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Law at, to or from the Centre? The European Court of Justice and the Harmonization of Private Law in the European Union†

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1. INTRODUCTION

Directives are of crucial importance for the harmonization of private law in the European Union. The use of this legislative instrument invariably entails a complex interaction between different actors at national and Community level. For, unlike Regulations, Directives do not, generally speaking, have direct effect. To have direct effect they require transposition into national law. Accordingly, Directives are addressed to the Member States and leave to the States the choice as to the form and method of achieving the end established by the Directive (Article 249(3) EC). In the normal case, the Community institutions have the choice whether to legislate by means of Directives or Regulations, although exceptions are frequent.[1] However, since (at least in theory) Directives constitute a lesser interference with the national system they should be given first priority in the light of the principle of subsidiarity.[2] In the area of substantive private law, harmonization has, in the

† The authors are very grateful for the invitation to contribute this piece to this collection and wish to thank Albertina Albors-Llorens, John Armour, Matthew Conaglen, Ulrike Janzen, and Stephan Lorenz for their help, support, and encouragement in the writing of this chapter. Any errors and inaccuracies remain our responsibility.

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[1] In the field of private law, see now the important legal basis provided by Art. 95 EC. Contrast, e.g., Arts. 44, 46(2), 94, 96, 132(1), and 137(2) EC, under all of which only Directives can be adopted.

[2] See para. 6 of Protocol No. 30 on the application of the principles of subsidiarity and proportionality, annexed to the EC Treaty (added by the Treaty of Amsterdam: OJ 1997 C 340/105).

The Institutional Framework of European Private Law. Fabrizio Cafaggi.
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past, occurred mainly through the means of Directives.[3] By contrast, in the area of judicial cooperation in civil matters the Regulation has been the preferred instrument.[4] It seems that the Regulation will also become the preferred instrument in the field of international private law.[5]

The main advantage of Directives cannot be underestimated. They make the legislative process flexible, and flexible from both ends.[6] They enable the Community to introduce complex legislative change where it would be difficult to devise Regulations with the specificity necessary for an instrument that has direct application in the Member States. Leaving the Member States a measure of discretion as to how to achieve the desired end ensures that the Directive's aim is embedded into the framework of national laws. 'Translating' the aim of the Directive into 'national' concepts and fleshing it out by using 'national' techniques should avoid distorting the coherence of national law while achieving the desired end in a very effective

[3] An overview of the *acquis communautaire* in the field of contractual and extra-contractual liability is given in Annex III to the Communication from the Commission to the Council and the European Parliament on European Contract Law, 11 July 2001, COM(2001)398 final, at 52. Without exception, the relevant legislation is in the form of Directives. The following Directives all affect contractual liability and are in one way or another 'consumer Directives': 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 1999 L 171/12); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/29); Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158/59); Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372/31); 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 1997 L 144/19); 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 1994 L 280/83); 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 1987 L 42/48) as modified by Directive 90/88 (OJ 1990 L 61/14) and Directive 98/7 (OJ 1998 L 101/ 17). See furthermore Council Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382/17); 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 171/1); Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ 2000 L 200/35), Council Directive 85/374/EEC of 25 of July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210/29) as modified by Directive 99/34/EC (OJ 1999 L 141/20); Directive 97/5/EC of the European Parliament and the Council of 27 January 1997 on cross-border credit transfers (OJ 1997 L 43/25). See, however, Regulation 2006/2004/EC on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ 2004 L 364/1).

[4] The most important of which is Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (entry into force 1 March 2002): OJ 2001 L 012/1, as amended.

[5] See, e.g., the Proposal of 22 July 2003 for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('ROME II') COM(2003)427(01).

[6] See, e.g., P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (3rd edn, 2003), at 115.

way. In an ideal world, both European and national law would thus benefit from the flexibility of Directives. At the Community level, legislation may be passed without having to adjust its every aspect to the diverse legal systems of an ever-increasing number of Member States. At the national level, the process of implementation enables the Member State to choose legislative measures that interfere least and cohere most effectively with the system of domestic law.

It is clear from these preliminary observations that Directives are of seminal importance in the process of harmonization of private law. It should, however, also be emphasized from the outset that Directives have considerable drawbacks. Ensuring that the Member States actually implement the Directive and, furthermore, that the Directive is transposed properly and uniformly across the EU is a complex task. It is primarily due to the jurisprudence of the Court of Justice (hereinafter, 'ECJ') that Directives have, on the whole, been a succesful instrument of harmonization. The position of the ECJ is not an easy one. The Court is confronted by a choice between conflicting aims: on the one hand, ensuring the effectiveness of Directives that are not (fully) implemented; and, on the other hand, maintaining the flexibility which is necessary if Directives are not to collapse into 'concealed' Regulations.

The ECJ has employed a two-pronged strategy. First, the court developed a number of techniques aimed, directly or indirectly, at increasing the effectiveness of Directives: it ascribed to Directives limited direct effect, it required national courts to interpret their national law in the light of the Directive and it introduced Member State liability for failure to implement Directives properly. The first two techniques directly facilitate the end of the Directive, while the third provides a significant incentive for the Member State to comply with the implementation requirement (and at the same time provides some measure of compensation to individuals who would have enjoyed such rights had the Member State in question properly implemented the Directive). All three techniques utilize the private citizen's desire to benefit from the rights accorded to him in Directives and his willingness to enforce them in court proceedings, thereby becoming an important agent in enforcing Community legislation. The second strategy is provided for in the Treaty and brings the Commission into play. The Commission constantly monitors the implementation process and may bring infringement proceedings under Article 226 EC if it takes the view that a Member State has not implemented a Directive appropriately (or, indeed, at all). This provides the ECJ with an invaluable opportunity to explain with binding force how closely the Directive's text must be mirrored in the national system and thus how much discretion the Directive leaves the Member State in choosing the method and means of transposing it into national law.

In the present chapter, the two strategies will be examined in turn. The aim will be to put the rationale of Directives to a test. Needless to say, given the great number of Directives it will not be possible to even attempt a comprehensive study. Rather, illustrations have been chosen in order to reveal the typical difficulties connected with legislating through Directives and to show the role played by the ECJ in the harmonization of private law in the EC thus far.

2. LOCATING THE ANALYSIS WITHIN THE SYSTEM

Before we move to analyse the various mechanisms for securing the effectiveness of Directives in the context of EC private law, we must first briefly set out how such cases reach the national and European courts. In particular, it is helpful at this stage to note more specifically a number of ways in which the practical operation of this complex system can influence the frequency and nature of the opportunities available to the ECJ significantly to influence the interpretation and development of private law within the EU. The following discussion attempts to illustrate the various scenarios and factors that may have an effect upon the significance of the ECJ's role, looking from both the EC and national perspectives.

(1) The substantive terms of an EC Directive may set only a minimum standard (a technique commonly known as 'minimum harmonization') that must be met by Member States on implementation, while allowing them to provide greater protection in that field should they so desire (subject to compatibility with the general rules of the Treaty). This situation discloses a role for the ECJ, in that it will often be called upon to interpret the nature and extent of the harmonization laid down by the relevant EC legislation. The same is true of the assessment of the scope of any permitted derogation from the EC legislation or options provided in an EC Directive for implementation (e.g. a 'menu' of choices, deemed functionally equivalent by the legislation).[7]

(2) The nature of the EC legislative process means that certain Member States in the Council may (however rarely) find themselves outvoted on a particular measure, which they must then implement in national law even though they voted against it. One possible route for ECJ influence upon the harmonization of private law in the EU is through ruling upon challenges to the validity of such EC legislation under Article 230 EC (e.g. *Working Time*,[8] *Tobacco Advertising*,[9] etc.).

(3) The approach taken by national legislation in implementing EC legislation (typically Directives) may be of great significance in determining how much of a role the ECJ may play in practice in interpreting the relevant EC legislation:

(a) The national rules may have implemented a Directive incorrectly, either intentionally or inadvertently. While this may clearly be contrary to EC law (e.g. Articles 10 and 249 EC, etc.), it may mean that national courts cannot apply those elements of the Directive under national law as between private parties. This might not prevent references under

[7] See, generally, Slot, 'Harmonisation', 21 *EL Rev* (1996) 378 and Dougan, 'Minimum Harmonisation and the Internal Market', 37 *CML Rev* (2000) 853.

[8] See Case C-84/94, *UK* v *Council* (*Working Time Directive* case) [1996] ECR I-5755.

[9] See Case C-376/98, *Germany* v *Parliament and Council* ('*Tobacco Advertising*') [2000] ECR I-8419.

Article 234 EC as to the requirements of the Directive, not least due to the possibility of a damages claim under the *Francovich* case-law[10] against the defaulting Member State. However, it may deter some individuals from bringing such claims based upon EC law in the first place, thus limiting the frequency of cases that might be the subject of the application of EC law in national courts and, thus, of a reference to the ECJ under Article 234 EC.

(b) A Member State's failure properly to implement EC legislation (or, indeed, a Member State's action in breach of any of the requirements of EC law) can also be taken to the ECJ by the Commission under Article 226 EC.[11] This provides the ECJ with a further (and, in the case of the private law Directives, very significant)[12] opportunity to interpret the requirements of the relevant EC legislation and to assess whether or not the Member State in question has adequately secured its aims and objectives in national law.

(c) The institutional framework adopted for the implementation and enforcement of a Directive may lead to a paucity of litigation in national courts requiring that the interpretation of the Directive be debated.[13] While this may not necessarily detract from the effectiveness of the actual implementation and enforcement of the Directive, it may well deprive the national courts of the chance to hear such cases, with a concomitant reduction in the number of cases that might become the subject of a reference to the ECJ under Article 234 EC.

(d) Conversely, the national legislator may decide that matters would be simplified if the principles and provisions underlying the EC legislation were extended to cover a closely related field, even in matters that fall outside the scope of EC legislative competence and that are solely questions of national law (e.g. rules on the tax treatment of mergers of companies from different Member States (EC law) and of companies

[10] See Joined Cases C-6 and 9/90, *Francovich and Bonifaci* v *Italy* [1991] ECR I-5357. The key example concerning incorrect national implementation is Case C-392/93, *R* v *HM Treasury*, ex parte *British Telecommunications plc* [1996] ECR I-1631, while on failure to implement a Directive at all, see Joined Cases 178, 179, 188, 189 and 190/94, *Dillenkofer* v *Germany* [1996] ECR I-4845.

[11] Note that actions by other Member States against a defaulting Member State *are* possible under Art. 227 EC, although the political and diplomatic ramifications of making use of this provision have ensured that it has rarely been relied upon as an enforcement mechanism. For the only examples thus far, see Case 141/78, *France* v *UK* [1979] ECR 2923 (a fisheries dispute; France (with the Commission's support) successfully proceeded against the UK) and Case C-388/95, *Belgium* v *Spain* [2000] ECR I-3121 (concerning Spanish rules of origin for Rioja wine; the Commission did not support the action and the Court rejected Belgium's arguments).

[12] See our discussion *infra* in Section 4 for various examples in this vein.

[13] For a striking example, see the role of the OFT (and its own assiduous prosecution thereof) in the identification, scrutiny, and application of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999, No. 2083) (hereinafter 'UTCCR'), discussed briefly *infra* in Section 4A.

within a single Member State (national law)).[14] This strategy can be successful in reducing the regulatory burden imposed by different layers of legislation (EC, national, etc.), which are often drafted in different terms. However, national courts may need to know how EC law would have been interpreted by the ECJ had it applied to the facts of a particular case, so as to ensure that divergences do not develop between the 'national' and 'EC' understanding of the same terminology in parallel but distinct contexts.[15] This can have the effect of increasing the range and frequency of cases in which the ECJ is called upon to interpret EC law under Article 234 EC.

(e) A similar phenomenon to that detailed under (3)(d) can be observed in Member States that have an equality clause laid down in their national constitution:[16] here, the interpretation of the EC law point is relevant even to wholly internal, national fact situations, because the national court needs to ensure that the treatment of its own nationals is not less favourable than the treatment that would be accorded to a national of another Member State as a result of the application of EC law (e.g. on free movement (see *TK-Heimdienst*[17]) or competition (see *Bronner*[18]) grounds).

(4) National rules that relate to the procedure by which EC law rights may be enforced or to the remedies that may be available for the enforcement of EC law rights may restrict the extent to which such EC law rights may, in practice, be relied upon by private parties. Assessing whether the national rules used to enforce EC law rights are equivalent (i.e. non-discriminatory)

[14] See Directive 90/434/EEC (OJ 1990 L 225/1), which was at issue in Case C-28/95, *Leur-Bloem* v *Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161.

[15] See, e.g., Joined Cases C-297/88 and 197/89, *Dzodzi* v *Belgium* [1990] ECR I-3763 and Case C-28/95, *Leur-Bloem, supra* note 14, and s. 60 of the UK's Competition Act 1998. Also, *cf.* Case C-346/93, *Kleinwort Benson Ltd* v *City of Glasgow District Council* [1995] ECR I-615 (where the ECJ refused to accept that the reference was admissible because national law expressly reserved the possibility of diverging from the Brussels Convention on jurisdiction and the enforcement of judgments and because national courts were not required to treat the ECJ's interpretation as binding upon them: see the note by Bishop in 20 *EL Rev* (1995) 495).

[16] See Spaventa's case note on Case C-254/98, *Schutzverband gegen unlauteren Wettbewerb* v *TK-Heimdienst Sas GmbH* [2000] ECR I-151 in 37 *CML Rev* (2000) 1265.

[17] See Case C-254/98, *supra* note 16.

[18] See Case C-7/97, *Oscar Bronner GmbH & Co. KG* v *Mediaprint Zeitungs- unde Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791. The case concerned the application of Austrian competition law and is probably better classified under (3)(d) on its facts. However, it also serves to illustrate the systemic point made here. Bronner had applied to be given access to Mediaprint's distribution system but Mediaprint refused to agree to this. Had Bronner been a German plaintiff then EC competition law would have applied. Had those rules required that such access be given to Bronner, then in such circumstances, even if Austrian competition law had not been in the same terms as the EC rules, the application of a constitutional equality clause in Austria would have required that similar treatment be accorded to Austrian plaintiffs in the same situation as Bronner.

to those available for national law rights is a further important avenue by which private law harmonization has been developed by the ECJ under Article 234 EC rulings, while the assessment of the adequacy and effectiveness of such national rules has been another. However, a similar order potential restriction may arise where the costs of litigation are very high, thus deterring private parties from going to court to enforce their EC law rights.[19] Sometimes, this may manifest itself in the use of alternative dispute resolution mechanisms (mediation, etc.), so those EC law rights may still have a significant practical impact, but this deprives the ECJ of opportunities to receive references from national courts under Article 234 EC and thus to contribute to the process of developing EC private law principles.

