

## THE DOUBLE-HEADED APPROACH OF THE ECJ CONCERNING CONSUMER PROTECTION

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### 1. Introduction

The extent to which consumers are to be “protected” is part of the larger debate on how interventionist States ought to be. Whatever background views on political theory one may hold, in the EU of today it seems clear that fears that consumers, as the largest group in the economy, are “not heard”<sup>1</sup> are unwarranted. The Council first emphasized the importance of consumer interests for the European legal system in 1975.<sup>2</sup> Since then, consumer protection has been reinforced at EC level on innumerable occasions.<sup>3</sup> Today, one could even argue that the pendulum has swung to the other extreme and “consumerism” has become the dominating issue of harmonization. As the Commission recently observed: “[t]he development of consumer policy at EU level has been the essential corollary of the progressive establishment of the internal market”.<sup>4</sup> Understanding the interrelation between consumer policy and the internal market is a central aim of this paper. The weight given to consumer interests in the case law of the ECJ is of crucial importance in this respect.<sup>5</sup>

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1. As President John F. Kennedy warned 40 years ago in his famous Special Message to the Congress on Protecting the Consumer Interest, 15 March 1962.

2. Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, O.J. 1975, C 92/1.

3. E.g. Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, O.J. 1981, C 133/1; Council Resolution of 23rd June 1986, O.J. 1987, C 3/2; Green Paper on European Union Consumer Protection, COM(2001)531 final; Consumer Policy Strategy 2002–2006, COM(2002)208 final; Decision No 1926/2006/EC of the European Parliament and the Council of 18 Dec. 2006 establishing a programme of Community action in the field of consumer policy (2007–2013), O.J. 2006, L 404/39. A separate Commission DG deals with consumer issues (“Health & Consumer Protection”).

4. COM(2002)208 final, p. 6.

5. See more generally as to the importance of the ECJ for the harmonization of private law, Johnston and Unberath, “Law at, to or from the centre? The European Court of Justice and the

In relation to negative harmonization, we submit that the ECJ is sceptical of any restrictions on trade at national level that are founded on consumer protection. While recognizing consumer protection as a fundamental value of EC law, the Court does not hesitate to unmask interventionist legislation at national level as being in the end simply unnecessary to achieve that legislation's stated goal, and thus contrary to the principle of proportionality. The case law on positive harmonization, by contrast, could not be more different in spirit. Challenges to the legal validity of EC consumer protection measures are virtually absent<sup>6</sup> from the EC legal landscape. The Court allows the Community legislation "a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments".<sup>7</sup> Moreover, on the whole the Court has been at pains to grant the consumer protection directives a wide scope of application and – crucially – to give its provisions the most interventionist reading. While this finding of a diverging case law can in our view easily be demonstrated by contrasting the case law in the field of negative harmonization with that in the areas of positive harmonization, its explanation will be less obvious and the resolution of the tension between these differing premises will be extremely controversial, though of primary importance for any future reform of this area of the law.

In what follows we will give a brief outline of the significance of consumer protection for EC law (below, 2.) before we examine the case law of the ECJ in the areas of both negative (below, 3.) and positive harmonization (below, 4.) concerning consumer protection. Our analysis concentrates on the recent case law (after 2001)<sup>8</sup> but where necessary older cases will also be discussed.

Harmonisation of Private law in the European Union", Ch. 5 in Cafaggi (Ed.), *The Europeanization of Private Law* (Collected Courses of the Academy of European Law, Oxford, 2006).

6. Case C-376/98, *Germany v. European Parliament and Council (Tobacco Advertising I)*, [2000] ECR I-8419, being the only successful challenge so far, and one which succeeded on the question of the appropriate legal basis for such measures. The current Tobacco Advertising Directive (2003/33/EC O.J. 2003, L 152/16), reformulated and re-adopted after this judgment, survived a further legal challenge by Germany: Case C-380/03, *Germany v. European Parliament and Council*, judgment of 12 Dec. 2006, nyr. See Ludwigs, annotation in 44 CML Rev. (2007), 1159–1176.

7. Case C-344/04, *International Air Transport Association, European Low Fares Airline Association, Hapag-Lloyd Express GmbH v. Department of Transport*, [2006] ECR I-403, para 80. The case concerned Council Regulation (EC) No 2027/97 of 9 Oct. 1997 on air carrier liability in the event of accidents (O.J. 1997, L 285/1) as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (O.J. 2002, L 140/2) ("Regulation No 2027/97"). The Regulation was held to satisfy the proportionality test.

8. For the period until 2000, see the insightful analysis by Stuyck, "European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?", 37 CML Rev. (2000), 367–400.

In a final section (below, 5.), we seek to evaluate the present state of affairs. For reasons of space, in the section on negative harmonization we have concentrated on cases in which consumer protection was relied upon by Member States and, in the section on positive harmonization, on cases involving those Directives concerned mainly with the economic interests of consumers.

## 2. The internal market and consumers

### 2.1. Consumer protection – justifying regulation

In order to understand the Community's legislative approach to consumer protection it is useful briefly to recapitulate the role of the ECJ during the founding years of EC law. In landmark decisions on the nature of the EC Treaty and the principle of free movement of goods, the ECJ assigned itself a crucial role in establishing and developing an integrated market.<sup>9</sup> In a first step, the Court ascribed direct effect to unconditional and sufficiently precise provisions of the Treaty<sup>10</sup> and established the supremacy of such directly effective EC law over inconsistent national law.<sup>11</sup> Since this reasoning applied in particular to the provisions on the four basic freedoms, removing obstacles to intra-Community trade no longer required corrective legislative measures. Second, the Court considerably extended the scope of application of the four freedoms.<sup>12</sup> Member States were required to defend trade rules having a cross-border effect even if they did not discriminate on the basis of the origin of a product. This judicially controlled process of policing national barriers to intra-Community trade is known as “negative harmonization”.<sup>13</sup> Its importance for the internal market is mainly because, prior to the SEA in 1987, the legislative process was often paralysed due to the requirement of unanimity in the Council.<sup>14</sup>

9. Jacobs, “The Evolution of the European Legal Order”, 41 CML Rev. (2004), 303–309.

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

11. Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

12. First in the *Dassonville* case concerning Art. 28 (ex 30) EC. Case 8/74, *Procureur du Roi v. Dassonville*, [1974] ECR 837, para 5: “All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to trade restrictions”. On the other freedoms, see *infra* note 40.

13. On this topic, see generally Slot, “Harmonisation”, 21 ELRev. (1996), 378–387 and Dougan, “Minimum Harmonization and the Internal Market”, 37 CML Rev. (2000), 853–885.

14. On which see e.g., Arnall et al., *Wyatt & Dashwood's European Union Law* (2006), chs. 2 and 3; Weiler, “The Transformation of Europe”, 100 Yale LJ (1991), 2403–2483.

While positive harmonization introduces certain standards believed to be reasonable across the Community, negative harmonization rules out certain national standards as being excessive. In their place, trade is allowed to flow freely. Negative harmonization is thus naturally biased in favour of trade and leads to *deregulation* over time.<sup>15</sup> If even discriminatory measures may be justified (Art. 30 EC), Member States may *a fortiori* uphold certain indistinctly applicable rules. The Court recognized this and extended the range of policies that could be relied upon to *justify* such indistinctly applicable trade restrictions in the very same decision in which the mutual recognition principle was introduced: *Cassis de Dijon*.<sup>16</sup> Defining the threshold for compatibility with the Treaty has been a delicate task ever since. According to the *Cassis* test (also known as the “rule of reason”)<sup>17</sup> a national law caught by Article 28 EC is justified if it is proportionate in relation to a so-called “mandatory requirement”.<sup>18</sup> And here we are back to our starting point: consumer protection in its widest sense is the most important objective of the *Cassis* caveat to free movement.<sup>19</sup>

The Commission<sup>20</sup> supported the *Cassis* ruling in its response and stated the far-reaching effect of *Cassis* on the legislative activity of the Community in the following terms:<sup>21</sup> “[t]he Commission’s work of harmonization will henceforth have to be directed mainly at national laws having an impact on the functioning of the common market where barriers to trade to be removed arise from national provisions which are admissible under the criteria set out by the Court”. This approach was continued with the important White Paper

15. For a succinct discussion, see Craig and de Búrca, *EU Law*, 3<sup>rd</sup> ed. (OUP, 2003), pp. 638–639, 672–676.

16. Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] ECR 649, para 8. The principle of mutual recognition recognized by the Court in 1979 demands that goods lawfully marketed in one Member State are not to be made subject to more stringent regulation in another Member State. This does not mean, however, that the lowest regulatory denominator necessarily prevails.

17. Although perhaps more precisely understood as an “objective justification” test: on this terminology (albeit in the competition law field), see Whish and Sufrin, “Article 85 EEC and the Rule of Reason”, 7 YEL (1987), 1–38.

18. The other freedoms apply a similar concept, but often use different nomenclature: e.g. an “imperative reason in the public interest”: see e.g. Spaventa, “On discrimination and the theory of mandatory requirements”, 3 CYELS (2000), 457–478.

19. Consumer protection was not referred to in Art. 30 EC. In this context it should be recalled, however, that the Council had underlined its crucial importance in 1975, shortly before the judgment in *Cassis*, *supra* note 16.

20. Which had foreshadowed the Court’s broad approach: see Directive 70/50/EEC, O.J. 1970, L 13/29.

21. Communication of 3 Oct. 1980, O.J. 1980, C 256/2.

of 1985 on the “completion” by 1992 of the internal market.<sup>22</sup> The Commission confined thus positive harmonization to those rules which were – generally speaking – admissible under the *Cassis* test.<sup>23</sup> According to the list of mandatory requirements under *Cassis* such positive harmonization was to be accordingly directed towards the protection of public health, the fairness of commercial transactions and the defence of the consumer. The statement: “if certain trade restrictions are allowed to persist they should at least be uniform across the Community” forms the guiding principle of this mass of legislation.

As a consequence, the Court’s deregulation of national barriers to trade has been supplemented with an ever-increasing body of universally applicable positive Community legislation on consumer protection. Directives protecting consumers between 1975<sup>24</sup> and 1987<sup>25</sup> were thus largely prompted by the case law on national barriers to trade. They all aim at least partially at harmonizing product- or marketing-related requirements protecting the safety and health of consumers or their economic interest.<sup>26</sup> Product labelling requirements, to give an example, have been a recurrent theme in the case law of the ECJ right up until the present day. Hence, they lend themselves to positive harmonization.<sup>27</sup>

22. Completing the Internal Market, White Paper, COM(85)310 final.

23. The Commission was thus able to focus on – in its view – more deserving areas of harmonization, leaving it to the Court to deal with the every day policing of unnecessary and unreasonable barriers to intra-Community trade.

24. The year of the Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy (14 April 1975), O.J. 1975, C 92/1.

25. When the Single European Act (hereinafter SEA) was agreed upon.

26. E.g. Council Directive 75/106/EEC of 19 Dec. 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids (O.J. 1975, L 42/1); Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (O.J. 1976, L 262/201); Council Directive 84/450/EEC of 10 Sept. 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (O.J. 1984, L 250/17); Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (O.J. 1985, L 210/29); Council Directive 87/102/EEC of 22 Dec. 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (O.J. 1987, L 42/48); Council Directive 85/577/EEC of 20 Dec. 1985 to protect the consumer in respect of contracts negotiated away from business premises (O.J. 1985, L 372/31).

27. See e.g. Council Directive 79/112/EEC of 18 Dec. 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (O.J. 1979, L 33/1), as amended.

This interplay between negative and positive harmonization explains why Article 94 (ex 100) EC served as a legal basis for consumer measures: in the light of *Cassis* such legislation is meant to serve the internal market by harmonizing legitimate obstacles to trade. Yet, it is not obvious that the functioning of the internal market requires that Community law completely replaces national law and also applies to wholly internal situations. As was explained, the basic freedoms of the Treaty are – as a general rule – confined to cross-border situations. The rules on the free movement of goods, for instance, serve to remove obstacles to *inter-Member State* trade: this is what provides the *Community* dimension which activates the application of the EC rules. If negative harmonization is limited to cross-border situations and the purpose of positive harmonization is to create uniform limits to the free movement of goods and services, one would expect that such legislation was limited in scope to cross-border situations and would not apply to purely domestic issues. Consumer protection is a corollary of the internal market and the internal market is different from the domestic market.<sup>28</sup> However, from the outset measures of consumer protection were not limited to cross-border situations.<sup>29</sup> Yet if Article 94 (or now 95) EC is invoked as a basis for positive harmonization, then an additional argument is required to justify a universal scope of application. This is not the place to evaluate whether this additional argument can be provided but merely to state an obvious difference between negative and positive harmonization.<sup>30</sup>

## 2.2. *The status of consumer protection today*

It is important to realize that, in this strategy of positive harmonization, consumer protection is a corollary, a “mere” by-product, of the internal market. The SEA confirmed this and recognized consumer protection as a legitimate goal of the Community within the context of the internal market: Article 95

28. This does not mean that these rules may lack any *influence* upon the way in which such matters might (best) be developed at *national* level: certain spillover effects are clearly observable and may even be desirable from the perspective of the regulatory compliance burden imposed upon private parties. These issues are outlined in Johnston and Unberath, op. cit. *supra* note 5.

29. The Commission, however, is considering such an option in relation to some of the consumer directives in Green Paper on the Review of the Consumer *Acquis*, COM(2006)744, p. 14: Question A2, Option 2 (“cross-border contracts only”).

30. For the expression of some scepticism on the appropriate breadth of EC competence in this field, see the various contributions of Weatherill, e.g.: “The Commission’s options for developing EC consumer protection and contract law: Assessing the constitutional bases”, (2002) EBLR, 497–515, and “Why object to the harmonization of private law by the EC?”, 12 ERPL (2004), 633–660.

(ex 100) required the Commission in its proposals *directed at the functioning of the internal market* and regulating health, safety, environmental and consumer protection to “take as a base a high level of protection”. Arguably, this had already been the policy before the entry into force of the SEA. At any rate, subsequent legislative measures followed the same policy pattern as those before (often enough simply amending earlier legislation): protecting safety and health,<sup>31</sup> providing information<sup>32</sup> or safeguarding the economic interests of consumers.<sup>33</sup>

The Treaty of Maastricht, by contrast, provided for a *distinct* legal basis for specific Community measures in the field of consumer protection (later amended by the Treaty of Amsterdam).<sup>34</sup> Article 153(3) (ex 129a) EC now provides that the Community shall contribute to consumer protection through: “(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States”.<sup>35</sup> Accordingly, consumer protection has moved up to the rank of a fundamental constitutional value of EC law. However, in spite of the increased emphasis accorded to consumer protection, little has changed in the overall approach. Thus, to our knowledge, not a single legislative measure has so far been solely based upon Article 153(3)(b) EC. In any event, the bulk of legislation has continued the journey indicated in *Cassis* and the Commission’s White Paper of 1985 and is aimed at harmonizing (potentially) legitimate obstacles to trade.<sup>36</sup>

31. E.g. Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys (O.J. 1988, L 187/1).

32. E.g. Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users, (O.J. 1990, L 185/16); Council Directive 90/496/EEC of 24 Sept. 1990 on nutrition labelling for foodstuffs (O.J. 1990, L 276/40); Commission Regulation (EEC) No 1014/90 of 24 April 1990 laying down detailed implementing rules on the definition, description and presentation of spirit drinks (O.J. 1990, L 105/9).

