argument which the AG considers to be relevant in this context is that because of the restriction of the definition of measures having equivalent effect as measures having equivalent effect as quantitative restrictions on exports many national measures may not be regarded as obstacles to intra-community trade because the discrimination test currently used necessarily requires a comparison between the effect of the measures on goods sold in the member states of origin and on exported goods. If, however, a particular product is produced only for export and not sold on the domestic market, it will never be possible to determine whether a certain measure confers an advantage on national production or the domestic market.⁷ The second argument in favour of modifying the existing case law according to the AG is that both Article 28 EC and Article 29 EC have the same object, which is the elimination of trade barriers between member states. In the light of this principle the AG does not see a reason to draw a sharp distinction between the definition of measures having an equivalent effect on exports and measures having an equivalent effect on imports.⁸ The third argument brought forward by the AG is that all four fundamental freedoms should be interpreted consistently. The definition of measures having equivalent effects on exports is the only freedom so far in which the ECJ has required the existence of a different treatment of goods in order to find a restriction.⁹

In the light of those arguments, the AG proposes the following modification of the case law: She suggests that basically the criteria developed by the ECJ in the case law on Article 28 EC should be applied to situations to be treated under Article 29 EC as well; nevertheless the existing case law should be adapted for this purpose. Consequently, according to *Dassonville* any national measure capable of hindering, directly or indirectly, actually or potentially, intra-community trade should be defined as measures having an equivalent effect to quantitative restrictions on exports. However since a large number of measures is likely to fall under this definition, the AG suggests excluding measures the effects of which are too uncertain and too indirect.¹⁰

⁵ See Opinion of AG Trstenjak in case C-205/07, delivered on 17 July 2008, at paragraphs 52ff.

⁶ See case C-8/74 – Procureur du Roi vs. Dassonville, at paragraph 5.

⁷ See AG's opinion, at paragraph 43.

⁸ See AG's opinion, at paragraph 44.

⁹ See AG's opinion, at paragraph 45.

¹⁰ See AG's opinion, at paragraphs 53-56.

Secondly, referring to *Keck-et-Mithouard* and the exemption of non-discriminatory selling arrangements from the definition of restrictions to imports therein, such measures should be excluded which apply indistinctively to all relevant traders operating within the national territory as long as they affect in the same manner products destined for the domestic market and products destined for export.¹¹ However, the AG suggest modifying the case law and adapting it to Article 29 EC also in this regard: Since there are certain selling arrangements which restrict exit from the domestic market even though they do discriminate exports neither in law nor in fact not all selling arrangements should automatically fall under the definition of measures having equivalent effects as quantitative restrictions on exports.

The AG provides us with three arguments in favour of an alteration of the *Keck et Mithouard*-jurisprudence:¹² First of all, measures hindering access to the market have not been sufficiently considered under the case law applying *Keck et Mithouard* because in principle, *Keck et Mithouard* is relevant only after the goods have already been imported into the market of another member state. By contrast, selling arrangements which restrict access to the market itself might not fall within the definition of restrictions though they can have a very restrictive effect. Therefore measures should always be examined by reference to their effect on access or exit from the market. Secondly, even if the principle that identical conditions in fact and in law must exist for the goods sold on the market in a member state and for the goods destined to leave this member state, it is still possible that discrimination might arise for the product sold on the external market. Theoretically there might exist national provisions which have an actual discriminatory effect on exported goods because of factors which originate in the market on which the product is sold and not only because of the characteristics of the measure itself and therefore selling arrangements which restrict exit from the market must still be considered as measures having equivalent effect. Finally, selling arrangements may often be an obstacle to export while not being a requirement concerning the goods themselves. Therefore selling arrangements should be evaluated as to whether they directly prevent or hinder exit from the market, in which case the exemption laid down in *Keck et Mithouard* should not be applied.

Applied to the facts in *Gysbrechts* the AG found that the first part of the first criterion of the proposed modified test (whether the measure applies to all relevant traders) was fulfilled. However the second part of the first criterion of the test (whether the measure affects in the same manner the marketing of domestic products and those exported to other member states) was not found to be fulfilled as regards the question of whether the provision is an obstacle to leaving the market in spite of the fact that it does not per se give rise to discrimination in law or in fact. The Belgian provision in question might deter the vendor from selling his goods to foreign member states because he risks not receiving payment for the goods shipped. Therefore a measure prohibiting a vendor to ask for the customer's credit card details constitutes an obstacle for the goods concerned to exit from the market and is a measure having equivalent effect to a quantitative restriction on exports.¹³

As regards a possible justification of the measure under Article 30 EC or the mandatory requirements developed in *Cassis de Dijon* and subsequent case law, the AG found that consumer protection, which is one of the mandatory requirements, could be a possible justification in the present case.¹⁴

Lastly the AG had to consider whether the Belgian provision was proportionate to the aim pursued, which is the protection of consumers. The AG found a general prohibition on demanding an advance or payment before the end of the period of withdrawal proportionate to the aim pursued. However, the AG came to a different conclusion concerning the question of whether also a prohibition to ask for the

¹¹ See AG's opinion, at paragraph 58.

¹² See AG's opinion, at paragraphs 61-64.

¹³ See AG's opinion, at paragraphs 74-76.

¹⁴ See AG's opinion, at paragraphs 77-79.

customer's credit card details before the end of the period of the right to withdrawal was proportionate: First of all the AG considered that the primary goal of the vendor asking for the customer's credit card details is not the collection of payment for the goods but reasons of precaution in case the customer does not pay for the goods. The consumer's level of protection is not diminished as long as the vendor does not make use of the card details provided by the customer. Secondly, under Belgian criminal law a vendor is liable for breach of his obligation not to debit the credit card for the amount during the period for exercising the right of withdrawal. The AG considers that the possibility of fraudulent use is diminished if there is an effective penalty for a violation of this obligation. Moreover it must also be considered that payment by credit card offers a vast number of advantages for the customer as well as for the vendor including a balance of the level of protection for each party. The AG finds that measured by the total number of credit card transactions cases of fraudulent use of credit cards are rare. It would be exaggerated to give the consumer absolute protection in this case when the vendor would have no protection.

The Court themselves basically followed the AG's opinion but tackled only very briefly this kind of altered discrimination test suggested by the AG. They state briefly in paragraph 42 of the judgment that this measure is more likely to affect exports than imports, however without providing a very convincing argument. The Court sees the main problem in the difficulties in law enforcement in a foreign member state. In other words they do not consider that a consumer whose credit card details have been used although he wanted to send back the goods received or has never received the goods ordered would face the same risk of law enforcement in another member state against the merchant who would normally be economically more powerful than the customer. By imposing the monetary risk on the customer the Court has surely not taken its most consumer-friendly approach.

The ECJ considered that the first prohibition (prohibition of collecting money from the customer's credit card account before the expiry of the period of withdrawal) is in accordance with the Treaty but they rejected the second one (prohibition of asking for credit card details before the expiry of the period of withdrawal). With regard to the principle of proportionality, however, the Court takes a completely different approach than the AG. The Court repeats the criteria used for evaluation of whether a restriction on intra-community trade is proportionate to the aim pursued, which is whether the measure is suitable and does not go beyond what is necessary to attain those objectives. Applied to the facts in *Gysbrechts* the Court finds that the prohibition on requiring payment before the expiry of the period of withdrawal and the prohibition of requesting the customer's credit card details are suitable to ensure a high level of consumer protection in distance selling. However, as regards necessity the Court takes a different stance: The ECJ accepts that especially in distance selling there is often a gap between the performances of contractual obligations of both parties. Consequently it has to be decided on how the risk of non-performance is allocated between the parties. The Court fears, however, that a customer who has already made an advance payment to the vendor might feel obliged not to exercise his right of withdrawal. Therefore a prohibition of an advance payment and the collection of payment before the expiry of the relevant period do not go beyond what is necessary to ensure the effectiveness of this right. By contrast, the prohibition of asking for credit card details only eliminates the risk that the supplier collects the price before expiry of this period which is already sufficiently treated with by the prohibition already laid down in the provision in question. The Court holds that the prohibition of collecting payment itself is already sufficient for eliminating the aforementioned risk. On the other hand it would be disproportionate to deprive the dealer from the possibility of collecting credit card details when in fact he has no other security that he will receive the price for the goods shipped to the customer. Moreover, if the seller was not allowed to ask for credit card details anymore he would most likely refrain from offering his goods to customers outside Belgium. Therefore this measure constitutes – according to the ECJ – an obstacle to cross-border trade and is disproportionate to the aim pursued, namely the protection of customer and the effective implementation of the right of withdrawal within a certain time limit after the contract has been concluded.

2.3. Questions

Gysbrechts raises a lot of interesting questions; many of them however have not been clearly answered by the Court so far. First of all, there is the question of whether the regime applicable to Article 28 EC (the *Dassonville* and *Keck-et-Mithouard* criteria) can be applied equally to Article 29 EC. In principle the AG suggests to apply the same regime with some alteration to the discrimination test. Nevertheless the ECJ remains silent on whether this newly developed test should be applied and if yes, to what extent it should be based on the already existing test under Article 28 EC and how – if at all – it should be changed.

Moreover the ECJ seemingly treats the balance of sellers' and consumers' interests differently in *Gysbrechts* than in previous case law. Whereas the ECJ had put the emphasis on the protection of the consumer in previous cases, now a lack of protection to some degree seems to be accepted for the sake of promoting the common market.

Finally it can be discussed whether the ECJ has actually abolished the principle of minimum harmonisation by considering a "more stringent rule" disproportionate.¹⁵ By using the principle of proportionality basically any "more stringent rule" implementing a directive could potentially be considered disproportionate and therefore incompatible with the Treaty. In the light of the draft for a new consumers' rights directive¹⁶ which uses a maximum harmonisation approach it could be argued that the principle of minimum harmonisation will be completely abandoned in consumer protection law.

3. Minimum Harmonisation

3.1. The Importance of Minimum Harmonisation in Consumer Protection Matters

Though minimum harmonisation has been institutionalized within the Treaty only by the Single European Act and the Treaty on the European Union, it had already been a legal instrument for adopting and implementing several directives in environmental, consumer and employee protection matters for some decades.¹⁷ Given the fact that the EC Treaty does not confer an independent competence in terms of consumer protection to the European Community, extensive use of this legal instrument has been made to make intervention of the Community possible in this field.¹⁸ The amount of existing rules at Community¹⁹ in this field is rather remarkable considering the actual lack of competence the Community has with regard to consumer protection.

To adopt such rules mostly Article 95 EC is used though it does not refer to any particular competence in consumer sales contracts or protection law but rather to the creation and completion of a functioning internal market. Despite the introduction of Article 153 EC, which states that in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers and adopt respective

¹⁵ See Reich/Micklitz, 2008, at 349.

¹⁶ See Proposal for a Directive of the European Parliament and of the Council on Consumer Rights of 8 October 2008, 2008/0196 (COD).

¹⁷ See Dougan, 2000, at 853.

¹⁸ See Rott, 2003, at 1107.

¹⁹ See for example Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993 ("unfair commercial terms directive"); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997 ("distance selling directive"); Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985 ("doorstep selling directive").

measures (also in combination with Article 95 EC), the importance of Article 95 EC itself for the adoption of consumer protection rules has not diminished; directives adopted under Article 95 EC often claim to serve the purpose of “completing the internal market” though they actually regulate matters of consumer protection.²⁰

Nevertheless it is questionable if Article 95 EC can serve at all as a basis for the adoption of minimum harmonisation rules. Whereas Article 153 EC regulating the Community’s competence in consumer protection policy does not exclude member states from exercising their power in the same field, the wording of Article 95 EC does not explicitly allow member states to adopt stricter rules.²¹ The only possibility member states have to retain more stringent national rules under Article 95 EC is the limited procedure laid down in Article 95 (4) EC, i.e. to maintain national provisions if necessary on grounds of major needs referred to in Article 30 EC, or relating to the protection of the environment or the working environment. Strictly speaking, though the EC has made extensive use of Article 95 EC in the past to adopt legislative measures with minimum harmonisation clauses, such measures cannot be based on Article 95 EC because Article 95 EC itself does not allow member states to preserve or adopt more stringent rules than those enacted by the EC institutions.²²

The ECJ interestingly does not act on the question whether a directive enabling member states to implement more stringent measures can be adopted under Article 95 EC in *Gysbrechts*. Actually the ECJ applies the same ruling to the *Gysbrechts* case than to earlier cases like *Buet* and *Karner*²³, where in both cases the Court saw no difficulty in using Article 95 EC as basis for issuing a directive mainly dealing with consumer protection.

3.2. Limitations to More Stringent National Rules

Preserving existing or even implementing new more stringent measures is only allowed (i) if the directive contains a respective enabling clause and (ii) as far as these measures are compatible with the EC Treaty. Limitations may arise from the four freedoms, in consumer protection matters in the first place from the free movement of goods and the free provision of services. Whether a national provision is still compatible with the Treaty or not has to be decided by the ECJ. The instrument used by the Court to decide on that issue is the principle of proportionality, according to which a measure must be suitable, necessary and proportionate in relation to the aim pursued by the respective member state’s government.²⁴ In other words, there must be a sufficient causal relationship between the measure adopted and the interest pursued (*suitability*), there must not be any other available option which is as effective as the measure in question to achieve the interest and has less restrictive effect on market integration (*necessity*) and the measure must not be disproportionate to the interest pursued by the national government (“*per se*” *proportionality* or proportionality in the narrower sense).

Two of the earlier cases in which the Court had to deal with minimum harmonisation and the question whether a more stringent national rule was still compatible with the Treaty were *Buet* and *di Pinto*. *Buet*²⁵ concerned the question whether a total ban of doorstep selling of certain products adopted by France when implementing the doorstep selling directive can be justified by consumer protection issues. In the respective case, France banned the selling of educational material at private doorsteps, arguing that in such a sensitive matter consumer protection could justify a total prohibition of doorstep selling of certain products.

²⁰ See Rott, 2003, at 1108.

²¹ See Weatherill, 2009, at 151.

²² See Weatherill, 2009, at 151.

²³ See Weatherill, 2009, at 153.

²⁴ See Jans, 2007, at 711.

²⁵ See case C-382/87 – *Buet* vs. *Ministère Public*.

The ECJ considered that the French law constituted an obstacle to the free movement of goods laid down in Article 28 EC, but found it justified. The ECJ stated that as far as educational material is concerned, not only the economic risk of an ill-considered purchase must be taken into account, but also the possible long-term harm. According to the Court, the potential purchaser of this kind of products often belongs to a category of people who are behind with their education and seeking to catch up, which makes them particularly vulnerable when faced with salesmen of educational material.²⁶ Moreover, the numerous complaints about this kind of sales and the low quality show the need for such a provision adopted by French legislation.

Although the Court found an obstacle to intra-community trade in this case, it followed the principle of minimum harmonisation by still leaving enough discretion to the member states to regulate doorstep selling and to take a more stringent approach to consumer protection matters. The ECJ neither found a violation of Article 95 on the basis of the minimum harmonisation approach that was taken in the doorstep selling directive.

Likewise in *Di Pinto*²⁷ the Court had to deal with the relationship between the free movement of goods and rights conferred to the consumer in the framework of the doorstep selling directive having made use of the respective minimum harmonisation clause. This case, however, is slightly different concerning the competence left to member states when implementing a minimum harmonisation directive.