(5) Finally in this brief summary, the approach taken by national courts in their operation of the procedure for making references under Article 234 EC[20] for a preliminary ruling from the ECJ is a further determinant of the frequency that case-law reaches the ECJ for its interpretation of EC Directives or the EC Treaty.[21] While some have argued that the ECJ itself has begun to offer less encouragement to national courts to make such references,[22] others assert that the doctrines developed by the ECJ under Article 234 (such as *acte clair*) have had the effect of encouraging national courts to treat their duties to refer questions of EC law for a preliminary ruling with less respect than they deserve.[23] While there is clearly no overall shortage of cases reaching the ECJ via the Article 234 route,[24] national

[19] The desire to remove this obstacle, at least in cross-border disputes, was behind Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes: OJ 2003 L 026/41.

[20] On which see, generally, D. Anderson and M. Demetriou, *References to the European Court* (2nd edn, 2002), P. Lasok and T. Millett (with A. Howard), *Judicial Control in the EU: Procedures and Principles* (2004), and Craig and de Búrca, *supra* note 6, Chap. 11. On national courts and the ECJ, see the very helpful collection of national reports and comparative analyses in A.-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds), *The European Courts & National Courts: Doctrine and Jurisprudence* (1997) (which also addresses key questions of cooperation between the ECJ and national courts in the light of the constitutional challenge that the application of EC law has posed for many Member States and their courts). For sectoral analyses, see M. Jarvis, *The Application of EC Law by National Courts: The Free Movement of Goods* (1998), and S. Sciarra (ed.), *Labour Law in the Courts: National Judges and the European Court of Justice* (2001).

[21] For analysis of the case-law trends, see Stone Sweet and Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95', Jean Monnet Working Paper No. 14/97 (1997) (available at www.jeanmonnetprogram.org/papers/97/97-14-.html, last visited 20 January 2005). See, further, A. Stone Sweet, *The Judicial Construction of Europe* (2004), Chap. 2.

[22] See, e.g., O'Keeffe, 'Is the Spirit of Article 177 Under Attack? Preliminary References and Admissibility', 23 *EL Rev* (1998) 509.

[23] See Arnull, 'The Use and Abuse of Article 177 EEC', 52 *MLR* (1989) 622 and A. Arnull, *The European Union and its Court of Justice* (1999), 49–69, esp. at 68, note 247.

[24] See the *Annual Report of the Court of Justice* (2003), 213 ff., esp. at 215 (showing that more cases were received than completed during 2003, increasing the total number of cases pending to 974); and this number may increase still further as the national courts of the newest Member States (post-2004

courts may be discouraged from referring questions. In some cases this may be due to the time it may take to receive an answer, and in others because they take the (not always justifiable) view that the answer to the EC law point in issue is straightforward enough for them to resolve for themselves. This is another factor in assessing the extent to which the ECJ will have the opportunity to make a contribution to the development of European private law.

Before we move to discuss the impact of the case-law of the ECJ on the nature and value of Directives in more detail, it is necessary to make one more preliminary observation. For there is a more subtle 'advantage' of Directives which is independent of the isue of flexibility and which may (in the back of the mind of the legislator) operate in favour of Directives. Dressing up secondary Community legislation in 'national clothes' may, as pointed out by Canaris,[25] increase legal certainty and the acceptance of (what is in substance) Community legislation at national level. To understand his argument, it is necessary to make a brief observation as to the ways in which legislation may be questioned on grounds of constitutionality. Regulations may be challenged by a Member State for want of legal basis within the period laid down in Article 230(5) EC (two months), but the possibility to challenge Regulations incidentally in proceedings brought by private persons is not limited as to time according to Article 241 EC. According to Article 230 EC, Directives can also be challenged directly before the ECJ, and since unanimity is no longer required under Article 95 EC any Member States' doubts as to the soundness of the legal basis of a Directive may, as explained, be likely to result in proceedings before the ECJ. However, once a Directive has been transposed into national law the validity of the relevant rules then follows exclusively from national sources. Hence, any doubt as to the appropriate legal basis at Community level no longer threatens legal certainty. The validity of the Directive may still be considered incidentally in proceedings under Article 234 EC. But the national law that implements it remains binding, whatever the outcome of the preliminary ruling.

However, doubts as to constitutionality of Community legislation cannot justify a blanket avoidance of the use of EC Regulations and a preference for Directives. The insecurity that follows from doubts as to the legal basis is a well-known phenomenon in all systems in which courts have the power to strike down legislation. There is no reason to accept the price to be paid for Directives simply in order to reduce this risk. After all, in many Member States the relevant national legislation may also be void for a variety of reasons. 'Dressing up' Community legislation may therefore have only the 'psychological' advantage that it is not easily recognizable as

enlargement) encounter practical problems and queries concerning the application of the *acquis communautaire* (often rapidly introduced and naturally as yet largely untested) in their own legal systems.

[25] *Cf.* Canaris, 'Aspekte der europäischen Rechtsangleichung mit Hilfe von Richtlinien', in C. Canaris and A. Zaccaria (eds), *Die Umsetzung von zivilrechtlichen Richtlinien der Europäischen Gemeinschaft in Italien und Deutschland* (2002), 128, at 134 ff.

such. However, if this were actually needed to increase the acceptance of Community law, this would show little confidence in the virtues of European law. Moreover, the national clothing may well conceal the need to interpret the respective provision as part of European law and thus increase the danger that each Member State creates its own blend of Community legislation by interpreting it from the perspective of its own familiar concepts. Needles to say, this danger exists also in relation to Regulations, but the European 'identity' of this type of legislation cannot be in doubt.[26]

In what follows, we will endeavour to examine a number of these issues. We will use the vehicle of Directives and how EC law has striven to make them effective in national legal systems to analyse the role of the ECJ, both generally and in its interaction with national courts and legislatures. In so doing, we will examine some of the case-law on some of the EC's 'private law Directives'[27] to assess how effectively these strategies for enforcing Directives have operated and will draw some tentative conclusions for their future use and interpretation by the ECJ in this field. It is to this analysis that we now turn.

3. MISSING IMPLEMENTATION—DOES IT MATTER?

If a Member State fails to transpose a Directive into national law (whether at all or only in part) within the time limit set in the Directive, the Commission may object to this failure in infringement proceedings under Article 226 EC. However, the ECJ was not satisfied with this state of affairs as the only mechanism for the enforcement of EC law in such cases. It took the position that other measures were needed in order to increase the effectiveness of Directives as far as possible. The Court developed three techniques which all aim to secure the effective application of Directives (at least in some respects), even if the Member State has failed correctly to transpose them into national law. This process started in the 1970s, when the Court ascribed limited direct effect to Directives; it continued in the 1980s, with the introduction of the more subtle interpretation requirement, and came to a provisional end in the 1990s, when Member State liability was established for failure to implement Directives. The first two of these techniques ensure that the end of the Directive is achieved despite the missing implementation, while the third technique accepts that the end of the Directive cannot be achieved directly but instead entitles any potential beneficiary under the Directive to monetary compensation for his lost 'expectation', at the expense of the defaulting Member State. The case-law is fairly

[26] Indeed, the ECJ has made it clear that Member States are not permitted to 're-enact' EC Regulations in the form of national laws, since this would be to disguise the character of Regulations as Community instruments and would undermine their direct applicability, as provided for by the EC Treaty itself in (what is now) Art. 249: see Case 34/73, *Variola* v *Amministrazione delle Finanze* [1973] ECR 981.

[27] See *supra* note 3.

well developed and (except for a few issues at the fringes) seems to have settled most major issues. In what follows, we will analyse the two techniques designed to achieve the end of the Directive in spite of missing implementation. For reasons of space we cannot discuss State liability here, which in any event is a more indirect method of increasing the effectiveness of Directives.[28]

A. Direct Effect

The most straightforward way of ensuring that the result aimed at by Directives is achieved, even if they have not been implemented correctly, is by holding them to be directly effective. This is also the most drastic measure, both from a national and an EC law perspective. At the EC level, there is a danger that this development would blur the difference between Directives and Regulations beyond recognition. The ECJ was well aware of this point from the very beginning and has cautiously avoided the trap, which nevertheless was set in front of the ECJ again and again by some of the Advocates General.[29] Direct effect would taint the very essence of Directives and all the advantages flowing from Directives would also be destroyed. If Directives had direct effect, why should the Member State bother to transpose them? Yet it is the limited discretion of the Member State as to the means of how to achieve the end in the Directive that makes them attractive as a legislative measure both at the Community level as also the national level.

[28] The issue of Member State liability for breaches of EC law is discussed elsewhere in this volume by van Gerven and Albors-Llorens. On this topic, see the seminal judgment in Joined Cases C-46 and 48/93, *Brasserie du Pêcheur SA* v *Germany* and *The Queen* v *Secretary of State for Transport*, ex parte *Factortame Ltd and others (Factortame (No. 3))* [1996] ECR I-1029 (noted by Oliver, 34 *CML Rev* (1997) 635). For discussion and development, see T. Heukels and A. McDonnell, *The Action for Damages in Community Law* (1997); Convery, 'State Liability in the United Kingdom after *Brasserie du Pêcheur*', 34 *CML Rev* (1997) 603; Craig and de Búrca, *supra* note 6, at 257–73; Dougan, 'The *Francovich* Right to Reparation: Reshaping the Contours of Community Remedial Competence', 6 *EPL* (2000) 103; and Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down', 38 *CML Rev* (2001) 301; see also Papier in *Münchener Kommentar* (4th edn, 2003), v, § 839 BGB, paras. 98–103 with references; Gundel, 'Gemeinschaftsrechtliche Haftungsvorgaben für judikatives Unrecht' [2004] *EWS* 8. Of particular relevance for the topic of our argument are Joined Cases 178, 179, 188, 189, and 190/94, *Dillenkofer* v *Germany* [1996] ECR I-4845, which concerned Directive 90/314/EEC on package travel, package holidays, and package tours: failure to take any implementing measures is *per se* a sufficiently serious breach of EC law, where no other national law covers the matter (which illustrates the strong incentive given to Member States to take prompt and effective implementing action); and Case C-261/95, *Palmisani* v *Istituto Nazionale della Previdenza Sociale* [1997] ECR I-4025, focusing upon whether national time limits rendered the national remedy for Member State liability a sufficiently effective one (which time limits were upheld) and upon whether or not the national rules applied in assessing the applicable time limits in EC law cases were equivalent to those applied in comparable national proceedings. This latter point illustrates the role of the ECJ in giving guidance on what counts as 'equivalent' in such cases, which can have quite some impact upon national private law.

[29] E.g. Lenz AG: see his Opinion in Case C-91/92, *Paola Faccini Dori* v *Recreb Srl* [1994] ECR I-3325, paras. 43–73. See, also, Pescatore, 'Direct Effect: An "Infant Disease" of Community Law?', 8 *EL Rev* (1983) 155.

I. Vertical relationships

However, if the direct effect of Directives was limited this could surely do no harm, while also significantly increasing the reach of Directives? The only question was to identify a workable control factor for distinguishing between cases in which direct effect could be ascribed and those in which this was not possible. This was quickly found in the distinction between vertical and horizontal direct effect. The Member State that failed to transpose the Directive on time ought not to be allowed to rely upon national laws that contravened the end of the Directive.[30] Private persons can thus rely upon the Directive as against the State provided that the general criteria for direct effect are met. For a provision to have direct effect, it is necessary that its subject matter is unconditional and sufficiently precise.[31] If this is the case, it may be relied upon before the national courts by individuals against the State where the latter has failed to implement the Directive in domestic law by the end of the period prescribed or where it has failed to implement the Directive correctly. The argument seems to be that the State should not be allowed to 'benefit' from its 'unlawful' failure to transpose the Directive. As always the ECJ does not differentiate between the different emanations of a State, thus enabling it to adopt a wide definition of the State, and thereby securing effectiveness for Directives in a greater range of situations.[32]

II. Horizontal relationships

In proceedings exclusively between private parties, by contrast, a Directive cannot of itself impose obligations upon an individual and cannot therefore be relied upon as such against an individual; even a clear, precise and unconditional provision of a Directive seeking to confer rights or impose obligations on individuals cannot of itself apply in such proceedings. This was confirmed recently by the Grand Chamber of the ECJ in *Pfeiffer and others* v *Deutsches Rotes Kreuz*.[33] In this case, references for preliminary rulings were made in various sets of proceedings between employees and former employees of a regional branch of the *Deutsches Rotes Kreuz* (German Red Cross). The employees were emergency workers and sought to rely *inter alia* on Article 6(2) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time.[34] This provision requires the Member States to take the measures necessary to ensure that the average working time for each 7-day period, including overtime, does not exceed 48 hours.[35] German

[30] E.g. Case 148/78, *Pubblico Ministero* v *Ratti* [1979] ECR 1629.

[31] See Case 26/62, *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1.

[32] E.g. Case 152/84, *Marshall* v *Southampton and S.W. Hampshire Area Health Authority (Teaching) (Marshall I)* [1986] ECR 723.

[33] Joined Cases C-397 to C-403/01, judgment of 5 October 2004, not yet reported, paras. 108–109. See, for further discussion of this case the text at *infra* note 102.

[34] OJ 1993 L 307/18.

[35] Joined Cases C-397 to C-403/01, *supra* note 33, para. 90. This includes on-call time, where the worker is required to be physically present at a place specified by his employer (para. 93), as had already

legislation, however, allowed for working time beyond the 48-hour limit and was not compatible with Directive 93/104/EC in that respect. However, since the proceedings were held to be exclusively between private parties Article 6(2) could not be ascribed direct effect even though it was sufficiently clear and unconditional.[36]

III. Evaluation

This settled jurisprudence of the ECJ denying direct effect in horizontal relationships is to be applauded. It is of first importance that Directives do not have direct effect if they lack proper national implementation. Implementation carries with it all of the advantages associated with Directives and only by insisting upon national implementation are Member States given enough scope to secure the goals of Directives within the national legal system. After all, this practical accommodation of these goals in the national legal order is a major justification for legislating through Directives.