33. E.g. 92/295/EEC: Commission Recommendation of 7 April 1992 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (distance selling) (O.J. 1992, L 156/21).

34. See for a short historical account Lurger in Streinz (Ed.), *EUV/EGV* (München 2003), Art. 153 EGV Rn. 1 et seq.; Stuyck, *supra* note 8, 377–388.

35. In addition, consumer protection was added to the list of values pursued by the EU in Art. 3(t) EC. Art. 153(1) EC establishes a “right” of consumers to information, education and to organize themselves in order to safeguard their interests, while health, safety and economic interests are to be taken account of as “interests” of consumers though little seems to follow from this distinction.

36. For an overview of legislation in force in the field of consumer protection, see: eur-lex.europa.eu/en/repert/1520.htm#152040. E.g. economic interests: Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (O.J. 1993, L 95/29); information requirements: Commission Directive 94/54/EC of 18 Nov. 1994 concerning the compulsory indication



Why is this so? One could speculate that the political agenda has been slow to emerge or that other matters have distracted the Commission's attention. There is, however, another more fundamental reason for this reluctance to move away from the connection with the internal market. The primary task of the EU is guaranteeing the four fundamental freedoms. Consumer protection is relevant, but relevant only in this context, namely as a ground to justify rules that restrict trade. It is not the task of the EU (or for that matter any Member State) directly to satisfy consumer needs but rather to ensure that consumers are enabled to participate uninhibited in the market. Consumer protection is called for when and where the market is not such as to ensure free choice among competing products and services. Consumer protection is thus one reaction to market failure, competition law another.<sup>37</sup> In a Community which is market-driven and which originates in the creation of a free trade zone, consumer protection is bound to be of merely auxiliary nature and to remain a *corollary* to the internal market. There is nothing wrong with that. This view of consumer protection may be modest and not easy to square with the recent revival of consumerism, but it is one worth pursuing if private autonomy is to remain the basic value of an enlarged EU.

The recent case law of the ECJ in this field, to which we now turn, confirms the basic soundness of this position. The Court has continued to police national trade rules by applying the *Cassis* approach and deregulation is very often the outcome of the proceedings. Many cases that have reached the Court have concerned negative harmonization. The constant flow of cases reveals a tendency to excessive or paternalistic regulation at national level. The number of cases in which positive harmonization measures have come before the Court for interpretation is also considerable and rising. This was to be expected since the number of legislative measures has dramatically increased over the years. In the field of the consumer *acquis communautaire*, the existence of partly overlapping and sometimes inconsistent measures of secondary legislation has prompted the Commission to initiate a wholesale revision process in order to increase consistency and consolidate the relevant legislation.<sup>38</sup> The first early studies have already been

on the labelling of certain foodstuffs of particulars other than those provided for in Council Directive 79/112/EEC (O.J. 1994, L 300/14); Commission Regulation (EEC) No 1848/93 of 9 July 1993 laying down detailed rules for the application of Council Regulation (EEC) No 2082/92 on certificates of specific character for agricultural products and foodstuffs (O.J. 1993, L 168/35).

37. Stuyck, *supra* note 8, 368–377, drawing on Drexler, *Die wirtschaftliche Selbstbestimmung des Verbrauchers* (Tübingen, 1998).

38. Communication from the Commission to the Council and the European Parliament on European Contract Law, 11 July 2001, COM(2001)398; however, the recent Green Paper, *supra* note 29, has a much narrower scope.



published.<sup>39</sup> Against this background, it will be interesting to inquire whether the Court has been successful in delimiting the scope of positive harmonization measures, and has interpreted them in a methodologically sound way by, *inter alia*, giving the provisions a meaning that can be easily applied in proceedings before Member State courts.

### 3. Negative harmonization

The story begins with free movement of goods and the seminal cases of *Dassonville* and *Cassis* referred to above, the reasoning of which was later to be transferred to the other freedoms.<sup>40</sup> The protection of the health and safety of persons, as well as consumer protection more generally, are the most relevant grounds of justification, i.e. the most important “mandatory requirements” under the *Cassis* test.<sup>41</sup> The burden of proof in relation to the justification lies with the Member State.<sup>42</sup> Already this procedural issue indicates the tendency of the case law on negative harmonization: in the great majority of (at any rate recent) cases, Member States have failed to establish the justifiability of their trade-inhibiting rules. This extensive power to scrutinize (and, ultimately, require the disapplication of) national laws which are on their face indistinctly applicable creates its own difficulties: while it is common ground that Member States should not need to justify rules which are not a hindrance to intra-Community trade and that the *Dassonville* formula is too wide, there is considerable disagreement among commentators as to which type(s) of rules hinder trade.<sup>43</sup> The ECJ placed a limit on *Dassonville* as late as 1993 in the seminal *Keck* case:<sup>44</sup> national provisions restricting or prohibiting certain

39. For a comprehensive comparative study, see Schulte-Nölke, Twigg-Flesner and Ebers (Eds.), *EC Consumer Law Compendium*, 12 Dec. 2006, available at [www.eu-consumer-law.org](http://www.eu-consumer-law.org).

40. The leading cases are: Case C-76/90, *Säger v. Dennemeyer & Co. Ltd.*, [1991] ECR I-4221 (provision of services, Art. 49 EC); Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165 (right of establishment, Art. 43 EC); Case C-415/93, *URBSFA and UEFA v. Bosman*, [1995] ECR I-4921 (free movement of workers, Art. 39 EC).

41. Stuyck *supra* note 8, at 389

42. Recently confirmed in Case C-14/02, *ATRAL SA v. Belgium*, [2003] ECR I-4431, para 69.

43. For an overview, see (e.g.) Spaventa, “From *Gebhard* to *Carpenter*: towards a (non-) Economic Constitution”, 41 CML Rev. (2004), 743, 744–747; Craig and de Búrca, *supra* note 15, p. 641–642; Weatherill, “After *Keck*: Some Thoughts on how to Clarify the Clarification”, 33 CML Rev. (1996) 885, 896–897.

44. Joined Cases Case C-267 & 268/91 *Keck and Mithouard* [1993] ECR I-6097, para 16. In *Keck* a French provision prohibiting resale at a loss was regarded as such a selling arrangement.

selling arrangements which apply to all relevant traders operating within the national territory (first condition) and affect in the same manner the marketing of domestic products and of those from other Member States (second condition) would not be such as to hinder trade.<sup>45</sup> In the following, we will examine the recent case law of the ECJ as far as it concerns national provisions which aim in some form or other to protect consumers. Consumer protection is most often relied upon in relation to the free movement of goods, so it is this fundamental freedom upon which we therefore focus.<sup>46</sup>

The deregulatory effect of the rules on the free movement of goods, especially the rule of reason, is forcefully demonstrated by the important *DocMorris* case.<sup>47</sup> It concerned German legislation restricting internet sales and

45. The Court subsequently found provisions concerning the place and times of sale of certain products and advertising of those products as well as certain marketing methods to be provisions governing selling arrangements, Case C-292/92 *Hünormund and Others v. Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787 (pharmacies not allowed to advertise para-pharmaceutical products); Joined Cases Case C-401 & 402/92, *Tankstation 't Heukske and Boermans*, [1994] I-2199 (compulsory closing of petrol station at a certain time). In Joined Cases C-34–36/95, *Konsumentombudsmannen v. De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, [1997] ECR I-3843 and Case C-405/98, *Konsumentombudsmannen v. Gourmet International Products*, [2001] ECR I-1795, selling arrangements were held to have a differential impact for domestic and importuning traders. Both cases concerned total bans on advertising for certain products. In Case C-254/98, *Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH*, [2000] ECR I-151, para 24, a rule requiring a permanent establishment in the district where a baker, butcher or grocer made sales on rounds was held likelier to affect traders from other Member States.

46. See also Stuyck, *supra* note 8, 389–392. Few cases concerning these other freedoms between 2001 and 2006 raise the issue of consumer protection. Consumer protection was at stake in, *inter alia*, Case C-422/02, *Caixa-Bank France v. Ministère de l'Économie, des Finances et de l'Industrie*, [2004] ECR I-8961. In this case, French legislation prohibiting the payment of remuneration on sight accounts was found not to be necessary to ensure consumer protection, para 21. Consumer protection also played a central role in the recent spate of gambling cases before the ECJ, discussed in detail by Hatzopoulos and Do, “The case law of the ECJ concerning the free provision of services: 2000–2005”, 43 CML Rev. (2006), 923, 969–972.

47. Case C-322/01, *Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval*, [2004] ECR I-14887 (Full Court). Cf. Ruffert, “Internet-Apotheke und Dogmatik der Grundfreiheiten”, (2005) *Jura*, 258, 263. The case is noteworthy in two other respects. It illustrates the Court's approach to selling arrangements. In the case at hand the Court found that the prohibition on the sale by mail order of authorized medicine outside pharmacies did not affect the sale of domestic medicines in the same way as it affected the sale of those coming from other Member States. Hence it impeded access to the market to pharmacies established outside Germany and thus despite being a selling arrangement constituted a measure having an equivalent effect to quantitative restrictions (hereinafter “MEQRs”); Case C-322/01, *DocMorris*, paras. 74–75. See for analysis Lang's annotation in 42 CML Rev. (2005), 189, 201; Streinz, “Das Verbot des Apothekenversandhandels mit Arzneimitteln”, (2003) *EuZW*, 37, 40; Koch, case note, (2004) *EuZW*, 50. Another issue was whether a national provision implementing a Directive was subject to the rules on free movement. The Court followed earlier rulings in clarifying that as a

advertising by mail order of medical products for human use by pharmacies established in another Member State: the national prohibition, though founded upon a concern of utmost importance, namely necessary for the protection of human life and health in the sense of Article 30 EC, nevertheless was held to be disproportionate in some respects. The Court came to the conclusion that the restrictions on the marketing of medicine outside pharmacies could be justified in relation to prescription medicine<sup>48</sup> but they were excessive in relation to non-prescription medicines.<sup>49</sup> The case further illustrates that deregulation is not necessarily a source of conflict with the Member State. In a pre-emptive move shortly before the Court's judgment was handed down, the German legislature had liberalized the medicines market and had allowed the internet sale of authorized medicine under certain conditions even if it required prescription: in other words, the deregulation went further than the judgment actually required!<sup>50</sup>

In other recent cases the Court has adopted a more cautious approach to relative market access and justification with a view to consumer protection by leaving the final determination of these issues to the national court.<sup>51</sup> Na-

matter of principle such legislation did not constitute a MEQR (para 53, with references). See to the same effect Case C-463/01, *Commission v. Germany*, [2004] ECR I-11705, para 55.

48. Mainly because of the need to be able to check the authenticity of doctor's prescriptions and to ensure that the medicine is handed over to the customer himself, *DocMorris*, *supra* note 47, paras. 74–75, para 119.

49. *Ibid.*, para 112.

50. Gesetz zur Modernisierung der gesetzlichen Krankenversicherung, BGBl. 2003 I-2190.

51. Case C-20/03, *Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong*, [2005] ECR I-4133 para 31; the Advocate General not only regarded the Belgian law requiring prior administrative authorization for the sale of periodicals through itinerant activities as being caught but also to be clearly disproportionate, Opinion, paras. 88, 90, 73. Whether the activity in question was covered by Directive 85/577/EEC of 20 Dec. 1985 to protect the consumer in respect of contracts negotiated away from business premises was not discussed by the Court, presumably because A.G. Léger and the Commission differed in this respect: Opinion para 29. In Case C-441/04, *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt* [2006] ECR I-2093, the Court confirmed its judgment in *Burmanjer*. This case concerned an Austrian law prohibiting the doorstep selling of silver jewellery. This time, the applicability of Directive 85/577/EEC of 20 Dec. 1985 to protect the consumer in respect of contracts negotiated away from business premises was not in doubt and the Court confirmed that, first, the Directive (being a minimum harmonization measure) did not preclude Member States from prohibiting the marketing method of doorstep selling and, second, such legislation needed to comply with Art. 28 EC, *ibid.* paras. 11–12; cf. also Art. 153(5), sentence 2 EC. As in *Burmanjer*, the Court did not regard the information available to be sufficient in this regard and entrusted the task of applying the second condition of the rule in *Keck* to the referring national court, *ibid.* para 25. Furthermore, the Court did not pre-determine the issue of justification should the national law be caught, but merely mentioned the guiding principle: whether the national law was proportionate to achieve consumer protection depended foremost upon whether the protection afforded by the Directive could be regarded as sufficient in relation to doorstep selling of jewellery, *ibid.* paras. 27–29.

tional courts may, of course, be more sympathetic to the arguments advanced by the national legislature in favour of national rules impeding market access than the ECJ.<sup>52</sup> In the light of these rulings and *DocMorris*, the distinction between selling arrangements and product-related requirements has been of less significance than might have appeared at first sight. The Court has moved further away from an “all or nothing” approach. The emphasis is shifted to the caveats added to the *Keck* exception, i.e. the requirement that the provisions in question affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. If this is not the case, the national law re-enters the sphere of scrutiny under the EC free movement rules. On the whole, however, these post-*Cassis* qualifications do not severely limit the range of applicability of the basic freedoms but rather enable the Court to scrutinize the relative impact of the national rule upon market access and evaluate closely whether national legislation affects imports more than domestic products. The Court’s desire to secure a broad scope of application for primary legislation and accordingly to safeguard its power to police national market regulation is illustrated by cases which – at least at first sight – concerned purely internal situations.<sup>53</sup>

In a significant number of recent cases, the Court was asked further to clarify the conditions under which national labelling and marketing requirements are compatible with the Treaty. Such provisions affect the product itself and are therefore MEQRs according to the rule in *Keck*. As a consequence, the Court had to decide whether the national law in question was proportionate

52. The Court is clearly aware of this danger. In Case C-416/00, *Tommaso Morellato v. Comune di Padova*, [2003] ECR I-9343 the Court held that whether the national law in question affected imported products more than domestic products was for the national court to determine, but it hastened to add that if the measure were found by the national court to discriminate then it would not be justified, *ibid.* paras. 36, 42.