The case concerned a merchant who was canvassed for the purpose of concluding an advertising contract concerning the sale of his business. The French Cour de Cassation had referred the question to the ECJ whether French law implementing the doorstep selling directive could protect also a merchant and not only a consumer (by definition a private customer). The ECJ held in this case that even though this particular contract was outside his usual business, a merchant does not fall within the scope of the doorstep selling directive, which is designed to protect only consumers in the narrow sense. Even though the directive is a minimum harmonisation directive, it cannot be implemented and interpreted such as protecting not only private customers, but also merchants.²⁸ Nevertheless the ECJ stated that member states were allowed to adopt more stringent members allowing for the same level of protection for merchants as for consumers – not in the framework of the directive, but perhaps in some different national provisions.²⁹ In this case the Court underlined again that member states are in principle autonomous in implementing their own consumer protection policy and contract law in the framework of minimum harmonisation directives. The ECJ did not explicitly touch upon the question whether legislation with minimum harmonisation clauses enabling member states to adopt more stringent rules are compatible with Article 95 EC, but obviously found the subsumption of a merchant under the definition of “consumer” inconsistent with EC legislation.

3.3. *The Importance of Minimum Harmonisation within the Legal Order of the European Community*

The primary goal of the EC at the time of its founding was the implementation of a “common” and later, of an “internal” market.³⁰ In order to remove cross-border barriers to trade and provisions of services, it was necessary to guarantee equal conditions for all market participants regardless of their residence. Therefore in theory a maximum harmonisation concept would suit best for achieving an

²⁶ See Buet, at paragraph 13.

²⁷ Case C-361/89 – *Di Pinto*.

²⁸ See *Di Pinto*, at paragraph 18.

²⁹ See *Di Pinto*, at paragraph 22.

³⁰ See for instance already case 15/81 – *Gaston Schul Douane-Expeditie BV vs. Inspecteur der Invoerrechten en Accijnzen*, at paragraphs 1431-1432.

internal market without trade barriers: if market participants are sure to expect the same rights and obligations in every member state, cross-border trade is likely to be enhanced.

Nevertheless the same concept cannot be applied as soon as the Community is not only concerned with economic integration, but also with social protection and welfare issues such as consumer protection: the Community is not able to deal with different social issues in different member states. Neither is the EC obliged to maintain the “highest possible standard” in consumer protection matters; it does not have to adopt or support the highest level of consumer protection that can be found among the member states, but only a “high” standard of protection. The Community’s legal system has to resolve an underlying normative conflict: Whereas a uniform legal system would foster market integration and contribute to remove trade barriers,³¹ a more differentiated approach is needed for guaranteeing basic social and employee rights to citizens as well as in terms of consumer and environmental protection.³² Although “negative harmonisation” in the sense of the simple removal of obstacles to the free movement of goods is sufficient for a mere economic integration, at the same time “positive integration” is needed when social values are taken into consideration.

The differentiated approach chosen by the Community is to confer some legislative freedom to the member states in the framework of harmonisation, i.e. to enable them to maintain their (higher) standards in consumer protection and/or to adopt more stringent rules than those designed by the EC legislators. Minimum harmonisation therefore allow for different levels of protection in different member states as well as reducing transaction costs in implementing the measures adopted by the EC through directives. Moreover, a consensus on legislative acts is more likely to be reached at Community level when those acts are mere minimum requirements and the member states are allowed to alter the rules when implementing them.

3.4. Arguments against Minimum Harmonisation

In their Green Paper³³ the Commission expressed their position in favour of a maximum harmonisation approach in consumer protection matters. The Commission sees the main problem in consumer protection matters in the fragmentation of the existing *acquis*.³⁴ Firstly, member states are allowed to adopt more stringent national rules as a result of the minimum harmonisation approach which has been used until now in Community legislation on consumer protection. Therefore the national laws of the member states differ largely depending on the extent to which member states have made use of the possibility to implement more stringent rules. Secondly, many issues are regulated differently between the directives themselves or have been left open which leads to an additional fragmentation of the *consumer acquis*.

This fragmentation triggers a certain level of uncertainty about the exact level of consumer protection in each member state.³⁵ According to the Commission, this uncertainty leads to considerably higher additional costs for operators in the common market. Sellers who engage in cross-border transactions and offer their goods to purchasers outside of the member states in which they are established have to seek legal advice on the different legal situation. Moreover they have to modify the legal information on their websites and in their marketing materials as well as in the consumer contracts themselves. In the case of non-compliance they might encounter litigation costs as well. The Commission even refers

³¹ See Dougan, 2000, at 860.

³² See Dougan, 2000, at 854.

³³ See Green Paper on the Review of the Consumer Acquis presented by the European Commission, 8 February 2007, COM (2006) 744.

³⁴ See Green Paper, 2007, at 6.

³⁵ See Twigg-Flessner, 2008, at 175.

to a recent Eurobarometer survey showing that it is not uncommon for operators to even refuse delivery to a consumer residing outside their own member state.³⁶

From the consumer's point of view, the Commission also sees some reluctance in cross-border orders due to the fragmentation in the *acquis* mentioned above. One of the main arguments to refrain from buying in another member states is – according to the Commission – the lack of confidence consumers have in the different legal system. Again, consumers are most likely unsure about the level of protection they enjoy when placing a cross-border order. The Commission mentions the varying length for the cooling off-period in distance selling contracts and the different modalities for the exercise of the right of withdrawal as an example.³⁷

However it is questionable whether the maximum harmonisation approach suggested by the Commission is suitable enough for eliminating these problems. On the one hand, the Commission does not consider a major barrier for cross-border consumer sales which is the existence of different languages and the vast refusal of consumers to conclude a contract in a foreign language. Even the harmonisation of consumers' rights to a maximum extent does not eliminate the fact that apart from only very few exceptions consumers as well as businesses must make use of a foreign language when engaging in cross-border contracts.³⁸

On the other hand fostering cross border trade involves more than an alignment of consumer sales law in different legal systems. Guaranteeing equal rights to all private customers in every member state for each and every distance selling contract regardless of whether it takes place within the same or different member states will not be sufficient to strengthen the market participants' confidence into cross border transactions. Even if we leave the languages issue aside there still remain other national differences, especially in the legal orders of the member states. Consumer selling contracts do not only involve matters of consumer protection, but also issues of general contract law, questions of competent jurisdiction and applicable litigation rules etc. Harmonizing consumers' rights and consumer protection is only one – albeit important – step in furthering the common market.

4. Implications of the Gysbrechts Case on National Private Law Rules

4.1. National Private Law Rules as Restrictions to Article 29 EC?

The basic question in *Gysbrechts* is if the measure adopted by the Belgian legislation and the administrative practice of the authorities is a measure having equivalent effect to a quantitative restriction on exports and if they could be justified and were proportionate in the light of Article 29 EC. Answering this question is not a very easy task since there exists only very little case law regarding Article 29 EC and much less than on Article 28 EC. According to the wording, both Articles 28 and 29 EC seem to establish the same criteria for a measure constituting an obstacle to intra-community trade.

One of the earlier cases where the Court had to deal specifically with restrictions on exports under Article 29 EC was *Groenveld*. However, in this decision the Court interpreted Article 29 EC as far as only such measures should be prohibited that *specifically* hinder exports. In other words, the court used a direct discrimination approach (different from the *Dassonville*-approach used in the framework

³⁶ See survey of February/March 2008 on the DG Health and Consumer Protection web page. However the reasons for the refusal are not completely clear according to this survey and the survey itself does not provide sufficient evidence to establish a causal link between the legal situation and the refusal to deliver cross-border.

³⁷ See Green Paper, 2007, at 7.

³⁸ See Micklitz/Reich, 2009, at 282f and Micklitz, 2009, at 53.

of Article 28 EC). In the *Groenveld*-case the Court stated that measures prohibited by Article 29 EC are measures which have

“as their specific object or effect the restriction exports and thereby the establishment of a difference in treatment between the domestic trade of a member state and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the state in question at the expense of the production or of the trade of other member states.”³⁹

By contrast the provision challenged in the *Gysbrechts* case concerned a selling arrangement applicable to all internet sales regardless of the residence of the customer; therefore it does not leave any space for applying the *Groenveld*-regime to the facts. The ECJ suddenly passes on to an indirect discrimination test though, as it states in paragraph 42 of *Gysbrechts*:

“[...] the consequences of such a prohibition are generally more significant in cross border sales made directly to consumers [...] by reason, inter alia, of the obstacles to bringing any legal proceedings in another member state against consumers who default, especially when the sales involve relatively small sums.”

It then continues in paragraph 43

“Consequently, even if a prohibition such as that at issue in the main proceedings is applicable to all traders active in the national territory, its actual effect is none the less greater on goods leaving the market of the exporting member state than on the marketing of goods in the domestic market of that member state.”

From that reasoning it follows that the Court leaves the direct discrimination test previously used in the framework of Article 29 EC and moves to an indirect discrimination test which has not been used before (but without a sound reasoning why they do so).

However, in *Alpine Investments*⁴⁰ which is quoted by the AG in a footnote of her opinion (although concerning services and not goods, which generally have to be treated differently) the Court stated that a member state’s measure could constitute a restriction to Article 59 EC if the freedom to provide services although it is applied generally and in a non-discriminatory matter and although it does not have as an object or the effect of affording an advantage to the national market compared to service providers resident in other member states. The AG did not provide any further explanation why the criteria developed in *Alpine Investments* should apply in the *Gysbrechts* case. Moreover it has to be considered that *Alpine Investments* considered a cold calling case which took place in the 1990es, whereas it was re-regulated by Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (“Directive on privacy and electronic communications”) as well as Directive 2000/31/EC on a legal framework for electronic commerce (“e-commerce Directive”) which explicitly provides in its Article 3 that cold calling is exempted from the country of origin principle and has to be regulated by the state in which the recipient of the call is situated. Therefore it seems at least questionable if the argument used in *Alpine Investments* can be upheld as the legal domain it concerned has been regulated differently since the judgment was rendered.

Furthermore, the Court only considered the respective rule in *Alpine Investments* as not compatible with the Treaty because of the special circumstances of the case. The Court ruled that the restriction of punishing cold calls outside the Netherlands was justified by the mandatory requirement of public interest consisting in maintaining the good reputation of the national financial sector. It considered that the confidence customers have in financial service providers was likely be put at risk if such a method of acquiring new customers was used.

³⁹ See *Groenveld*, at paragraph 7.

⁴⁰ See case C-384/93 – *Alpine Investments BV*.

Generally speaking the application of these general criteria for qualifying a measure as an obstacle to intra-community trade under Article 28 EC should be reconsidered when dealing with cases in the framework of Article 29 EC. First of all these criteria were designed to foster the internal market through the elimination of trade barriers for imports (as follows from the fact that these criteria were developed in cases where entrepreneurs of one member state were complaining about not being able to sell their goods in another member state because of the particular rules existing in the state the goods were destined for). Secondly, these criteria certainly had as an objective to leave some autonomy with the member states. The mandatory requirements developed by the Court in *Cassis de Dijon* for example allow member states to ban certain goods from being imported by justifying restrictive measures by certain issues lying in the public interest. The ECJ will have to elaborate why the application of the same criteria and the indirect discrimination test are justified in pure Article 29 EC-situations.

Moreover, the ECJ did not make any reference in *Gysbrechts* to the question if national private law rules can constitute an obstacle at all to cross-border trade. In *CMC Motorradcenter*⁴¹, for example, the ECJ rejected the argument that pre-contractual information obligations imposed on the parties by a German provision obstructed the free movement of goods. The Court ruled that the restrictive effects of the respective German provision on the free movement of goods were too uncertain and too indirect for the measure to constitute an obstacle to intra-Community trade.

The idea behind this case law is that due to the supremacy Community law has over national law, the application of national law must be examined as well as to its conformity with Community law.⁴² In other words the mere application of national private law rules and particularly national contract law rules can theoretically constitute a barrier to intra-Community trade. However, the formula developed by the Court in *Dassonville* should be broad enough to deal with such barriers arising from the application of national private law.⁴³ Moreover, national private law will most likely have to be qualified as a selling arrangement instead of a product-related rule according to the *Keck*-formula. Consequently national private law will not constitute an obstacle to cross-border trade as long as it applies to all traders without discrimination.

Another case in which the ECJ had to deal with the problem of national law rules constituting obstacles to primary law was the *Karner*-case.⁴⁴ The ECJ was confronted with the question whether a national rule concerning public announcements in commercial communication implementing more stringent rules than provided in the directive on misleading advertising⁴⁵ was compatible with the EC Treaty and particularly with Article 28 EC.

The facts of the case were such that Karner brought action against Troostwijk before the Commercial Court of Vienna because of an infringement of Article 30 of the law against unfair competition which prohibits any public announcements or notices intended for a large circle of persons from making reference to the fact that the goods advertised originate from an insolvent estate when the goods in question, even though that was their origin, no longer form part of the insolvent estate. Troostwijk appealed the injunction by stating that Article 30 (1) of the law against unfair competition is contrary to Article 28 EC (as well as to Article 10 of the European Convention on Human rights). According to Troostwijk, that provision restricts the possibility of disseminating advertising which is lawful in other

⁴¹ See case C-93/92 *CMC Motorradcenter GmbH vs. Pelin Baskiciogullari*.

⁴² Steindorff, 1996, at 57.

⁴³ Fallon/Meeusen, 2002, at 46.

⁴⁴ See case C-71/02, *Herbert Karner Industrie-Auktionen GmbH vs. Troostwijk GmbH*.

⁴⁵ Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18).

Member States. Moreover advertising cannot be confined to the boundaries of a single member state and varying the information according to the member states concerned is impossible on the internet.

The ECJ noted that Article 30 of the law on unfair competition is based on the presumption that consumers prefer to purchase goods sold by an insolvency administrator when a company is wound up because they hope to make purchases at advantageous prices. Where advertising related to the sale of goods from an insolvent estate, it would be difficult to know whether the sale has organised by the insolvency administrator or by a party who had acquired goods from the insolvent estate. The national provision is intended to prevent economic operators from taking undue advantage of that tendency on the part of consumers.

The Court then proceeded to examine the national provision as to its compatibility with the free movement of goods. The ECJ found that the advertising rule satisfied the conditions of *Keck*. At first sight an advertising rule is a mere selling arrangement. Furthermore, unlike in *Gourmet*⁴⁶ the law does not totally prohibit the advertising of certain goods, but prohibits merely the reference that the goods to be sold come from an insolvent estate. Therefore the measure did not put imported products at a disadvantage. Lastly, it is indistinctively applicable to domestic and to foreign goods. The ECJ found that the necessary conditions established for selling arrangements compatible with the Treaty in *Keck-et-Mithouard* were fulfilled and therefore declared the measure compatible with Article 28.

Another interesting point in the *Karner* judgment is the discussion of whether a *per se* advertising prohibition is proportionate and compatible with the EC Treaty. In *Karner* the prohibition was justified because the national provision was intended to prevent sellers from taking undue advantage on the part of consumers because they might assume that they make an especially good bargain when buying goods originating from an insolvent estate. Nevertheless the Court considered that Article 28 EC cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information by be justified by mandatory requirements concerning the protection of consumers. The idea behind this reasoning is that consumer information is fundamental principle of Community consumer policy and traders should not be prevented from giving information unless this information might mislead consumers.⁴⁷

The application of the same ruling to *Gysbrechts* triggers two questions: first of all, is the measure at stake a selling arrangement or product-related and secondly, is it indistinctively applicable to domestic and to foreign goods or is there any form of discrimination. The prohibition of collecting credit card details before the period of withdrawal has expired has nothing to do with the product ordered, so the provision is clearly a selling arrangement. The second question is more difficult to answer: A more consumer-friendly provision in one member state (like the Belgian one in question) could ultimately lead to the situation that consumers from other member states tend to buy more goods in that member state than in other member states and potentially also than in their home country if the consumer protection related provisions are less favourable for them. The result of the examination therefore varies according to whether the emphasis is put on the sellers' or the consumers' interests.