The exception provided for in vertical relationships between private parties, on the one hand, and the State, on the other, (arguably unnecessarily) blurs the line between Regulations and Directives. The result is uncertainty at the fringes: for example, unpredictability as to the precise scope of the notion of an 'emanation of the State' for the purposes of the vertical direct effect case-law[37] creates serious concerns for various entities *vis-à-vis* their responsibilities of compliance with relevant Directives.[38] Such uncertainty might be expected to generate a wealth of references to the ECJ under Article 234 EC, as national courts are faced with arguments as to whether a particular defendant amounts to an organ of the State for the purposes of vertical direct effect. While there has been a fair range of case-law on the question, the guidance from the ECJ has not clarified the position greatly, which has no doubt acted as an encouragement to national courts to apply the relatively loose criteria for themselves.[39] This approach may deprive the ECJ of some opportunities to rule upon various substantive aspects of the Directives at issue in the national

been clarified in another case with major implications for the health sector: see Case C-151/02, *Landeshauptstadt Kiel* v *Jaeger* [2003] ECR I-8389, para. 103.

[36] Joined Cases C-397 to C-403/01, *supra* note 33, para. 109.

[37] See, e.g., the decision in Case C-188/89, *Foster* v *British Gas plc* [1990] ECR I-3313 and its application by the UK courts ([1991] 2 AC 306; [1991] 2 CMLR 217), and the subsequent UK case-law such as *Doughty* v *Rolls Royce plc* ([1992] IRLR 126; [1992] 1 CMLR 1045), *Griffin* v *S.W. Water Services Ltd* ([1995] IRLR 15) and *National Union of Teachers* v *Governing Body of St Mary's Church of England (Aided) Junior School* ([1997] ICR 334).

[38] And this uncertainty is exacerbated by the challenge to the very rationale of the vertical direct effect case-law (i.e. not allowing the *State* to benefit from its failure to implement the Directive) that is made by employing this broad notion of the State: if the defendant entity had no responsibility for such implementation, it is difficult to apply this rationale in a number of cases—see, also, Case 103/88, *Fratelli Costanzo SpA* v *Commune di Milano* [1989] ECR 1839, where the Municipality of Milan was held to count as an organ of the State for these purposes.

[39] See, e.g., Case C-343/98, *Collino & Chiappero* v *Telecom Italia SpA* [2000] ECR I-6659, esp. para. 24.

litigation, but if national courts do follow the wide interpretation of the notion of the State in such cases[40] then it may secure a more frequent and effective application of the Directives themselves in the national legal order. At a time when the resources of the European judicature to answer such questions are becoming increasingly stretched,[41] this balancing act will become ever more delicate for the ECJ.

The delicacy of this balance is nicely illustrated by the case-law stemming from *CIA Security* v *Signalson and Securitel*,[42] where the Court held that the obligation to notify to the Commission draft technical regulations as required by Directive 83/189/EEC,[43] the purpose of which is to allow the Commission to assess whether the national legislation creates a barrier to trade, was capable of being relied upon before national courts. As a result, national technical regulations that had not been notified suffered from a procedural defect and could not be applied as against individuals.[44] While in one sense this conclusion concerned the vertical relationship between a Member State's enforcement authorities and an individual company,[45] it clearly had an important impact upon the relations between private individuals,[46] as was made abundantly clear in the *Unilever Italia* case.[47] Thus even private parties may rely against other private parties upon the Member State's failure to notify a technical regulation. In the ECJ's view, this scenario does not amount to 'horizontal direct effect' in the strict sense, since the Directive's notification requirement does not itself seek to provide substantive terms by which the private parties' relations are to be regulated. Whether or not the current national law survives the test, it will still be *national* law that regulates the relations between the parties (e.g. in *Unilever Italia*, the relevant provisions of Italian contract law).[48] Even accepting this analysis,[49] however, the practical outcome is questionable: private parties cannot be

[40] A good UK example being the *NUT* v *St Mary's School* case, *supra* note 37.

[41] See, e.g., Johnston, 'Judicial Reform and the Treaty of Nice', 38 *CML Rev* (2000) 499 and A.A. Dashwood and A.C. Johnston (eds), *The Future of the Judicial System of the European Union* (2001).

[42] Case C-194/94, *CIA Security SA* v *Signalson SA and Securitel SPRL* [1996] ECR I-2201. For general discussion of these 'incidental horizontal effect' cases, see Dougan, 'The "Disguised" Vertical Direct Effect of Directives?', [2000] *CLJ* 586.

[43] OJ 1983 L 109/8.

[44] Case C-194/94, *supra* note 42, para. 48. See, however, Case C-226/97, *Criminal proceedings against Lemmens* [1998] ECR I-3711, para. 36: the use by the public authorities of a product manufactured according to a non-notified Regulation is not unlawful.

[45] See, also, Case C-13/96, *Bic Benelux SA* v *Belgium* [1997] ECR I-1753.

[46] In *CIA Security* itself, *supra* note 42, the plaintiff was suing the defendant companies for trade libel due to their claims about the non-conformity of CIA Security's products with the relevant Belgian legislation on security systems. Meanwhile the defendants counterclaimed that CIA Security had not respected the current Belgian law on the subject: CIA Security's response was that that current Belgian law had not been notified under the Directive and thus could not be applied to its products.

[47] Case C-443/98, *Unilever Italia SpA* v *Central Food SpA* [2000] ECR I-7535 (noted by Weatherill, 26 *EL Rev* (2001) 177 and 117 *LQR* (2001) 213, and Dougan [2001] *CLJ* 253).

[48] See paras. 50 and 51 of the *Unilever Italia* case, *supra* note 47, for this explanation by the ECJ.

[49] Which many find highly unpersuasive: see, e.g., the Opinions of Jacobs AG in both Case C-443/98, *Unilever Italia*, *supra* note 47, and Case C-159/00, *Sapod Audic* v *Eco-Emballages SA* [2002]

held responsible for the Member State's failure to notify and yet they suffer the consequences of having relied upon what seemed valid national law in planning their conduct. It also creates commercial uncertainty, for private parties now need to inquire whether in the process of passing a particular regulation at national level the notification obligation has been complied with in order to be able to ascertain whether to comply with the otherwise perfectly valid national law.[50]

It is thus unsurprising that in *Sapod Audic* v *Eco-Emballages*[51] the ECJ conceded that it was for the national court to determine the consequences that result from the inapplicability of that national provision as regards the nullity or unenforceability of a contract, subject only to the proviso that the applicable rules of national law are not less favourable than those governing similar domestic actions and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law.[52] The Court regards the 'Notification Directive' 83/189/EEC (and its consolidating successor Directive 98/34/EC),[53] and the means of preventive control established by it, as an essential tool in protecting freedom of movement of goods.[54] The sanction of nullity is at least theoretically a powerful incentive to comply with the notification requirement. In any event, it is more effective than the alternative method of enforcement by infringement procedure for each and every technical regulation at national level. This result-oriented stance of the ECJ, however, is difficult to square with the nature of Directives[55] and creates

ECR I-5031 (discussed in the subsequent text) and the clear and helpful discussion in Dougan's case note on the latter case, 40 *CML Rev* (2003) 193, at 204–10, and the references cited therein.

[50] For further criticism of this line of cases, see Schepel, 'The Enforcement of EC Law in Contractual Relations: Case Studies in How Not to "Constitutionalize" Private Law', 9 *ERPL* (2004) 661, at 672, and, for an approving view, see Gundel [2001] *EuZW* 143. Note that, in response to these case-law developments on the effect of these notification requirements, the Commission has set up a website—the Technical Regulations Information System (TRIS)—to provide information to businesses on the notification procedure and individual cases thereunder (see COM(2003)200 final, 43–4 and http://europa.eu.int/commm/enterprise/tris).

[51] Case C-159/00, [2002] ECR I-5031 (noted by Dougan, *supra* note 49). The factual scenario of this case provides even greater difficulty for the position taken by the Court on direct effect in *Unilever Italia, supra* note 47: here, the result required not only that the national rules could not be applied as between the two private parties, but also that any terms of the parties' contract that effectively corresponded to the terms of the now inapplicable national law. This suggests a significant role for the ECJ in shaping certain aspects of national private law in such cases, which threatens commercial certainty still further.

[52] Case C-159/00, *supra* note 51, paras. 52–53.

[53] OJ 1998 L 204/37, as amended by Directive 98/48/EC (OJ 1998 L 217/18), concerning transparency of regulations on information society services.

[54] See, e.g., the Commission reports on Directives 98/34/EC (COM(2003)200 final, Part II) and 98/48/EC (COM(2003)69 final). See also Weatherill's earlier analysis, 'Compulsory Notification of Draft Technical Regulations: the Contribution of Directive 83/189 to the Management of the Internal Market', 16 *YEL* (1996) 129.

[55] See, e.g., Dougan, *supra* note 49, at 204–10 for discussion of how faint the dividing line is between, on the one hand, the impact of the direct effect of the notification requirement and, on the other, traditional horizontal direct effect (if, indeed, such a distinction exists at all).

commercial uncertainty or, at the very least, imposes substantial extra burdens upon private parties to check the status of such national technical regulations before relying upon them to guide their commercial behaviour.[56] Ascribing the 'Information Directive' 83/189/EEC direct effect in proceedings between private parties is an anomaly that ought not to be generalized, as the Court itself has emphasized.

B. Interpretation

I. Origins: the von Colson *line of cases*

The posible direct effect of Directives if relied upon by private parties as against the Member State is of limited value in relation to the great number of Directives concerning private law relationships, which normally involve proceedings exclusively between private parties.[57] Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (76/207/EEC)[58] provided the Court with an opportunity to develop a new instrument to improve the effectiveness of Directives.

In the cases of *von Colson and Kamann*[59] and *Harz*,[60] the Court for the first time indicated that the obligation arising from a Directive to achieve the result envisaged by the Directive, and the Member State's duty under Article 10 EC to take all appropriate measures to ensure the fulfilment of that obligation, are both binding on all the authorities of Member States, including the courts. In applying the national law, the ECJ concluded,[61] the national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result envisaged by the Directive. Ironically, in one of the cases at hand (*von Colson*) ascribing direct effect to the Directive would have been possible in principle, since the employer (who refused to engage the plaintiffs as social workers in a prison for male prisoners for reasons relating to their sex) was the *Land Nordrhein-Westfalen*.[62] The reason that the court was compelled to fashion an alternative device was that the Directive did not include a sufficiently precise obligation in relation to the

[56] See the TRIS website (*supra* note 50): it may help to remove some of the uncertainty and reduce some of this compliance burden on private parties, but such checks must still be made assiduously.

[57] See the references to the relevant Directives *supra* in note 3.

[58] OJ 1976 L 39/40.

[59] Case 14/83, *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, para. 26.

[60] Of the same date, see Case 79/83, *Harz* v *Deutsche Tradax GmbH* [1984] ECR 1921, para. 26.

[61] Case 14/83, *supra* note 59, para. 26; Case 79/83, *supra* note 60, para. 26.

[62] See Case 152/84, *supra* note 32. In the *Harz* case (Case 79/83, *supra* note 60), the employer who had discriminated against the female applicant was a private party (although see Case 43/75, *Defrenne* v *SABENA* (*Defrenne II*) [1976] ECR 455 (on the horizontal direct effect of what is now Art. 141 EC on equal pay for equal work) and Case C-177/88, *Dekker* v *Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-3941 (concerning the impact of Art, 6 of Directive 76/207/EC, *supra* note 58—the role of this provision is discussed further in our subsequent text).

sanctions for discrimination that could be relied upon by individuals in order to obtain specific compensation.[63]

Article 6 of Directive 76/207/EC required Member States to introduce such measures as are necessary to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process. The Member States are given discretion as to the sanctions that can be imposed, subject to the qualification that the adopted measures must be sufficiently effective to achieve the objective of the Directive. It followed that, if compensation were made available, such compensation needed to be 'effective'. In the ECJ's view, this meant that it ought to have a deterrent effect and be adequate in relation to the damage sustained; in particular it was not sufficient merely to provide for the reimbursement of any expenses incurred in connection with the application.[64] The Court stressed that the national court should take this into account in interpreting the relevant provisions of German law aimed to give effect to the Directive. However, the Court also explicitly stated that the national court was required to bring national law into conformity with the result envisaged by the Directive, provided that 'it is given discretion to do so under national law'.[65] Furthermore, the Court clarified that it was for the national court alone to interpret national law.[66]

A few years later, the *Bundesarbeitsgericht* duly acknowledged the interpretation given to Directive 76/207/EEC by the ECJ but, in the light of the wording of the relevant provision of national law and the intention of the legislator as apparent from the preparatory works, the national court felt unable to bring the relevant national provision in force at the time (§ 611a of the German Civil Code (BGB)) into conformity with the result envisaged by the Directive.[67] However, the court did not stop short at this point, but emphasized that the obligation to interpret national law in conformity with the Directive extended beyond the particular measures adopted to implement the Directives. The court held that discrimination in relation to the sex of the plaintiff constituted a sufficiently serious infringement of the general right to one's personality to justify an award of monetary compensation irrespective of a pecuniary loss of the plaintiff.[68] The court upheld the award of one month's salary as being sufficient to give effect to Article 6 of Directive 76/207/EEC.

[63] Case 14/83, *supra* note 59, para. 27.

[64] *Ibid.*, para. 28; *cf.* Case 79/83, *supra* note 60, para. 28.

[65] Case 14/83, *supra* note 59, para. 28; *cf.* Case 79/83, *supra* note 60, para. 28.

[66] Case 14/83, *supra* note 59, para. 25; Case 79/83, *supra* note 60, para. 25 (which, as a matter of the ECJ's jurisdiction under Art. 234 EC, must surely be correct, although this line can become rather blurred at times: see, e.g., Case C-28/95, *supra* note 14, concerning the situation where national law refers to EC rules to govern situations that are not themselves within the scope of the relevant EC provisions (often known as '*renvoi*')).