53. Cf. the much-discussed Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, [2004] ECR I-3025; see de Cecco, “Room to move? Minimum harmonization and fundamental rights”, 43 CML Rev. (2006), 9; Stuyck annotation, 41 CML Rev. (2004), 1683. For an overview of recent cases concerning measures internal to Member States, see Oliver and Roth, “The internal market and the four freedoms”, 41 CML Rev. (2004), 407, 429–434. *Karner* concerned an Austrian law which restricted, in the interest of consumers, the advertising of goods stemming from an insolvent company. This was found to be a selling arrangement within the meaning of the rule in *Keck* but was nevertheless subjected to control under Art. 10 ECHR, para 49. The case is anomalous: first, due to the purely internal nature of the claim, the admissibility of the reference was at least doubtful. Second, it remains unclear whether and to what extent the principle of freedom of expression is applicable in addition or as an alternative to the rules on the free movement of goods. Of course, the overall result in minimum harmonization cases is the same: the Member State is required to justify the more stringent measures of consumer protection. Also, the type of justification available seems to be similar in both types of cases: in relation to the commercial exercise of the freedom of expression, consumer protection is a valid reason for interference with that freedom.

to achieving the protection of the consumer and/or public health. The persistence of cases of this type is not due to a need for clarification of the guiding principles but a result of the desire of the Member States to protect real or perceived idiosyncratic consumer habits or to set up rules that achieve a high standard of safety. The leading case in this respect is the *Beer Purity* case.<sup>54</sup> This case is typical of the way in which national rules that aim to protect consumers are defended (and the reasons why this defence can crumble in the face of the onslaught from the free movement imperative). Usually, the Member State stipulates that a generic product name may only be used under certain narrow conditions. The justification normally comprises an argument from consumer expectations and an argument derived from health risks. The Court finds both arguments weak. Measures of consumer protection may not prohibit the marketing of a product simply in order to reinforce real or purported local consumer habits.<sup>55</sup> According to the principle of proportionality, prohibition is an *ultima ratio* measure. A scheme of compulsory information normally suffices to protect the consumer and is less restrictive.<sup>56</sup> The second popular argument in favour of product “purity” requirements is that they are necessary to protect the health of consumers. While marketing can be prohibited if public health is at stake, a ban is justified only if the *specific* features of the product pose a real danger; if a sweeping ban is put in place, the principle of proportionality requires that the trader can easily resort to a

54. Case 178/84, *Commission v. Germany (Beer purity)*, [1987] ECR 1227. The case concerned a German law according to which a product could only be sold as “beer” if it complied with certain requirements purportedly protecting consumers. Another important case concerning the labelling of products is the *Clinique* case: Case C-315/92, *Verband Sozialer Wettbewerb v. Clinique Laboratories and Estée Lauder*, [1994] ECR I-317. In this case a German law prohibiting the use of the name “Clinique” on cosmetic products on grounds of consumer protection constituted a MEQR and was not justified by consumer protection. Since the goods were not sold in pharmacies there was no indication in the view of the Court that consumers would believe that goods sold under this name had medical properties despite the fact that the name of the product had such connotations in the German language (“Klinik” meaning hospital). One can object to this decision that the Court did not take seriously the specific features of the German market and it rests on what Weatherill has rightly called “majoritarianism”, “Recent case law concerning the free movement of goods”, 36 CML Rev. (1999), 51, 69.

55. There may well be a parallel here with the cases under Art. 90 EC concerning national internal taxation measures: see e.g. Case 170/78, *Commission v. United Kingdom (Beer and Wine)*, [1980] ECR 417 and Case 168/78, *Commission v. France (Whisky and Cognac)*, [1980] ECR 347. See also the issue of established national consumer preference in the context of the Swedish alcohol monopoly in Case C-405/98, *Konsumentombudsmannen v. Gourmet International Products*, [2001] ECR I-1795.

56. Case 178/84, *Beer purity*, para 35. The Court later refined its approach to consumer expectations regarding the features of a product, e.g. Case C-383/97, *Criminal proceedings against Arnoldus van der Laan*, [1999] ECR I-731.

procedure to clarify whether the product poses a danger.<sup>57</sup> Recent cases reveal that the Court will not hesitate to reject implausible and excessive measures which are not *strictly* necessary to protect the consumer.<sup>58</sup>

The preference for the provision of compulsory information over more severe marketing restrictions is clearly illustrated in these cases. This information prerogative presupposes that information is effective and provides the consumer with all that he needs to make an informed and unconstrained choice. Hence, this approach relies on certain assumptions regarding the cognitive and decisional skills of consumers. In most cases, these assumptions are not explicitly mentioned. Sometimes, however, as in some of these recent labelling cases, the Court unveils the features of the mysterious yet notorious benchmark consumer. Thus we learn that the “reference consumer” is the “average consumer” who, in the Court’s view, is “reasonably well informed” and “reasonably observant and circumspect”.<sup>59</sup> If the reference consumer is taken to be equipped with these skills, it is then but a small step to stipulate that compulsory information is an effective means for the protection of the consumer. At the same time, it cannot be denied that this conceptualization of the reference consumer has clear implications for national regulatory autonomy, in the sense that it deprives each Member State of the ability to adopt

57. Case 178/84, *Beer Purity*, paras. 41–53. Confirmed in many cases since, cf. e.g. Case C-420/01, *Commission v. Italy*, [2003] ECR I-6445 where the Italian Government failed to show that the prohibition on the marketing of energy drinks containing caffeine in excess of a certain limit is necessary and proportionate for the protection of public health.

58. Cf. Case C-14/00, *Commission v. Italy*, [2003] ECR I-513; Case C-12/00, *Commission v. Spain*, [2003] ECR I-459. The Commission in these cases successfully challenged the compatibility with Community law of Italian and Spanish laws prohibiting the marketing of cocoa and chocolate products under the name of chocolate if they contained vegetable fats other than cocoa butter. In Case C-358/01, *Commission v. Spain*, [2003] ECR I-3145, Spanish legislation refusing access to the Spanish market for products lawfully manufactured and marketed in other Member States under the name of “*limpiador con lejía*” (cleaner with bleach) if they contained active chlorine below a certain minimum was held to be disproportionate. Case C-30/99 *Commission v. Ireland*, [2001] ECR I-4619, concerned compulsory hallmarking and imposing certain standards of fineness. The Irish Government claimed that they were necessary to protect consumers and promote fair trading. The Court gave these considerations short shrift, paras. 32–33: a “reasonably” well-informed and observant consumer familiar with the Irish system of standards of fineness was given equivalent and intelligible information by a hallmark struck on an article of precious metal from another Member State which indicates the standard of fineness in parts per thousand. Applying reasoning very similar to that in Case C-30/99, the Court also refuted the arguments based upon the protection of expectations of consumers related to the product “gold” in two infringement proceedings against France: Case C-84/00, *Commission v. France*, [2001] ECR I-4553 and Case C-166/03, *Commission v. France*, [2004] ECR I-6535. The Court found the national labelling requirements in question to be disproportionate.

59. Case C-358/01, *Commission v. Spain*, para 53 (see also Opinion para 67). Cf. Case C-30/99, *Commission v. Ireland*, para 32. See also Weatherill op. cit. *supra* note 54, 51, 56 et seq.



national legal rules which seek to protect a wider range of consumers than merely those of reasonable circumspection.<sup>60</sup>

A related and important line of cases on consumer protection concerned national measures (totally) prohibiting the marketing of foodstuffs containing certain additives that purportedly posed a risk to public health.<sup>61</sup> As to the substance of the claims that the foodstuffs posed risks to public health, in relation to the Italian legislation the Court found that Italy had failed to prove the alleged risks,<sup>62</sup> while it took a more nuanced approach towards the French legislation in *Commission v. France* and *Greenham and Abel*.<sup>63</sup> In *Commission v. Denmark*, a prohibition on the addition of certain vitamins and minerals was found to be not proportionate since it did not sufficiently distinguish according to the level of risk for public health.<sup>64</sup> Jarvis derived from *Commission v. France*<sup>65</sup> the proposition that the burden on the Member State to prove the existence of a health risk was “not a particularly heavy one to discharge”.<sup>66</sup> With respect, in the light of the general trend of the case law the opposite conclusion seems more compelling. To our knowledge in all but one case<sup>67</sup> between 2001 and 2006, the Court was of the view that the national measure was disproportionate because it was not strictly or at least in every respect necessary to protect public health. This is not simply a coincidence but the result of a remarkably strict handling of the health derogation in Article 30 EC. This becomes even more apparent if one recalls that the Court accepts in principle that it is *for the Member State* to decide on the appropriate level of protection of human health and life and acknowledges that

60. See e.g. Weatherill, op. cit. *supra* note 54, 51.

61. Case C-24/00, *Commission v. France*, [2004] ECR I-1277, regarding national legislation exhaustively listing the nutrients which may be added to foodstuffs; Case C-95/01, *John Greenham v. Léonard Abel*, [2004] ECR I-1333 and Case C-192/01, *Commission v. Denmark*, [2003] ECR I-9693, both regarding foodstuffs to which vitamins and minerals have been added; Case C-420/01, *Commission v. Italy*, *supra* note 57; Case C-270/02, *Commission v. Italy*, [2004] ECR I-1559 regarding prior marketing authorization for foodstuffs for sportsmen and women (“energy bars”, rehydrating drinks).

62. Case C-270/02, *ibid.*, para 24; Case C-420/01, *supra* note 57, para 36.

63. Case C-24/00, *supra* note 61, para 58–66 (the national authorities successfully established the risk at least of some of the additives); *Greenham and Abel*, *supra* note 61, para 46 leaving the application to the national court.

64. Case C-192/01, *Commission v. Denmark*, *supra* note 61, para 55.

65. Case C-24/00, *supra* note 61.

66. Jarvis, 41 CML Rev. (2004), 1395, 1408.

67. Case C-366/04, *Georg Schwarz v. Bürgermeister der Landeshauptstadt Salzburg*, [2005] ECR I-10139. In this case national legislation prohibiting the sale of non-packaged confectionary from vending machines was regarded as a proportionate measure for the protection of public health, para 36.



this discretion was “particularly wide” if uncertainty as to the extent of the risk persists.<sup>68</sup>

Whether the national provisions in question really were, as it appears, excessive, cannot be decided here. What can be noted, however, is this: the Court regularly opts in favour of free trade if the health risk contended for by the Member State is doubtful. Moreover, even if a Member State succeeds in showing that excessive consumption of a certain foodstuff is unhealthy, in the view of the Court this does not necessarily warrant prohibiting the marketing of such products since “appropriate labelling” enables consumers “to decide for themselves” whether to use them.<sup>69</sup> The concept of a well-informed and circumspect consumer thus also lies at the heart of this aspect of negative harmonization. The concept points to a classic liberal and trade-oriented approach to the rules on free movement. The ECJ’s “reference” consumer does not expect the State to regulate his diet in the safest possible way but merely to protect him against specific, well-established and serious health risks.

On the other hand, the EC’s *legislative* activity in the field of consumer protection may be said to have established sometimes quite extensive protection for consumers. In the light of this legislative base-level of protection, it is perhaps not so surprising that the Court has adopted a policy of strict scrutiny of other national consumer protection measures where they affect inter-Member State trade. Yet this point has somewhat less force if the Commission only develops legislative proposals in areas where the ECJ considers the restrictions imposed by such national rules to be *permissible*.<sup>70</sup> Either way, the extent of the existing legislation is vital to any assessment of EC law and the ECJ’s approach to consumer protection. It is to the examination of these positive harmonization measures that we now turn.

#### 4. Positive harmonization

##### 4.1. Framework

In section 2 above we explained how consumer protection came to be one of the favourite topics of positive harmonization. The main objective of the EC Treaty is to guarantee the four basic freedoms. This implies the deregulation of national barriers to intra-Community trade which the Court ensures in

68. See e.g. *Greenham and Abel*, *supra* note 61, paras. 37–42 and 48, concerning French legislation; Case C-192/01, *Commission v. Denmark*, *supra* note 61, paras. 42–46.

69. Case C-24/00, *supra* note 61, para 75.

70. See Communication of 3 Oct. 1980, O.J. 1980, C 256/2 and the text *supra*, at note 21.

the process of negative harmonization. Member States may, however, restrict trade or the other freedoms in the interest of consumer protection. As far as the economic interests of consumers are concerned this reflects the idea that market failure calls for corrective measures under the headings of competition and/or consumer law respectively. In order to reduce the resulting differences in regulation across the Community, many individual measures of harmonization have been directed at consumer protection. The directives discussed below therefore have as their object the establishment and functioning of the internal market. As already pointed out, the framework for harmonization is mainly set up by Articles 94, 95 and 153 EC. Three further preliminary observations are necessary before we evaluate the recent case law.

First, the SEA of 1987 inserted into the Treaty the requirement that in the legislation adopted pursuant to the Treaty a “high level” of consumer protection is to be achieved: this injunction is now contained in Articles 95(3) EC and 153(1) EC. While the principle of mutual recognition derived from *Cassis* tends to favour low levels of regulation and leads to deregulation, the opposite seems to be intended for legislation at Community level. This, among other factors to be discussed, creates an uneasy tension between negative and positive harmonization and it will always be interesting to examine what the Court makes of the policy statement contained in the legal basis of the directives in this field.

Second, with regard to the preferred instrument for such positive harmonization, the Treaty initially only provided a legal basis for directives (now Art. 94 EC). Their main advantage is flexibility, but they have drawbacks too, the most obvious of which is that the Member States need to pass legislation to implement them.<sup>71</sup> Yet even after regulations were made available in 1987 (under what is now Art. 95(1) EC), directives remained the preferred instrument for legislation seeking to protect consumers. One reason for this is that 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.<sup>72</sup> Another feature typical of the directives examined is that they are minimum harmonization measures allowing the Member States to maintain or introduce more stringent protective measures.<sup>73</sup> Both features of the directives in this field tend to complicate matters, adding different layers

71. Which we discuss in Johnston and Unberath, *supra* note 5, pp. 157–178.

72. 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: O.J. 1997, C 340/105).

73. Directive 85/374/EEC on product liability being the most prominent exception (O.J. 1985, L 210/29). A preference for minimum harmonization is also expressed in Art. 153(5) EC for legislation not connected with the internal market.

of (often contradictory) legislation to an already densely thicketed regulatory maze. Again it will be interesting to examine whether the Court succeeds in establishing a coherent interpretation of these provisions. It should be noted, however, that there seems to have been a recent change in the Commission's approach and total harmonization measures are now to be prioritized.<sup>74</sup> This brings directives closer to regulations in the sense that Member State discretion on implementation would be concomitantly reduced under a total harmonization measure.