4.2. *The Balance of Sellers' and Consumers' Interests*

Both the AG as well as the ECJ comes to the conclusion that prohibiting the collection of credit card details before the expiry of the period of withdrawal is disproportionate to the aim pursued. The bottom line is that they assume a seller-based approach instead of a consumer-based approach for the sake of consumer law harmonisation: They consider the Belgian measure disproportionate and an obstacle to exports, because vendors have no guarantee for payment if they are not allowed to ask for the customer's credit card number before they send the goods. Nevertheless both could as well have

⁴⁶ See case Case C-458/06 – Skatteverket vs. Gourmet Classic Ltd.

⁴⁷ Stuyck, 2004, at 1697.

assumed a customer based approach and considered that the measure is likely to enhance cross-border shopping: a customer might more likely order products in a country which has a high level of consumer protection and probably a higher one than his own home country (provided that he is properly informed about the respective legal provisions).

It is also remarkable that the AG says in paragraph 85 that it is disproportionate to avoid fraudulent use of credit card data and withdrawal of money before the end of the period of withdrawal by prohibiting the collection of credit card data before the end of this period. There is no other way to effectively prevent a trader from withdrawing money except by not offering him credit card data before the end of the period of withdrawal. Actually most distance sellers withdraw the money at least at the same time when they deliver the goods, sometimes also before delivering the goods and sometimes even before checking if the goods offered are available. However, the AG does not propose another more proportionate measure to prevent that risk. By contrast she argues that the prohibition of withdrawing money from the consumer's credit card would already constitute a suitable and proportionate measure, which is certainly not true for cases of fraudulent use of credit card details.

The approach taken by the Court ultimately leads to a maximum harmonisation of consumer protection laws. Therefore it is all the more questionable why the ECJ did not rule on the question of competence for the adoption of minimum harmonisation legislation in the framework of Article 95 EC. If member states want to preserve their "more stringent rules" in this field, they would only be allowed to do so with regard to domestic goods sent to customers resident in the same country. Consequently, undertakings would have to apply different contract rules to goods sold to member state residents and customer residing outside this member state (to avoid any kind of "restriction" to exports, ideally the law of the home country of each different customer should apply according to the origin of the customer). This would not only lead to an unbearable burden in processing the different orders coming from different member states but merchants might again refrain from selling to customers outside their own member state.

5. Conclusion

The *Gysbrechts* judgment is certainly remarkable as the Court for the first time seems to overrule the principle of minimum harmonisation in consumer protection matters and consequently also the possibility for member states to adopt "more stringent rules" – though explicitly provided for in the Directive 97/7/EC – by applying the principle of proportionality and stating that the measure as it has been transposed by the Belgian government and interpreted by the competent authorities was disproportionate and constituted an unjustified restriction to the free movement of goods in the framework of Article 29 EC.

The question is not only if the Court has put an end to the autonomy of member states at all to preserve the possibility of developing and implementing their own consumer protection policy, but also if the regime of Article 29 EC as it previously has been interpreted has been changed by the Court. The Court has not only altered the direct discrimination test to an indirect discrimination test, but has also taken into consideration the test proposed by the AG (though it has not touched upon it very extensively) which has never been used before and seems a bit to go round in circles to arrange a certain outcome. It is surely arguable if this test can and will be applied to future cases.

Furthermore the ECJ has not seized the opportunity to express their view on the Article 95 EC – minimum harmonisation clauses dilemma. *Gysbrechts* would have opened the door for clarification on whether the adoption of minimum harmonisation directives under Article 95 EC is constitutionally correct and/or under which circumstances Article 95 EC can be used for adopting minimum harmonisation directives.

Likewise this case would have provided an excellent opportunity to clarify whether national provisions and especially national contract law and consumer protection law are restrictions to the free movement of goods and to what extent such measures can be justified by mandatory requirements.

In summary the judgment brings up interesting questions not only concerning the constitutional order of the Community and the autonomy of member states but also the Court's approach to consumer protection in general. Therefore further case law of the Court in this matter will have to be awaited before general conclusions can be drawn on whether this recent approach constitutes a modification in the ECJ's case law.

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Does the National Court Know European Law? A Note on Ex-Officio Application after Asturcom

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1. Introduction

The overarching theme of the present Working Paper is the impact of the European Union's internal market on the private law of the Member States. This article discusses the national judge's duty to raise European law *ex-officio* from the perspective of the currently most recent case dealing with the issue; the *Asturcom*¹ ruling from 6 October 2009. The case concerned an enforcement action for an arbitration award containing a potentially unfair arbitration clause which had become final after the lapse of a national prescription period. *Asturcom* answered the question whether there is internal market legislation, in this case the Consumer Directives, whose nature is so fundamental that in se it enjoys the status of 'European public policy' and has to be applied *ex-officio*. The ECJ ruled in applying the procedural autonomy test that the 'effectiveness' limb did not require the automatic application. Under the 'equivalence' limb the provision of Consumer law was said to be so fundamental as to have to be treated equal to national public policy. It is this author's interpretation that hereby the ECJ denied the status of a uniformly and automatically applicable 'European public policy' to the Consumer Directives. It did, however, create an indirect form of European public policy, namely by elevating Consumer concerns to national public policy. Whereas the true public policy type would always require automatic application, the indirect type remains contingent on the national legal system having an exception for public policy at all.

Before delving into the doctrine of the *ex-officio* application of European law² as it developed jurisprudentially, let us take a step back and grasp globally what this article will deal with. *Ex-officio* application is a figure of procedural law that denotes an application of the law by the judge on his own motion rather than due to the impetus of one of the parties. The national civil procedural narrative is staged on a horizontal axis, on which the ownership of the dispute is described as a struggle between the powers of the judge and the parties to frame the dispute. The powers of the judge are analyzed as his activeness or passiveness, correlative to the parties' autonomy. This distinction crudely matches the juxtaposition of an adversarial to an inquisitorial procedural system. An 'inquisitorial' system, the continental model, might be said to pursue an ultimate and positivistic legal solution as truth. Principally, finding the applicable norm is left to the Court rather than invocation by the parties under the maxim *iura novit curia*, the Court knows the law. The distinction between facts and law, however, nuances the powers of the judge in the maxim *da mihi factum, dabo tibi jus*. The parties establish or 'own' the facts, the Court 'owns' the law. The 'adversarial system', which is to be found under the common law system, is grounded in the parties' opposition towards each other and essentially lets them define the extent or ambit of the dispute. Such conception of legal proceedings is much more narrated in terms of adjudicating a conflict between subjects. The very basis for the claim that parties should be in charge of their dispute is grounded in party autonomy, which in turn is rooted in a substantive liberal private law vision. This can and has been challenged by arguing for the social function of procedural law. Procedural law does not only affect the parties individually, but also society as a whole. Procedure and a private dispute therefore nevertheless can have an important

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¹ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-00000.

² Awaiting the emergence of a consensus on post-Lisbon Treaty terminology, 'European law' refers to the overarching European Union law thereby including what previously had been designated as Community law.

impact on society which justifies interference with leaving legal disputes even between private parties to their exclusive will if judged in a Court. Coming back to the *ex-officio* theme of this article: Both, continental and common law models elevate certain ‘public interests’ above party autonomy. How the balance between societal and individual interests is struck is determined within a legal system and essentially constitutes a tendency towards either social or liberal conceptions respectively. The caricature of the difference between continent and common law, however, breaks down at this point; both models accept public interest as ground for interference of the judge and application of the law regardless of the parties’ position.³

So, where does the *ex-officio* application of European law fit into the ‘classic’ rehearsal of procedural law? In applying European law, the answers to the ‘Who is the master of the dispute?’ query can be phrased not only in the judge-party delimitation, but additionally in terms of European-national law. In other words, the ownership of the dispute is not just a horizontal power struggle but also a vertical one as defined through the applicable law between national procedural law and exigencies of European law. The discussion of *ex-officio* application of European law is therefore most often coloured in tones of sovereignty. Or rather we can say that by the addition of a hierarchical dimension, the concerns for party autonomy become enlarged with concerns of procedural autonomy. Public interest intrusion of private autonomy, read private relationships, is nothing new at national level. What is new is the dimension and the thought that the public interest can be formulated at European level. This brings us to the last general point. With the involvement of the European level, we reach the second dimension, the principle of procedural autonomy, which has become a vehicle for manifesting Member States’ concerns regarding sovereignty over procedure. A formulation of European public policy has to address the vertical power struggle over ownership of a legal dispute. In these terms, *Asturcom* touched a European rule, Consumer law that is, with potential for a public interest. Under the factual circumstances a conflict arose with arbitration - a field that traditionally exhibits great resistance against the intrusion of public interest due to the nature of arbitration as an alternative dispute settlement mechanism. *Asturcom* is at the crossing of these tensions, making it a formidable case from which to illustrate the impact of European law on private law.

2. The Case

The Facts

Asturcom Telecomunicaciones SL (Asturcom) and Maria Cristina Rodríguez Nogueira (the consumer) had concluded a mobile phone contract. The consumer defaulted under the contract as she failed to pay a number of bills and terminated the contract before the agreed minimum subscription period had expired. The contract included an arbitration clause stipulating that disputes should be brought in front of the ‘European Association of Arbitration in Law and Equity’. Asturcom initiated proceedings in front of the arbitration tribunal located in Bilbao, which handed down an award decision against the consumer to pay the sum of around 700€. The consumer had not become involved at any stage of the proceedings, the result being that after the expiry of the two months time limitation, the arbitration award became final under Spanish law. Asturcom then applied to the Spanish Court for the enforcement of the arbitration award.

³ AG Jacobs in Joined cases C-430/93 and C-431/93 Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten [1995] I-04705. See his overview of the different procedural regimes on public policy in paras 33-45 and on this point particularly para 37 with the remark that the determination of what constitutes public policy is much more contended between the legal systems.

At this point the Spanish Court stayed proceedings and referred the following preliminary question under Article 234EC to the European Court of Justice:

“In order that the protection given to consumers by [Directive 93/13, the Unfair Terms Directive] should be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the award if it finds that the arbitration agreement contains an unfair arbitration clause that is to the detriment of the consumer?”.

The referring Court therefore raised three legal issues: The first was (1) whether a national judge must determine of its own motion whether an arbitration agreement is void in an action for enforcement of a final arbitration award. Rather implicit, yet contained in the reference if we place *Asturcom* in the relevant context, was (2) whether the necessity to determine of its own motion was an obligation or mere discretion. The last issue concerned the consequences and (3) whether finding an unfair arbitration clause to the detriment of a consumer required annulment of the award.

The Case in front of the ECJ

The judgment was rendered by the First Chamber with Judge Tizzano as Rapporteur, who had been Advocate General in the closely related *Mostaza Claro*⁴ case. In answering the referred question, the ECJ centered on the *ex-officio* issue of the case. Rather than the result of the case, it is particularly the Courts line of reasoning that should deserve our attention. The ECJ started its argumentation by noting the principles which in previous cases had lead it to require a national Court to assess of its own motion whether a contractual term is unfair. This was notably the protective purpose of the Unfair Terms Directive based on the assumption that the consumer is a weaker party both in terms of bargaining power as well as level of knowledge. Specifically Article 6(1) of the Directive provides that unfair terms shall not be binding on the consumer has the purpose of creating and effective rather than formal balance between the parties. As the Court noted, the ‘mandatory’ nature of the provision in *Mostaza Claro* lead it to pronounce a duty on a national Court to correct an imbalance by positive actions unconnected with the parties to the contract – that is to require the national Court to assess the unfairness of contract terms on its own motion. The Court then distinguished the facts in *Asturcom* by pointing out that the consumer never became involved in the arbitration proceedings, and did not challenge the arbitration award in court– whereby after passing of the national time limits for challenge, the award acquired force of *res judicata*.

The Court then pointed to the importance of the principle of *res judicata* for both European and national legal orders, the implementation of which in the absence of European rules is left to the Member States. Under the principle of procedural autonomy, the Court proceeded to subject these national rules to the two pronged test of ‘effectiveness of European law’ and ‘equivalence’ - the two limitations to the general presumption of procedural autonomy of the Member States.

⁴ Case C-168/05 Elisa María Mostaza Claro v Centro Móvil Milenium SL [2006] ECR I-10421.

Under ‘effectiveness’, the Court tested whether the national procedural rule makes the application of European law “*impossible or excessively difficult*”. It then referred to the *van Schijndel*⁵/*Peterbroeck*⁶ which formulated a ‘contextual approach’ which prescribes to examine a given rule regarding its role, progress and as a whole, having regard also to the basic principles of the domestic judicial system. In the present case the Court considered that the arbitration award acquired force of *res judicata* due to the lapse of the time limit to challenge arbitration awards. The Court re-iterated case law on the compatibility of reasonable time limits with European law. It then examined the Spanish two month time limit to challenge arbitration awards under ‘reasonableness’ from two points: First the length of the time limit, which it judged to be sufficient for an assessment “*as to whether there are grounds for challenging an arbitration award and, if appropriate, the action for annulment of the award to be prepared.*”⁷ The initiation of the time period was held to be reasonable as the time limit commences only at the consumer’s notification of the arbitration award, which precludes the expiry of the time period without a consumer being aware of the award. For these reasons, the Court found the national time periods in compliance with the principle of effectiveness and turned to the test of equivalence.

The Court here recalled the basic formulation of the principle of ‘equivalence’: “*the conditions imposed by domestic law under which the courts and tribunals may apply a rule of Community law of their own motion must not be less favourable than those governing the application by those bodies of their own motion of rules of domestic law of the same ranking*”.⁸ The Court stressed the privileged, namely mandatory, nature of Article 6(1) of the Unfair Terms Directive as well as that of the general purpose of the Directive which is essential to the tasks of the Community under Article 3(1)(t) of the EC Treaty.⁹ From this the Court derived an importance which must be equal to national rules ranking as public policy rules in the domestic legal systems. The national Court was under a duty to apply European law of its own motion both where it has the duty or discretion to do so for national rules of public policy. Since the ECJ only interprets the European law it finished the case with a strong indication that Spanish Courts have acknowledged their *ex-officio* power in award enforcement proceedings in relation to national public policy rules. Though the facts were for the verification of the referring Court, this was a rather strong indication that under the principle of equivalence the national Court is required to examine the unfair term at issue of its own motion.

The last issue discussed was which consequences were to flow from such *ex-officio* application. These are at the disposition of national law, as long as they ensure the goal of Article 6(1) of the Directive, namely that any unfair terms are not binding on the consumer.

The Advocate General’s Opinion

In her opinion, which was delivered 14 May 2009, Advocate General Trstenjak tackled the referred question by separating the issue of the power of review of the enforcing court from the duty to review. Regarding the first issue, the power of review, she relied on a teleological interpretation of the Directive by stressing the principle of effective judicial protection and the right to be heard which calls for “adequate and effective means” to protect consumers against such terms. On the other hand she pointed out that due the nature of arbitration proceedings a general reluctance in legal systems of

⁵ Joined cases C-430/93 and C-431/93 *van Schijndel* .