[67] BAG [1990] NJW 65, 66. The relevant provision in force at the time of the decision provided only for compensation in damages measured by the reliance interest, and in view of the court could not be extended to cover more than expenses incurred in connection with the application.

[68] *Ibid.*, at 66. See, on the origins of the right to one's personality, B.S. Markesinis and H. Unberath, *The German Law of Torts* (4th edn, 2002), at 74 ff.

The legislator reacted by adjusting the relevant provision (§ 611a BGB) so that compensation was no longer limited to the reliance interest.

Yet the right to compensation required that fault could be imputed to the employer, and fault was likewise necessary to bring oneself within the delictual protection of the right to one's personality (derived from § 823(1) BGB). When the same question was brought before the ECJ in *Dekker* (a reference for a preliminary ruling from the *Hoge Raad der Nederlanden*), the Court once again conceded that the Member States had discretion as to the sanctions for which it made provision.[69] However, the Court immediately added that the practical effect of the principles established by the Directive would be weakened considerably if the employer's liability for infringement of the principle of equal treatment were made subject to proof of fault attributable to him and also to there being no ground of exemption recognized by the applicable national law.[70] The *Bundesarbeitsgericht* in a first response to this jurisprudence held that it did not see any possibility of applying the relevant German law in a way that conformed to the result of the *Dekker* case.[71] In a preliminary ruling initiated by the *Arbeitsgericht Hamburg* at roughly the same time as this ruling of the *Bundesarbeitsgericht*, the ECJ confirmed in *Draehmpaehl* that the fault requirement of German law was contrary to Directive 76/207/EEC.[72]

The German provisions at the time were also contrary to the result envisaged by the Directive in another respect. They stipulated a ceiling for recovery of three months' salary. This was held not to comply with the requirement of providing for an effective sanction for the breach of the obligations flowing from the Directive.[73] First of all, the Court stressed that the Member State, in choosing the appropriate solution for guaranteeing that the objective of the Directive is attained, must ensure that infringements of Community law are penalized under conditions which are analogous to those applicable to infringements of domestic law of a similar nature and importance.[74] Since such a ceiling was not a general limit to monetary compensation in German law, the sanctions in the context of Community law were less effective than in domestic law. However, the ECJ indicated that, under certain

[69] Case C-177/88, *supra* note 62.

[70] *Ibid.*, para. 24.

[71] BAG [1996] NJW 2529, 2533 (compensation was denied accordingly).

[72] Case C-180/95, *Nils Draehmpaehl* v *Urania Immobilienservice OHG* [1997] ECR I-2195, para. 19 (noted by Ward at 23 *EL Rev* (1998) 65).

[73] A conclusion already presaged by Case C-271/91, *Marshall* v *Southampton and South-West Hampshire Area Health Authority (Teaching) (Marshall II)* [1993] ECR I-4367, para. 32. For an analysis of the ECJ's remedies case-law from a national labour law perspective, see Kilpatrick, 'Turning Remedies Around: A Sectoral Analysis of the Court of Justice', Chap. 5 in G. de Búrca and J.H.H. Weiler (eds), *The European Court of Justice* (2001), 143 ff.

[74] Case C-180/95, *supra* note 72, para. 29: an application of the principle of 'equivalence' or 'non-discrimination' developed in the Court's case-law on the scrutiny of national procedural and remedial rules for the enforcement of EC law rights (see, e.g., Craig and de Búrca, *supra* note 6, at 230–57).

conditions, the Member State could introduce a ceiling for recovery. This would be the case where the employer could prove that, because the applicant who was eventually engaged had superior qualifications, the unsuccessful applicant would not have obtained the vacant position, even if there had been no discrimination in the selection process.[75] As a result the legislator was once again forced to reconsider and adjust § 611a BGB.[76] In its present form, § 611a BGB no longer requires fault, but instead limits the maximum amount recoverable to three months' salary under the same conditions as those indicated in the aforementioned *Draehmpaehl* case, namely provided that the unsuccessful candidate would in any event not have been engaged.

This group of cases is extremely interesting for the interplay that it reveals between Directives, the case-law of the ECJ and the role of the national courts.

First, the *von Colson* case is noteworthy as the starting point for the requirement that national law is to be interpreted by the national courts as far as possible in order to achieve the result envisaged by the Directive. Indeed, one might have expected this principle of interpretation to have been developed somewhat earlier by the ECJ, given that its basic form is far less intrusive upon national law than direct effect, when viewed from a national constitutional perspective. In that sense, it is a path of 'constitutional least resistance' for the national court in giving effect to EC law. Many national legal systems already applied a similar rule of interpretation to treaties under general international law, making the assumption that (in the absence of express intentions to the contrary) the legislature intended to conform with the country's international obligations.[77]

Secondly, in *von Colson* and *Draehmpaehl* the Court clarified the principle that national law must provide effective remedies in order to protect the rights granted under Community legislation. This latter aspect of the jurisprudence of the ECJ considerably narrowed down the discretion granted to the Member States in respect of sanctions. The aim of the Directive—that persons who consider themselves wronged by discrimination are able to pursue their claims effectively by judicial process—has been given a remarkably strict and detailed interpretation by the ECJ. The flexibility, for which the Directive on its face initially seemed to provide, was stifled by the ECJ in the interest of ensuring that the aim of the Directive (i.e. that employers were effectively deterred from discriminating on the basis of sex) was achieved, and achieved as fully and effectively as possible. It is to be expected that the same (rigid) attitude on the part of the ECJ will prevail in respect of the imminent implementation of the new anti-discrimination Directives 2000/43/EC (on racial equality) and 2000/78/EC (establishing a general framework for equal treatment in

[75] Case C-180/95, *supra* note 72, para. 37.

[76] Law of 29 June 1998 BGBl. I, 1694.

[77] See, e.g., *Salomon* v *Commissioners of Customs & Excise* [1967] 2 QB 116 and *Garland* v *British Rail Engineering Ltd* [1983] 2 AC 751 (esp. at 771, *per* Lord Diplock), itself a case concerning the application and interpretation of EEC law in the UK courts).

employment and occupation),[78] and Directive 2002/73/EC[79] (amending Directive 76/207/EEC).[80]

The third conclusion to be drawn concerns the relationship between, on the one hand, the approach of the ECJ towards fleshing out the obligations flowing from Directives and, on the other, the interpretation requirement. At first, following the case of *von Colson*, the German courts were able to adjust national law by the means of interpretation, despite the fact that the wording of the relevant national legislation diverged from that of the Directive. Yet over time it became increasingly difficult to rely upon this approach. Each time the ECJ subsequently tightened the requirements, the legislator had to intervene and pass new legislation. This last point provides a good illustration of a particular 'weakness' of the interpretative method, which deserves to be explored in more detail.

II. The narrow limits of interpretation

In the cases of *von Colson* and *Harz*, the ECJ stressed that the obligation upon Member States (flowing from Article 249(3) EC) to transpose a Directive was also binding upon national courts in applying national law. However, while the Court sometimes disregards the internal rules of organization of a Member State,[81] in respect of the requirement of interpretation, the Court took account of the separation of powers in the Member State. The ECJ did not require the national court to do something that it was not entitled to do or which it did not have jurisdiction to do, namely to use methods of interpretation which were not recognized in that particular Member State. The Court thus held that interpretation in conformity with the Directive was required if the national court was given 'discretion to do so' under

[78] OJ 2000 L 180/22 and L 303/16. See, further, the Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, 5 November 2003, COM(2003)657 final.

[79] OJ 2002 L 269/15.

[80] See the draft proposal for an Anti-Discrimination Act by the German Government of 16 December 2004, Bundestag-Drucksache 15/4583. In the UK, consultation on detailed regulations to implement Directive 2002/73/EC, *supra* note 79, is set to begin 'in spring 2005, with a view to regulations coming into force on 1 October 2005' (the deadline for implementation) (this timetable is according to the website of the UK Government's Women & Equality Unit: www.womenandequality unit.gov.uk/legislation/ – last visited 20 January 2005). The UK has implemented the Race Equality Directive in the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003, No. 1626) and see, further, the Race Relations (Amendment) Act 2000. For implementation of Directive 2000/78/EC in the UK, see the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003, No. 1660) and the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003, No. 1661). According to the website of the DTI, consultation will take place on the age discrimination aspects in the summer of 2005, with a view to bringing legislation into force on 1 October 2006 (see www.dti.gov.uk/er/equality/statement.htm – last visited 20 January 2005).

[81] See, in particular, Case C-302/97, *Konle* v *Austria* [1999] ECR I-3099 and Case C-424/97, *Haim* v *Kassenzahnärztliche Vereinigung Nordrhein (Haim II)* [2000] ECR I-5123 (discussed by Anagnostaras, 'The Allocation of Responsibility in State Liability Actions for Breach of Community Law', 26 *EL Rev* (2001) 139).

national law.[82] Equally importantly, the Court was careful not to interfere with the interpretation of national law, which it regarded as the exclusive task of the national court.[83] This means that the reach of the interpretative method depends upon the limits of interpretation as they are laid down in each of the 25 Member States. If such discretion is accorded to a national court, then it is required by Article 249(3) EC to apply the relevant national law in conformity with the Directive. In other words, the discretion must be used in the interest of securing the effective application of Community law.

It is not the place here to explain in detail the approach to interpretation adopted in the different Member States.[84] It suffices to mention guidelines that seem to be followed by the German courts and the courts in the United Kingdom. In Germany the courts have on the whole consistently refused to 'rectify' national law in the light of a Directive if the wording of the respective provision of national law was unequivocal and was backed by a clearly expressed intention of the legislator apparent from the preparatory works.[85] The more specific and precise the provisions of national law, the more difficult it will be to use the interpretive method to secure a result that conforms to the wording and purpose of the relevant Directive. The implementation of Directive 76/207/EEC (discussed in Section 3.B.I, above) shows as much. The national courts felt unable to overcome the wording of the relevant provision on compensation, which was both specific and unambiguous in limiting damages as to the conditions of recovery (fault) and also the amount recoverable (reliance interest, later an upper limit of three months' salary). The second point that should be mentioned concerns the only more specific guideline that the ECJ has given to the national courts. Ever since *von Colson*, the ECJ has stressed that the interpretative method required the national court to consider national law as a whole, in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the Directive, yet the Court was particularly forceful if national legislation was passed in order to implement the Directive in question.[86] In the Court's view 'every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the Directive

[82] Case 14/83, *supra* note 59, para. 28; Case 79/83, *supra* note 60, para. 28.

[83] Case 14/83, *supra* note 59, para. 25; Case 79/83, *supra* note 60, para. 25; indeed, to have held otherwise would have exceeded the Court's jurisdiction under Art. 234 EC.

[84] For an overview, see S. Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (2001) and see also S. Prechal, *Directives in European Community Law: A Study of Directives and their Enforcement in National Courts* (1995), 195–245 (see, now, the revised 2nd edn, 2005).

[85] See also (in addition to the already cited decisions of the *Bundesarbeitsgericht*, *supra* notes 67 and 71), e.g. BGH, 19 Oct. 2004, XI ZR 337/03, sub II.3 (not yet reported); BGH [2004] NJW 154, 155; BAG [2003] NZA 742, at 747–50. For an overview, see Canaris, 'Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre' in H. Koziol and P. Rummel (eds), *Im Dienste der Gerechtigkeit: Festschrift für Franz Bydlinski* (2002), 47; M. Franzen, *Privatrechtsangeleichung durch die Europäische Gemeinschaft* (1999), 291–404.

[86] Case 14/83, *supra* note 59, para. 26; e.g. Joined Cases C-397 to C-403/01, *supra* note 33, para. 115.

concerned'.[87] That was *a fortiori* the case when domestic provisions were specifically enacted for the purpose of transposing a Directive.[88] Some have concluded that this presumption entitled the national courts to 'correct' the wording of the national law, whatever the circumstances of any national legislation implementing a Directive, assuming that this was also in the interest of the national legislator.[89] This is clearly *not* how German courts have understood the jurisprudence of the ECJ. Once again, the group of cases on Directive 76/207/EEC is an example in point. While it is certainly easier to apply a provision in the light of a Directive if the national legislator did not consciously deviate from the Directive than if the legislator deliberately refused to give effect to a certain result flowing from that Directive, the German courts will not easily set the wording of a provision aside and are most likely not to do so if the objectively assessed purpose of a provision does not conform to the result of the Directive.

The case-law in the United Kingdom would seem to reflect a similar understanding of the requirements of EC law in this regard.[90] Thus, the courts have been prepared to adopt more purposive and result-oriented methods of interpretation where the national implementing rules contain a gap or an ambiguity that would jeopardize the attainment of a Directive's objectives.[91] At the other extreme, the courts have refused to 'discover' room for interpretive ambiguity in national legislation where none could be said to exist. Lord Templeman's judgment in *Duke* v *GEC Reliance Ltd*[92] provided a strong and early affirmation of this point. This case concerned the deliberate retention by the UK government of discriminatory retirement ages for men and women under the Sex Discrimination Act 1975 and the question whether that legislation could be read so as to give effect to the equal treatment on that point as required under Directive 76/207/EEC, which his Lordship

[87] Case C-334/92, *Wagner Miret* v *Fondo de Garantía Salarial* [1993] ECR I-6911, para. 20. This more or less reflects the position reached by the UK courts in their approach to EC law: see, e.g., *Garland* v *BREL, supra* note 77, and *Thoburn* v *Sunderland County Council* [2002] 3 WLR 247; [2002] 1 CMLR 50 (noted by Marshall, 118 *LQR* (2002) 493, Campbell and Young [2002] *PL* 399 and Boyron, 27 *EL Rev* (2002) 771).

[88] Joined Cases C-397 to C-403/01, *supra* note 33, para. 112.

[89] E.g. Grundmann, 'Richtlinienkonforme Auslegung im Bereich des Privatrechts', [1996] *ZEuP* 399, at 418.

[90] See, e.g., Craig, 'Indirect Effect of Directives in the Application of National Legislation', Chap. 3 in M. Andenas and F.G. Jacobs (eds), *European Community Law in the English Courts* (1998), 37 ff. and, more generally, C. Boch, *EC Law in the UK* (2000).