Third, the Commission has put forward a far-reaching rationale for legislative activity in the field of consumer protection. Since in *Tobacco Advertising*<sup>75</sup> the Court stressed that "a mere finding of disparities between national rules" is not sufficient to justify the choice of Article 95 EC as a legal basis, an additional argument is needed to justify the introduction of uniform Community rules. In relation to consumers, the Commission has suggested the following rationale: approximating the laws applicable to consumer transactions across the EU is said to increase consumer "confidence" to contract for services and goods beyond national boundaries.<sup>76</sup> Increasing "consumer confidence" to shop across borders would facilitate intra-Community trade and therefore serve the functioning of the internal market. If the consumer knows his rights when the transaction involves a cross-border element, he is likelier to shop around and to seek services and goods stemming from providers established in another Member State. On the basis of the "confidence" argument one could conceive of approximation of laws on a grand scale. However, as Roth has remarked: "the protection of the 'confident consumer' may have a very weak and unreliable basis in Community law".<sup>77</sup> It is not

74. Commission Communication on Consumer Policy Strategy 2002–2006, COM(2002) 208, p. 12–13: "For these directives, one of the key priorities for the Commission would be to propose full harmonization in order to minimize variations in consumer protection rules across the EU that create fragmentation of the internal market to the detriment of consumers and business." Examples of this "new" approach are Directive 2002/65/EC concerning the distance marketing of consumer financial services (O.J. 2002, L 271/16) and Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (O.J. 2005, L149/22). On the latter measure, see Weatherill and Bernitz (Eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and Techniques* (Oxford, 2007).

75. *Tobacco Advertising I*, *supra* note 6, para 84.

76. See Recital 5 of Directive 1999/44/EC on consumer sales (O.J. 1999, L 171/12). Strengthening confidence of consumers to shop across borders is part of the "new" approach of the Commission's Communication on Consumer Policy Strategy 2002–2006 COM(2002)208, p. 7. Though note that it had already been relied on previously: see Recitals 8 and 9 of Directive 90/314/EEC on package travel.

77. Roth, CML Rev. (2003), 937, 944. Cf. Stuyck, *supra* note 8, pp. 396–397. Weatherill regards the matter as "unresolved": "The Commission's options for developing EC consumer protection and contract law: Assessing the constitutional bases", (2002) EBLR, 497–515, 511.

beyond doubt that the directives on consumer protection increase confidence. The difficulty results from the very nature of consumer “protection”. Such interventions into market activity are normally limited to correction of market failures. Hence, if consumer-protective laws are uniform then the consumer knows about his rights of redress in relation to market deficiencies. In a “healthy” market environment the consumer may not need such extra protection and, consequently, laws on consumer protection may impose extra costs without in fact improving the position of consumers. It would be questionable to introduce comprehensive harmonization not directed at market failure under the heading of “consumer protection”.<sup>78</sup> Furthermore, it is difficult to see why strengthening consumer confidence to shop across borders also ought to justify harmonizing the law of contract in relation to purely domestic situations. *Prima facie*, increasing confidence is a strong argument for harmonizing rules applicable to cross-border situations but a weak argument for universally applicable consumer laws.<sup>79</sup> For the purposes of this paper, it suffices to note that consumer protection is obviously just one aspect of contract law. It is therefore not necessarily a step backwards that the Commission now seems to be concentrating on consolidating the existing consumer laws.<sup>80</sup> In any event, this is a more pressing task. A great number of legislative measures in relation to the protection of economic interests of consumers are already in force, which are replete with detailed, partly overlapping rules which are not mutually consistent in every respect.<sup>81</sup> Consumer confusion, not confidence, may be the result if this mass of rules is not simplified.

For reasons of space, we cannot evaluate all of the Court’s judgments on positive harmonization designed to protect consumers in this contribution. We should, however, note in passing that the number of (successful) infringement proceedings for (total) failure to transpose a directive within the last

78. Also in this sense, see Hesselink, “European Contract Law: A matter of consumer protection, citizenship or justice?”, (Centre for the Study of European Contract Law, Working Paper No. 2006/04), who has suggested extending the Community competence in the field of justice or citizenship to encompass a European contract law. Whether or not the Treaty contains at present a sufficient legal basis for the harmonization of contract law on the whole, is not to be discussed here. See van Gerven, “Harmonization of private law: Do we need it?”, 41 CML Rev. (2004), 505; Weatherill, “European Private Law and the constitutional dimension”, in Cafaggi, op. cit. *supra* note 5, ch 3, pp. 79 et seq.

79. The Commission is currently reviewing its approach, *supra* note 29.

80. First Annual Progress Report on European Contract Law and the *Acquis* Review, COM(2005) 456, p. 4: “The Commission therefore will clearly prioritize issues that are relevant to the consumer contract law *acquis*, and other contract law related *acquis*.” Similarly narrow: Green Paper, *supra* note 29.

81. See the study referred to *supra*, note 39, which gives a comprehensive account of the implementation process in the Member States, points out difficulties within the Community legislation and indicates possible solutions.

five years is significant.<sup>82</sup> Furthermore, not all directives have attracted many preliminary rulings.<sup>83</sup> In the following we will concentrate on directives regarded as the core of the consumer *acquis*.<sup>84</sup> Most of them are currently under scrutiny with a view to sweeping reform.<sup>85</sup> Our focus is whether the case law of the Court between 2001 and 2006 reveals weaknesses in the Community legislation in the field of consumer protection and, more generally, whether the Court has succeeded in adopting a coherent approach. Coherence is assessed in relation to two aspects: first in relation to the system of secondary legislation in force and, second and equally importantly, in relation to the requirements of primary legislation, especially the guarantee of the basic freedoms under the Treaty.

Against this background, the case law on consumer protection can be analysed from two perspectives. A major challenge for positive harmonization is to implement consumer policy uniformly across considerably diverging legal systems and at the same time respect the principle of subsidiarity under Article 5 EC.<sup>86</sup> While much depends on the actual drafting and ambit of legislation it is in the end the Court's task to mediate between Community rule and national implementation (below, 4.2.). The question will be whether the current approach is satisfactory, regarding both the *end* of harmonization and also, and crucially, the *means* employed to achieve it. The second interrelated theme of the analysis concerns the deeper policy implications of the secondary legislation as interpreted by the Court (below, 4.3.).

82. Directive 98/7EC: Case C-386/01, *Commission v. Spain*, [2002] ECR I-7063; Directive 1999/94/EC: Case C-74/02, *Commission v. Germany*, [2003] ECR I-9877; Case C-22/02, *Commission v. Italy*, [2003] ECR I-9011; Case C-161/02 *Commission v. France*, [2003] ECR I-6567; Directive 1999/44/EC: Case C-311/03, *Commission v. France*, (unpublished, judgment of 1 July 2004); Case C-310/03, *Commission v. Luxemburg*, [2004] ECR I-1969; Directive 97/7/EC: Case C-414/01, *Commission v. Spain*, [2002] ECR I-11121.

83. Directive 87/102/EEC on consumer credit (O.J. 1987, L 42/48, as amended by Directive 90/88/EEC, O.J. 1990, L61/14) has not, it seems, raised many interpretative issues in the last five years. See, as to the interpretation of Arts. 4 and 6 of that Directive: Case C-264/02, *Cofinoga Mèrignac SA v. Sylvain Sachithanathan*, [2004] ECR I-2157.

84. Note that cases on the interpretation of directives protecting public health have been discussed in the section on negative harmonization, *supra* 3.3.

85. They are listed in Annex II of the Green Paper, *supra* note 29. Previously: Communication COM(2001)398, *supra* note 38; Communication from the Commission to the Council and the European Parliament, European Contract Law and the revision of the *acquis*: The way forward, 11 Oct. 2004, COM(2004)651.

86. Cf. de Búrca, "The Principle of Subsidiarity and the Court of Justice as an institutional actor" 38 JCMS (1998), 214.

#### 4.2. Coherence between Community rule and national implementation

##### 4.2.1. Minimum harmonization

A minimum harmonization directive or regulation does not preclude a Member State from taking more restrictive measures of consumer protection, such as for instance prohibiting the marketing method of doorstep selling for certain products beyond the safeguards provided for in Directive 85/577/EEC on doorstep selling.<sup>87</sup> However, a national law which goes beyond the Directive's minimum protection is subject to the rules of the free movement of goods. The Court addressed this issue *inter alia* in *A-Punkt Schmuckhandels*.<sup>88</sup> As explained above,<sup>89</sup> the Court left it to the referring national court to decide whether the national law (on its face a selling arrangement) was caught by Article 28 EC and, if so, whether it could be justified. This depended foremost upon whether the protection afforded by the Directive could be regarded as sufficient in relation to doorstep selling.<sup>90</sup>

While in such a situation the Directive arguably provides satisfactory protection, in another line of cases it proved not to do so.<sup>91</sup> 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. Some investments turned out to be financially unsound; in other cases the financial burden overextended the consumer. As a result, large numbers of consumers sought to set aside the contracts that had committed them to these investments. The doorstep selling Directive seemed, with its right of cancellation, in many cases to provide a way of getting out of these meanwhile bitterly regretted contracts.<sup>92</sup> Credit agreements intended for the purpose of acquiring or retaining property rights in land or in an existing or projected building were not explicitly excluded from the scope of the Directive.<sup>93</sup> At national level,

87. Directive 85/577/EEC of 20 Dec. 1985 to protect the consumer in respect of contracts negotiated away from business premises, O.J. 1985, L 372/31.

88. *A-Punkt Schmuckhandels* note 51, *supra*.

89. See text at note 51, *supra*.

90. *A-Punkt Schmuckhandels*, note 51, *supra* paras. 27–29.

91. See also Johnston and Unberath, *supra* note 5, pp. 173–178.

92. O.J. 1985, L 372/31 (the Doorstep Selling Directive).

93. They are so excluded by Art. 2 of Council Directive 87/102/EEC of 22 Dec. 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (O.J. 1987, L 42/48) as amended by Council Directive 90/88/EEC of 22 Feb. 1990 (O.J. 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 (S.I. 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 ...”.

however, all credit agreements were excluded from the scope of application of the law implementing the doorstep-selling Directive (or at least appeared to be excluded according to the wording of the relevant statute). In any event, according to German law the right of cancellation would have lapsed one year after the conclusion of the contract. In *Heininger*, 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.<sup>94</sup> The ECJ seemed simply to assume that the exercise of the right to cancel the contract (as laid down in Art. 5(1) of the Directive) was unlimited in time, since the Directive itself provided for no express limitation of that right. 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.<sup>95</sup> 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 consumer but instead sought to strike a balance between the competing interests of the parties to the contract.

Yet, 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, at least not by the means of Community law. The reason is that getting out of the credit agreement does not protect the consumer in economic terms. The problem in this line of so-called “waste property” cases was with the contract for the acquisition of immovable property itself. Hence, only if the right of cancellation also affected the purchase of property could the consumer truly benefit from the cancellation. If these contracts were treated as a single unit and the consumer could transfer back the property and *thereby* also discharge his obligations under the credit agreement, the risk of the investment could be transferred back to the provider

94. Case C-481/99, *Heininger v. Bayerische Hypo- und Vereinsbank AG*, [2001] ECR I-9945, paras. 40 and 48.

95. *Ibid.*, para 47.



of the loan.<sup>96</sup> In the second set of cases,<sup>97</sup> the ECJ had to decide whether the consumer could rely upon Community law to achieve this result. The difficulty with this argument is obvious. Given the clear wording of the Directive, it is not surprising that Advocate General Léger<sup>98</sup> came to the conclusion that Community law did not require that the right of cancellation extend to the contract of sale of immovable property. The Court followed his reasoning: Article 3(2)(a) of the doorstep-selling Directive excludes from its scope of application the contract of sale of land or other immovable property and does not contain any provisions on connected contracts.<sup>99</sup> All arguments in favour of the consumer that had been advanced in the alternative also failed. In the event of cancellation of a credit agreement the consumer is required under Article 5 of the Directive to restore the *status quo ante*.<sup>100</sup> It follows that the debtor must pay back the loan to the creditor,<sup>101</sup> must pay it back immediately<sup>102</sup> and must also pay the lender interest at the market rate.<sup>103</sup> The outcome is in line with orthodox principles of restitution; any other result would have created anomalies.<sup>104</sup> In the final analysis, the Court realized in *Schulte* (and the parallel *Crailsheimer Volksbank* case) that the doorstep-selling Directive was simply not meant to deal with the sort of situation that arose in the *Heininger* and *Schulte* litigation and that in any event it was for the legislature to intervene should protection be regarded necessary.<sup>105</sup>

96. § 359(3) sentence 3 BGB provides for this result, if the provider of credit facilitates the acquisition (beyond simply providing the credit) by closely co-operating with the provider of the immovable property. The provision was not applicable *ratione temporis* on the facts in *Heininger*.

97. Case C-350/03, *Schulte v. Bausparkasse Badenia*, [2005] ECR I-9215; Case C-229/04, *Crailsheimer Volksbank v. Conrads and others*, [2005] ECR I-9273: both cases are discussed Terryn, 44 CML Rev., 501. In *Crailsheimer* the Court referred to the reasoning in *Schulte* and in addition held that the application of the Directive could not be made subject to the condition that when a third party intervenes in the name of or on behalf of a trader in the negotiation or conclusion of a contract, the trader was or should have been aware that the contract was concluded in a doorstep-selling situation, para 49.

98. Opinion of A.G. Léger in *Schulte*, para 114.

99. *Schulte*, paras. 75–76. Cf. Terryn, op. cit. *supra* note 97, at 516, who suggests that such rules ought to be introduced by future legislative reform.

100. *Ibid.*, paras. 88, 92. See for the application of this holding at national level BGH XI ZR 6/04, BGHZ 168, 1.

101. Case C-350/03, *Schulte*, para 86.

102. *Ibid.*, para 87.

103. *Ibid.*, para 90.

104. This is not (wholly) uncontroversial, *contra* Derleder annotation BKR 2005, 442, 445.

105. As had been previously noted, e.g. Bungeroth, “Die Rückabwicklung nach dem HWiG widerrufener Immobiliarkredite”, (2004) *Wertpapier-Mitteilungen*, 1505, 1511.

The story does not end there, however. For in the final paragraphs of its *Schulte* judgment the Court came up with a surprising<sup>106</sup> legal twist to help the consumer and transfer to the bank the risks of the financed investment. According to Article 4(3) of the Directive, Member States are to ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this article is not supplied. Before *Schulte*, it was generally believed that the (only) consequence of this failure to inform was that the right of cancellation is prolonged, albeit prolonged for an indefinite period of time (as the Court rather boldly implied in *Heininger*). In *Schulte* the Court added another, novel and potentially far-reaching, consequence: if the bank failed to comply with the obligation to inform the consumer of his right of cancellation, then the bank should bear the consequence that the risks “associated” with the failure to comply actually materialize.<sup>107</sup> One must formulate the rule with extreme caution, since the Court failed clearly to identify the nature of the risk and simply referred to “those risks”.<sup>108</sup> What were “those” risks? This is what the Court said a couple of lines earlier: a consumer who would have cancelled the credit agreement had he been informed of his right of cancellation would not have concluded the purchase of land contract.<sup>109</sup> Hence he would have avoided exposure to the risks of the financial investment.<sup>110</sup> We venture to infer: Member States must ensure that the risk of the investment is transferred back to the bank, provided that the consumer would have cancelled the contract had he been correctly informed.