⁶ Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-04599.

⁷ Case C-40/08 *Asturcom* para 44.

⁸ Case C-40/08 *Asturcom* para 49.

⁹ With the entry into force of the Lisbon Treaty, according to the table of equivalence, Article 3 was repealed and replaced “in substance, by Article 7 of the Treaty on the Functioning of the European Union (‘TFEU’) and by Articles 13(1) and 21, paragraph 3, second subparagraph of the Treaty on European Union (‘TEU’)”. Article 7 TFEU has replaced the extensive list of the EC Treaty and simply reads: “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.”

carrying out substantive examinations in the enforcement stage of arbitration awards persists. The Court had held that an imbalance between parties must be corrected by “*positive action unconnected with the actual parties to the contract*”¹⁰. The Advocate General took the view that such ‘positive action’ is not granted in a case where the consumer has to participate in invalid arbitration proceedings. Under the assumption that a consumer could not be required to file an action for annulment “*in view of the frequent lack of business experience among consumers*”¹¹, the national Court is the first judicial instance to assess the unfairness of a given contract term. Therefore, she followed principles which are recognized also under international law and proposed: “*The enforcement of an arbitration award which is contrary to public policy is prohibited, in the light of the fact that in Mostaza Claro the Court implicitly ranked Community-law consumer protection provisions as rules capable of being governed by considerations of public policy*”.¹² She therefore reached the point of having to assess the principle of *res judicata* which could be violated under these circumstances and reviewed the previous case law on this matter. The principle of *res judicata* therefore had to be in conformity with the principle of effectiveness and equivalence, the procedural autonomy test. Her conclusion in reliance on the ‘effectiveness limb’ was:

“...above all in view of the need for effective consumer protection and having regard to the case-law of the Court of Justice which expressly requires positive action unconnected with the actual parties to the contract, I am convinced that it may be necessary, in exceptional cases, to disregard the principle of *res judicata*.”¹³

From the *Mostaza Claro* judgment she derived that the assessment of the Court’s own motion is a duty rather than mere power.

3. The Issues: Procedural Autonomy, Public Policy and International Arbitration

Asturcom concerned the enforcement of an arbitration award granted on the basis of a consumer contract that included a potentially unfair arbitration clause. The ECJ held that there was a duty on behalf of the national Court to raise the Unfair Terms Directive *ex-officio* during an enforcement proceeding. It reached its judgment in performing four steps of reasoning. First, it distinguished *Asturcom* from *Mostaza Claro*, secondly it stressed the principle of procedural autonomy of the Member States as limited by the effectiveness and equivalence. The third and fourth step consisted in testing the effectiveness and equivalence requirements respectively. The national on time limitation and *res judicata* passed the effectiveness test. By construing Consumer law to constitute a European rule of equal importance as national public policy considerations, the national rule failed under the equivalence limb. Significantly, the Advocate General had failed the time limit under the effectiveness limb.

Regarding (A) the principle of procedural autonomy and the methodology used to establish compliance with the ‘effectiveness’ limb thereof, the ECJ confirmed that the contextual approach of *van Schijndel/Peterbroeck* is also used for testing the effectiveness of Consumer law application. This can be analysed as an attempt to streamline Consumer law with the increasing importance of the contextual approach to test ‘effectiveness’ under procedural autonomy in general. (B) From a Consumer law point of view, *Asturcom* finally settled the indeterminacy surrounding the status of Consumer law provisions and its disputed rank as public policy. Most importantly, the ECJ locates the

¹⁰ The AG cites Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98) [2000] ECR I-04941 para 25 and Case C-168/05 *Mostaza Claro* para 26.

¹¹ Opinion of the AG in Case C-40/08 *Asturcom* para 67.

¹² Opinion of the AG in Case C-40/08 *Asturcom* para 70.

¹³ Opinion of the AG in Case C-40/08 *Asturcom* para 75.

legal authority of Consumer law. Previous consumer cases had led to the finding of a duty on behalf of the national courts to raise European law, but whether it was Consumer law by itself, effectiveness or equivalence that required this application remained unclear. *Asturcom* clarified that the unfair term provision of the Unfair Terms Directive constituted mandatory law equal in nature to national public policy under the equivalence limb. (C) From the point of view of international arbitration, *Asturcom* was fundamental in establishing how European law coped with the challenges of alternative dispute settlement. EC Consumer law had to be raised in an enforcement action of an arbitration award to the extent that there was a duty or discretion to raise rules of national public policy rules. The result reached is in conformity with international law obligations of the Member States under the New York Arbitration Convention. Each of these issues will be explored in greater detail below.

A. *Procedural Autonomy*

That we should be concerned at all with questioning in which cases EC law must be applied *ex-officio* is far from evident. Had the ECJ followed the Opinion of Advocate General Darmon in *Verholen*¹⁴, the national judge would have an entirely different cognition of European law than is currently the case. He had argued that *all* EC law provisions should be raised of their own motion in the national Courts.¹⁵ The argument ran as follows: The doctrine of direct effect and primacy created a duty on the national Court to disapply a national rule which was contrary to a European rule. It followed from *Simmenthal*¹⁶ that this disapplication had to be made on the Court's own motion. Therefore, at the same time, this rule implicitly seemed to rely on a duty to apply European rules at all times. After all, the national judge could only disapply a national rule contravening EC law of its own motion after considering or raising that European rule in the first place. The question of *ex-officio* application was thus rephrased as a question of primacy.¹⁷ The ECJ did not follow the Advocate General's opinion; the question of the duty to apply European law in "sequel"¹⁸ to direct effect and supremacy remained untouched and hence open.

¹⁴ Joined cases C-87/90, C-88/90 and C-89/90 A. Verholen and others v Sociale Verzekeringsbank Amsterdam [1991] ECR I-03757.

¹⁵ AG Darmon in Case 243/78 *Simmenthal SpA v Commission of the European Communities* [1980] ECR 00593 paras 19-22, see also MARIOLINA ELIANTONIO, *Europeanisation of administrative justice? : the influence of the ECJ's case law in Italy, Germany and England* (Europa 2009), 130.

¹⁶ Case 243/78 *Simmenthal*.

¹⁷ Prechal notes that the tendency to perceive "all kinds of obstacles" in terms of supremacy is symptomatic for French legal writing. SACHA PRECHAL, 'Community Law in National Courts: The Lessons from Van Schijndel', (1998) *Common Market Law Review* 681, 683.

¹⁸ SACHA PRECHAL, 'Community Law in National Courts: The Lessons from Van Schijndel', (1998) *Common Market Law Review* 681, 683.

Instead, what followed was the creation and rise of the principle of procedural autonomy. Accordingly, since European law is enforced in national courts,¹⁹ Member States are presumed to enjoy procedural autonomy. The origin of the principle of procedural autonomy is located in the wording of the *Rewe/Comet* cases:

“... it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law [...] it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature”²⁰

This autonomy is limited by (1) the principle of effectiveness, (2) the principle of equivalence and (3) general principles of European law²¹. The principle of primacy determines that, in case of a conflict between a substantive European and national rule, the European law rule prevails. Rules of the legal environment on the other hand, that is “*procedural matters in this broad sense as they are organized in the legal systems of the Member States*”, only need to ensure that they enable the effective application of EC law or realization of EC rights respectively. The rationale behind this approach has been explained by Advocate General Jacobs: “*It should be noted first that the proper application of the law does not necessarily mean that there cannot be any limits on its application.*”²² Under this ‘procedural autonomy’ model EC law enjoys substantive primacy but has to respect procedural autonomy, which challenges EC law to determine the line between “substantive”²³ and procedural law. Hence, not all EC law is automatically applied in the Courts of the Member States.

¹⁹ With minor exceptions, Competition law holds a special position in respect of application of EC law.

²⁰ Case 33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989 para 5, similarly “Consequently, in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter” Case 45-76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 02043 para 13.

²¹ For example the possibility of a reference to the ECJ must have existed at one stage of judicial proceedings (*Peterbroeck*) or effective judicial protection under Article 6 ECHR. The standard reference for this aspect is the *Johnston* case, specifically para 18 and further Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651. This third limb of procedural autonomy is not systematically tested in the jurisprudence of the Court. It has, however, in previous jurisprudence been established that the autonomy of national procedural rules can ‘fail’ under general principles of law. To include it in a list may be a tautology as the principle of procedural autonomy applies only “in the absence of Community rules governing a matter”, and of course the general principles are formulated on Community level. What makes their mention worthwhile in the list limiting procedural autonomy is their nature as principles. Hence, they cannot be applied in a rule per se fashion and instead enter into the testing under the procedural autonomy heading.

²² Opinion of AG Jacobs in Joined cases C-430/93 and C-431/93 *van Schijndel* para 31.

²³ Substantive in this respect is probably not a very happy choice of words. It must be read as existing substantively on European level. For Community law, the distinction becomes one of whether an aspect is “intrinsic” to a European rule or whether it is a procedural rule independent of the EC rule, thus enjoying the margin or procedural autonomy. Such ambiguity was found in *T-Mobile Netherlands* regarding a rule of evidentiary nature (presumption of a causal connection). Evidence under Dutch law was classified as procedural rules. The questions thus rose whether the presumption could be said to be contained in the EC Competition rules itself, thus falling under primacy of EC law, or not, and hence enjoying the benefit of the procedural autonomy testing. The ECJ ruled that the presumption was an intrinsic part of the Community rule so that the national Court is obliged to apply it (para 46). The case is both, a confirmation of the validity of the approach as well as an illustrative example of the models inherent ambiguity on defining a rule to be either procedure or intrinsic to an EC rule. Case C-8/08 *T-Mobile Netherlands, KPN Mobile NV, Orange Nederland NV Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-00000.

The primacy/procedural autonomy dichotomy²⁴ represents a fundamental conceptual schism within European law. The perspective one takes thereto boils down to an interpretation of the *Simmenthal* (*ex-officio* application out of primacy and direct effect) judgment juxtaposed with the *Rewe/Comet* (procedural autonomy) line. From a point of view of academic honesty it is important to draw the reader's attention to the fundamental nature of this discord.²⁵ For the purpose of this article on the other hand it is sufficient to observe that in the last 10 years the ECJ has developed a very consistent jurisprudence which relies on the *Rewe/Comet* that is the procedural autonomy line.²⁶ Accordingly, primacy and procedural autonomy are not antitheses of each other. Therefore, the ECJ presently operates under the premise that European law as it stands does not presume its automatic application. Consequently, *ex-officio* application is principally left to the realm of the Member States' respective judicial organisation, subject to the test of procedural autonomy under which European law may require the national judge to apply European law of its own motion.²⁷

The issue of procedural autonomy is of course omnipresent in any discussion of *ex-officio* application since the powers of the judge are a crucial feature of national procedural law.²⁸ It was already pointed out that existence and extent of a principle of 'procedural autonomy' has been subject to extensive debate, a debate which has great merits but is not pursued further in this article. Rather the article addresses the *mechanisms* of the principle of procedural autonomy as a 'way of organizing reasons' and creating a 'supportive structure' between reasons and decision.²⁹ In this way, procedural autonomy is a second order argument that ranks different legal arguments. The principle of procedural autonomy comprises two tests; the effectiveness and the equivalence test, which we address in turn.³⁰ The wide potential implications of the *Asturcom* case are due to the fact that *Asturcom* manipulates the use of the legal reasoning mechanism itself.

²⁴ These two different approaches juxtapose *Simmenthal* and *Rewe* with each other. For an elaboration of the inherent tension and how to reconcile the judgments see PRECHAL, in which she discusses the relationship between procedural rules, primacy and direct effect and which is largely congruent with the Advocate General Jacob's opinion in Joined cases C-430/93 and C-431/93 van Schijndel .

²⁵ Most famously against procedural autonomy C.N. KAKOURIS, 'Do the Member States Possess Judicial Procedural "Autonomy"?' (1997) *Common Market Law Review*, 1389. See also contributions by Lenaerts as one of the strongest primacist K. LENAERT & T. CORTHAUT, 'Of birds and hedges: The role of primacy in invoking norms of EU law.' (2006) *31 European Law Review*, 287. A different account is followed by M. DOUGAN, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy.' (2007) *44 Common Market Law Review*, 931. The difference between primacist versus procedural autonomy is explicated very clearly by SACHA PRECHAL & NATALYA SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond', (2004) *European Review of Private Law* 589.

²⁶ The dichotomy between the two interpretations is not convincing. In another paper I have explored a different conceptualization of effectiveness and equivalence as rendering a conflict visible can accommodate both elements. The procedural autonomy analysis determines whether a conflict between European and national law occurs. If it does, primacy solves the conflict in favour of the European norm. The discussion thereof is, however, beyond the ambit of the topic of this article.

²⁷ One caution to this generalization may be found in Competition law as a truly European public policy which might require 'automatic application' (read: *ex-officio* application). This argument is discussed below in the section on public policy.

²⁸ Continued criticism of the notion 'procedural autonomy' was in vain, first only the Advocate Generals and parties used the notion, but after the *Wells* case [2004] the language has entered, and consistently so, also the ECJ's judgment.

²⁹ See in JOXERRAMON BENGOTXEA, et al., 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in Grainne de Burca & Joseph H H Weiler (eds), *The European Court of Justice (Collected courses of the Academy of European Law, 2001)* for an instructive elaboration of the 'legal reasoning' approach applied to the European Court of Justice.

³⁰ For the moment leaving aside the discussion whether fundamental rights do constitute a third element of procedural autonomy or stand outside of the test.

Effectiveness – from standard to balancing

Under the ‘effectiveness’³¹ limb, the Court tests respectively that a national rule must not render ‘*virtually impossible or excessively difficult*’ the exercise of rights conferred by European law or must not render ‘*virtually impossible or excessively difficult*’ the application of European law. These formulations differ from one another as one is geared to the protection of a right, the other towards the protection of the law itself. These two formulations, from which the ECJ seems to choose the ‘better fit’ to a legal problem, exemplify a subjective or an objective approach respectively.³² Subjective in this context refers to a specific interest of an individual or group based test, whereas objective relates to the pure application of law in order to protect a wider common interest of society. The distinction can also be formulated as effectiveness of a right versus effectiveness of policy based approach.

In *Asturcom*, the Court jumps from one phrasing to the other, beginning with an objective, concluding with a subjective formulation. This suggests that the protected interests are not mutually exclusive.³³ In Consumer law the ECJ generally uses the formulation that a national rule may not make ‘*virtually impossible or excessively difficult*’ the exercise of consumer rights in the ‘effectiveness’ test. In both senses, the principle of effectiveness functions as a standard, and specifies certain requirements a national rule has to meet as a specific result. Initially, the main discussion focussed on the question whether the standard applied should be a more stringent one worded in terms of adequacy or even more stringent ‘full effectiveness’ rather than the mere ‘virtually impossible or excessively difficult’ wording.³⁴ In both formulations, ‘effectiveness’ functions as a standard or threshold.

The test of ‘effectiveness’ was reshaped after the rendering of the *van Schijndel/Peterbroeck* cases, by which the ECJ when testing the ‘effectiveness’ of a national rule created an additional and seemingly cumulative consideration:

“...national procedural provisions [...] must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole before the various national instances. [context part] In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration [balancing part]”.³⁵

³¹ For a very original and differentiated discussion of the meaning and importance of the principle of ‘effectiveness’ for the European legal order, see M. ROSS, ‘Effectiveness in the European legal order(s): Beyond supremacy to constitutional proportionality.’ (2006) 31 *European Law Review*, 476.