[91] The case of *Litster* v *Forth Dry Dock Engineering Ltd* [1989] 1 AC 546 (concerning Directive 77/187/EEC, OJ 1977 L 61/26, on the protection of employees on the transfer of undertakings and the UK's Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981, No. 1794)) is a good example of the clarifying and gap-filling function that such interpretation can provide where implementing rules have failed to cover all eventualities. (See now Directive 98/50/EC, OJ 1998 L 201/88, as amended by Directive 2001/23/EC, OJ 2001 L 82/16.) See also *Pickstone* v *Freemans plc* [1989] 1 AC 66.

[92] [1988] AC 618, at 635–42, esp. 639–41. See also *Finnegan* v *Clowney Youth Training Programme Ltd*. [1990] 2 AC 407.

held that it could not (refusing to re-write national law so as to give effect to an improperly implemented Directive, precisely because that would in essence have led to direct effect). Given that the defendant employer was a private party, direct effect was also unavailable, so the plaintiff was left without redress. However, the possibility that a claimant may be left without any remedy at all can encourage the UK courts to be rather more flexible in applying requirements as to interpretation to achieve a particular result, even where the legislation in question was not specifically introduced to implement the relevant Directive.[93] With the advent of Member State liability, some of this pressure to use the tool of interpretation rather more strongly has been released, although it could still be argued that even a stretched interpretation is a more palatable and less controversial alternative for a court to entertain (leading to the direct grant of rights for the claimant as against another private party) than to be forced to declare the State liable in damages to the claimant (particularly where this result is so alien to the UK system, in terms of holding the legislator liable for exercising its legislative power where that power has traditionally been viewed as an absolute one that cannot be challenged by the courts).[94] Thus far, however, it must be conceded that the incidence of this phenomenon of (perhaps over-)stretched interpretation has been more frequent under the UK's Human Rights Act 1998, which willingness aligns with the absence of any satisfactory remedy in national courts for a breach of the 1998 Act by primary legislation.[95]

It follows that the interpretative method is a useful tool for achieving conformity with the result of Directives in individual cases, yet its success depends upon a number of factors that are, from the perspective of Community law, entirely accidental. The ECJ cannot do more than instruct the national court as to the meaning of Community law: it is then the national court's task to determine whether the national law can actually be applied in conformity with the Directive. Since the discretion of national courts to apply statutory or case-law may vary from Member State to Member State, the interpretative method is a relatively weak and vulnerable device for increasing the effectiveness of Directives across the Community.

It should thus be unsurprising that attempts were made to strip the *von Colson* jurisprudence of its 'national' corset. These attempts to tighten the requirements of interpretation were boosted by some passages in the much-discussed *Marleasing*

[93] An example may well be the case of *Webb* v *EMO Air Cargo (No. 2)* [1993] 1 WLR 49; [1993] 1 CMLR 259: see *infra* note 108.

[94] See, e.g., Craig, 'Parliamentary Sovereignty in the United Kingdom after *Factortame*', 11 *YBEL* (1991) 221, his UK country report in Slaughter, Stone Sweet and Weiler (eds), *supra* note 20, and his *Public Law and Democracy in the United Kingdom and the United States of America* (1990).

[95] Which includes Orders in Council issued under the Royal Prerogative and all secondary legislation where to impugn its validity would itself amount to a challenge to the validity of its parent statute (ss. 3 and 21(1) of the Human Rights Act 1998). See, e.g., *R* v *A (No. 2)* [2001] 2 WLR 1546 and, generally, Edwards, 'Reading Down Legislation under the Human Rights Act', 20 *Legal Sudies* (2000) 353.

case.[96] Here, the Court first repeated the *von Colson* rule that the national court was called upon to interpret national law 'as far as possible' in the light of the Directive,[97] but then added that this requirement 'precluded' the interpretation of provisions of national law in a manner contravening the Directive.[98] Subsequently this was understood by some to mean that the ECJ 'acknowledged that the non-transposed Directive, irrespective of the "vertical" or "horizontal" nature of the relationship, has the effect of "precluding" incompatible domestic provisions'.[99] Without a fuller explanation of the context of this statement, it is our view that this strong construction of the *Marleasing* judgment was erroneous. The key question raised in *Marleasing* was whether or not the general contract law rules of the Spanish Civil Code should be interpreted so as also to apply to a contract setting up a company (in the absence of specific implementation by Spain into national law of the First Company Law Directive (68/151/EEC)[100]). So long as it remained open to the Spanish court to maintain that *either* interpretation was possible under national law, the ECJ's statement—that Article 11 of the Directive 'precluded' an interpretation of Spanish law that included the general contract law grounds for nullity of a contract—merely explained which interpretive option the national court was obliged to choose if it was to ensure conformity with the Directive.

That this interpretation of the case-law is preferable is implicit in many subsequent judgments.[101] It has been recently confirmed in the aforementioned *Pfeiffer* case: when the national court 'applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a Directive, the national court is bound to interpret national law, *so far as possible*, in the light of the wording and the purpose of the Directive concerned in order to achieve the result sought by the Directive'.[102] Ironically, more than one year before the ECJ handed down its judgment in the *Pfeiffer* case, in a carefully reasoned

[96] Case C-106/89 *Marleasing SA* v *La Comercial Internacional de Alimentación SA* [1990] ECR I-4135. See, e.g., de Búrca, 'Giving Effect to European Community Directives', (1992) 55 *MLR* 215 and contrast Maltby, '*Marleasing*: What is All the Fuss About?', (1993) 109 *LQR* 301.

[97] Case C-106/89 (note 96, above), para. 8.

[98] *Ibid.*, para. 9.

[99] Opinion of Saggio AG in Joined Cases C-240 to C-244/98, *Océano Grupo Editorial SA* v *Roció Murciano Quintero* [2000] ECR I-4941, para. 31, note 18.

[100] OJ Spec Ed 1968 (I) 41.

[101] Including the judgment in the *Océano Grupo* case: Joined Cases C-240 to C-244/98, *supra* note 99, paras. 30–32. For further discussion, see Craig, 'Directives: Direct Effect, Indirect Effect and the Construction of National Legislation', 22 *EL Rev* (1997) 519 and Craig and de Búrca, *supra* note 6, 213–20.

[102] Joined Cases C-397 to C-403/01, *supra* note 33, para. 113 (emphasis added). See, also, the text at *supra* note 33, for the ECJ's refusal in this case to accord the Directive horizontal direct effect. Note, however, that this reading of the decision does not appear to be uncontroversial: Riesenhuber and Domröse, 'Richtlinienkonforme Rechtsfindung und nationale Methodenlehre', [2005] *RIW* 47, at 51, derive from para. 116 of the judgment that the national courts are required to adopt an interpretation *contra legem*. However, even in that particular passage the Court only required the 'application of interpretative methods recognised by national law'. Contrast the Opinion of Colomer AG in Joined Cases

decision the *Bundesarbeitsgericht* had already clarified that the relevant provisions of national law could not be interpreted so as to comply with Article 6(2) of Directive 93/104/EC.[103] The reason for this somewhat unfortunate lack of coordination between the different courts lies in the fact that in the *Pfeiffer* case the reference was made by a labour court of first instance (the *Arbeitsgericht Lörrach*) before the *Bundesarbeitsgericht* issued its aforementioned decision. Furthermore, the latter national court of last instance did not consider it necessary to await clarification of the issue before it by the ECJ.[104] The practical result of this lack of coordination is that, in spite of the high profile of the *Pfeiffer* case at EC level (Grand Chamber), it is unlikely that the actual decision of the ECJ will make a difference as to the outcome of the proceedings before the national courts in which the references were made in the *Pfeiffer* case. The limited value of the interpretative method and the need for legislative action in transposing Directives into national law is once more illustrated.[105]

The ECJ was justified in its refusal to give in to the temptation to disregard the boundaries of interpretation on the national level. For had it done so, the conclusion drawn by Advocate General Saggio[106] would have been inevitable: if the national courts were bound to interpret national law in such a way as to give effect to the result pursued by the Directive regardless of whether they had discretion to do so under national law, the Directive would have acquired all-encompassing direct effect. Again, the difference between Regulations and Directives would have been diminished and all the advantages flowing from the flexibility associated with the

C-397 to C-403/01, *supra* note 33, para. 58, where he had suggested that if 'it is impossible to provide an interpretation which conforms to the Directive concerned, the national court must ensure the full effectiveness of Community law by setting aside on its own authority, where appropriate, any conflicting provisions of national law'.

[103] BAG [2003] NZA 742. The case involved facts very similar to those in the *Pfeiffer* case and draws the (with hindsight) correct conclusions as to the consequences of the *Simap* case: Case C-303/98, *Sindicato de Médicos de Asistencia Pública (Simap)* v *Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963) for emergency workers employed by the *Deutsches Rotes Kreuz*.

[104] BAG [2003] NZA 742, at 747.

[105] In the meantime, as a reaction to Case C-151/02, *Jaeger* [2003] ECR I-838 the German legislator has amended the relevant provisions of national law: Law of 24 December 2003 [2003] I BGBl. 3002. On the controversial question whether or not the amended provisions are fully compatible with Community law, see (e.g.) Schliemann, 'Allzeit bereit—Bereitschaftsdienst zwischen Europarecht, Arbeitszeitgesetz und Tarifvertrag', [2004] *NZA* 513. In the UK, see the Working Time Regulations 1998 (SI 1998, No. 1833) amended by the Working Time (Amendment) Regulations 2002 (SI 2002, No. 3128) and by the Working Time (Amendment) Regulations 2003 (SI 2003, No. 1684) (implementing Directive 2000/34/EC, OJ 2000 L 195/41, which removed the exclusion of doctors in training from the scope of the Directive). In *R* v *Attorney General for Northern Ireland* ex parte *Burns* [1999] IRLR 315, an employee claimed damages from the UK for its failure promptly to implement the Directive. The national court held that the UK had indeed committed a sufficiently serious breach of EC law, but that the plaintiff had failed to show that this had caused her any loss on the facts. See, generally, C. Barnard, *EC Employment Law* (2000), at 402–20 and H. Collins, K. Ewing, and A. McColgan, *Labour Law: Text and Materials* (2002), at 371–413.

[106] *Supra* note 99.

need to transpose Directives into national law would likewise have vanished.[107] For the same reason, therefore, as that for the denial of horizontal direct effect to Directives, it is wise that the ECJ has consistently adhered to the *von Colson* jurisprudence, the key feature of which is that the interpretative method works only 'so far as possible' under national law.

Nevertheless, we must finally note that national courts have been known to change their minds as to the extent of the 'interpretability' of national law so as to conform to the requirements of a Directive, once the ECJ has ruled upon the correct interpretation of that Directive after an Article 234 EC reference. The litigation in the *Webb* v *EMO Air Cargo Ltd* saga in the UK may be said to illustrate this possibility.[108] While, strictly, this practice suggests that national courts do not always properly respect the boundary between permissible interpretation and allowing direct effect via the 'back door', the practice does reflect an understandable desire to provide a remedy in the individual case. Even so, given the availability of a damages claim against a defaulting Member State in such a situation, one could forgive the defendants in these cases for feeling somewhat aggrieved at such behaviour by the national courts. Ultimately, however, this practice is one more example of how the ECJ's interpretation of the provisions of Directives can be leveraged further into national (private) law than a strict application of the ECJ's own jurisprudence on direct effect and interpretation might suggest.

III. Consumers and the ECJ: the Heininger *saga*

This section concludes with a discussion of another line of cases of recent vintage, which also illustrate the complex triangular relationship between the ECJ, the national courts and the national legislator that arises in the process of implementing and applying Directives. Due to constraints of space, this discussion must be limited to the main points. In Germany, schemes whereby average earners took out a loan and invested it in immovable property had become popular in the late 1980s and early 1990s. As a matter of fact, however, the demand for commercial sites and residential premises had been overestimated and many investments did not generate any profit, but on the contrary turned out to be financially unsound. The promised tax benefits likewise did not benefit average earners to any large extent, as their tax burden was relatively small in any case. The cases became known under

[107] As, e.g., the *Bundesarbeitsgericht* also pointed out in [2003] NZA 742, at 750.

[108] See the judgment of the Court of Appeal at [1992] 2 All ER 43; [1992] 1 CMLR 793 and the first judgment of the House of Lords at [1993] 1 WLR 49; [1993] 1 CMLR 259 (see esp. para. 10 of Lord Keith's judgment in the CMLR report, where no discrimination under the terms of the Sex Discrimination Act 1975 was found). The final ruling of the House of Lords on the case's return from Luxembourg ([1995] 1 WLR 1454; [1996] 2 CMLR 990) saw Lord Keith attempting to fit the ECJ's reply into the scheme of the UK legislation (see paras 10 and 11), in a way which seemed to run counter to the interpretation of UK law that he had originally adopted prior to making the reference to the ECJ. The saga is noted by Deards, 2 *EPL* (1996) 71 and Boch, 33 *CML Rev* (1996) 547, and see Craig, *supra* note 101, at 530–3. See, also, BGH [2002] NJW 1881, discussed *infra* note 120.

the name of *Schrottimmobilien* ('waste property').[109] Large numbers of consumers sought to set aside the contracts that had committed them to these investments. Community law was relied upon in some of these proceedings, which is why the genesis of these cases is interesting for our purposes.

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises seemed, with its right of cancellation, to provide a way of getting out of these now bitterly regretted contracts.[110] The acquisition of land or residential property is excluded from the scope of that Directive according to Article 3(2)(a). Credit agreements intended for the purpose of acquiring or retaining property rights in land or in an existing or projected building, however, were not explicitly excluded from the scope of the Directive.[111] In some cases, the credit arrangement had been concluded on the doorstep of the consumer, so the issue arose whether or not the Doorstep Selling Directive could be relied on.