The apparent creativity of the Court for the sake of consumer protection can be criticized for a number of reasons. First, it gives a broad provision of the Directive an unduly narrow and detailed reading, despite the fact that the provision was meant to leave it to the Member States to lay down appropriate sanctions.<sup>111</sup> Second, as to the substance of the Court’s view, it is difficult to see why the failure to inform about a right to withdraw during seven days after the conclusion of the contract should justify the transfer of the risk resulting from investing the borrowed sum of money.<sup>112</sup> Liability should be restricted to those harms the risk of which was the reason for the imposition

106. This line of argument had not been considered in the Opinion of A.G. Léger.

107. *Schulte*, paras. 94–103.

108. *Ibid.*, para 100. Or: risks “inherent in investments such as those at issue in the main proceedings”, para 103.

109. *Ibid.*, para 97.

110. *Ibid.*, paras. 98–99.

111. *Contra* Derleder, *op. cit. supra* note 104, p. 443.

112. See for a similar argument already Thume and Edelmann, annotation, (2005) BKR, 477, 479, 484.

of the duty.<sup>113</sup> The information duty was imposed to protect the consumer's interest in relation to his decision to withdraw from the contract, but not to protect him from injury resulting from using the "object" provided. To give an example: if I buy a snowboard from a doorstep salesman and later injure myself snowboarding, the seller of the snowboard surely does not have to bear the "risk" of injury despite the fact that I would have cancelled the contract had I been informed of the right of cancellation and thus avoided the risk of using it. Likewise, if the consumer uses the money provided under a loan agreement the bank does not have to bear the risk of that investment simply because it failed to inform the consumer of his right to withdraw. Furthermore, the decision to use the object is voluntary human conduct which of itself negatives the causal connection as a *novus actus interveniens*.<sup>114</sup>

Needless to say, the Court's reading of the Directive must be accepted as authoritative. What are the national courts to make of it?<sup>115</sup> In many cases the purchase contract was concluded before the loan agreement. The causal link between failure to inform and investment risk is clearly lacking in these cases.<sup>116</sup> The consumer bears the burden of proof for the contention that he would have cancelled the contract had he been informed about the right to cancel.<sup>117</sup> This will not be an easy task, for in fact in most cases the consumer had been informed about a similar right of cancellation, namely the right (specific to German law) to withdraw in relation to consumer credit. Finally, it must be recalled that fault is an essential precondition for liability in German law<sup>118</sup> and also necessary to establish the bank's liability.<sup>119</sup> Since, ac-

113. As to this approach to causality, see Hart and Honoré, *Causation in the Law*, 2<sup>nd</sup> ed. (Oxford 1985), p. 286.

114. Hart and Honoré, *op. cit. supra*, pp. 136–137.

115. The two leading national cases subsequent to *Schulte* and *Crailsheimer Volksbank* are BGH, XI ZR 6/04, BGHZ 168, 1 = NJW 2006, 2099 and BGH, XI ZR 204/04, BGHZ 169, 109 = NJW 2007, 357; confirmed recently by BGH, XI ZR 130/05, *nyr*. They contain meticulous references to an abundant literature and case law. There has yet to be an English case on this point after *Schulte* and *Crailsheimer Volksbank*.

116. BGH, XI ZR 6/04, BGHZ 168, 1, para 38 with references.

117. BGH, XI ZR 204/04, BGHZ 169, 109, para 43 with references.

118. For a comparative assessment, see Markesinis, Unberath and Johnston, *The German Law of Contract*, 2<sup>nd</sup> ed. (Oxford 2006), pp. 444–450.

119. BGH, XI ZR 204/04, BGHZ 169, 109, para 42 with references; contra Schwintowski, (2005) EuZW, 724, 726, who suggests that in the view of the ECJ, the fault requirement is irrelevant. Even if this were true, national courts cannot simply do away with it. One must remember that as between private individuals the Directive does not have direct effect and therefore the supremacy of EC law cannot be relied upon. (Unless, that is, the cases on an effective remedy for breach of an EC law right which seem to operate horizontally can be prayed in aid: see e.g. Case C-177/88, *Dekker v. Stichting VJV-Centrum*, [1990] ECR 3941 and Case C-180/95, *Nils Draehmpaehl v. Urania Immobilienservice*, [1997] ECR I-2195. It should be noted, however, that cases in this vein have typically related only to Directive 76/207/EEC.)

according to the wording of the national provisions in force at the time, banks were not under an *obligation* to inform consumers about a right of cancellation if the loan agreement was concluded at the doorstep, the lender can hardly be regarded as being at fault not having informed consumers in this respect.<sup>120</sup> Accordingly, under national law the risk cannot be transferred. If the ECJ in *Schulte* meant to imply that the Directive required that the burden be removed from the consumer irrespective of fault on part of the bank, then the doorstep selling Directive was not correctly transposed. This may then give rise to actions against the German State for a sufficiently serious breach of EC law (although whether the relevant breach would indeed be considered sufficiently serious in the circumstances is more questionable).<sup>121</sup>

The case law on Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts<sup>122</sup> on the whole confirms the tendency of the case law on the doorstep selling Directive: the Court regularly prefers the most consumer-friendly interpretation of secondary legislation, narrows down the requirements for transposition into national law, and underlines the need to give (indirect) effect to directives even where they were not fully implemented by national legislation. The Court had occasion to interpret the Directive in nine decisions between 2001 and 2006, four of which primarily addressed the requirements for implementation at national level.<sup>123</sup>

*Commission v. Sweden*<sup>124</sup> is one of the rare cases in which the Commission brought an enforcement action under Article 226 EC against the Member State for failure to implement and the Member State *succeeded* in establishing that it had correctly transposed the unfair terms Directive. The Court accepted that the incorporation of the Annex to the Directive in the preparatory work of the Swedish statute was a “suitable solution” because, according to a

120. The issue is controversial, in this sense see e.g. Habersack, annotation, (2006) JZ, 91, 93. Liability may be imposed, however, if the bank failed to inform as to other aspects of the transaction, see for this source of liability that is independent from the Directive, BGH XI ZR 6/04, NJW 2006, 2099, para 39–61.

121. See e.g. Case C-392/93, *The Queen v. HM Treasury ex parte British Telecommunications plc*, [1996] ECR I-1631 for a perhaps analogous scenario where the proper interpretation of the requirements of the relevant directive was not obvious, which led to the denial of State liability on the facts.

122. O.J. 1993, L 95/29.

123. For reasons of space we can only briefly refer to Joined Cases C-541 & 542/99, *Cape Snc v. Idealservice Srl; and Idealservice MN RE Sas v. OMAI Srl*, [2001] ECR I-9049 (holding that the term “consumer” is confined to natural persons), and Case C-167/00, *Verein für Konsumenteninformation v. Karl Heinz Henkel*, [2002] ECR I-8111, concerning questions of jurisdiction under the Brussels convention.

124. C-478/99, *Commission v. Sweden*, [2002] ECR I-4147.

legal tradition well established in Sweden and common to the Nordic countries, the preparatory work was an important aid to interpreting legislation.<sup>125</sup>

The strictness of the ECJ's approach to implementation is well illustrated by *Commission v. Netherlands*,<sup>126</sup> which concerned the implementation of Articles 4(2) and 5 of the unfair terms Directive into national law. The Netherlands Government argued that the pre-existing provisions of its national law fully complied with the Directive and that therefore no further action was required.<sup>127</sup> This claim was backed up by references to decisions of the national courts.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> 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 the 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.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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

125. *Ibid.*, para 14.

126. Case C-144/99, *Commission v. Netherlands*, [2001] ECR I-3541.

127. See, for early commentary and criticism, Hondius, "Non-implementation of the Directive on Unfair Contract Terms: The Dutch Case", 2 ERPL (1997) 193.

128. For details, see the Opinion of A.G. Tizzano in Case C-144/99, *Commission v. Netherlands*, *supra* note 126, paras. 10–13.

129. Case C-144/99, *Commission v. Netherlands*, *supra* note 126, para 16.

130. *Ibid.*, para 17.

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

132. Case C-144/99, *Commission v. Netherlands*, *supra* note 126, para 18.

133. Opinion, Case C-144/99, *Commission v. Netherlands*, *supra* note 126, para 15.

of the Netherlands was “unable to show” that its legislation complied with the Directive.<sup>134</sup> The Court underlined that in the field of consumer protection “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”.<sup>135</sup>

The combined effect of these principles is considerably to diminish the discretion of the Member State in choosing the appropriate measure of implementation. The ECJ made perfectly clear in this case that the interpretative method of giving directives effect even where they were not fully transposed 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 rule in *Commission v. Netherlands* was subsequently applied by Advocate General Alber in *Commission v. Italy*: “recourse to the principle of interpretation in the light of Community law by a national court cannot replace the obligation of the legislature of that Member State to transpose the directive in a manner which is precise and free from doubt”.<sup>136</sup> In the case at hand, the wording of the relevant provisions of Italian law did not exclude the bringing of an action against recommending the use of unfair terms in contracts,<sup>137</sup> as required by Article 7(3) of the Directive; yet the case law was not unanimous in this respect. The Court followed the Advocate General and concluded that the transposition of Article 7(3) into the Italian legal system did not take sufficient account of the principle of legal certainty.<sup>138</sup>

The strict test of compliance is also exemplified by the latest case in this series: *Commission v. Spain*,<sup>139</sup> where the Court found that Spain had failed to give full effect to Articles 5 and 6(2) of the unfair terms Directive. The case illustrates further that the task of defending the national implementing measure is exceedingly difficult if the national legislature has not transposed the directive word for word.<sup>140</sup> Even the most remote and abstract possibility that the national law might be interpreted in a way that does not give full

134. Case C-144/99, *Commission v. Netherlands*, *supra* note 126, para 19. A.G. 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, Opinion, Case C-144/99, *supra* note 126, para 20.

135. *Ibid.*, judgment, para 21.

136. Case C-372/99, *Commission v. Italy*, [2002] ECR I-819, Opinion, para 53.

137. Whether the Directive required as much was controversial before the decision in this case, cf. judgment in Case C-372/99, *Commission v. Italy*, paras. 12–16.

138. Case C-372/99, *Commission v. Italy*, para 27.

139. Case C-70/03 *Commission v. Spain*, [2004] ECR I-7999.

140. For a detailed discussion of this case, see Johnston and Unberath, *supra* note 5, pp. 182–184.

effect to the Directive seems sufficient to trigger a condemnation by the Court.<sup>141</sup>

Our analysis of the case law on minimum harmonization measures would not be complete if it did not give proper consideration to the case *Freiburger Kommunalbauten*, which stands out against the general trend.<sup>142</sup> It concerned the interpretation of the unfair terms in consumer contracts Directive and the scope of the rights granted therein. The Court held that it was for the national court to decide whether the contractual term at issue was unfair under Article 3(1) of the Directive. In many ways, this judicial self-restraint provides an interesting counter-example to the *Schulte/Heininger* line of cases. By adopting a more cautious line of reasoning the Court in the end opted for a workable approach which leaves sufficient flexibility at the national level for adjustments, a feature arguably absent in the other consumer protection cases discussed so far.<sup>143</sup>

In order to appreciate the importance of the *Freiburger Kommunalbauten* case it is necessary briefly to allude to a fundamental problem of policing contract terms at Community level.<sup>144</sup> The Directive's central provision is contained in Article 3(1): "[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obliga-

141. Case C-70/03 *Commission v. Spain*, paras. 18, 19, 33, 34.

142. Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ulrike Hofstetter and Ludger Hofstetter*, [2004] ECR I-3403. See annotation by Markwardt (2005) ZIP, 152 and Röthel (2005) ZEuP, 418 with references.

143. It should be acknowledged that in some cases outside the consumer law field, the Court has shown signs of leaving national law to fill gaps left in a directive where some remuneration is required by that directive but its levels or methods for its calculation are not specified by the directive: see e.g. Case C-131/97, *Annalisa Carbonari v. Università degli studi di Bologna and others*, [1999] ECR I-1103, para 45 (no Community rule under Directive 75/362/EEC (as amended) as to level or methods for fixing remuneration for doctors during their training period, so this was left to national law); Case C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*, [2003] ECR I-1251, para 34 (there is no Community definition of "equitable remuneration" for the broadcast of a copyright phonogram contained in Directive 92/100/EEC, so it was left to national law to secure this); and Case C-465/04, *Honyvem Informazioni Commerciali Srl v. Mariella De Zotti*, [2006] ECR I-2879, paras. 33–36 (Art. 17 of the commercial agents Directive 86/653/EEC lays down a framework for an indemnity to be paid to a commercial agent on termination of the agency contract, but contains no methodology for the calculation of that indemnity: thus, Member States have a discretion as to the choice of methods for its calculation).

144. For a more detailed comparative evaluation of the control of standard terms and of the implications of the Directive, see: Markesinis, Unberath and Johnston, op. cit. *supra* note 118, pp. 163–180.



tions arising under the contract, to the detriment of the consumer".<sup>145</sup> Achieving harmonization on the basis of this test is difficult because the control of standard terms is interwoven with the function of the specific term within the framework of national law. So while "good faith" may now (in some respects) even be part of English law, it is not impossible that the concept means (or will be taken to mean) something quite different to a common lawyer when it comes to be applied to individual cases. This may also be true on a more abstract level. The test of fairness is embedded in the context of the rules of national law; it is difficult to flesh out the test without a careful appreciation of the context of the regime of the relevant particular default rules.<sup>146</sup> The default rules applicable to the contract in question may, in turn, be (and frequently are) substantially different from the rules applicable in other European jurisdictions.<sup>147</sup> It is therefore exceedingly difficult to define in abstract terms what "unfairness" means independently of the national legal context in which the contract term in question was used. Good faith in the unfair terms Directives is context-dependent: "... the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law".<sup>148</sup> The conclusion appears almost inevitable that the ECJ is not in a position satisfactorily to define the central requirement of the unfairness test. In *Freiburger Kommunalbauten* the Court inferred accordingly that it was for the national court to decide whether the contractual term at issue<sup>149</sup> was unfair under Article 3(1) of the

145. This rather abstract test is accompanied by an "indicative" list of prohibited terms in the Annex (Art. 3(3): the list in the Annex runs from (a) to (q) in providing such "indications"). Since the inclusion of a term in the list does not necessarily mean that it is unfair, the list is often referred to as a "grey" list.

146. In Germany, this approach to standard terms is laid down in § 307(2) of the Civil Code according to which a term is more likely to be deemed unfair the more it departs from the central default rules of the Code.

147. The decision of the House of Lords in *Director General of Fair Trading v. First National Bank plc* [2002] 1 AC 481 is an example of this phenomenon: it concerned a term on post-judgment interest on a loan, which in German law would be a matter expressly provided for in the Code itself, § 291 BGB, while in England it depends upon the agreement of the parties and was thus subject to the fairness test under the Directive.