³² The acceptance of the terms subjective and objective for the indication that the protected interest can either be specific or general varies with the legal tradition. The distinction is meant similar to the French distinction between “public policy rules designed to order society (*règles d’ordre public de direction*), adopted in the general interest and which the court may raise of its own motion, and public policy rules designed to protect specific interests (*règles d’ordre public de protection*), adopted in the interest of a particular category of persons and which may be relied upon only by persons belonging to that category”. See para 58 Case C-429/05 *Max Rampion and Marie-Jeanne Godard, née Rampion v Franfinance SA and K par K SAS* [2007] ECR I-08017.

³³ I do think that there a significance in differentiating between objective and subjective might arise by arguing that the Consumer behaviour can impact on the validity of his right in negligent behaviour whereas his behaviour should be beyond impact for general public interest in application of a rule.

³⁴ Seyr in her thesis on effectiveness/effet utile finds that the formulation used by the ECJ does not influence the outcome. Where the ECJ deploys the test of full effectiveness, the outcome is not more intrusive into national procedural autonomy than where it uses the ‘virtually impossible’ formulation. SIBYLLE SEYR, *Der effet utile in der Rechtsprechung des EuGH* (Duncker & Humblot 2008).

³⁵ Case C-312/93 *Peterbroeck*.

The structure of the effectiveness test changed from standard to a new emphasis of the national context and a subsequent balancing thereof. Generally, the *van Schijndel/Peterbroeck* test is therefore referred to as contextual approach.³⁶ It means that the rationale of a given procedural rule can justify a restriction or limitation on the bringing of a claim based in EC law. The Court referred to rights of the defence, legal certainty, proper conduct of procedure, but we can also think about for example unjustified enrichment, which was accepted by the Court in *Manfredi*.^{37, 38} However, the test goes further than a merely 'contextualised' understanding of a national procedural rule, which would only imply a method for determining the 'real' nature of a national rule. In addition, the basic principles upon which these national rules are based must "be taken into consideration". Herein lays the truly fundamental importance of the contextual approach: National procedural law receives standing. By taking into consideration national procedural rules, these can enter into a conflict with EC law requirements. The conflict is not automatically resolved by primacy type as a rule but under a balancing exercise. It is, however, not an alternative to effectiveness as a standard. In understanding the contextualized *van Schijndel/Peterbroeck* test as a balancing exercise, effectiveness as a standard is used to determine the EC law side of the balance. The EC law interest is then balanced against the contextualized national procedural provision.³⁹

Consumer law in the procedural autonomy test

The 'contextualized approach' is regularly applied by the ECJ within testing procedural autonomy, albeit not in an absolutely systematic fashion. Not so in Consumer law, where almost all cases were decided on the basis of an exclusively teleological rationale (what is the aim of a given provision), in which effectiveness acted as a standard instead of the balancing/contextualised approach. The case law located the duty to apply Consumer law ambiguously in the specific nature of Consumer law, the values and purposes of Consumer Directives, rather than a clear subsumption under the equivalence or effectiveness balancing approach.⁴⁰ Neither in *Océano Grupo*⁴¹ [2000], *Mostaza Claro* [2006], or

³⁶ Sometimes the *van Schijndel/Peterbroeck* case law is referred to as 'purposive approach' because it is the purpose of the national rule that is taken into the legal reasoning. This is not very fitting: It is not only the purpose ("the role of that procedure") of the national rule that plays, but the context which is a wider notion including role, progress and various judicial instances. Moreover, the purpose as teleological reasoning is taken into account on both levels, Community and national. The balancing aspect is the novelty. The ECJ and commentators have referred to the passage of the judgment in a unitary way so that in discourse contextualization and balancing are not separated. Hence the preference for 'contextual approach' to designate both parts.

³⁷ Joined cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA* [2006] I-06619.

³⁸ In other words, the Court balances the domestic national interests, with the interest of the European claim. Some authors have maintained that it is European general principles which are being balanced. I believe alone on a literal reading of the judgment, this reasoning can be rejected, as the Court clearly speaks of the national context which has to be taken into account.

³⁹ For strong criticism on the use of the 'effectiveness' limb in general, see ANGELA WARD, 'Do unto others as you would have them do unto you: Willy Kempter and the duty to raise EC law in national litigation.' (2008) 33 *European Law Review*, 739, 753. According to her, the effectiveness as a standard is too indeterminate, and the contextual approach too unstructured. She therefore proposes to streamline the ECJ's jurisprudence with Article 6(1) ECHR case law, according to which "non-discriminatory temporal limitations to the enforcement of Community law, at national level, would only need to be disapplied, under EC law, if they struck at the "very essence" of right of access to a court, failed to pursue a legitimate aim, and were disproportionate." In my reading of the case, all these elements are already implicit in the effectiveness under the Peterbroeck test, with the possible exception of the 'very essence' element. A clearer articulation within effectiveness testing would nevertheless be desirable. I do agree with Ward's criticism of the indeterminacy of the effectiveness as standard.

⁴⁰ In the same direction J. H. JANS, *Europeanisation of public law* (Europa Law Pub. 2007) Who argue that the ex-officio application is "not always approach along the lines of *Fan Schijndel and Peterbroeck*".

*Rampion and Godard*⁴² [2007] had the Court made reference to the *van Schijndel/Peterbroeck* balancing test. In *Cofidis* [2002] it did, but used the context not the balancing bit of the formulation.⁴³ *Pannon*⁴⁴ [2009] does not contain a reference to *van Schijndel* or *Peterbroeck*, but the Court arguably performs a brief balancing.⁴⁵ In all of these cases, the exigencies of EC Consumer law prevailed and in the outcome *ex-officio* application was required. As a result, due to their intrusive nature into national procedure, Consumer law cases were hovering grouped together in a special bubble, the legal authority's origin of which remained disputed.

Regarding the *ex-officio* application of general European as opposed to European Consumer law, *van der Weerd*⁴⁶ seems the most metajudicial judgment that addressed the question of the nature of Consumer law. The ECJ here organized its case law in three categories: 1) the *Peterbroeck* case as access to justice and the opportunity to rely effectively on the incompatibility of a domestic provision with European law; 2) the specificity of the Unfair Terms Directive and the consumer as a group worthy to be given effective protection (*Océano Grupo, Cofidis, Mostaza Claro*); and 3) the ruling in *Eco Swiss*⁴⁷ under equivalence. Only then did it proceed to test the general requirement of effectiveness in the concrete case under the *van Schijndel/Peterbroeck* contextual test of effectiveness. Remarkably therefore, the ECJ in its 'organization' of case law continued to treat Consumer law outside of the box of ordinary procedural autonomy testing, or at least on a very high end of a gradation of effectiveness⁴⁸. It explicitly acknowledged the duty to apply Consumer law as a separate category, a category beyond balancing and equivalence considerations.⁴⁹ In its openly and strong teleological consideration, the consumer jurisprudence significantly diverged from the general administrative case law line.

With this previous categorization, *Asturcom* sits uneasy. Especially the *sui generis* status which had been accorded to Consumer law in *van der Weerd* is not confirmed. On the contrary, in *Asturcom*, the ECJ clearly subjects Consumer law to the exigencies of procedural autonomy, namely understood as a principle covering the jurisprudence rendered in *Rewe/Comet* and limited by the principles of equivalence and effectiveness. What is interesting is that the Court uses the *van Schijndel/Peterbroeck* approach to determine compliance of the rule with the effectiveness limb. *Asturcom* in this respect can be read as an attempt to streamline Consumer law cases with the general, often administrative, body of law regarding procedural autonomy. The jurisprudential developments I would predict, move towards a point of stabilization. Procedural autonomy as a principle has been firmly enshrined in the European legal order, and the ECJ dogmatically sticks to the effectiveness and equivalence test – and starting to do so even in the field of Consumer law.

(Contd.) _____

⁴¹ Joined cases C-240/98 to C-244/98 *Océano Grupo*.

⁴² Case C-429/05 *Rampion and Godard*.

⁴³ Case C-473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875 para 37.

⁴⁴ Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Györfi* [2009] ECR I-00000.

⁴⁵ Case C-243/08 *Pannon* para 34 “the specific characteristics of the procedure for determining jurisdiction, which takes place under national law between the seller or supplier and the consumer, cannot constitute a factor which is liable to affect the legal protection from which the consumer must benefit under the provisions of the Directive”.

⁴⁶ Joined cases C-222/05 to C-225/05 *J. van der Weerd and Others (C-222/05), H. de Rooy sr. and H. de Rooy jr. (C-223/05), Maatschap H. en J. van 't Oever and Others (C-224/05) and B. J. van Middendorp (C-225/05) v Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-04233.

⁴⁷ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-03055.

⁴⁸ As the Advocate General suggested, the consumer is situated at a very high end of of a sliding scale of effectiveness, see the Opinion of the AG in *Joined cases C-222/05 to C-225/05 van der Weerd* para 23 “The question whether in practice it is excessively difficult to exercise a right can be a matter of a sliding scale”.

⁴⁹ See also J.J. VAN DAM & J.A.R. VAN EIJSDEN, 'Ex officio Application of EC Law by National Courts of Law in Tax Cases, Discretionary Authority or an Obligation?' (2009) 1 EC Tax Review, 16, 20.

Res judicata as the starting point

If procedural autonomy is conceived of as a frame, whatever is picked as the central object to the effectiveness and equivalence test literally changes the picture. Which rules we subject to the test determines the rules to be balanced in the two pronged test and naturally determines the case outcome. In *Asturcom*, the balancing is formally made between on one hand the objective of the Unfair Terms Directive (replacing the formal balance of the contract by an effective balance between consumer and other part) and on the other hand the requirements of *res judicata* and the fault element of the consumer (the consumer's inertia).⁵⁰ The Court locates the principle of *res judicata* on both, European and national level. This is a typical example of the Courts reconciliatory approach. Rather than framing the issue as a conflict between European and national exigencies it creates an overlap, a fiction of a single norm expressed on both levels. By stressing the importance of the principle of *res judicata* for both legal orders the reasoning shifts from a vertical balancing axis between rules of one legal order against the other but is reconciled or at least mitigated towards a single hierarchically neutral conflict on horizontal level. The ECJ observed that "to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive".⁵¹ It then subjected the national two months time limit to a reasonableness test holding it to be "*reasonable in that it enables both an assessment to be made as to whether there are grounds for challenging an arbitration award and, if appropriate, the action for annulment of the award to be prepared.*"⁵²

At the point that 'in the absence of European rules on the matter' it is national law that governs a matter we reach the procedural autonomy argument in that the national rule has to comply with the effectiveness and equivalence. By framing the procedural rule at issue, the ECJ narrates the case as one of time limits. That an important moment of choice had already passed at this stage of reasoning is pinpointed by the alternative account of the Advocate General. She had analysed the question as one regarding access to justice rather than time limits. The ECJ's reasoning was also contingent on this question, but it circumvented a reasoned consideration thereof. An access to justice test would have considered whether there was an effective opportunity to rely on a right, and the question whether the consumer can be expected to bring judicial proceedings against an arbitration award at all. The ECJ had seemingly previously denied this⁵³, and the Advocate General had doubts. By stressing the 'inertia' of the consumer, the ECJ implicitly relied on the fiction that there is a difference between the consumer not having taken any judicial steps 'at all' and the consumer having brought an action for annulment be it outside of the time limits. This is justified in relying on New York Convention which is treated below, under which these facts indeed would have made a difference. Yet, for the consumer rationale the issue was not so much the adequacy of a time limit but the duty of the consumer to bring proceedings as such. Regardless of the normative point on the degree of protection a consumer deserves, this discussion would have been merited by the previous case law which indicated that the costs of bringing judicial proceedings could be so deterring on the consumer that certain terms of Consumer law should be applied *ex-officio* for that reason alone.

⁵⁰ Case C-40/08 *Asturcom* para 34 "Accordingly, it is necessary to determine whether the need to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them requires the court or tribunal responsible for enforcement to ensure that the consumer is afforded absolute protection, even where the consumer has not brought any legal proceedings in order to assert his rights and notwithstanding the fact that the domestic rules of procedure apply the principle of *res judicata*."

⁵¹ Case C-40/08 *Asturcom* para 36.

⁵² Case C-40/08 *Asturcom* para 44.

⁵³ Case C-243/08 *Pannon*.

Subjective versus objective effectiveness and a discussion of the consumer right

Regardless of whether the ECJ in the end truly meant to weigh ‘consumer inertia’ outside of the procedural autonomy test, the consumer’s behaviour did figure as an element taken into consideration within the effectiveness limb of procedural autonomy. Under ‘effectiveness’, the ECJ balanced the objective of the Unfair Terms Directive against the rules of domestic procedure applying *res judicata* as well as the fact that the consumer had not tried to assert his rights in legal proceedings.⁵⁴ The behavioural element ultimately tipped the scales within the effectiveness consideration:

“the principle of effectiveness cannot be stretched so far as to mean that, in circumstances such as those in the main proceedings, a national court is required not only to compensate for a procedural omission on the part of a consumer who is unaware of his rights, as in the case which gave rise to the judgment in *Mostaza Claro*, but also to make up fully for the total inertia on the part of the consumer concerned who, like the defendant in the main proceedings, neither participated in the arbitration proceedings nor brought an action for annulment of the arbitration award, which therefore became final.”

Non-reliance of a consumer right seemed to compromise the right itself; differently formulated, the consumer forfeited his rights by not participating actively at any stage of the legal proceedings.

In previous case law, the ECJ had taken a perspective dominated by a concern for the protection of the consumer. In order to find for a duty of the national Court to apply EC Consumer law, it had relied on the “*imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract*”⁵⁵, of ensuring effective protection “*in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them*”⁵⁶ and the fact that the protection of the Directive

“thus extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve”.⁵⁷

In addition, the ECJ had previously relied on the deterrent function of such review by the Courts.⁵⁸

If the ECJ does not distinguish the case on grounds of the special nature of arbitration proceedings, all the above considerations regarding the consumer and the purpose of the Directive must still be valid and taken into account. They have in common that they are based on a conceptualisation of the consumer who 1) does not know his rights or 2) is deterred by costs and or experience of judicial proceedings. The Court has used these arguments previously in order to excuse inaction on behalf of the consumer. One therefore has to wonder what changed in the *Asturcom* constellation of facts. Just the same, Mrs Rodríguez Nogueira might be ignorant as regarding her right not to be bound by an unfair term, or more likely still, she might not even be aware that the term was unfair at all. Secondly, the costs of initiating court proceedings in minor claims remain just as deterrent. And one might add a third additional point which was not discussed by the Advocate General or the ECJ. How many laypeople or consumers are actually aware of the qualitative difference between arbitration and judicial proceedings? If arbitration is perceived as a judicial instance by the consumer, the bar for actually initiating proceedings is raised another notch.

And what is the distinction between a mere “procedural omission” and “complete inertia”? This in fact points to the direction that the Court could have reached a different conclusion if the consumer had

⁵⁴ “[...] the consumer has not brought any legal proceedings in order to assert his rights” Case C-40/08 *Asturcom* para 34.

⁵⁵ Joined cases C-240/98 to C-244/98 *Océano Grupo* para 27.

⁵⁶ Joined cases C-240/98 to C-244/98 *Océano Grupo* para 28.

⁵⁷ Case C-473/00 *Cofidis* para 34.