At the level of national law there were two obstacles to be surmounted. First of all, credit arrangements in which credit is subject to the giving of security by way of a charge on immovable property, and is granted on usual terms for the intermediate financing of the same, were excluded from the scope of application of the *Verbraucherkreditgesetz* (Consumer Credit Act) in force at the time.[112] This meant that consumers could not avail themselves of the right of cancellation contained therein. The specific German statute then in force and intended to implement the Doorstep Selling Directive (the *Haustürwiderrufsgesetz*) provided for a right of cancellation but excluded all credit agreements from its scope of application. The combined effect of these rules was that consumers could not set aside the credit agreement nor the acquisition of immovable property. The second obstacle was that the consumer's right of cancellation under the Consumer Credit Act in any event lapsed one year after the consumer's declaration of his intention to conclude the credit agreement. Two questions were thus referred by the *Bundesgerichtshof* to the ECJ, namely whether the Doorstep Selling Directive covered agreements for the

[109] See, for a discussion of these cases and their background, Bungeroth, 'Die Rückabwicklung nach dem HWiG widerrufener Immobiliarkredite', [2004] *WM* 1505. He estimated that around 300,000 consumers have fallen into financial difficulties as a result of taking part in such doubtful investment schemes.

[110] OJ 1985 L 372/31 (the Doorstep Selling Directive).

[111] They are so excluded by Art. 2 of 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 1987 L 42/48) as amended by Council Directive 90/88/EEC of 22 February 1990 (OJ 1990 L 61/14, the Consumer Credit Directive). In the UK, see reg. 3(2)(a) of the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (SI 1987, No. 2117), which excludes 'any contract–(i) for the sale or other disposition of land, or for a lease or land mortgage; (ii) to finance the purchase of land; (iii) for a bridging loan in connection with the purchase of land . . .'.

[112] The relevant legislation is reproduced in Case C-481/99, *Heininger* v *Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-9945.

grant of credit secured on immovable property and whether the time limit for the exercise of the right of cancellation contained in the provisions of national law was compatible with that Directive.[113]

In the resulting preliminary ruling, the ECJ interpreted the relevant Directives in what appeared to be the most consumer-friendly manner, namely affirming the applicability of the Doorstep Selling Directive to credit agreements secured by a charge on land and stating that the Directive precluded national legislation imposing a time limit such as that provided for under German law.[114] The reason for excluding such credit agreements at national level from the scope of application of the Doorstep Selling Directive was—in the view of the German court—that they were intimately linked to the purchase of an interest in land, which was, as explained, in fact excluded from the scope of application of the Directive.[115] The Court, however, dismissed this argument and stated that the fact that the credit agreement was secured by a charge on immovable property did not render it any less necessary to protect the consumer.[116] As to the time limit, the German court suggested that the Member States were given discretion as to the sanctions for failing to notify the consumer of his right of cancellation. Article 5 of the Doorstep Selling Directive merely required the Member States to ensure that their national legislation laid down 'appropriate consumer protection measures' in cases where the information was not supplied. The ECJ once more referred to the need to protect the consumer and concluded that even a time limit of one year as to the exercise of the right of cancellation could not be justified. The argument from legal certainty raised in defence of the time limit did not persuade the Court, since in its view the trader could avoid any such uncertainty by complying with the requirement to provide the relevant information to the consumer.[117] The decision of the ECJ in this case can be criticized for two main reasons.

First of all, the Court did not pay any significant attention to the arguments raised concerning the discretion of the Member States in implementing Directives.[118] Even where on its face the Directive did not require anything more specific than the adoption of 'appropriate measures', the ECJ seemed to be prepared to strike down every provision which did not appear unilaterally to protect the

[113] BGH [2000] NJW 521.

[114] Case C-481/99, *above* note 112, paras. 40 and 48.

[115] This would also seem to accord with the rationale behind the UK's implementation of the Directive in reg. 3(2)(a) of the 1987 Regulations, *supra* note 111.

[116] Case C-481/99, *supra* note 112, para. 34. This is a conclusion redolent of the approach adopted by the ECJ concerning national time limits and the proper implementation of Directives in its judgment in Case C-208/90, *Emmott* v *Minister for Social Welfare and Attorney General* [1991] ECR I-4269 (see paras. 19–23: the Member State can avoid such an uncertainty by ensuring that the Directive is implemented correctly).

[117] *Ibid.*, para. 47.

[118] See, e.g., *ibid.*, paras. 43 ff.: the ECJ seems simply to assume that the exercise of the right to cancel the contract (as laid down in Art. 5(1) of the Directive) is unlimited in time, since the Directive itself provides for no express limitation of that right.

consumer but instead sought to strike a balance between the competing interests of the parties to the contract.[119] The judgment in *Heininger* necessitated considerable adjustments at the national level: first, an attempt was made to create conformity through interpretation, but eventually the legislator stepped in. After the case returned to it from Luxembourg, the *Bundesgerichtshof* somewhat surprisingly concluded that it was possible to interpret the provisions of national law so as to achieve the result of the reading given to the Doorstep Selling Directive by the ECJ and to grant the consumer a right of cancellation of the credit agreement.[120] This change of position[121] was justified by reference to a number of lower court decisions and academic writings, which had previously argued in favour of this particular interpretation. One could not say, the court stated, that these opinions were all blatantly wrong, so their very existence 'showed' that there was discretion as to how to construe national law. The court even went so far as to extend this Community-inspired interpretation of the provisions of national law beyond the scope of application of the Directive,[122] which provides a particularly vivid example of the possibility of spill-over effects from the interpretation of EC law adopted by the ECJ and required to be applied by the national courts. The *Bundesgerichtshof* refrained, however, from expressing an opinion as to whether the lack of conformity with Community law of the time limit could be remedied by interpretation.[123] The details are now of only historic interest, for in the end the legislator intervened and adjusted the relevant provisions of German law.[124] What is interesting, however, is the enormous amount of ink that was spilled in German literature and the great number of cases concerned with the question whether or not German law could be interpreted in conformity with the Directive.[125] All these efforts became moot once the legislator adapted the relevant statutory provisions to ensure that German law was in conformity with the *Heininger* judgment.

Secondly, in spite of its extreme interpretation of the Doorstep Selling Directive, the ECJ's judgment in *Heininger* did not in the end achieve the effective protection of the consumer, in any event not by the means of Community law.[126] The reason

[119] See Franzen, '"*Heininger*" und die Folgen: ein Lehrstück zum Gemeinschaftsprivatrecht' [2003] *JZ* 321, at 325.

[120] BGH [2002] NJW 1881, at 1883; contrast the opinion of the court expressed in the reference itself: [2000] NJW 521.

[121] Which in the end was to no avail for the applicants, since it was subsequently found that the other conditions of application were not met (the contract was not negotiated or concluded in a doorstep-selling situation): OLG Munich, [2002] BKR 912.

[122] BGH [2002] NJW 1881, at 1884.

[123] BGH [2002] NJW 1881, at 1884.

[124] Law of 23 July 2002 [2002] I BGBl. 2850. According to s. 495 BGB, the consumer has a general right of cancellation in relation to consumer credit contracts. The right of cancellation arising out of doorstep-selling practices is a subsidiary right according to s. 312a BGB. Finally, if the consumer has not been notified of his right of cancellation, then the time limit for the exercise of the right does not commence according to s. 355(3) sentence 3 BGB: in other words, it never lapses.

[125] See the rich references in BGH [2002] NJW 1881.

[126] See Franzen, [2003] *JZ* 321, at 332.

is that setting the credit agreement aside only results in an obligation owed by the consumer to return the loan. A consumer who has difficulties in meeting the obligation to pay interest, however, will rarely be able to pay back the loan itself. In other words, getting out of the credit agreement does not protect the consumer in economic terms. This is hardly surprising, for in this line of 'waste property' cases the terms of the credit agreement were not substantively unfair. The problem was with the contract for the acquisition of immovable property itself, which invariably was a bad deal for the consumer. Hence, only if the right of cancellation also affected the purchase of land could the consumer truly benefit from the cancellation. If these contracts were treated as a single unit and the consumer could transfer back the land and *thereby* also discharge his or her obligations under the credit agreement, the risk of the investment could be transferred back to the provider of the loan. However, the Eleventh Senate (which is in charge of these matters at the *Bundesgerichtshof*) did not adopt this consumer-friendly approach.[127] This did not escape criticism. The argument was voiced that, once again, this jurisprudence was not in conformity with Community law, especially the Doorstep Selling Directive. References for preliminary rulings were made accordingly and their outcome in Luxembourg is to be awaited with interest.[128]

The difficulty with this argument is obvious. Article 3(2)(a) of the Doorstep Selling Directive excludes from its scope of application the contract of sale of land or other immovables. In addition, according to Article 7 of the Directive, it is national laws that are to govern the legal effects of the cancellation. Given this clear wording of the Directive, it is not surprising that Advocate General Léger in his opinion in *Schulte* v *Deutsche Bausparkasse Badenia AG*[129] came to the conclusion that Community law did not require that the right of cancellation extended to the contract of sale of immovable property. This was a matter exclusively to be determined by reference to national law.[130] It should be noted that in the meantime the German legislator has clarified the circumstances in which a credit agreement and

[127] As a result, the right of cancellation is limited to the credit agreement—the two transactions are not to be treated as a unit: e.g. BGH [2002] NJW 1881, at 1884 and [2002] BKR 579, at 580 (both decisions of the Eleventh Senate), approving note by Rohe, [2002] *BKR* 577. The issue is controversial: contrast, e.g., Deutsch 'Verbraucherschutz gegen den BGH' [2003] *NJW* 2881; BGH [2004] NJW 2731; [2004] NJW 2736 (Second Senate, both decisions concerned the related context of real estate investment funds).

[128] LG Bochum [2003] BKR 706 (lodged as Case C-350/03, *Schulte* v *Bausparkasse Badenia AG*, OJ 2003 C 264/18) and OLG Bremen [2004] NJW 2238 (lodged as Case C-229/04, *Crailsheimer Volksbank* v *Conrads and others*, OJ 2004 C 201/9; see now the Opinion of Léger AG of 2 June 2005).

[129] Opinion of Léger AG in Case C-350/03, *supra* note 128, para. 114 (28 September 2004, not yet reported—text available from the Court's website (http://curia.eu.int/en/content/juris/index_form.htm); not yet decided by the ECJ). The very admissibility of the reference by the *Landgericht* Bochum was also strongly doubted by the AG in his Opinion: see paras. 38–48 (the failure to determine whether or not the contract in question was actually concluded in a 'doorstep-selling situation' meant that the questions asked could be no more than 'hypothetical'—see esp. para. 41 and the cases cited in note 18 thereto).

[130] Opinion of Léger AG in Case C-350/03, *supra* note 128, para. 94.

a contract for the acquisition of immovable property are to be treated as 'connected contracts'. According to § 358(3) sentence 3 BGB, this will be the case if the provider of credit facilitates the acquisition (beyond simply providing the credit) by closely cooperating with the provider of the immovable property. Whether the Court will follow the reasoning of the Advocate General in *Schulte*—provided that the reference is held to be admissible under Article 234 EC—remains to be seen. Yet one wonders whether, in the light of these remarks, it was really necessary to narrow the discretion of the Member States in implementing the Doorstep Selling Directive so significantly in the *Heininger* decision. In the final analysis, the Doorstep Selling Directive was simply not meant to deal with the sort of situation that arose in the *Heininger* litigation.[131]

4. POLICING IMPLEMENTATION

In the previous section we inquired whether or not the missing implementation of Directives matters. It matters because the ECJ has consistently refused to ascribe fully-fledged direct effect to Directives; instead, under certain conditions national courts are required to bring national law into conformity with the Directive, namely either by reason of the direct effect of the Directive in vertical relationships or by the Directive-friendly interpretation of national law. Missing implementation also matters because Member States may become liable in damages to private parties who have incurred loss as a result of the failure to transpose the Directive into national law. In this section, we examine the one mechanism for policing implementation that was explicitly provided for in the Treaty itself, namely infringement proceedings under Article 226 EC. In the previous section we showed how the ECJ skilfully created incentives for private parties to rely upon Directives before national courts and thus turned them into agents for the enforcement of Community law, but infringement proceedings bring the Commission into play. The Commission comprehensively monitors the implementation process in the Member States and makes frequent use of the mechanism provided for in Article 226 EC.

One may doubt whether it is useful to differentiate between the different devices that allow the ECJ to express its (binding) views as to the meaning of provisions of Directives. After all, as is clear from the examples given in the previous section, preliminary rulings proceedings regularly result in an (abstract) evaluation of national law. This usually takes the form of a statement that the Directive 'precludes' (or does not preclude) a certain rule of national law. Whether the prohibited rule is contained in a statute supposedly implementing the Directive or stems from other sources of national law is immaterial.[132] In any event, the Member States are given

[131] *Cf.* Bungeroth, [2004] *WM* 1505, at 1511.

[132] See, e.g., Case C-106/89, *Marleasing*, *supra* note 96, paras. 7 and 8. Of course, as discussed in the previous section, the precise *consequences* in national law of such an interpretation of EC law by the

a clear indication whether or not their attempts at transposing the Directive have been successful. Also, in respect of the interpretation of the Directive itself, it does not make a difference as to how the case reached the ECJ.[133] Still, there is a significant if subtle difference between the two sets of proceedings: this concerns the approach adopted towards national law.

In proceedings involving private parties who in one way or another can derive a benefit from a Directive, the ECJ, after clarifying that a certain rule of national law is not compatible with the Directive, requires the national courts to do everything possible in applying national law to achieve the result envisaged by the Directive in the individual case. And, as we have seen in the examples so far, national courts have at times gone out of their way to stretch national law so as to achieve a result that conforms to the Directive. State liability, likewise, is a measure of last resort. Hence, if Directives are to be given effect in an individual case, national law is to be interpreted and applied so far as possible in conformity with the Directive. As we will shortly see, this does not seem to be the approach adopted in infringement proceedings when analysing national law. Here, national law is often given the most Directive-hostile interpretation and in case of doubt the ECJ will find national law to have failed properly to implement the Directive.[134] Whether or not the measures implementing the Directive could in the individual case be applied in such a way as to achieve the result pursued by the Directive often does not 'win' the case for the Member State. The measures that transpose the Directive must, as we will see, be unequivocal and clear in giving effect to the Directive. This is a new and considerable source for further diminishing the flexibility of legislating through Directives.