148. Case C-237/02, *Freiburger Kommunalbauten*, para 21, the judgment being in this respect more lucid than the Opinion, para 25, which had merely referred to the need to interpret the contract in a specific case before a national court.

149. The German *Bundesgerichtshof* had defined the term in the question referred as one that provides "that the purchaser of a building which is to be constructed is to pay the total price for that building, irrespective of whether there has been any progress in the construction, provided that the seller has previously provided him with a guarantee from a credit institution securing any monetary claims the purchaser may have in respect of defective performance or non-performance of the contract", para 14. See, as to its significance, Basty, annotation, (2004) DNotZ, 768.

Directive.<sup>150</sup> In exercising this self-restraint the Court followed the advice of its Advocate General that this was “not merely a question of the clear demarcation of powers as between the Community and the Member States, but also one of the economical use of legal remedies”.<sup>151</sup>

*Freiburger Kommunalbauten* casts doubt on the more pro-active approach to the fairness test of Article 3 of the Directive in *Océano*.<sup>152</sup> There, the Court had regarded as “unfair” within the meaning of Article 3 of the Directive a jurisdiction clause, which had not been individually negotiated, in a contract between a consumer and a seller or supplier conferring exclusive jurisdiction on a court in the territorial jurisdiction in which the seller or supplier has his principal place of business.<sup>153</sup> The main argument for finding an imbalance was that “in the case of disputes concerning limited amounts of money, the costs relating to the consumer’s entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence”.<sup>154</sup> The Court obviously regarded the term in question as so grossly unfair that it was not necessary to inquire into the context in which it was used. The need to police contract terms as against a complex background of national default rules was not alluded to by the ECJ in its judgment. The ruling in *Freiburger Kommunalbauten* is not easy to square with the approach in *Océano*. It is therefore interesting to observe that in none of the cases of 2001–2006 did a national court seek specific guidance as to the meaning of Article 3 of the Directive (including the case of *Mostaza Claro*, to be discussed next). Still, predicting the willingness of the Court to give an indication as to the interpretation of “unfairness” under the Directive in the individual case is not an easy task and the exact scope of the Court’s power in this respect has yet to be clarified.

In *Océano* the Court further ruled that the national court had the power to determine *of its own motion* whether a term is unfair.<sup>155</sup> This was justified as a means both of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers. This aspect of the ruling in *Océano* was relied upon in two subsequent cases. In these cases the Court was not required to consider the

150. Case C-237/02, *Freiburger Kommunalbauten*, para 25.

151. *Ibid.*, Opinion, para 29.

152. Joined Cases C-240–244/98, *Océano Grupo Editorial v. Rocío Murciano Quintero*, [2000] ECR I-4941, annotated by Stuyck, 38 CML Rev. (2001) 719.

153. *Ibid.*, para 24.

154. *Ibid.*, para 22.

155. *Ibid.*, para 28.

unfairness of the term under Article 3 of the Directive; the unfairness was presumed in these proceedings. The Court held in *Cofidis*<sup>156</sup> that the protection conferred upon consumers by the Directive precluded a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibited the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair. The Court held that such a time limit was liable to affect the effectiveness of the protection intended by Articles 6 and 7 of the Directive: “to deprive consumers of the benefit of that protection, sellers or suppliers would merely have to wait until the expiry of the time limit fixed by the national legislature before seeking enforcement of the unfair terms they would continue to use in contracts”.<sup>157</sup> France was ultimately required to change its general rule contained in the Consumer Code and dispense with the time limit in the interest of consumer protection at the expense of legal certainty.

Giving full effect to the requirements of the Directive may thus involve adjusting the national legal environment in which the consumer is bound to make use of the rights provided for in Community law.<sup>158</sup> In a similar vein (and applying *Océano* and *Cofidis*) the Court recently held in *Mostaza Claro*<sup>159</sup> that a national court seized of an action for annulment of an arbitration award needed to determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.<sup>160</sup> Once more legal certainty had to give way to consumer protection and once more the ECJ subjected rules forming the procedural background in which the consumer right was to be enforced to full control under the unfair terms Directive. The reasoning of the Court is noteworthy. For not only did the Court underline the need to protect the consumer as the “weaker party” from being bound to unfair terms on

156. Case C-473/00, *Cofidis SA v. Jean-Louis Fredout*, [2002] ECR I-10875, paras. 16, 38.

157. *Ibid.*, para 35.

158. In this sense Rott, annotation, (2003) EuZW, 5, 9.

159. Case C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, [2006] ECR I-10421, paras. 29, 39.

160. The Court also applied Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton NV*, [1999] ECR I-3055, para 37, in which it held that a national court needed to grant an application made for annulment of an arbitration award, if it considered that the award in question was contrary to Art. 81 EC, provided that its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy. Hence, in *Mostaza Claro*, the national court was likewise only required to set aside the award on grounds of consumer protection if national law in principle provided for setting aside the award on grounds of public policy, para 35.

the basis of Article 6 of the Directive, but it also referred to Article 3(1)(t) EC and the nature and importance of the public interest underlying the protection which the Directive confers upon consumers.<sup>161</sup> Advocate General Tizzano had argued that consumer protection was too wide a concept to justify setting aside an arbitration award and instead suggested confining the ruling to the violation of the right to a fair hearing.<sup>162</sup> The Court, by contrast, seemed to regard consumer protection as being of great weight and sufficiently clear and precise to be capable of application in this manner.

#### 4.2.2. Total harmonization

Total harmonization directives leave even less discretion for deviations and adjustments at national level. This is made abundantly clear in the recent case law of the ECJ. The most important example in the field of consumer protection is Directive 85/374/EEC on product liability.<sup>163</sup> Its implementation at national level was the subject of no fewer than five of the seven cases from 2001 to 2006.<sup>164</sup> On 25 March 2002 the Court handed down three judgments raising the question whether Member States could derogate from the product liability Directive and clarifying the nature of complete harmonization by the means of a directive.<sup>165</sup> In a first step, the Court in carefully reasoned judgments concluded that the Directive seeks to achieve, in the matters regulated by it, complete harmonization of the laws, regulations and administrative provisions of the Member States.<sup>166</sup> The purpose of the Directive in establishing

161. *Mostaza Claro*, *supra* note 159, paras. 37–38. Following *Eco Swiss* (*supra* note 160), para 36, which had invoked Art. 3(1)(g) EC.

162. *Mostaza Claro*, Opinion para 56–57. This is remarkable for, as we have seen, in other cases he has not hesitated to found the prerogative of consumer protection on the Treaty (cf. his pro-consumer interpretation rule in Case C-168/00, *Simone Leitner v. TUI Deutschland GmbH & Co KG*, [2002] ECR I-2631).

163. Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products of 25 July 1985, O.J. 1985, L 210/29. For recent and extensive comparative treatment of the subject, see Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (Oxford, 2005).

164. We will concentrate on the implications of total harmonization since this aspect of the case law leads to useful insights into the nature of directives more generally. We may thus only briefly refer the reader to Case C-127/04, *Declan O'Byrne v. Sanofi Pasteur MSD Ltd*, [2006] ECR I-1313, annotated by Rösler, (2006) EWIR, 253, concerning the interpretation of Art. 11 of the Directive and Case C-203/99, *Henning Vedfeldt v. Århus Amtskommune*, [2001] ECR I-3569, annotated by Taschner, (2002) CML Rev., 385, concerning its Arts. 7 and 9.

165. Case C-52/00, *Commission v. France*, [2002] ECR I-3827; Case C-183/00, *María Victoria González Sánchez v. Medicina Asturiana SA*, [2002] ECR I-3901; Case C-154/00, *Commission v. Greece*, [2002] ECR I-3879.

166. See to the same effect: Case C-52/00, *Commission v. France*, paras. 13–25; Case C-154/00, *Commission v. Greece*, paras. 9–21; *Medicina Asturiana*, *supra* note 165, paras. 23–30.

a harmonized system of civil liability on the part of producers in respect of damage caused by defective products was “to ensure undistorted competition between traders, to facilitate the free movement of goods and to avoid differences in levels of consumer protection”.<sup>167</sup> The difficulty of defining the ambit of the Directive is mainly linked to Article 13: “[t]his Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified”. On the one hand, the national legislature is precluded from regulating product liability within the framework of the Directive but, on the other, Member States may maintain pre-existing regimes of liability.

The Court underlined in general terms that Article 13 of the Directive did not preclude the application of “other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects”,<sup>168</sup> while a “system of producer liability founded on the same basis as that put in place by the Directive and not limited to a given sector of production” needed to comply with the Directive.<sup>169</sup> The Court clarified the reach of the liability regime of the Directive more specifically in three important respects.<sup>170</sup> We limit our comments here to the threshold requirement of € 500 provided for in Article 9(b) of the Directive, since it is typical of the reasoning of the Court. The threshold, the Court emphasized, was the result of a conscious policy decision of the Community legislature, namely “that, in order to avoid an excessive number of actions, in the event of minor material

167. Case C-52/00, *Commission v. France*, *supra* note 165, para 17.

168. *Medicina Asturiana*, *supra* note 165, para 31.

169. *Ibid.*, para 33.

170. First, as to the threshold of € 500, see the text. Second, a French law equating the supplier with the producer for the purposes of product liability was incompatible with Art. 3(3) of the Directive, which renders the supplier liable only on an ancillary basis, where the producer is unknown (Case C-52/00, *Commission v. France*, *supra* note 165, para 40). Third, Art. 15 of the Directive did not authorize Member States to alter the conditions under which Art. 7(e) is applied or to amend the rules governing derogations provided for in Art. 7(d) (Case C-52/00, *Commission v. France*, para 47). In another recent case, the Court had the opportunity to apply these principles and to comment further upon the ambit of Art. 13 of the Directive. In Case C-402/03, *Skov Aeg v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen*, [2006] ECR I-199, paras. 45 and 48, the Court held that while a rule under which the supplier is answerable without restriction for the producer’s fault-based liability was compatible with the Directive, this was not the case with a rule under which the supplier is answerable, beyond the cases listed exhaustively in Art. 3(3) of the Directive, for the no-fault liability which the Directive establishes and imposes on the producer. See, also, Riehm, “Die überschießende Umsetzung vollharmonisierender EG-Richtlinien”, (2006) JZ, 1035, 1045, who suggests far-reaching implications for German tort law of Case C-52/00, *Commission v. France*.

damage the victims of defective products cannot rely upon the rules of liability laid down in the Directive but must bring an action under the ordinary law of contractual or non-contractual liability".<sup>171</sup> Accordingly, Member States (France and Greece in the present proceedings) were precluded from adopting a more consumer-friendly approach in this respect.<sup>172</sup> It is noteworthy that the partial failure of France to comply with the Court's ruling in Case C-52/00 resulted in the later imposition of substantial fines upon France under Article 228 EC for non-compliance with the earlier judgment.<sup>173</sup>

This recent line of cases confirms that a total harmonization measure imposes upon the Member State a relatively strict set of uniform provisions precluding the national legislature from deviating from the policy decisions contained therein. The strictness of the rules contained in such a complete harmonization directive likens it to an EC regulation for all material purposes except for the issue of direct effect. The missing direct effect is an obvious drawback, since it requires parallel yet completely pre-determined legislative activity at national level which is constantly to be monitored by the Commission and the Court. More specifically and unsurprisingly, Member States are precluded by such a directive from adopting or retaining national laws which are more favourable to consumers than the directive. However, if the directive in question allows for alternative legal regimes applicable alongside the rules implementing the directive, such as Article 13 of the product liability Directive, difficult questions arise as to *which* derogations may be tolerated. Their assessment occupies considerable judicial resources on the part of the ECJ, while in the end the degree of harmonization achieved may in fact be no greater than that secured under minimum harmonization measures.

#### 4.2.4. Directives as a means of harmonization

The flexibility intended by directives is of utmost importance in a Community with heterogeneous systems of law. Directives, however, come at a price: they complicate the legislative process by requiring action at different levels and in different Member States, and add another layer of complexity to the task faced by national courts in interpreting and applying the law in the case at hand.<sup>174</sup> To this one must add the impact of the continuing trend of judg-

171. Case C-154/00, *Commission v. Greece*, *supra* note 165, para 30.

172. Case C-154/00, *Commission v. Greece*, para 34; Case C-52/00, *Commission v. France*, para 34. Although see the later Case, *Skov Eeg* para 48, as explained *supra* note 170.

173. Case C-177/04, *Commission v. France*, [2006] ECR I-2461, para 78, fixed at € 31,650 for each day of delay from delivery of the judgment on 14 March 2006. For general discussion of this area, see Wennerås, "A new dawn for Commission enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, lump sums and penalty payments", 43 CML Rev. (2006), 31.

174. Johnston and Unberath, *op. cit. supra* note 5, p. 188.



ments delivered by the ECJ, which judgments have served to increase the efficacy of directives in the absence of implementation in national law. The difference in the application of the notion of direct effect as between directives and regulations has been diminished, if not quite eliminated. Sir Francis Jacobs has succinctly observed: "... to compensate for the lack of horizontal direct effect, the Court has employed various techniques which have progressively minimized any consequential loss of effectiveness".<sup>175</sup> The most important such technique<sup>176</sup> is the interpretative method, according to which national courts are required to interpret so far as possible 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. The difficulty with this is that the limits to interpretation are not uniform (or at least not applied uniformly) across the Community.<sup>177</sup> Little wonder, then, that a recent comprehensive comparative study suggests that the laws of the Member States differ "considerably" in the fields covered by directives.<sup>178</sup> It should thus come as no surprise that the ECJ is constantly on the lookout for alternative means to increase the *effet utile* of directives.<sup>179</sup>

When directives are construed as if they were regulations – in a manner which is highly restrictive of Member States' discretion – and, hence,

175. Cf. Jacobs, *op. cit. supra* note 9, p. 307.

176. For a detailed analysis of this and other methods to increase the effectiveness of directives in the absence of implementation, see: Johnston and Unberath, *op. cit. supra* note 5, pp. 158–178 with references.

177. For the limits in German law, see Herresthal, *Rechtsfortbildung im europarechtlichen Bezugsrahmen*, (München 2006) and Johnston and Unberath, *op. cit. supra* note 5, pp. 169–171 for the approach prevailing in the UK.