⁵⁸ Joined cases C-240/98 to C-244/98 *Océano Grupo* para 28, Case C-473/00 *Cofidis* para 32.

initiated an action to annul the award. What if the consumer had become active? The uncertainty surrounding the role of consumer ‘inertia’ generates insecurity about outcomes in cases in which consumer had become active, but so after the prescription of time limits. The open scenario is that of a consumer trying to rely on the Consumer Directive only in enforcement proceedings, when he had not previously raised the argument and the time limits for an annulment action passed. It is not the focus of this paper, but we may at least in passing note the discussion regarding the legitimacy of the use of jurisdiction and arbitration clauses in consumer contracts in general.⁵⁹

As touched upon above, the ECJ does not clearly distinguish between testing the ‘effectiveness’ of the law objectively or a specific right subjectively. However, if we understand *Asturcom* to rely on a fault element which consists of the consumer not having brought an action, then the ECJ seems to rely on a subjective interpretation of effectiveness. After all, the ‘effectiveness’ requirements of the law objectively and the general interest which it protects, is not influenced by the behaviour of the consumer.⁶⁰ Of course, one can also translate the behaviour “not bringing an action” not as a behavioural difference but as objectified difference regarding the nature of the proceedings. The objective difference can be found between *Mostaza Claro* and *Asturcom*. Whereas both disputes involved and arbitration award, *Mostaza Claro* was a reference in an action for annulment of the arbitration award whereas *Asturcom* was referred in an action for enforcement thereof. *Asturcom* was less stringent under effectiveness, yet as we will see below more demanding under equivalence.

B. Public Policy

Is there a European public policy?

Briefly summarized, the AG came to the conclusion that because the national Court was the first independent instance able to scrutinize the terms of a contract, it had to be able to review an arbitration award in enforcement proceedings. The Court reached the same conclusion, however, via a markedly different path of argumentation: Whereas the AG reached the duty of the judge to apply European law under the principle of effectiveness, the ECJ only did so under the principle of equivalence, which is contingent upon the national legal orders.

⁵⁹ Principally, arbitration must be voluntary; which can be questioned on grounds of the parties difference in bargaining power. Bates additionally cites the ‘repeat-player’ advantage, the threat to consumer’s due process due to incorrect application of legislation, the costs of arbitration for the consumer and limited appeal possibilities. She thus pleads for excluding consumer contracts from arbitration, due to the fact that the advantages (e.g. transaction costs) of the arbitration process for businesses do not materialize in relation to consumer disputes. DONNA BATES, ‘A consumer’s dream or pandora’s box: Is arbitration a viable option for cross-border consumer disputes?’ (2004) 27 *Fordham International Law Journal*, 823.

⁶⁰ As already Pound cautions when it comes to weighing or valuing claims [...] we must be careful to compare them on the same plane [...]. If we think of either in terms of a policy we must think of the other in the same terms [...] If the one is thought of as a right and the other as a policy, or if the one is thought of as an individual interest and the other as a social interest, our way of stating the question may leave nothing to decide.” ROSCOE POUND, ‘A survey of social interests’, (1943) 57 *Harvard Law Review*, 1, 2.

In first instance we noted that based on the facts in *Asturcom*, Consumer law was not able to engage *ex-officio* application from a point of view of effectiveness of the Unfair Terms Directive. The Court then proceeded (note the sequence!) to test the equivalence limb of procedural autonomy. The second and paramount importance of the *Asturcom* ruling lies in the clarification that Consumer law, at least Article 6(1) of the Unfair Terms Directive, has the status of ‘mandatory provision’⁶¹ which ranks equal to national rules of public policy, and does so under the principle of equivalence.

The importance of this clarification, or in fact that it is a clarification at all, can only be understood by placing *Asturcom* in the general framework of the public policy discourse that preceded the judgment. As we have seen above, in younger days of European law it was not inconceivable that the whole lot of the *acquis* would be applicable as a public policy matter of fact. Open remained, whether not at least some EC law provisions were mandatory in nature. The query whether some rules of EC law were ‘more equal’ than others arose first in the field of Competition law after the *Eco Swiss* case. Competition law was an obvious candidate for thought on mandatoryness due to its hierarchical and central standing in the EC legal order as well as the fact that traditionally, Competition law rules figure among the internationally accepted rules of *ordre public international*. It was the wording deployed in *Eco Swiss*⁶² which fueled speculations on the existence of a European public policy properly speaking. From there, following *Mostaza Claro* which cited *Eco Swiss*, the debate spilled over into Consumer law. The question became whether there were European rules which qualified as public policy, and if so, on which level. In Private International law terminology, what was at stake was essentially whether certain European provisions had the nature of public policy,⁶³ and to classify their mandatory nature as either domestic, international and transnational.⁶⁴ Domestic public policy traditionally is a more far reaching, more encompassing concept.⁶⁵ For example the NY Convention committee endorsed a narrow view of public policy.⁶⁶ International public policy on the other hand still refers to a particular vision, traditionally a national one, of what all other nations would perceive to be a concept of public policy. Due to its theoretically greater generalizability, it is at the same time more narrow as the exceptions it permits will tend to be more limited exactly for the reason that they are said to be applicable (albeit be it still from a national point of view) to other countries as well. Truly international or transnational public policy on the other hand presumes an “objective concept of international public policy”.⁶⁷

⁶¹ Case C-40/08 *Asturcom* para 30.

⁶² Case C-126/97 *Eco Swiss*.

⁶³ See JAN-JAAP KUIPERS, *The scope of secondary EC law - A matter for the Rome I Regulation?* (2009) on file with author. The distinction as envisaged in the Rome I Regulation and Article 9 on overriding mandatory provisions “1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.. Article 3 (3) for national mandatory rules: “3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement”.

⁶⁴ JOHN DAVID H. WIRES, ‘The Public Policy Sword and the New York Convention: A Quest for Uniformity’, (2009) SSRN eLibrary, 7.

⁶⁵ WIRES, 8, ALBERT VAN DEN BERG, ‘Distinction domestic-international public policy’, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (Kluwer Law International, 1996)

⁶⁶ WIRES, 8 citing Report of the Committee on the Enforcement of International Arbitral Awards, 28 March 1955, UN Doc. E/2704 and E/AC.42/4/Rev.1.

⁶⁷ WIRES, 10.

One remark of caution on the notion of European public policy/*ordre public*⁶⁸: Under truly national public policy, the identification of a rule as public policy as well as the rule formulation remain on domestic level ('national public policy'). Under a true European public policy, both, identification and rule formulation move to EC level ('European public policy'). Most authors when using the notion of European public policy refer to the type of *ordre public international*, or more precise in this matter an *ordre public europeen*.⁶⁹ *Asturcom*, however, took a third option: One could also refer to the fact that European law can specify certain European provisions to rank internally in the law of the Member States as public policy as European public policy. The concepts are, however, more nuanced. The Member States remain free to attach the consequences and to design the laws to their public policy. Therefore, by nature, they remain *ordre public national* in a third, mixed option rather than truly European rules of *ordre public international*. Under this hybrid form the EC level designates the mandatory nature of an EC provision, however, the formulation of consequences attached remain on Member State level. The nature of the rule itself remains thus national, it is only the mechanism by which the status as public policy is determined that changes. They are European in the sense that EC law determines their standing within the national legal order ('indirect EU public policy' as national public policy with European origin). The distinction is a vital one which lies at the heart of the significance of the *Asturcom* ruling.

Truly European or a national public policy of European origin?

The main impetus for considering the public policy nature of European provisions was generated by *Eco Swiss*. The contentious point was whether *Eco Swiss et al.* could constitute authority for considering Competition law a European public policy of the *ordre public international* type or whether it remained *ordre public national*. The ECJ had held that where

“domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1)EC”⁷⁰

Under the principle of equivalence, though the Court did not expressly name it, Article 81EC enjoyed equal footing with other provisions on national public policy. The Court grounded the particular status of Article 81EC in two authorities. (1) The first was Article 3(1)(g)EC which is “*essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market*”.⁷¹ Secondly (2) the fact that agreements and decisions prohibited according to the article are automatically void under Article 82(2)EC.⁷²

Regarding the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards the Court held that Article 81(1)EC must be regarded as a matter of public policy within the meaning of the Convention. The Convention provides that recognition and enforcement may be refused on

⁶⁸ Public policy and *ordre public* is used interchangeably here. *Ordre public* has been argued a wider notion than the notion of public policy. The different language versions of ECJ cases defy this interpretation; public policy is consistently translated as *ordre public*. Hence, in *Asturcom* the Court ruled that “*doit être considéré comme une norme équivalente aux règles nationales qui occupent, au sein de l’ordre juridique interne, le rang de normes d’ordre public.*” Case C-40/08 *Asturcom* para 52.

⁶⁹ PHILLIP LANDOLT, 'Limits on Court Review of International Arbitration Awards Assessed', (2007) 23 *Arbitration International*, 63-77, as substantiation referring to the Manfredi Joined cases C-295/04 to C-298/04 Manfredi Also MARCO LOOS, 'ECJ – Mostaza Claro', (2007) 3 *European Review of Contract Law*, 439, 443.

⁷⁰ Case C-126/97 *Eco Swiss* para 37.

⁷¹ Case C-126/97 *Eco Swiss* para 36.

⁷² Case C-126/97 *Eco Swiss* para 36.

national public policy grounds.⁷³ By providing that Article 81EC constitutes a reason of public policy, the ECJ created an external face of Communitarian public policy. On the internal side, Article 81EC was leveled with national public policy. Because its application remained contingent on national law no independent and automatically applicable European public policy was created.

According to this view, it is only under the principle of equivalence that Competition law has to be treated equal to national rules of public policy, according another view, *Eco Swiss* created a European public policy rule.⁷⁴ However, considering that the *Eco Swiss* judgment explicitly referred to the duty to grant an application for annulment of an arbitration award “where its domestic rules of procedure require it [...] founded on failure to observe national rules of public policy”⁷⁵ a merely textual interpretation must arrive at the conclusion that by nature, public policy remained at national level. An interpretation later confirmed explicitly in *van der Weerd*, which as we have seen explicitly grouped *Eco Swiss* as a case decided under the equivalence principle and hence of indirect European public policy only.⁷⁶

While the interpretation of *Eco Swiss* nevertheless remained disputed,⁷⁷ the Court referred to the judgment in *Mostaza Claro* - a consumer case – and the public policy discussion which had broken out in the Competition area moved into Consumer law. The eager reception of the discussion points to a need for a legal explanation to justify the unspecified source of authority for the very intrusive and far-reaching nature of the case law in this area. *Mostaza Claro*⁷⁸ concerned the validity of an arbitration clause under the Unfair Terms Directive. The Court only referred one question, namely whether the Court is determined to examine the unfairness of the clause even when “that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings”.⁷⁹ The Court, rather unsurprisingly after the judgments in *Océano Grupo* and *Cofidis*, found that the Court must determine whether an arbitration agreement is void even if that argument had not been raised in previous arbitration proceedings.

Advocate General Tizzano in *Mostaza Claro* had remarked in his opinion that there were two ways in which to reach the very same conclusion.⁸⁰ Both by means of drawing an analogy to *Eco Swiss*, however one arguing the status of the Unfair Terms Directive was worthy to be considered as public

⁷³ “... the public policy of that country”. Since all Member States have ratified the New York Convention, all Member States effectively enjoy the possibility under that Convention of not recognizing and enforcing an arbitration award on grounds of national public policy. The question is whether under the principle of equivalence such a power to derogate for national public policy reasons, in an issue involving European law does not easily turn into a duty to derogate.

⁷⁴ And consequently gave rise to the reference in Joined cases C-222/05 to C-225/05 *van der Weerd* see the Opinion of the Advocate General Maduro “Is this any different when the Community rule at issue is fundamental? In its order for reference, the referring court contemplates the possibility that some norms may be of such crucial importance that Community law regards them as rules of ‘public policy’ and thus requires national courts to apply them of their own motion.” para 26.

⁷⁵ Case C-126/97 *Eco Swiss* paras 37 and 41.

⁷⁶ The same solution was also advocated by Advocate General Maduro: “However, it would be mistaken to conclude from *Eco Swiss* that the principle of effectiveness requires that some Community norms, on account of their importance for the Community legal system, must be applied by national courts even where the parties have failed to rely on them.” Joined cases C-222/05 to C-225/05 *van der Weerd* para 27.

⁷⁷ PRECHAL & SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From Van Schijndel to *Eco Swiss* and Beyond', 600 who argue that *Eco Swiss* decided the public policy character of Article 81 EC only for the context of review of arbitration awards.

⁷⁸ The facts and question of the case are pretty straightforward: *Mostaza Claro* had concluded a contract with a mobile operator, and when she did not comply with the minimum subscription period, was granted a period to refuse the arbitration proceedings. She did not object, the arbitration body found against her, at what time she contested the clause in front of the referring Court.

⁷⁹ Case C-168/05 *Mostaza Claro* para 20.

⁸⁰ Opinion of AG Tizzano in Case C-168/05 *Mostaza Claro*

policy, the other by means of fundamental right to a fair hearing argument. The Advocate General suggested the latter approach in presenting the *Krombach*⁸¹ case under which the ECJ had held that insufficient protection of the defendant's right to defence could constitute enough ground to have recourse to the public policy exception. As fundamental right of the EU, and common to the Member States, the right to be heard would therefore have been elevated to public policy status, rather than the consumer Directive itself. Briefly put, the ECJ did not follow the Advocate General but chose for the first approach: "*The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair*".⁸² Again, it was Consumer law as such rather than judicial protection arguments that explained the national Court's duty to apply European law.

In this respect, the *Mostaza Claro* judgment also reinforced the Competition law centred debate on European public policy.⁸³ Indeed, the Court here seemed to rank European law instruments according to the nature and importance of the public interest they represented. A reference to the principle of equivalence was absent from the judgment, so that the authority of Consumer law to impose the *ex-officio* application of the rule in question was not clear. *Mostaza Claro*, however, seemed to imply due to the fact that the duty to apply EC law was derived under 'effectiveness'. Very explicitly, the Court referred to the nature and importance of the public interest, that is an objective effectiveness. From a Competition law point of view, one could then argue that surely if Consumer law represented an independent public interest, so did the Competition rules. A reception of *Mostaza Claro* therefore swept back into the Competition law debate. As referred to above, the issue was explicitly addressed by the Court in *van der Weerd*. We have already remarked that the judgment continued to place Consumer law in an odd category, outside of effectiveness and equivalence considerations, and somewhat privileged yet without legal grounding. On *Eco Swiss*, that is Competition law, the Court confirmed a restricted interpretation, namely that Competition law fell under the principle that "*equal treatment is given to pleas based on national law and those based on Community law*".⁸⁴ Hence, Competition law remained at the level of *ordre public national*.⁸⁵ By contrast, where should the special nature of Consumer law be legally rooted? Did previous judgments imply that Consumer law occupied a position similar to a European public policy, just as the Competition law or was the special nature attributable alone to the strengths of the public interests protected?

Asturcom on the nature of the Consumer law provision as national public policy

The wording of *van der Weerd* and *Mostaza Claro*⁸⁶ did not refer to national provisions as gates for public interest considerations. Therefore in Consumer law speculation on the nature of Consumer law remained vivid. They could be (1) true and independent European public policy, or (2) remain part of *ordre public national*. Under the third option, Consumer law would not at all be a Communitarian public interest (be it independently or dependent on the national public interest notion). Under this approach, consumer rights enjoyed a different presumption under the effectiveness limb of procedural

⁸¹ Dieter Krombach v André Bamberski [2000] ECR I-01935.