Furthermore, it is evident that the requirements as to implementation developed in infringement proceedings can sometimes undermine the usefulness of the techniques described in the previous section. Those techniques may assist in providing a remedy in the individual case, but they do not ensure the general and overall 'correctness' of the implementation of the Directive in national law. As a result, the pressure for further 'corrective' national legislative measures does not wither away, and this pressure can be increased if the Commission applies to the ECJ to impose fines upon a Member State in persistent default in taking measures to implement a

ECJ will vary depending upon the relevant EC law doctrine at issue (interpretation shapes national law where it is open to different possible meanings, direct effect basically replaces the inconsistent national law on that point, etc.).

[133] Although it should perhaps be noted that the context of the reference and the observed consequences of previous ECJ judgments under Art. 234 EC can lead to a change of approach by the ECJ in subsequent cases (see Joined Cases C-267 and 268/91, *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097, esp. paras. 14–16).

[134] While acknowledging that 'it should be borne in mind that, according to the case-law of the Court, the scope of national laws, rules or administrative provisions must be assessed in the light of the interpretation given to them by national courts . . .': Case C-372/99, *Commission* v *Italy* [2002] ECR I-819, para. 20.

judgment under Article 226 EC.[135] This suggests that the ECJ views the techniques developed to secure the effectiveness of Directives in national law more as 'coping strategies' than long-term solutions to the problems of clear implementation.

A. The Unfair Terms in Consumer Contracts Directive

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[136] provides a useful starting point for substantiating the claims made by way of introduction. Article 5 of that Directive provides an interesting parallel between the interpretation of national law and the interpretation of contracts between private parties. The second sentence of Article 5 requires that in case of doubt the interpretation most favourable to the consumer ought to prevail (also known as interpretation *contra proferentem*). This means that the courts are in individual cases obliged to assess the term *in concreto* and construe it in a way that is favourable to the consumer. Article 7 of the Directive, however, also provides for a procedure by which the unfairness of terms can be assessed *in abstracto* with a view to the use of the terms in future contracts between dealers and consumers. Consumer organizations are thereby given the power to apply to a competent authority and obtain a review of the fairness of the terms to which they object (Article 7(2)). If the *contra proferentem* rule were also applied in this context it would operate to the detriment of the consumer, for it would favour upholding terms which, if not construed in a particularly consumer-friendly manner, would be unfair. It is natural, therefore, that Article 5 sentence 3 of the Directive excludes the application of the *contra proferentem* rule in proceedings brought pursuant to Article 7(2). In such proceedings, the term is to be given an objective interpretation. If we return to the interpretation of national law for a moment, the same phenomenon can be observed. As to the interpretation of such provisions *in concreto* in preliminary rulings, in case of doubt, the most Directive-friendly interpretation prevails. In infringement proceedings, national law is assessed *in abstracto* and in case of doubt the incompatibility between national law and Directive is established. The strict approach of the ECJ in infringement proceedings can, somewhat ironically, be illustrated by looking at cases that were concerned with Article 5 of the Unfair Terms Directive.[137]

In *Commission* v *Kingdom of the Netherlands*,[138] the applicant maintained that the respondent had failed correctly to transpose Articles 4(2) and 5 of the Unfair Terms Directive into national law. The Netherlands Government argued that the pre-existing

[135] See Art. 228 EC (discussed in its previous incarnation as Art. 171 EC by Bonnie, 'Commission Discretion under Art. 171(2) EC', 23 *EL Rev* (1998) 537) and Case C-387/97, *Commission* v *Greece* [2000] ECR I-5047.

[136] OJ 1993 L 95/29.

[137] Implemented in Germany by s. 305c(2) BGB and the *Unterlassungsklagengesetz*; in the UK, see now the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999, No. 2083).

[138] Case C-144/99, [2001] ECR I-3541.

provisions of its national law fully complied with the Directive and that therefore no further action was required.[139] This claim was backed up by references to decisions of the national courts.[140] Furthermore, the Netherlands Government contended that the Member States were entirely free to choose the form and methods necessary to transpose a Directive into national law.[141] The ECJ, however, did not follow this reasoning.

The Court conceded (as it had in fact held on a previous occasion) that legislative action on part of the Member State was not 'necessarily' required in order to implement a Directive.[142] However, it then heavily qualified this discretion of the Member States to choose the methods of implementing a Directive. It was essential, the Court stressed, that national law 'guaranteed' that national authorities will 'effectively' apply the Directive 'in full' and that individuals are made 'fully' aware of their rights and may rely upon them before the national courts.[143] The condition for securing 'full implementation' that the national law was *transparent* was particularly important, the Court was at pains to emphasize, where the Directive in question was also intended to grant rights to nationals of other Member States.[144] This is the case with the Unfair Terms Directive, as indeed with all of the other 'consumer directives'. Advocate General Tizzano's opinion brought out in more drastic terms the standard applied in infringement proceedings: the framework implementing the Directive in question 'must be designed in such a way as to remove all doubt or ambiguity' as regards the content of the relevant national legislation and its compliance with the Directive.[145]

The 'burden of proof' to establish full compliance is on the Member State, as is also clear from the judgment itself, where the Court stated that the Kingdom of the Netherlands was 'unable to show' that its legislation complied with the Directive.[146] Advocate General Tizzano even went so far as to derive from the very existence of a difference of opinion between the Commission and the Member State that the implementation was not free from ambiguity.[147] As to the merits of the case, he had particular doubts as to whether the national legislation ensured that, in proceedings brought according to Article 7(2) of the Directive, the *contra proferentem* rule of interpretation was not applied (as required by Article 5 sentence 3, as explained above).[148]

[139] See, for early commentary and criticism, Hondius, 'Non-implementation of the Directive on Unfair Contract Terms: the Dutch Case', 2 *ERPL* (1997) 193.

[140] For details, see the Opinion of Tizzano AG in Case C-144/99, *supra* note 138, paras. 10–13.

[141] Case C-144/99, *supra* note 138, para. 16.

[142] *Ibid.*, para. 17.

[143] *Ibid.*, para. 17. *Cf.* Case C-236/95, *Commission* v *Greece* [1996] ECR I-4459, para. 13.

[144] Case C-144/99, *supra* note 138, para. 18.

[145] Opinion, Case C-144/99, *supra* note 138, para. 15.

[146] Case C-144/99, *supra* note 138, para. 19.

[147] Opinion, Case C-144/99, *supra* note 138, para. 20.

[148] *Ibid.*, para. 30.

Especially noteworthy in our context is the defence of last resort of the Member State in this case. The Netherlands had suggested that in any event the national legislation could be interpreted in such a way as to ensure conformity with the Directive. The Court refuted this argument and its reasoning deserves to be quoted in full:

> . . . even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty. That, moreover, is particularly true in the field of consumer protection.[149]

In the same vein, Advocate General Tizzano, in a passage referred to by the Court with approval, stated that the principle of interpretation could certainly not serve 'as an excuse' for failure to transpose or for inadequate transposition.[150]

The case is interesting because it clarified and confirmed three general principles of Community law as shaped by the case-law of a pro-active ECJ. First, while legislative action transposing a Directive into national law is not required *per se*, the pre-existing legislation of that Member State must leave no room for doubt as to its conformity with the relevant Directive. Secondly, it is for the Member State to prove that the Directive is fully effective in its national legal system. Thirdly, the requirement as to transparency of the implementation precludes the Member State from relying to any significant extent upon the willingness of its national court to apply the national law in a way that is consistent with the Directive. In the view of the ECJ, this does not constitute a full and adequate implementation of the Directive in question. The combined effect of these principles is considerably to diminish the discretion of the Member State in choosing the appropriate measure of implementation. Pre-existing legislation will only suffice if it exactly mirrors the Directive and, at least in the case of consumer Directives, the consumers are made fully aware of their rights, as accorded to them by the Directive, by the wording of the relevant provision of national law. The ECJ made perfectly clear in this case that the interpretative method may be applied in proceedings involving private parties, but it may not serve as a substitute for legislative action since it is likely to fail the transparency test.

The strict test of compliance illustrated by the previous case in relation to a claim that pre-existing national law was in conformity with the Directive applies with equal force to any legislation passed in order to transpose a Directive into national law. This is exemplified by the case of *Commission* v *Kingdom of Spain*,[151] where the Commission contended that Spain had failed to give full effect to Articles 5 and 6(2) of the Unfair Terms Directive.

As to the first plea, the Commission adopted the view that the national legislature had not stated expressly that the rule of interpretation favourable to the consumer

[149] Opinion, Case C-144/99, *supra* note 138, judgment para. 21.

[150] *Ibid.*, Opinion, para. 35.

[151] Case C-70/03, judgment of 9 September 2004, not yet reported.

did not apply in the case of collective actions (by 'persons or organizations, having a legitimate interest under national law in protecting consumers, . . . before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair') referred to in Article 7(2) of the Directive, and therefore, Article 5 sentence 3 was not properly transposed.[152] Spain maintained that the rule of interpretation *contra proferentem* did not apply in relation to proceedings within the meaning of Article 7(2).[153] Since this was in its view self-evident, expressly to repeat the exact wording of Article 5 sentence 3 of the Directive in national law would have served no practical purpose. Advocate General Geelhoed conceded that there were no specific hints that the rule of interpretation favourable to the consumer was applied in Spanish law in proceedings within the meaning of Article 7(2) and that therefore it could not be stated with certainty that Spain had failed to give full effect to Article 5 sentence 3 of the Directive.[154] Yet, he added, there was the 'legal possibility' that the *contra proferentem* rule of interpretation would be applied in such proceedings.[155] The resulting ruling of the Court demonstrated the heavy burden placed upon the Member State when it does not simply transpose the text of a Directive *en bloc*. For the Court simply stated that Spain had not succeeded in establishing that the result of the Directive *would* be achieved in the national legal system, since it could not point to any provision or decision in support of its position.[156] One might have thought that it was for the Commission, which initiated the proceedings, to identify a failure to transpose the Directive. As we have also seen, however, in the *Commission* v *Netherlands* case discussed previously, the burden of proof in this respect rests with the Member State. The task of defending the national implementing measure is exceedingly difficult if the national legislator has not transposed the Directive word for word. Even the most remote and most abstract possibility that the national law might be interpreted in a way that does not give full effect to the Directive seems to suffice to trigger the intervention of the Court. These remarks apply with equal force in relation to the second plea of the Commission, to which we must now turn.

Spain had exercised its discretion in implementing Article 6(2) of the Unfair Terms Directive by giving that vague and open-textured provision a more specific meaning. In the Directive it is stated that Member States shall take the 'necessary measures' to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-EU Member State as the law applicable to the contract if the latter has a 'close connection' with the territory of the Member States. Spain had transposed this provision, yet (among other real or alleged failures to give full effect to the Directive) instead of simply referring to a 'close connection', Spanish law more specifically required that the declaration of

[152] *Ibid.*, para. 12.

[153] As to the argument of Spain, see the Opinion of Geelhoed AG, *supra* note 151, para. 6.

[154] *Ibid.*, para. 18.

[155] *Ibid.*

[156] Case C-70/03, *supra* note 151, paras. 18–19.

consent was given on Spanish territory and the party agreeing to be bound by the contract was habitually resident there.[157] Advocate General Geelhoed correctly stated that this approach to fleshing out the requirement of close connection was narrower than that of the abstract definition in the Directive.[158] As a result, the scope of protection of the Directive was prejudiced.[159] The Court adopted the same narrow view. The Member State was precluded from circumscribing what was—as the Court admitted—the 'vague' term of a 'close connection' by predetermined criteria such as residence and the conclusion of the contract.[160] The strict compliance test apparent here leaves the Member State virtually no discretion as to how to implement Article 6(2) of the Unfair Terms Directive. Spain would only have escaped the verdict of infringing Community law if it had actually used the term 'close connection' or words to that effect in transposing the Directive. This is regrettable, for neither the Advocate General nor the Court were able to point to any more specific circumstances in which the Spanish solution would generate an unsatisfactory result. In other words, the merits of the Spanish attempt at giving the provision a more concrete meaning were not even seriously considered.[161] Again the remote, abstract possibility that the interest of the consumer might be prejudiced sufficed to declare the national legislation to be incompatible with the Directive.

Before leaving the discussion of the Unfair Terms Directive, it is worth taking a brief detour to examine a significant aspect of the UK's implementation of this piece of legislation, namely the significant role played by the Office of Fair Trading in monitoring terms in consumer contracts and enforcing the Unfair Terms in Consumer Contracts Regulations 1999.[162] In this area, the Office of Fair Trading and its Unfair Contract Terms Unit[163] have had a far greater impact in practical terms than the

[157] Reproduced in *ibid.*, para. 25.

[158] *Ibid.*, Opinion, para. 27.

[159] *Ibid.*, para. 28.

[160] *Ibid.*, para. 33.

[161] Perhaps the best compromise, respecting the terms of the ECJ's judgment, would be for Spain to include the phrase 'close connection' as the overarching concept, but then to supplement it by using the criteria of consent having been given on Spanish territory and habitual Spanish residence as indicative of a sufficiently close connection. See, e.g., the implementation in Germany in Art. 29a EGBGB, which also indicates a further potential deviation of the Spanish provision. Under the Directive, a close connection to any of the Member States suffices, whereas the Spanish provision required a close connection to Spain. This difference, however, was not especially noted in the proceedings. In the UK, reg. 9 of the UTCCR 1999 basically reproduces the wording of Art. 6(2) of the Directive and thus avoids this potential inconsistency with the Directive.

[162] SI 1999, No. 2083. Note that other regulators, including trading standards officials and the utility regulators, are also charged with the function of considering whether complaints about the fairness of terms should be upheld: see Sched. 1 for a list of the relevant 'qualifying bodies' for these purposes. For fuller comparative discussion of the issue of standard terms and their regulation in German and English law generally, see B.S. Markesinis, H. Unberath, and A.C. Johnston, *The German Law of Contract* (forthcoming, 2006), Chap. 3, section 5, and the references cited therein.