178. Consumer Law Compendium, *supra* note 39, p. 745.

179. Case C-144/04, *Werner Mangold v. Rüdiger Helm*, [2005] ECR I-9981, provides a recent illustration. In this case, the Court regarded the principle of non-discrimination on grounds of age as a general principle of Community law, para 75. As such, its application was not conditional upon the expiry of the period allowed the Member States for the transposition of Directive 2000/78/EC (O.J. 2000, L 303/16) establishing a general framework for equal treatment in employment (para 76) and furthermore, unlike the Directive, was directly applicable to horizontal relationships. It followed that the national court was required to set aside any provision of national law which may conflict with the principle of equal treatment, para 77. See for a critical analysis the Editorial in 43 CML Rev. (2006), 1 and Hailbronner, "Hat der EuGH eine Normverwerfungskompetenz?", NZA 2006, 811, and the pursuant decision of the *Bundesarbeitsgericht* applying *Mangold*: BAG, 7 AZR 500/04, NZA 2006, 1162. See, however, most recently, the Opinion of A.G. Mazák in Case C-411/05, *Palacios de Villa v. Cortefiel Servicios S.A.* (pending; Opinion of 15 Feb. 2007), which seems to cast strong (and, for many, welcome) doubts upon the apparent approach of the ECJ in *Mangold* to the question of the apparent horizontal direct effect of general principles of EC law in the field of application of a Directive, and more generally. For discussion of the direct effect of directives and the impact of (and problems with) *Mangold*, see Dashwood, "From *Van Duyn* to *Mangold* via *Marshall*: Reducing direct effect to absurdity?", forthcoming in 9 CYELS (2006–2007).



the flexibility advantages of directives are not achieved in practice, then the drawbacks of directives may well outweigh the advantages. Regulations might then<sup>180</sup> prove to be a more appropriate instrument of harmonization.<sup>181</sup> This would not only 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.<sup>182</sup> Both sets of resources, needless to say, are in short supply. In any event in order to maintain the desired flexibility of directives the Court would need fundamentally to reconsider its approach and the Community legislature would have to limit the scope of applicability of its laws to core matters that really deserve a uniform treatment across the Community.

The cases reviewed here suggest that in policing the implementation of directives the Court requires a high degree of certainty and requires considerable hurdles to be cleared to achieve full compliance.<sup>183</sup> So far as the case law is concerned with interpreting directives, the Court has almost invariably broken down open-textured, abstract and broad provisions into comprehensive specific rules and has thereby reduced the leeway of Member States under a regime of directives considerably, giving directives a meaning which was not easily apparent from the wording of the relevant provisions.<sup>184</sup> This makes

180. Unless the suggestions of A.G. Lenz that full vertical and horizontal direct effect be granted to directives on the expiry of the implementation period were to be accepted (see Case C-91/92, *Dori v. Recreb Srl*, [1994] ECR I-3325). While the ECJ seems firmly to have set its face against such a step (see *Dori* itself and also the recent Joined Cases C-397–403/01, *Pfeiffer v. Deutsches Rotes Kreuz*, [2004] ECR I-88335), cases like *Mangold* continue to suggest that some judges, at least, continue to strive to increase the *effet utile* of directives, even at the risk of increasing doctrinal confusion in the notion of direct effect. For an early harbinger, see the well-known contribution by Pescatore, “Direct Effect: An infant disease of Community law?”, 8 EL Rev. (1983), 155–177.

181. Cf. also Kieninger, “Koordination, Angleichung und Vereinheitlichung des Europäischen Vertragsrechts”, (2004) SZIER, 483, 506.

182. These considerations as to the drawbacks of directives apply with greater force to complete harmonization. Measures of complete harmonization come very close indeed to regulations and impose strict criteria for compliance. See the cases discussed in relation to the product liability Directive, *supra* notes 165 and 170. But the difference is altogether not great: minimum harmonization allows the Member State to adopt a higher level of consumer protection but the room above the layer of uniform rules is considerably restricted by the basic freedoms contained in the Treaty, e.g. *A-Punkt Schmuckhandels*, note 51, *supra*., and by the impact of human rights, as *Karner*, *supra* note 53, implies. The Compendium, *supra* note 39, agrees that the argument in favour of complete harmonization is not very strong, p. 753.

183. E.g. Case C-144/99, *Commission v. Netherlands*, *supra* note 126; Case C-372/99, *Commission v. Italy*, *supra* note 136; Case C-70/03, *Commission v. Spain*, *supra* note 139. A more flexible approach was adopted in *Freiburger Kommunalbauten*, *supra* note 142 and Case C-478/99, *Commission v. Sweden*, *supra* note 124.

184. E.g. *Leitner*, *supra* note 162; *Cofidis*, *supra* note 156; *Mostaza Claro*, *supra* note 159.

it even more difficult for Member States correctly to transpose directives. Indeed, around half of the cases considered have dealt with the inaccurate implementation of directives or the failure to transpose them at all.

#### 4.3. *Setting high standards of consumer protection*

According to Article 95(3) EC harmonization measures in respect of consumer protection should be based on a “high level” of protection. The cases discussed so far have already revealed a significant pro-consumer bias in the Court’s case law. The recent case law on Directive 90/314/EEC on package travel<sup>185</sup> is typical of the Court’s approach regarding consumer protection more generally and confirms both that the ECJ is aiming at setting a high standard of consumer protection in interpreting secondary legislation and that the Court is assuming a pro-active role in using this basis to elaborate upon the nucleus of private law rules embedded in the consumer directives.

In *Simone Leitner*,<sup>186</sup> the question referred to the Court concerned the meaning of the term “damages” in Article 5(2) of the Directive, which states: “[w]ith regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services”. The facts of the case are straightforward. Simone Leitner booked a package holiday with TUI at a holiday club in Turkey. She got a salmonella infection from the meal served in the club and, as a result, was seriously ill for much of her holiday (and for some time after she returned home). An Austrian court of first instance awarded the claimant damages for the physical pain and suffering caused by the food poisoning and dismissed the remainder of the application, which was for compensation for the non-material damage caused to her and her parents by loss of enjoyment of the holidays. The court of appeal stayed proceedings and referred to the Court the question whether Article 5 of the Directive required that compensation is in principle payable in respect of claims for compensation for non-material damage.

Advocate General Tizzano answered the question in the affirmative. He pointed out that the meaning of the terms of a provision of Community law

185. O.J. 1990, L 158/59. In the past the Directive attracted attention in relation to the condition of Member State liability for missing or incorrect implementation, see Joined Cases C-178, 179, 188, 189 & 190/94, *Dillenkofer and others v. Germany*, [1996] ECR I-4845; Case C-140/97, *Rechberger and others v. Austria*, [1999] ECR I-3508.

186. *Leitner*, *supra* note 162.

must normally be given an autonomous and uniform interpretation throughout the Community.<sup>187</sup> He then invoked a rule of interpretation, which if it exists, is relevant to *all* secondary legislation based on Article 95 EC: “in the event of any doubt, the provisions of the Directive in question must be interpreted in the manner most favourable to the person whom they are intended to protect, namely the consumer of the tourism service”.<sup>188</sup> He inferred the rule from an analysis of the Directive and from the fact that Article 95(3) EC required that harmonization measures in respect of consumer protection should be based on a “high level” of protection. If one starts from this premise, then the route to an extensive reading of the open-textured notion of “damages” is predictable. Two lines of argument can be discerned. On the one hand, the Advocate General referred to textual and systematic arguments inferred from Community law<sup>189</sup> and, on the other, he pointed out that some Member States regarded the enjoyment of a holiday as an asset worth protecting through an award of damages for loss of enjoyment.<sup>190</sup> Neither set of arguments is convincing. Whether the Directive was intended to cover such loss is open to doubt,<sup>191</sup> while the reference to the practice in some Member States begs the question why the rules of these States and not of others are authoritative for the purpose of interpreting the – as the Advocate General underlined, autonomous – meaning of a provision of Community law? In the final analysis, the Opinion of the Advocate General indeed rested upon the principle that, in case of doubt as to the meaning of a concept, it should be given the most consumer-friendly interpretation.<sup>192</sup>

The Court, in a scantily reasoned judgment, did not explicitly endorse the general pro-consumer rule of interpretation but did come to the same conclusion as to the interpretation of Article 5. The first main reason for extending the notion of damages to encompass non-material harm for loss of enjoyment of a holiday appears to have been that Article 5 was “designed to offer protection to consumers” and that “compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance

187. Ibid., Opinion, para 25.

188. Ibid., Opinion, para 26. Cf. already the Opinion by A.G. Saggio, para 17 in *Rechberger*, *supra* note 185.

189. *Leitner*, *supra* note 162, Opinion, paras. 27–36.

190. Ibid., Opinion paras. 37–44, referring *inter alia* to § 651 f (2) of the German Civil Code and *Jarvis v. Swan Tours* [1973] QB 233; *Jackson v. Horizon Holidays* [1975] 1 WLR 1468.

191. We may refer, for reasons of space, to the insightful comments by Roth in his annotation, 40 CML Rev. (2003), 937, 945–948. See also the comparative case notes on *Leitner* in 11 ERPL (2003), 91–102.

192. This approach has been followed in the German literature (termed “*in dubio pro consumatore*”) most notably by Tonner and Rösler; see their analyses in (2006) JZ, 400 and 402 respectively.

to consumers”.<sup>193</sup> Advocate General Tizzano seemed to assume that if several interpretations are possible then that meaning is to be preferred which achieves the highest level of protection provided for in a Member State. The invocation of a “high level” of consumer protection in Article 95(3) EC cannot, however, be relied upon in this respect. As Stuyck has remarked: “a ‘high level’ of protection does not necessarily mean the ‘highest’ level of consumer welfare”.<sup>194</sup> It may be true that the object of the package travel Directive is to establish a “high” level of consumer protection. But it is controversial what a “high level of protection” in fact means. In any event, there are many shades of a “high level” of protection and, as a minimum harmonization measure,<sup>195</sup> the Directive does not exclude the possibility of an even higher level being achieved in a given Member State. Hence, Article 95(3) EC does not pre-determine the interpretation of Community measures based on Article 95(1) EC in specific cases. The pro-consumer rule of interpretation proclaimed by the Advocate General is highly problematic, if not misleading.<sup>196</sup>

The Court’s second main argument was this: it feared distortions of competition if the level of damages varied from one Member State to another.<sup>197</sup> With respect, this argument confuses minimum with total harmonization. Minimum harmonization implies that different levels of compensation may be retained across the Member States if the rules as to free movement are respected. If different rules are allowed to exist, it follows that “distortions” of competition may be perfectly legitimate under the regime of this or any other minimum harmonization Directive.

The ruling in *Leitner* is not confined to the package travel Directive but it may well influence the interpretation of the notion of “damages” throughout Community law. The case is also important in the light of the ongoing consultations on a European contract law, for it indicates that the ECJ is willing to take an active role in the process of creating autonomous core-concepts and fundamental rules of private law at Community level.<sup>198</sup> However, as Roth noted, whether the Court should really play such an active part is by no means beyond doubt.<sup>199</sup> In our context of positive harmonization, the main reason for judicial self-restraint is that the Court’s task in policing implemen-

193. *Leitner*, *supra* note 162, para 22.

194. Stuyck, *op. cit. supra* note 8, p. 392.

195. *Leitner*, *supra* note 162, Opinion, para 21.

196. See, for further criticism of the rule, Riesenhuber, “Kein Zweifel für den Verbraucher”, (2005) JZ, 829.

197. *Leitner*, *supra* note 162, paras. 20–21.

198. Cf. the analysis of Trstenjak, “Die Auslegung privatrechtlicher Richtlinien durch den EuGH”, (2007) *ZeUP*, 143, 152–155.

199. Roth, *op. cit. supra* note 191, 937.

tation is a limited one. It is not for the ECJ to fill in gaps left by a directive or to break down vague and abstract concepts such as “damages” into specific and rigid rules.<sup>200</sup> Otherwise, the flexibility which Directives are meant to generate is diminished and Member States are left with virtually no leeway at the implementation stage.<sup>201</sup> As we have already observed in relation to the *Heininger/Schulte* cases, in *Leitner* the Court once more has interpreted a wide concept in a narrow sense. Opting for the most consumer-friendly solution was not a matter of mere “mechanical” interpretation but – as Advocate General Tizzano fully acknowledged – actually involved contentious policy choices, which in our view ought to have been left to the Member States in the absence of a clear indication in the Directive.

The decision in *Club-Tour*<sup>202</sup> is confined to the Directive but also has far-reaching practical implications. The Court held that the term “package” used in Article 2(1) of the Directive must be interpreted as including holidays organized by a travel agency at the request and according to the specifications of a consumer or a defined group of consumers.<sup>203</sup> Further, the term “pre-arranged combination” of tourist services was interpreted by the Court so as to include combinations put together at the time when the contract is concluded between the travel agency and the consumer.<sup>204</sup> In a very short judgment, the Court followed the Opinion of Advocate General Tizzano, who, *inter alia*, invoked the pro-consumer rule of interpretation deployed in *Leitner*: in case of doubt as to the correct interpretation of the Directive, that interpretation ought to prevail which ensures that “the consumer has the broadest protection possible”.<sup>205</sup> We do not know whether the Court had any doubts as to the correct interpretation of the Directive, but in a central passage it seemed to rely upon the fact that the Directive was designed to protect consumers.<sup>206</sup>

One must remember that in the field of contract law one party to the contract is protected at the expense of the other: i.e. such consumer protection comes at a price. The extensive reading of the term “pre-arranged” to include combinations of services put together in a travel agency at the request of the consumer means that such travel agencies have to take out insurance to cover

200. *Ibid.*, 948–949.

201. Indeed, the Court’s approach here arguably amounts to a usurpation of the function of the Community legislature: had such detail been intended to be part of the Directive, it was perfectly open to the EC legislature to have provided (more of) it when it negotiated and agreed the measure.

202. Case C-400/00, *Club-Tour, Viagens e Turismo SA v. Alberto Carlos Lobo Gonçalves Garrido*, [2002] ECR I-4051.

203. *Ibid.*, para 16.

204. *Ibid.*, para 20.

205. *Ibid.*, Opinion, para 21.

206. *Ibid.*, para 13.

the risk of insolvency, as required under Article 7 of the Directive.<sup>207</sup> This increased burden may lead to market adjustments, since many small travel agencies do not have the degree of creditworthiness necessary for such insurance, as Tonner, who welcomed the judgment, has pointed out.<sup>208</sup> One would have hoped for a more explicit discussion of these policy implications of consumer protection, at least in the Opinion of the Advocate General, instead of the one-sided argument in favour of, as explained, a doubtful pro-consumer rule of interpretation.