⁸² Case C-168/05 *Mostaza Claro* para 38.

⁸³ For example *LOOS*, 443.

⁸⁴ Joined cases C-222/05 to C-225/05 *van der Weerd* para 40.

⁸⁵ Main confirmation for the true public policy theory was read into the Joined cases C-295/04 to C-298/04 *Manfredi*. However, even a very recent case, the Case C-8/08 *T-Mobile Netherlands* case states that Competition law is "automatically applicable" – a point in favour of a true European public policy case. In my opinion the development in the field of Competition law has not reached a conclusive stance as to whether or not at least Article 81(3)EC may be regarded as a directly applicable and thus true European public policy provision.

⁸⁶ "The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair" Case C-168/05 *Mostaza Claro* para 38.

autonomy – in other words if effectiveness is a “*sliding scale*”, the Consumer finds itself on the higher end thereof.⁸⁷ These three interpretations rivaled on the nature of the Consumer law provisions, and there were good arguments for each of them.

The Advocate General in *Asturcom* favoured an independent European public policy. She therefore pleaded for the EU to “embrace” a principle according to which the enforcement of an arbitration award which is contrary to public policy is prohibited.⁸⁸ This principle would be grounded in a reading of the *Mostaza Claro* case ranking Consumer law “implicitly [...] as rules capable of being governed by considerations of public policy”.⁸⁹ Accordingly, the Advocate General found a duty on the national Court to reject an application for enforcement of a final arbitration award. The reasoning was subsumed under the effectiveness limb and by raising Consumer law to public policy without the need for a connection to a national provision – as under the equivalence limb – would elevate Consumer law to a truly European public policy. Especially *Mostaza Claro*, perhaps in an analogy to the *Eco Swiss* ruling under Competition law, had received such an interpretation widely shared in the literature,⁹⁰ so that the position of the Advocate General was very much in line with the both, doctrine and precedent.

The ECJ did not follow. *Asturcom* decided that the nature of the European measure in question matters, but only in so far as a measure which is fundamental or sufficiently important will be classified as equal to national public policy under the equivalence test. The ECJ grounded the special mandatory nature of the measure in three factors: (1) the mandatory nature of Article 6(1) of the Unfair Terms Directive, (2) the fact that consumer protection constitutes a measure essential to the accomplishment of the EU’s tasks under Article 3(1)(t)EC, particularly raising the standard of living and the quality of life in its territory and (3) generally the nature and importance of the public interest underlying the protection which the Unfair Terms Directive confers.

The argument therefore relates only to the way national public policy is elaborated. We have on one hand potentially and depending on one’s reading of *Eco Swiss*, *Manfredi*, *T-Mobile* not to forget *Ingmar*, a set of true European public policy as *ordre public international* rules in the sense that they are automatically applicable in national courts, due to primacy. On the other hand of course *ordre public national* applicable by reasons of national law. The relevance of *Asturcom* is that it creates a hybrid or third form of “indirect European public policy” - the ECJ determines under ‘procedural autonomy’ and thereof the equivalence limb that Art. 6 (1) Unfair Terms Directive ranks and engages the same consequences as national public policy. The rules and hence consequences for the hybrid form remain determined by national law.

⁸⁷ See Opinion of the AG Maduro in Joined cases C-222/05 to C-225/05 *van der Weerd*.

⁸⁸ Opinion of the AG in Case C-40/08 *Asturcom* para 70.

⁸⁹ Opinion of the AG in Case C-40/08 *Asturcom* para 70.

⁹⁰ The Opinion of the AG in Case C-40/08 *Asturcom* cites several articles in para 41: “Jordans, R., ‘Anmerkung zu EuGH Rs. C-168/05 – Elisa Maria Mostaza Claro gegen Centro Móvil Milenium SL’, *Zeitschrift für Gemeinschaftsprivatrecht*, 2007, p. 50, which interprets the judgment to the effect that the Court regarded the unfair nature of the clause in question as being so serious that it was a matter of public policy. In the view of Loos, M., ‘Case: ECJ – Mostaza Claro’, *European Review of Contract Law*, 2007, Vol. 4, p. 443, the Court accorded the mandatory provisions of the directive on consumer protection the status of rules of public policy, as it had done previously in connection with the rules on competition. Poissonnier, G./Tricoit, J.-P., ‘The CJEC confirms its intention that the national courts should implement Community consumer law’, *Petites affiches*, September 2007, No 189, p. 15, observe that, unlike the Commission, the Court has not expressly classified Community consumer protection legislation as rules of public policy. Nevertheless, they take the view that the Court’s arguments in that judgment may be interpreted in such a way. In the view of Courbe, P./Brière, C./Dionisi-Peyrusse, A./Jault-Seseke, F./Legros, C., ‘Clause compromissoire et réglementation des clauses abusives: CJCE, 26 octobre 2006’, *Petites affiches*, 2007, No 152, p. 14, this case-law of the Court of Justice elevates the consumer protection rules in Directive 93/13 to the status of rules of public policy.”

C. *International Arbitration*

In order to understand the factual situation that gave rise to the *Asturcom* case, it is important to bear in mind the specificities of arbitration proceedings as alternative dispute settlement mechanisms. The pertinent feature of arbitration is that the parties voluntarily, that is by agreement, undertake to settle their dispute in a private forum rather than the public courts. A neutral third party then renders a decision - the arbitration award - which then typically can be challenged, recognised or executed judicially. The process of arbitration can generate different legal moments; the arbitration proceedings, and on the judicial level the action for annulment, as well as recognition or enforcement of the award. The grounds for interference by the Court are generally interpreted narrowly. International arbitration distinguishes between the powers of review of the Court in annulment actions from those in enforcement actions. Specifically, in 'mere' actions of enforcement, a case is not reopened *ab initio* and examined in substance unless for reasons of public policy. The question to which extent the application of EC law is required *ex-officio* is specifically sensitive from an arbitration point of view, as the review powers of the judge are normally largely limited. Furthermore, in theory, for each of these actions, EC law could formulate different requirements regarding the duty of a national Court to raise EU law.

In a case involving both, arbitration and the *ex-officio* application of EC law in an award enforcement action, one might have expected the ECJ to reason in terms of the special nature of arbitration proceedings. Advocate General Trstenjak had considered the national traditions of the Member States - these typically consider enforcement proceedings of the nature to give effect to an award and not a procedure in which the judge carries out a substantive (re-)assessment of the case. Substantive pleas in law by the parties are thus curtailed, as are the review powers of the judge.⁹¹ The *caveat* which is granted to State authority within the private nature of arbitration proceedings can be public policy, as codified in several Member States and international law.⁹² Article V(2)(b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards recognizes public policy as a ground for refusing recognition and enforcement of a foreign award but takes a narrow view on public policy by defining it as public policy of the country in which enforcement is sought only.

In the *Asturcom* judgment, even though the considerations on arbitration proceedings might have been underlying the motivation of the ECJ, they were not made explicit. An argument is to be made to the effect that the specific reasoning of the Court and the subsequent result of the case which was in perfect compliance with the New York Convention are indications for the Court being very conscious of not interfering with the working of the arbitration system. The Court began its reasoning with underlining the fact that the consumer did not "*in any way become involved in the various proceedings [...] and, in particular did not bring an action for annulment*".⁹³ The 'consumer's inertia' appeared as the decisive reason for distinguishing *Asturcom* from *Mostaza Claro*. Whether 'consumer inertia' was a consideration independent in addition to or within the procedural autonomy test to determine the effectiveness of a right remained unclear. The consumer behaviour was, as we saw, taken into account under the 'effectiveness' limb. The formulation could, however, also be read to the effect that it additionally constituted a variable independent from the procedural autonomy test.

⁹¹ Opinion of the AG in Case C-40/08 *Asturcom* para 62.

⁹² Similarly 1985 UNCITRAL Model Law Article 36 but without a definition of public policy. Also Article 29(2) of the 1966 Council of Europe Convention providing a Uniform Law on Arbitration, which was, however, only ratified by Belgium even though at the time of its inception this Arbitration Convention was taken to be the decisive ground for excluding arbitration from the scope of the Brussels Jurisdiction Convention, now Brussels I Regulation in Article I(4). See for the consequences of the exclusion of arbitration from the Brussels Regime HANS VAN HOUTTE, 'Why Not Include Arbitration in the Brussels Jurisdiction Regulation?' (2005) 21 *Arbitration International*, 509. Member State's hence remain bound by the regime of the New York Convention.

⁹³ Case C-40/08 *Asturcom* para 33.

Article V of the New York Convention makes refusal or enforcement in case of invalidity of the award agreement contingent on the request of the party against whom it is invoked.⁹⁴ *Ex-officio* refusal of recognition and enforcement is then only allowed for the grounds listed in Article V(2), namely inarbitrability of the subject matter and the public policy exception. The *Asturcom* facts could have qualified as a case of invalidity due to the inclusion of an unfair term. Under the New York Convention, refusal of enforcement is only available at the request of a party. In its ruling, the ECJ stressed the inactivity of the consumer, maybe to indicate implicitly tribute to the New York Convention. The ECJ constructed the duty to raise EC law in an enforcement proceeding *ex-officio* under the 'equivalence' limb by ranking it as national public policy. Public policy, rather than invalidity, is one of the grounds on which an award recognition action may be refused without a request of the party. It thereby complied with the permissible reasons for refusing recognition and enforcement *ex-officio* and without party activity as listed in Article V(2) of the New York Convention. The ECJ could also have established a duty on the national judge to review and hence possibly refuse an arbitration award under the effectiveness limb. Thereby, an award would possibly be refused for invalidity of the arbitration award in absence of a party request as required under Article V (1) of the Convention. Whether consciously or not - an inquiry which cannot surpass the nature of speculation - the result of *Asturcom* is entirely in compliance with the New York Convention. With a view to guaranteeing the efficiency of arbitration in the European legal order the *Asturcom* ruling is therefore to be welcomed.

4. Critical Assessment

"There are several questions which naturally flow from this process of judge-made policy. First, is the undertaking a legitimate part of the judicial function? Second, by what means are the sense of community values and current needs of the community ascertained? Third, is the process any different from the formation of a rule of law?"⁹⁵

Asturcom is incisional from a point of view of procedural autonomy, in terms of sovereignty of the Member States of their domestic procedure. Principally 'equivalence' amounts to a lower standard of review derived from the European level - were it not for the ECJ using the national public policy construction in *Asturcom*. Under the test of equivalence, while assuring that conditions for the application of EU law may not be less favourable than those governing domestic law of the same ranking, the domestic Court nevertheless remains responsible to select the domestic rule which qualifies as benchmarking comparator. "It is for that [the national] court, which alone has direct knowledge of the detailed procedural rules governing actions in the field of domestic law, to consider both the purpose and the essential characteristics of domestic actions which are claimed to be similar".⁹⁶ Though the task might be a difficult one⁹⁷, it remained at the domestic level in terms of competence. Admittedly the ECJ pays lipservice to its function being limited to a guiding one, effectively it substitutes the national Courts reasoning with its own. Consumer law is considered as national public policy. It substitutes the national Courts choice of comparator with an authority grounded in the nature of a specific EC law provision *in se*. For the domain of Member States' procedural laws this operation is much more intrusive than the free or unguided equivalence test.

This is a seemingly neutral choice, and one might argue that in every case decided under the equivalence limb, the ECJ will look into the national legal system in order to determine the provisions 'governing domestic law of the same ranking'. First of all, normally, 'equivalence' is an operation

⁹⁴ Article V(1)(a).

⁹⁵ JAMES HOPKINS, 'Public policy and the formation of a rule of law', (1971) 37 Brooklyn Law Review, 323, 330.

⁹⁶ Case C-40/08 *Asturcom* para 50.

⁹⁷ PRECHAL & SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond', on difficulty of equivalence testing.

based on the facts of case, whose generalizability is strongly limited. The ECJ might compare whether procedural rule A for claims based on EU law is less advantageous than procedural rule B which is used to determine similar domestic claims. In *Asturcom*, however, the Court is saying that Consumer law (arguably only Article 6(1) Unfair Terms Directive) is so important that it has to rank equal to national public policy. Rather than deciding a case on the facts, this judgment has the quality of a general rule in the abstract. In addition, public policy is not one legal provision of a given legal system, it is a category of rules. Such reasoning has implications well beyond the facts of one single case. Secondly, in terms of consequences, the nature of general procedural rules is qualitatively different from public policy rules. Public policy rules require exceptions to usual procedure; by their nature, their consequences are extraordinary. Through the use of this ‘guided equivalence test’, the ECJ created a kind of maximum equivalence vehicle.

The most important question to be posed after *Asturcom* seems to be whether the ECJ should rank European law. From a principled EC institutional legal point of view the result, namely the ranking or classification of EC law as fundamental or not seems a rarity as well. By judicial decision between types of European acts were horizontal differentiated along their importance. This is a hierarchisation but also implication which is not reflected in the Treaty structure’s typology of sources of EC law. The case for competition is perhaps more readily made; first of all, it concerns a Treaty article, and therefore in the rather strict hierarchy of sources in EU law an authoritative source. Next, it is horizontally applicable as between parties and agreements in violation thereof are automatically void. Furthermore competition law has much stronger claims to a uniform application as enforcement of Competition law is harmonized. Similarly one could argue for State aid. The nature of Consumer law, however, is different. The conferral of a special place on Consumer protection in the legal order, is an innovation which it eventually falls difficult to justify.

We may agree with a notion of public policy as furthering societal interests which a Community (ironically here the Community) places above individual interests.⁹⁸ But through societal interests expressed in a notion of public policy, “*extrinsic factors of uncertain weight*” may decide a case – which justifies a cautious stance towards the concept.⁹⁹ Advocate General Tizzano in *Mostaza Claro* cautioned against elevating Consumer protection to public policy: “*I fear that it is open to the objection that it might give excessively wide scope to a concept, namely that of public policy, which traditionally refers only to rules that are regarded as being of primary and absolute importance in a legal order.*”¹⁰⁰ *Asturcom* accords this status to at least Article 6(1) Unfair Terms Directive. Presumably, other provisions of Consumer law would enjoy the same status. After all, it is the consumer protection motive by which the mandatory nature of the Directive is justified – this object is common to all pure Consumer law on EC level. Possibly the reference to the binding nature could make a difference – in the sense that Art. 6(1) calls for a specific result.

What does the ruling mean for the level of consumer protection? From a net point of view, consumer protection across the EU is heightened. Without the decision, all Member States would have been free to adopt their own rules regarding the enforcement proceedings of awards containing an unfair term. Had the ECJ found a duty to mandatorily apply EC law under effectiveness, the ruling would have meant a harmonization of the law relating to arbitration enforcement. Since the judgment, found the duty to apply EC law only under equivalence, the treatment of award enforcement re-enters the realm of Member States. The level of consumer protection therefore remains disperse since in jurisdictions which do not contain rules for re-opening arbitration awards on grounds of public policy, an *Asturcom* type case would have an outcome to the detriment of the consumer. All jurisdictions in which an award enforcement proceeding contains special review rules for national public policy, the review must be possible for reason of the award including a potentially unfair contract term. Nevertheless, the

⁹⁸ POUND, 4-7.

⁹⁹ HOPKINS, 323.