[163] See regs. 10–15 UTCCR 1999 and the following internet address for further details: www.oft.gov.uk/Business/Legal+Powers/Unfair+Terms+in+Consumer+Contracts/default.htm (last visited

private enforcement of the Regulations in the courts.[164] Thus far, the UK courts have seen fewer than ten cases where the application of the Regulations has been required, whereas the OFT has issued detailed guidance on the area[165] and regular and voluminous bulletins on its activities in this field.[166] These bulletins include discussion of individual cases, contracts and terms referred to it and, in many cases, a discussion of the measures taken to ensure that such cases comply with the Regulations. The OFT was given this role after the view was taken that the overall benefits to be gained simply from relying upon private individuals to enforce the Regulations would neither be as great nor as efficient as charging a public body with a supervisory and enforcement function.[167] While it may be the case that some other systemic factors (such as high litigation costs or the absence of widespread litigation insurance) may also account for the relative paucity of cases on the Regulations in the UK, it seems clear that the important role played by the OFT is a (and perhaps *the*) major explanation for the lack of national case-law on the subject. This illustrates with some force how the particular choices taken by Member States in implementing EC Directives[168] may themselves have a significant impact upon the role that can be played by the ECJ in developing EC private law.

B. The Consumer Sales Directive

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[169] represents one of the most ambitious attempts at Community level of harmonization of private law so far. It covers the right to demand subsequent performance if

21 January 2005). For some early discussion, see, e.g., Bright, 'Winning the Battle Against Unfair Terms', 20 *Legal Studies* (2000) 331.

[164] For recent discussion of the major issues that have arisen in the courts thus far, see Ervine, 'The Unfair Terms in Consumer Contracts Regulations in the Courts', 2004 *SLT* 127.

[165] *Unfair Contract Terms Guidance* (OFT 311, Feb. 2001).

[166] These bulletins are all available on-line, by accessing the OFT's publications page (available at www.oft.gov.uk/News/Publications/Leaflet+Ordering.htm, last visited 21 January 2005). The most recent edition (*Unfair Contract Terms Bulletins 27 and 28* (OFT 743, September 2004)) covers cases from January to June 2004 and runs to some 147 pages.

[167] Indeed, the argument runs that consumers would largely remain unaware of harsh and/or non-negotiated terms in such (often standard-form) contracts and would instead seek out the lowest prices, leading to a vicious circle of harsher terms imposed by business to ensure ever lower prices. See Goldberg, 'Institutional Change and the Quasi-Invisible Hand', 17 *J L & Econ* (1974) 461 (reprinted in V.P. Goldberg (ed.), *Readings in the Economics of Contract Law* (1989), 169–73), Trebilcock, 'An Economic Approach to the Doctrine of Unconscionability', in B.J. Reiter and J. Swan (eds), *Studies in Contract Law* (1980), 379, at 390–421 and Law Commission (CP No. 166) and Scottish Law Commission (CP No. 119), *Unfair Terms in Contracts: A Joint Consultation Paper* (2002), 7–10. Most recently, see Ogus, 'What Legal Scholars Can Learn From Law and Economics', 79 *Chicago-Kent L Rev* (2004) 383, at 390–1.

[168] Compare, e.g., the approach originally taken by Italy in implementing Art. 7 of the Unfair Terms Directive (*supra* note 3): Case C-372/99, *Commission* v *Italy* [2002] ECR I-819.

[169] OJ 1999 L 171/12.

non-conforming goods are delivered, the right to termination and the right to price reduction. It does not concern issues related to the passing of mercantile risk and the right to recover damages. The Directive has been transposed in quite different ways in the various Member States.[170] For reasons of space only certain aspects of the implementation in Germany[171] and England[172] can be examined in this chapter. If, in the course of future infringement proceedings, the same rigorous test of compliance is applied as we have discussed above in relation to the Unfair Terms Directive, both the English and the German measures aiming to give effect to the Directive will not survive unchanged for long. It suffices here to give an example from each of the two jurisdictions.

The Directive has been used as a model for the recent German reform of the contract of sale. Unlike the transposition in England, the structural elements of the system of remedies envisaged by the Directive have been implanted into the very heart of the German law of obligations.[173] The reason for this so-called 'grand solution' (*große Lösung*) was that it has the advantage of reducing the number of overlapping regimes of rules. As a result, the impact of the Consumer Sales Directive extends beyond the areas to which it itself claims to apply and has a 'spill-over' effect upon other (cognate and related) parts of national (private) law: this provides an excellent illustration of one aspect of the possible spill-overs from EC law into national private law (as discussed in Section 2, above). For instance, the right to terminate the contract (§ 323 BGB, an essential aspect of the rights granted to the consumer in Article 3 of the Directive) is defined in the general part of the law of obligations, which applies to all contracts. § 323 I BGB, however, requires that the buyer must (even after breach has been established) set a period of time within which performance must be rendered before the contract may be terminated. The Directive does not require as much as this: it suffices that the buyer has requested that the seller cure the defect or deliver substitute goods and that a reasonable time has passed (Article 3(3)). Construing German law in the sense envisaged by the Directive is not possible, for the Second Commission on the reform of the BGB expressly rejected the removal of the requirement to set a period of time for performance.[174] Applying the fall-back provision of § 323(2) nr. 3 BGB might provide

[170] See for an overview e.g. Mansel, 'Kaufrechtsreform in Europa und die Dogmatik des deutschen Leistungsstörungsrechts', 204 *AcP* (2004) 396 (Austria, Greece, Finland, Italy, Spain, UK).

[171] See, for more detailed discussion of whether the German implementation is in conformity with the Directive and whether conformity can be achieved by the interpretative method, Unberath, 'Die richtlinienkonforme Auslegung am Beispiel der Kaufrechtsrichtlinie' [2005] *ZEuP* 5.

[172] On the implementation in England, see R. Bradgate and C. Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees* (2003); Reynolds, 'Specific Performance—a Regular Remedy for Consumers', 119 *LQR* (2003) 541; Arnold and Unberath, 'Die Umsetzung der Richtlinie über den Verbrauchsgüterkauf in England' [2004] *ZEuP* 366 (comparative).

[173] For treatment of the truly comprehensive reform of the German law of obligations, see Markesinis, Unberath and Johnston, *supra* note 162, Chap. 9, and for a comparative discussion of the contract of sale, see *ibid.*, Chap. 10, Section 2.

[174] See Unberath, *supra* note 171, 5, at 29 with references.

a solution in consumer sale situations,[175] but this device is in any event not sufficient implementation, as it is not a fully *transparent* regulation of the rights of the consumer. Furthermore, it would distort the uniform application of the German Civil Code depending upon whether or not the individual case fell within the scope of application of the Directive. It is not to be expected that the ECJ would tolerate such an obvious deviation from the wording of the Directive, were the matter to be raised before it. It must be stressed again: even if in individual cases the national court would dispense with the requirement that a period for performance must be set by the consumer, the legislation would not withstand infringement proceedings under Article 226 EC because the consumer is not fully and unambiguously made aware of his or her rights.

In England, the Consumer Sales Directive was transposed in a much less sweeping fashion by inserting special provisions for consumer sales into the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, while also slightly altering pre-existing provisions of these Acts.[176] Article 3(3) of the Directive was implemented correctly by the 2002 Regulations (see s. 48B(2) of the Sale of Goods Act 1979). The main challenge for English law lay elsewhere and was of a more fundamental nature. The newly added s. 48B of the Sale of Goods Act 1979 for the first time entitles the buyer to demand enforced performance in English law as a matter of right (rather than merely at the court's discretion). This comes close to a revolution in the remedies for breach of contract. It is probably for this reason, and due to the inertia of traditional reasoning, that in s. 48E it is provided that the court (in ordering specific performance or in giving effect to a remedy to which the buyer had not resorted) may make such orders either 'unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as it thinks just'. The provision runs contrary to the aim of the Directive to grant the consumer clear and unconditional rights.[177] English courts may well recognize the need to exercise the discretion accorded to them under this provision in conformity with the Directive. However, again it is unlikely that the ECJ will accept this sign of good will. Rather, it seems likely that the Court will point to the possibility, even if it is a remote one, that the rights of consumers may not be fully effective in English law and as a consequence will regard the respective provision as being contrary to the wording and purpose of the Consumer Sales Directive.

5. CONCLUSION

The upshot of this brief survey is that the ECJ has significantly increased the effectiveness of Directives as a legislative instrument. The Court has pursued a

[175] The issue is controversial. In this sense, e.g., see *ibid.*, at 31; Lorenz, in *Münchener Kommentar* (4th edn, 2004), iii, Vor § 474 BGB, para. 19.

[176] Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002, No. 3045).

[177] See, further, Arnold and Unberath, *supra* note 172, at 377 and 382.

two-pronged strategy. On the one hand, in individual cases it has required the national courts to apply their own law as far as conceivably possible in the light of the wording and purpose of the relevant Directive. On the other hand, if an abstract review of compliance with the Directive is called for, the Court has considerably tightened the requirements as to correct and full implementation. The examples discussed above indicate that it is difficult for the Member State to convince the Court that it has given full effect to the Directive in question, if the implementing measures do not transpose the Directive word for word. The 'carbon copy' method is thus clearly the safest way to implement Directives.[178] One cannot deny that in such cases the Court is faced with a difficult task: making sure that Directives are fully complied with while also maintaining flexibility for Member States in accommodating the aims of Directives within the national legal system. However, diminishing the discretion of Member States in this drastic fashion undermines the very essence of Directives, the very reason why they exist as a means of legislation, namely flexibility.

We would not go as far as to suggest that Directives should not 'survive' in this field.[179] It must be stressed once again that Directives can be a useful Community legislative instrument where the subject matter is complex and the differences between the legal systems of the Member States are considerable. Yet, in our view the Court has gone too far in its endeavour to give Directives *effet utile* and at times unnecessarily interfered with the exercise of the discretion accorded to Member States by Directives. The imminent need to police the implementation of the Consumer Sales Directive will undoubtedly provide a series of test cases for the future approach of the ECJ. It is to be hoped that a more flexible attitude will prevail than in relation to the implementation of other consumer Directives.[180] It must be remembered that Directives come at a price. It is the price, as the present chapter has tried to show, of considerably complicating the legislative process by requiring action at different levels and in different Member States (as well as adding another layer of complexity to the task faced by national courts in interpreting and applying the law in the case at hand). If the flexibility of Directives is not achieved in practice then these drawbacks may well outweigh the advantages. Regulations might then prove to be the better instrument of harmonization.[181] This would not only

[178] And may explain the UK's penchant for this approach via numerous statutory instruments, although this does create difficulties of overlapping measures protecting substantially similar interests (e.g. the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999: see Law Commission and Scottish Law Commission, *supra* note 167).

[179] See the thought-provoking article by Weir, 'Difficulties in Transposing Directives' [2004] *ZEuP* 595.

[180] See, further, the ECJ's case-law on the implementation of the Product Liability Directive (85/374/EEC, OJ 1985 L 210/29), such as Case C-52/00, *Commission* v *France* [2002] ECR I-3827 and Case C-154/00, *Commission* v *Greece* [2002] ECR I-3879, discussed in Weir, [2004] *ZEuP*, at 601 ff.

[181] In this sense, see also Kieninger, 'Koordination, Angleichung und Vereinheitlichung des Europäischen Vertragsrechts' [2004] *Schweizerische Zeitschrift für internationales und europäisches Recht*

free up legislative resources at the national level but also allow the Community institutions to focus upon bringing the meaning of its legislation into the open, rather than having to chase after any deviation (real or apparent) between the different levels of legislation. Both sets of resources, needless to say, are in short supply.

Considering the merits and demerits of the different categories of legislative instruments at Community level is all the more important in the light of the current wholesale revision of the *acquis communautaire* in the field of private law and the ambitious plans for further harmonization. In the year 2001, the European Commission launched a process of consultation about the way in which 'problems resulting from divergences between national contract laws' should be dealt with at the European level.[182] In the subsequent 'Action Plan' for 'a more coherent European contract law',[183] the Commission identified three areas in which measures were called for: first, to increase the coherence of the EC *acquis* in the area of contract law; secondly, to promote the elaboration of EU-wide general contract terms; and, thirdly, to examine further whether problems in the European contract law field may require non-sector-specific solutions, such as an optional instrument. Central to this (by all accounts ambitious) project of harmonization of contract law is the Common Frame of Reference (CFR), which will contain definitions of legal terms, fundamental principles and model rules of contract law. Its purposes are manifold.[184] It suffices here to mention the two functions that have an immediate impact upon secondary legislation. The CFR will provide a 'toolbox' for the Commission itself when presenting proposals for future legal instruments in the area of contract law and in reforming the existing legislation. In the view of the Commission, national legislators should use the CFR when transposing EC Directives in the area of contract law into national legislation and should also draw on the CFR when enacting legislation in areas of contract law that are not regulated at Community level. A great number of the harmonization measures affecting contract law are what one could call 'consumer protection laws'. It comes as little surprise, therefore, that an integral part of the sweeping revision process envisaged in the 'Action Plan'[185] is to make an assessment of the effectiveness and quality of measures that aim to protect the consumer.[186] It is suggested that the revision ought to include an inquiry into

483, at 506. *Cf.* Tröger, 'Zum Systemdenken im europäischen Schuldvertragsrecht' [2003] *ZEuP* 525, at 536–8, for further criticism as to the usefulness of Directives.

[182] Communication from the Commission to the Council and the European Parliament on European Contract Law, 11 July 2001, COM(2001)398 final, at 7.

[183] Communication from the Commission to the European Parliament and the Council, 12 Feb. 2003, COM (2003)68 final.

[184] See Communication from the Commission to the Council and the European Parliament, 'European Contract Law and the Revision of the *Acquis*: The Way Forward', 11 October 2004, COM(2004)651 final, at 2–4.

[185] *Ibid.*, at 3–4; COM(2003)68 final, *supra* note 183, at 19.

[186] See the (lengthy) list of relevant 'consumer' Directives in *supra* note 3. See, also, the comparative discussion of some of these Directives and their national implementation from the perspectives of German and English law in Markesinis, Unberath, and Johnston, *supra* note 162.

whether the present regime of Directives remains faithful to the idea of flexibility. If this is not the case, it might be better to bring about the intended reform by means of Regulations. Whatever the developments in legislative technique, the importance of the impact made by the ECJ upon the interpretation and application of EC private law principles in the Member States will continue to be a growing and fruitful field for further study and research. At the same time, this chapter has tried to show that the legislative techniques used, both at EC and national level, have a significant impact upon the nature of the ECJ's contribution to this process, both to date and for the future.