It is also noteworthy that this very notion of a “package” holiday seems increasingly outmoded in the modern marketplace: a recent English case<sup>209</sup> showed that attempting to apply notions of “pre-arranged” holidays at an “inclusive price” becomes incredibly context-dependent in a world where, for example, low-cost flights mean that an increasing number of holidaymakers will arrange flights themselves directly and then will seek accommodation and ancillary services elsewhere. This could deprive such consumers of

207. This issue received more detailed treatment in the English case of *The Queen (on the application of The Association of British Travel Agents Ltd) (ABTA) v. Civil Aviation Authority (CAA), The Secretary of State for Trade and Industry* [2006] EWHC 13 (QB (Admin.)), [2006] ACD 49; overturned by the Court of Appeal in *R (on the application of ABTA) v. Civil Aviation Authority* [2006] EWCA Civ 1299. The discussion of the Directive there was mainly due to the fact the UK’s regime for issuing Air Travel Organisers’ Licences (ATOLs) (Civil Aviation (Air Travel Organisers’ Licensing) Regulations 1995 (S.I. 1995, No. 1054)) was amended in 2003 to include a definition of “package” which was intended to align with that from the package travel Directive and used in the UK’s implementing rules (the Package Travel, Package Holidays and Package Tours Regulations 1992 (S.I. 1992, No. 3288)). Indeed, the very motivation for aligning the two regimes was to prevent travel agents from evading the indemnity provisions (which would apply under both the 1992 Regulations and the 1995 ATOL Regulations) by various devices relating to splitting or unbundling the contracts relating to different aspects of a holiday. This is a further fascinating illustration of the spillover effects that originate from an EC directive but which may encourage the (re-)alignment of purely national rules to ensure coherence with the national implementation of the EC rules; on this, see further: Johnston and Unberath, *op. cit. supra* note 5, section 2. The Court of Appeal in the *ABTA* case cited extensively from the ECJ’s judgment in *Club-Tour* and pointed out (per Chadwick LJ at [20]) that there was nothing in the UK’s implementing regulations to prevent UK courts from following the expansive approach taken in *Club-Tour*: reg. 2(1)(c)(ii) of the 1992 Regulations specifically provides that “the fact that a combination is arranged at the request of the consumer and in accordance with his specific instructions ... shall not of itself cause it to be treated as other than pre-arranged”, and while this does not imply that such requests will *always* lead to pre-arrangement, it is clear that this does not prevent the Regulations being applied in accordance with *Club-Tour*. Compare, however, DTI, *The Package Travel Regulations – Question and Answer Guidance for Organisers and Retailers* (November 2006; available on the internet at [www.dti.gov.uk/files/file35634.pdf](http://www.dti.gov.uk/files/file35634.pdf) (last visited 9 June 2007)), “Question 5”.

208. Tonner, annotation, (2002) EuZW, 403, 404. This point was also noted by the judge in the English *ABTA* case, *supra* note 207, at [66].

209. *ABTA*, *supra* note 207. On the UK, see generally Grant and Mason, *Holiday Law*, 4<sup>th</sup> ed. (London, 2007), ch. 2.



the protection afforded by the Directive in those circumstances, unless some other national scheme applies. Furthermore, it focuses attention upon internet providers of such services where flights are offered alongside links to accommodation, connecting bus and train tickets, and so on: are such internet sales offering a “package” under the Directive?<sup>210</sup> Although the case law is by no means developed on this point in the UK, it would seem that this would not amount to sale at an “inclusive price”<sup>211</sup> and thus would amount to a series of separate contracts rather than a protected “package”. Whether this approach would find favour with the ECJ is, of course, another matter. These difficulties merely underline the need for a re-examination of the practical implications of the package travel Directive and the associated (and very finely balanced) arguments with regard to the policy implications of consumer protection in this field.

Before we conclude this section it is important to note that in one recent decision the Court did not follow the pro-consumer approach suggested by the Advocate General. The Court’s decision in the case of *easyCar*<sup>212</sup> therefore deserves special attention. It concerned the interpretation of Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts,<sup>213</sup> namely the interpretation of Article 3(2) of the Directive, according to which its Articles 4, 5, 6 and 7(1) do not apply “to contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period”. *easyCar* is a car hire undertaking that offers cars for hire only via the internet. The UK Office of Fair

210. See the earlier overview by Kilbey, “Consumer protection evaded by the Internet”, 30 EL Rev. (2005), 123–132, and the comments by Chapman, “What does the *ABTA* judgment mean for Internet sales?”, (2006) *International Travel Law Journal*, 85–89.

211. *ABTA*, *supra* note 207: at first instance, see [97] et seq. (submissions) and [153] et seq. (conclusions of Goldring J on the matter). On appeal, see [24]–[31] (per Chadwick LJ), where the link is made between the notion of “pre-arrangement” and the understanding of what counts as an “inclusive price” (at [24]). The Court of Appeal identified the difficult case as being the situation where the total price is “equal to the aggregate of the prices for which the components would have been sold or offered for sale separately” (at [26]). This means that there is a “factual question to be resolved – on a case by case basis – ... whether the services are being sold or offered for sale as components of a combination; or whether they are being offered for sale separately, but at the same time” (ibid.). For a summary, see Grant and Mason (op. cit. *supra* note 209), pp. 37–39, who conclude that “it would be a brave travel agent who would nail his flag to the mast and state categorically that his normal business should not be bonded or insured” (at 39).

212. Case C-336/03, *easyCar (UK) Ltd v. Office of Fair Trading*, [2005] ECR I-1947.

213. O.J. 1997, L 144/19. As to the minimum harmonization aspect of the Directive see *DocMorris*, *supra* note 47. See for jurisdictional issues of such distance selling contracts in relation to the Brussels Convention Case C-96/00, *Gabriel* [2002] ECR I-6367 and Case C-27/02, *Engler v. Janus Versand GmbH*, [2005] ECR I-481.



Trading sought an injunction, arguing that easyCar was not in compliance with its obligations under the UK Regulations<sup>214</sup> implementing the distance contracts Directive. The High Court asked the Court of Justice essentially the following question: did Article 3(2) of the Directive apply to contracts for the provision of car hire services? Advocate General Stix-Hackl, after explaining that the wording of the provision was not conclusive, relied upon the purpose of the derogation.<sup>215</sup> Those services which have reservation as a precondition would be affected by the requirements of the distance contracts Directive to an unreasonable extent, thus causing high “opportunity costs”. She concluded that “pure” car hire contracts (i.e. those not connected with other services covered by Art. 3(2)) should not be exempt because the right of cancellation would not unreasonably affect the car hire company.<sup>216</sup> The Court, however, did not follow the Advocate General and, considering the wording of the different language versions of the Directive and the purpose of the derogation, came to the opposite conclusion:

“[c]learly, car hire undertakings carry on an activity which the legislature intended to protect against such consequences by means of the exemption laid down in Article 3(2) of the directive. Those undertakings must make arrangements for the performance, on the date fixed at the time of booking, of the agreed service and therefore, for that reason, suffer the same consequences in the event of cancellation as other undertakings operating in the transport sector or in the other sectors listed in Article 3(2)”. (para 29)

Neither the approach of the Court nor that of the Advocate General was predetermined by the wording, purpose or genesis of the Directive but involved a policy choice.<sup>217</sup> The Court was prudent not to burden the car-hire company with the right of cancellation. Some, however, have criticized the Court for “unnecessarily sacrificing” consumer protection in this decision.<sup>218</sup> Yet consumer protection is not the only value prevailing in the EC. The vital business interests of certain branches of the law and the desire of the Community legislator to protect them by inserting the derogation in Article 3(2) of the Directive are just as legitimate. One must remember that consumer protection – literally – comes at a price. As Wagner has pointed out in relation to the

214. The Consumer Protection (Distance Selling) Regulations 2000 (S.I. 2000, No. 334) (available on the internet at [www.opsi.gov.uk/si/si2000/20002334.htm](http://www.opsi.gov.uk/si/si2000/20002334.htm)).

215. *easyCar*, Opinion, para 59.

216. *Ibid.*, Opinion, paras. 60–68.

217. Cf. Ultsch, annotation, (2006) ZEuP, 170, 184.

218. Micklitz in *Münchener Kommentar zum BGB*, 5th ed. (München 2006), Vorbemerkung zu §§ 13, 14, Rn. 97.

distance selling Directive: “one would be mistaken if one believed that the right of cancellation is a benefaction for the consumer for which he would not have to pay”.<sup>219</sup> The derogation in Article 3(2) of the Directive acknowledges that this extra-cost entailed by the right of cancellation may be so high that it becomes prohibitive. Furthermore, the rationale for the right of cancellation<sup>220</sup> may not apply with full force to car-hire: the nature of the service is not such as to call for actual inspection of the performance in order to make up one’s mind. Hence, it is difficult to see why the consumer ought to be able to go back on his promise. All in all, while the *easyCar* judgment stands out against the general pro-consumer tendency of the case law, the conclusion reached by the Court seems perfectly reasonable.

However, the general trend of the case law on positive harmonization does seem to evince a pro-consumer bias in interpreting directives. It is no coincidence that Advocate General Tizzano suggested a rule of interpretation according to which, in case of doubt, the interpretation which best protects the consumer ought to be preferred. Whether the Court has covertly been following this pattern is in the end immaterial. As to the substance of its judgments, there can be no question that in the great majority of cases the Court has preferred a reading of directives that appears to be the most consumer-friendly.<sup>221</sup> Cases in which the Court has adopted what could be called a “neutral” approach – i.e. one that does not one-sidedly rely upon the protective purpose of the directive in interpreting its provisions – are rare.<sup>222</sup>

## 5. Coherence at Community level?

The starting point of our review was whether the case law revealed coherence in EC law in the field of consumer protection. Our survey confirms the finding of a double-headed approach towards consumer protection. In relation to negative harmonization (above 3.), we submitted that the ECJ is biased in favour of free trade and sceptical of any restrictions at national level that are founded on consumer protection. In defining the need for protection, the Court has argued on the premise of a “reference” consumer who is reasonably

219. Wagner, “Die soziale Frage und der gemeinsame Referenzrahmen”, (2007) ZEuP, 180, 207: according to his calculation, the extra cost imposed as a result of the Directive in relation to typical distance sales amounts to € 2.80 per sale.

220. Cf. Markesinis, Unberath and Johnston, op. cit. *supra* note 118, pp. 267–268.

221. See e.g. *Heininger*, *supra* note 94; *Schulte*, *supra* note 97; *Leitner*, *supra* note 162; *Club-Tour*, *supra* note 202; *Cofidis*, *supra* note 156; *Mostaza Claro*, *supra* note 159.

222. *easyCar*, *supra* note 212, where the Court did not follow the more consumer-friendly interpretation suggested by the Advocate General.

circumspect and well informed. The resulting judgments can be regarded as involving a trade-oriented and liberal approach. While recognizing consumer protection as a fundamental value of EC law, the Court regularly objects to legislation at national level as being unnecessary to achieve that legislation's stated goal, and thus contrary to the principle of proportionality.<sup>223</sup> Indeed, the Court has proved creative and has frequently come up with alternative measures that are less restrictive in regulating the market but just as effective in protecting consumers.<sup>224</sup> Even the most serious concern justifying restrictions of human conduct, namely dangers to public health, has often failed to convince the Court, the precautionary principle notwithstanding. The Member States are required to establish the seriousness of the risk in relation to specific dangers and must do so on a solid scientific basis.<sup>225</sup>

The case law on positive harmonization (above 4.) rests on a fundamentally different rationale. Apart from the fact that challenges to the legal validity of EC consumer protection measures are virtually absent,<sup>226</sup> on the whole the Court has granted the consumer protection directives a wide scope of application and amplified their regulatory and interventionist potential (4.3.). Where the wording of the relevant provision is ambivalent, the Court has invariably opted for the most consumer-friendly and often, therefore, the most trade-restricting interpretation. Very rarely has the Court attempted to take into account possible alternatives to mandatory rules that unilaterally seek to protect the consumer. Attempts by Member States to manoeuvre within the framework of open-textured provisions to increase legal certainty or to confine interventionist legislation have regularly been rejected (often at the suit of the Commission under Art. 226). One wonders what the "reference consumer" resident in the world of negative harmonization would have thought had he been invited by the Court into the realm of positive harmonization. But he was not.<sup>227</sup>

223. See *supra* text at note 54.

224. See *supra* text at note 47.

225. See *supra* text at note 61.

226. *Tobacco Advertising I*, *supra* note 6, being the only successful challenge so far, and one which succeeded on the question of the appropriate legal basis for such measures.

227. The Community legislation in the field of misleading advertising (see, e.g. Directive 84/450/EEC, O.J. 1984, L 250/17) has also led to some case law on this issue (e.g. Case C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, [1998] ECR I-4657, paras. 30–32, as to which see e.g. Temmink, "Verbod op misleidende informatie aan de consument: welk type consument?", (1998) NTER, 222). In this area, the "reference consumer" (i.e. he who would be "misled" by the advertising involved) seems to have been derived directly from the Court's case law on Art. 28 EC (see the reference in *Gut Springenheide* to the earlier Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH*, [1995] ECR I-1923: of all of these cases

What is the explanation of this paradox? There is, of course, a point of view from which the cases on negative and positive harmonization are entirely consistent. The EC Treaty itself does not only provide for the basic freedoms but in Article 95 EC instructs the Community legislature and ultimately the Court to enforce a “high level” of consumer protection. The case law in other words merely reflects conflicting regulatory choices embedded in the different levels of legislation of the Community. The Court is, as in principle it should be, neutral as to the policy implications of the laws it applies. Rather it amplifies what is given to it as Community rule. This function of the Court relates back to the founding years of Community law. Even today much of the case law of the ECJ still seems to be inspired by the fear that EC law is constantly in danger of being suppressed at national level and therefore needs robust protection to establish its domain. Regarding negative harmonization, the Court thus stresses the overriding importance of primary EC law, namely the basic freedoms, and hence pushes back national market regulation. In respect of positive harmonization, the ECJ seeks to increase the effectiveness of the real or perceived objective of secondary legislation, namely consumer protection, and hence fills the previously created void with extensive regulation. Two fundamentally conflicting policies are the result: free trade is the priority of primary legislation while interventionist consumer protection lies at the heart of the case law on secondary legislation. Yet it is not primarily the Court that is to be held responsible for the inconsistency. Its holdings merely point to a deeper-level tension in the fabric of the Community’s philosophy of market regulation.

Fifteen years after the “completion” of the internal market in 1992 (Art. 14(1) EC) one thus notes that the approach at Community level to the problem of regulating markets in the interest of consumers is just as heterogeneous and controversial as it is in most of the Member States. A first step towards more coherence would be to discuss more openly the policy decisions embedded in the consumer directives and consider them in the light of

referred to by the Court in paras. 30 and 31 of *Gut Springenheide, Mars* is the only one which really deals with the nature of the reference consumer directly). Thus, it must be acknowledged that the reference consumer has made its way into the misleading/comparative advertising field, but very much because of its strong roots in the free movement case law and its strong parallels with the Intellectual Property field, where the question relates not to the general protection of the consumer’s position in specific circumstances (as in all of the other Directives in the study) but specifically uses the risk of consumer confusion as its touchstone for the applicability of the rules. Thus, this is merely the logical consequence of the nature of these legislative measures, which is different from the more general protection of the consumer involved in the other Directives in this study. Note that Directive 84/450/EEC’s provisions relating to business-to-consumer relations have been amended by the Unfair Commercial Practices Directive 2005/29/EC, O.J. 2005, L 149/22.

proportionality and the possible applicability of theories of regulatory competition. In this paper we have not attempted to provide a solution for this unresolved issue but we have sought to reveal the policy implications in the case law of the Court which must surely form the basis of any future attempts to develop a more uniform approach.