¹⁰⁰ Opinion of AG Tizzano in Case C-168/05 *Mostaza Claro* para 56.

case guarantees a higher overall protection level than without the ‘involvement’ of EC law, albeit it is not a harmonized one – a factor which may carry other disadvantages by itself.

Despite the fact that the case law is developed in areas “which cannot be applied mechanically in fields other than those in which they were made”¹⁰¹, one should consider the implications of according ‘fundamental’ importance to Consumer law for other fields of law. On EU level, legal instruments will have to be analyzed along the line of ‘equal to national public policy’ argument in order to determine which acts enjoy this status. Why should not labour law, or environmental law, make similar claims? Advocate General Tizzano for example applied this reasoning in the opinion to *Heemskerk and Schaap*.¹⁰² According to him, the object of Regulations No 1254/1999 and 615/98, namely to safeguard animal welfare and to protect the financial interests of the EU, could not be regarded as equivalent to national (Dutch) rules of public policy. The difference might be readily justifiable in case of administrative measures as the transport of animals, however, one might certainly think of other secondary legislation such as the environment directives, or the equal treatment ones.¹⁰³ We can draw inspiration from the PIL framework due to the fact that the substance of certain secondary instruments was sufficiently important (and our exercise is to ‘find out’ which are the important European instruments) so as to warrant an interference into the standard conflict of law rules adopted in the European Regulations. Certainly a good case is to be made for the Agency Directive in an analogy to the decision in *Ingmar*. In the reform of the Rome Convention the Annex (now deleted) featured four directives: the Return of Cultural Objects Directive (EC 7/93); Posted Workers Directive (EC 71/96); Second non-life insurance Directive (EC 49/92) and the Second life assurance Directive (EEC 619/90).¹⁰⁴ Thinking further along the lines of Competition law and treaty articles, Article 12 EC¹⁰⁵, Article 18 EC on citizenship¹⁰⁶ fall to mention. These are the fields on the side of EU law which could be considered to form part of a European public policy.

On the side of the national law it falls to consider which fields of domestic law deploy special public policy exceptions, as these are the areas which are potentially affected by the *Asturcom* ruling. *Asturcom* illustrates the impact of EU law whenever the national system foresees *ex-officio* application of national public policy in relation to the enforcement of arbitration awards. Other fields of domestic law which often contains important public policy exceptions are for example nullity of contracts and other judicial acts or settlement agreements.¹⁰⁷ According to one view¹⁰⁸, these judgments (for example *Eco Swiss*) cannot be extrapolated to other fields of law. Accordingly the relevance of *Asturcom* would be limited to meaning that Article 6(1) of the Unfair Terms Directive is equal to national rules on public policy as understood in arbitration award proceedings only. It is true, that public policy may be interpreted in a range, sometimes wider, sometimes more narrow. Respective national provisions deploy different meanings of public policy. The point is reinforced by remembering that most legal

¹⁰¹ Case C-473/00 Cofidis para 37.

¹⁰² Opinion of the AG in Case C-455/06 Heemskerk BV and Firma Schaap v Productschap Vee en Vlees [2008] ECR I-00000 para 109.

¹⁰³ JAN H. JANS & A. T. MARSEILLE, 'Casenote Joined Cases C-222–225/05, Van der Weerd and others v. Minister van Landbouw, Natuur en Voedselkwaliteit', (2008) 45 Common Market Law Review, 853, 861.

¹⁰⁴ KUIPERS, (on file with author).

¹⁰⁵ PRECHAL & SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond', 603 cite a judgment of the Austrian OGH which found that Article 12 EC constitutes public policy which must be taken into account by virtue of national procedural law.

¹⁰⁶ PRECHAL & SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond', 609, fn 70 which mention a decision by the Dutch Council of State (ABRS2.3.2004, No.200308607/1) who ignored the possibility of Article 18 EC qualifying as public policy.

¹⁰⁷ For a good overview of domestic rules from Dutch and Belgian background see PRECHAL & SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond', 599.

¹⁰⁸ PRECHAL & SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond', 599.

systems or instruments (for example the New York Convention) have a more narrow interpretation of public policy whenever the enforcement of arbitration awards is concerned. It is here submitted that this argument cannot convince. Even though public policy – as argued above – has many national facets, EC law does not rely on the national definitions thereof.¹⁰⁹ According to the ECJ, the European provisions of fundamental nature have to be ranked equal to domestic rules of public policy – it does not matter how narrow or wide these national public policies are shaped. In addition, *Asturcom* already concerned the fields which must have one of the most narrowest interpretations of public policy exceptions, namely the enforcement stage of arbitration proceedings, which by its very nature only allows for a very limited catalogue of review. If already in this ‘sensitive’ area, Consumer law must be equated with national public policy, this must *a fortiori* be true for less narrow national interpretations of public policy.

Under a judicial activism critique, *Asturcom* is open for criticism of taking choices which should have been the legislator’s rather than the judiciary’s. As the name suggests, public policy is essentially a policy choice, the legislature arguably being closer to the community and politically legitimated.¹¹⁰ However, the Member States have not expressed such a will in favour of Consumer policy. Whether or not Consumer law deserves special protection, was not a choice of the ECJ to make. The main thrust of this criticism can be rephrased also by making a critique based on the need for legal reasoning in order to sustain judgments – that is a vision of adjudication beyond mere dispute settlement but ensuring predictability and legal certainty. So, if the so-called ranking of European law was not new, for example comparing the *Ingmar*¹¹¹ decision which gave special status to Articles of the Agency Directive, then the ECJ should have referred to these decisions. In addition, from a Private International law point of view we might refer to the Brussels regulation in which Consumer and Labour law are explicitly mentioned as areas which deserve protection (environmental law inclusion amendment is pending). Again, this might be valid arguments, but they were not advanced by the Court. The arguments which are given by the ECJ are not convincing.

In sum, the special status of Consumer law in respect of the *ex-officio* application of EC law is based on (1) the mandatory nature of the provision in question, (2) the importance of the public interest underlying a legal instrument and (3) the fact that the legal instruments is, in accordance with Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the European Union. It is difficult to predict which other provisions fulfill this test. However, especially the argument based on Article 3EC is weak. Certainly not all objectives which are named therein hold importance equal to national public policy.¹¹² A caricatured reference to the fact that protection of

¹⁰⁹ Ordre public has been argued a wider notion than the notion of public policy. The different language versions of ECJ cases defy this interpretation; public policy is consistently interpreted as ordre public. Hence, in *Asturcom* the Court ruled that “doit être considéré comme une norme équivalente aux règles nationales qui occupent, au sein de l’ordre juridique interne, le rang de normes d’ordre public“ Case C-40/08 *Asturcom* para 52.

¹¹⁰ HOPKINS, 336. Also 324, listing three reasons already advanced by St. Thomas Aquinas to prefer legislature 1) It is easier to find a few wise men in the legislature rather than many to judge, 2) legislators have more time for deliberation and 3) legislators make decisions about the future in a general sense, judges make decisions about past events in an individual sense.

¹¹¹ Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc.* [2001] ECR I-09305.

¹¹² Article 3 EC contained an extensive catalogue listing the activities of the Community:

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
 - (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) a common commercial policy; (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; (d) measures concerning the entry and movement of persons as provided for in Title IV; (e) a common policy in the sphere of agriculture and fisheries; (f) a common policy in the sphere of transport; (g) a system ensuring that competition in the internal market is not distorted; (h) the approximation of the laws of Member States to the extent required for the functioning of the common market; (i) the promotion of

tourists included in the Article 3EC suffices to demonstrate that it does not lend itself to present a catalogue of interests which hold greater importance in European law.

On its face, the use of the equivalence mechanism might seem the politically most desirable – respecting the procedural autonomy of the Member States and allowing for a seemingly neutral application. Below the surface this is not true. It is the ECJ deciding which rules are fundamental enough to constitute rules of public policy. It is this author's opinion that the way the *Asturcom* ruling was too abstract and consequently far reaching in manipulating the procedural autonomy test made specifically for judging factual circumstances and instead creating a quasi rule. The content of this quasi rule 'Article 6 Unfair Terms Directive is so fundamental that it ranks among national public policy' creates a typology of Directives (fundamental/non fundamental), unforeseen by the Treaty structure. That nature will have to be judicially determined in the future for individual provisions.

5. Conclusion

In the end, does the national Court know European law? Of course the lawyer has to answer with a mitigating "It depends!" But *Asturcom* clarified the fact that, yes, certain Consumer provisions are mandatory in that they rank equal to national public policy. The simple answer could then be: The national judge has to know EC Consumer law whenever he is supposed to know public policy.

Rather than assembling all the cases rendered on the delimitation of the procedural autonomy of the Member States, this article has taken the opportunity to illustrate in *Asturcom* the tools with which the ECJ reasons when deciding and the different elements it consists of. The ECJ is not consistent in its approach. There is no way of reasoning which can justify all of the case law rendered. We can state, however, that the Court has expanded and modified its methods of reasoning. First it constructed the principle of procedural autonomy, which is a proper creation of the Court in those aspects which go further than factual necessity due to the structure of decentralized enforcement of European law. The early version of procedural autonomy stipulated that national procedure must give sufficient effect or enforcement to European law. The concept changed with the introduction and proliferated use of the contextual/balancing approach which stipulates that the rationale of the national procedural rule must be taken into consideration. Procedural autonomy moved from a descriptive to a normative concept to serve as a shield of national rules against requirements of effectiveness from European law.

This is not to say that in 'effectiveness' as a standard balancing could never occur, it did. For example access to justice could be taken into consideration when considering time limits under effectiveness requirements. What changed is the level which is able to formulate exigencies. In the standard, it is the European level, e.g. Access to justice as an ECHR accepted principle of the EU legal order and these principles were used to interpret the rule itself. Effectiveness as a standard is a self-referential definition of a European provision itself. On the contrary to this under the *van Schijndel/Peterbroeck* approach, the national legal system formulates part of the balancing equation. As we have seen the effectiveness limb created a gate for national considerations. Effectiveness as a standard has much greater harmonizing power – the result reached by the Court concerns the interpretation of the EU level only, hence valid for all Member States. By weighing the national rule, in the national

(Contd.)

coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment; (j) a policy in the social sphere comprising a European Social Fund; (k) the strengthening of economic and social cohesion; (l) a policy in the sphere of the environment; (m) the strengthening of the competitiveness of Community industry; (n) the promotion of research and technological development; (o) encouragement for the establishment and development of trans-European networks; (p) a contribution to the attainment of a high level of health protection; (q) a contribution to education and training of quality and to the flowering of the cultures of the Member States; (r) a policy in the sphere of development cooperation; (s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development; (t) a contribution to the strengthening of consumer protection; (u) measures in the spheres of energy, civil protection and tourism.

circumstances, a judgment on effectiveness becomes very specific. Broadly speaking, it is less relevant for legal orders other than the referring one. This translates into less harmonization power.

But not only the effectiveness test has received a spin. Equivalence properly enjoys a new mechanism. From the very specific factual application of comparing a procedure for the realization of a national rule with that of a European based one, the ECJ invented 'maximum' equivalence in ruling that certain EU instruments have to enjoy the same procedural privileges as national public policy. The comparator for these European instruments has been fixed on quite abstract level. Hence, the nature of the equivalence reasoning has received a new possible structure. Although not full harmonization, the abstraction of the rule guarantees higher convergence of outcomes. In terms of procedural autonomy the operation is more intrusive into national procedure than the standard equivalence test. The implications of *Asturcom* therefore go well beyond international arbitration and Consumer law alone.

In purified form, two contrasting demands can be raised on the design of procedural rules. One is a materialistic conception, in which through procedure, a material form of justice can be warranted. Procedural law in this sense already contains a form of substantive justice. Alternatively, procedural law is seen in an instrumentalist fashion, by means of which the substantive law is realized. In other words in one version procedural law itself is the goal, in the other it is a means to achieve a goal. Of course it is not always possible to separate these two approaches. When taking into account European law, we have not only this horizontal distinction between the role of substantive in relation to procedural law; we also have the hierarchical dimension between the European and the domestic level.

The equivalence limb is a procedural test; it is self-sufficient, and from the vertical tension, this procedure itself guarantees a 'just' outcome. The effectiveness limb on the other hand is not mechanical in the same sense, it balances, and naturally in order to balance it constitutes a decision based on values, or ultimately justice¹¹³. It is not a neutral decision, even though the technicalities of the test conceal this to a certain degree. In the European context, this is the obvious advantage of deciding a case under the equivalence limb, since a value judgment in its original formulation is not required. Authors have proposed to put more emphasis on the equivalence test.¹¹⁴ However, by privileging the Consumer *acquis* in the application of the equivalence test, the neutral character of this rule is changed so as to include a value judgment. As we have seen this value choice in favour of the consumer is critical.

¹¹³ As an inspirational rather than rigorous point, one may mention the distinction created by Rawls in his Theory of Justice. He distinguishes between perfect, imperfect and pure procedural justice, based on various constellations of the existence of a fair outcome and the corresponding procedure, a vision of the fair outcome but no corresponding procedure, and the last in which the procedure itself constitutes the fair outcome.

¹¹⁴ Prominently WARD, 751.

Annex

	Community Instrument	National rule?	Result: <i>Ex-officio</i> Yes or No	Effectiveness Reasoning	Contextual/Balancing?	Equivalence ?
Oceano paras 25-29	Art. 6 Unfair Terms Directive, Unfair jurisdiction clause.		Yes	Pure effectiveness	No	No
Cofidis paras 27-38	Art. 6 and 7 Unfair Terms Directive, time period.	2 year limitation period under French law.	Yes	Effectiveness. Reference to Peterbroeck and context but not actively taken into account. Rule fails because “expiry of a limitation period” [note generality of claim.] is liable to “render application of the protection intended to be conferred on them by the Directive excessively difficult”. para 36.	Peterbroeck mentioned, but rationale of domestic legislation not discussed.	No
Mostaza Claro paras 24-39	Art. 6 Unfair Terms Directive, annulment action arbitration award.	Requirement to plead invalidity in initial submissions.	Yes	Effectiveness points towards ex-officio application. Then consideration of ‘efficient arbitration proceedings’ argument is canceled out by establishing requirement under the ‘equivalence limb’.	Arguable. Efficiency of arbitration proceedings is extensively discussed but not located in the national legal system.	Yes, reinforces effectiveness rationale.
Godard & Rampion paras 57 - 69	Art. 11(2) Consumer Credit Directive.		Yes	Effectiveness and equivalence reinforce each other. Interesting: dual aim of Directive stressed. “dual aim of ensuring both the creation of a common consumer credit market [...] and the protection of consumers who avail themselves of such credit”. Aim of consumer protection under effectiveness.	Van Schijndel mentioned by French government. ECJ circumvents discussion by denying issue was contained in referred question. Therefore no active use of the approach.	No
Pannon paras 29 - 35	Art. 6 Unfair Terms Directive, jurisdiction clause		Yes	Result is reached under effectiveness considering the aim of the Directive.	Arguably in para 34 ECJ briefly discards the relevance of any national law.	No
Asturcom paras 28-56	Art. 6 Unfair Terms Directive, enforcement action arbitration award	2 months limitation period under	Outcome: Yes. No under effectiveness, yes under equivalence.	Effectiveness failed for the first time to establish duty on national Court to apply Consumer law. ECJ moves to equivalence limb, equals Consumer provision to national public policy. Result is <i>ex-officio</i> application.	Yes, extensively on purpose of <i>res judicata</i> .	Yes

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