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I. INTRODUCTION

The suitability of the European Court of Justice (ECJ) as an interpreter of private law has, rightfully it seems, been questioned by many a commentator1. The Court appears ill equipped to adjudicate in matters of private law for at least two reasons. A main concern relates to the interpretative gap between instruments of EC law and rules of national laws in matters relating to substantive issues of private law, resulting from the Court’s lack of jurisdiction in issues which do not require a direct interpretation of rules of European law2. Thus, while the text of a Directive may be subject to interpretation in a preliminary reference procedure, its implementation has taken place at national level and the rules created thus fall outside the scope of the Court’s jurisdiction. The possibilities for the ECJ, therefore, to contribute to a systematisation between European and national laws are very restricted. This is aggravated, secondly, by the lack of an adequate methodology for the Court in private law matters. The blue print of such cases is a situation involving a balancing of interests between individual parties. Private law cases will therefore often take the ECJ outside its comfort zone of general, public policy matters with which it is familiar and, moreover, will require an insight in the social and economic context of specific types of transactions which the Court in many instances is unlikely to have3.

These concerns, however, have not withheld the ECJ from occasionally venturing into judgments that do directly influence the outcome of a private law dispute. A notable example is its judgment in Océano Grupo4. The preliminary reference in that case was to the effect that a national court may determine of its own motion whether a term of a contract is unfair, and thus is not restricted to acting only in cases where the consumer so requests. On top of this, however, the ECJ showed no

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4 European Court of Justice (ECJ) 27.06.2000, joined cases 240/98 to 244/98 (Océano Grupo Editorial SA/Rocío Murciano Quintero and Salvadat Editores SA/José M Sánchez Alcón Prades and others), [2000] ECR I-4941.
qualms in holding that the term in question – a jurisdiction clause conferring exclusive jurisdiction on the courts in Barcelona, where none of the consumer defendants in the main proceedings lived but where the seller had its principal place of business – was an unfair term within the meaning of Article 3 of the Unfair Terms Directive. The decision of the ECJ thus went beyond a mere technical interpretation of the text of the Directive, taking up and determining an essential point of the substance of the dispute. As to how the Court was able to do this without going outside the boundaries of its own jurisdiction is a matter that will be clarified further on in this paper.

The point in issue is where to set the standard for the ECJ in private law cases: should the Court be urged towards self-restraint, or should it be encouraged actively to contribute to the harmonisation of European private law through its case law? A two-way track will be argued for in this paper. On the one hand, it is thought that in the general field of private law, the ECJ should take heed of its limitations and aim for a restrained approach towards the interpretation of substantive legal matters. A wider systemisation of concepts and doctrines is achieved better at the level of individual Member States by national judges familiar with the workings of private law in those systems (section II). From another perspective, however, the ECJ may – and should even, it is submitted – take an active role in the interpretation of private law concepts. This second track focuses on the development of harmonising rules at European level. The ECJ may contribute to the consistency and clarity of concepts contained in European legislation by interpreting each instrument in light of the wider context of European rules. With the current focus of harmonisation being on a review of the consumer acquis, examples will be given of how the ECJ may aid the legislator, and has done so in some instances already, by creating a tighter framework of European consumer law through interpretation of directives in their wider legislative context (section III.1), as well as through a comparative interpretation of similar concepts found in different directives, so-called ‘cross-directive’ interpretation (section III.2).

Where the ECJ is entrusted with the task of contributing to the development of a coherent conceptual framework of European private law or, to stick with the example, of consumer law, another question arises: what should be the scope of the Court’s interpretative function? As the side-kick of the European legislator, the role of the ECJ would appear to be limited to the application of rules and underlying policies developed in the legislation – the legislator designs, while the Court interprets and gives effect to the rules. However, given the history of the ECJ in the highly politicised area of European law, it may be naïve to expect the Court to stay safely within the boundaries set by a mere textual interpretation of directives. The development of a conceptual framework for European consumer law, as suggested in section III, invites a wider interpretative role for the Court (section IV.1). A possible way forward would be for the ECJ to seek for general principles of European consumer law, in follow-up to earlier case law in which the Court quite boldly relied

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6 See below, p. 9.
8 On the different ways of interpretation, compare Van Gerven (n. 2) 103.
on general principles to give effect to EC law. Though a development in this direction would seem to overstep the boundaries of the Court’s competence, and therefore, at least at this stage, appears premature, a brief look will be had at instruments or techniques that may guide the Court should it be able to follow this course at a future time (section IV.2).

II. THE ECJ AND PRIVATE LAW

In a Montesquieuan view of State and law, which may be regarded as a common heritage for the constitutional organisation of the European Member States, the role of the judge is defined by its relation to the other two powers, the legislator and the executive. In relation to those, the judge is independent, whilst at the same time in a position to control the functioning of the other powers through a system of ‘checks and balances’\(^9\). This model is reflected also in the institutional structure of the European Union. In this context, an even stronger role for the judiciary power may be observed, with the ECJ taking an active role in legal integration through the interpretation of the Treaty, especially in the earlier decades of its history\(^10\). One may wonder, therefore, whether the ECJ should have a limited role in the sphere of private law, at least in comparison to its function in matters of constitutional or administrative law.

The root of the problem lies in the particular institutional structure of the EU, which reflects a constant mediation between the powers of the Community and those of the Member States. Unlike in domestic systems, where full legislative competence lies with the national authorities, the European legislator is confined by the principle of subsidiarity to balance its powers with those of the Member States. In other words, the Community may only take action where its objectives cannot be sufficiently achieved by the Member States and can be better achieved at the supranational level. As a further qualification, any action taken in this context shall not go beyond what is necessary to achieve the objectives of the Treaty\(^11\). For private law, with its focus on relationships between private parties rather than between individuals and the State, the consequence of the principle is a limited role for the Community. Whereas issues in the field of constitutional or administrative law often lend themselves to EU intervention – think for example of the numerous agricultural measures – private law is often sufficiently dealt with at national level and thus remains within the domain of the Member States. This is particularly so as the legislative competence of the Community is construed around the needs of the internal market, with an accessory role for consumer protection under Article 153 EC, which naturally limits EU influence to very specific areas of private law whilst excluding others\(^12\). For example, the regulation of cross-border transactions through specific measures in the field of contract law may be brought within the aim of completion of the internal market; measures relating to family law, however, are unlikely to fit the box.

\(^10\) Paul Craig/Gráinne de Búrca, EU Law. Text, Cases and Materials, 3\(^{rd}\) edn., 2003, 87, 100.
\(^11\) Art. 5 EC.
\(^12\) See Art. 95 EC.
Against this background, the limitations of the ECJ as a private law judiciary take shape. Two main factors influence its functioning in this sphere: first, the fact that, due to the particular division of competence between the Community and the Member States, regulation of consumer law has mainly taken the form of directives, thus forcing the Court into the constraints attached to this form of legislation; secondly, the existence of a methodological hiatus in the Court’s ability to deal with matters between private parties. Taken together, they support the view that the Court should exercise self-restraint in its interaction with rules of substantive private law at the level of national law.

1. The ECJ and private law legislation

Arguments for the restrictive role of the ECJ in private law matters relate to the fact that the bulk of legislation in this area has been introduced through directives\(^{13}\). As said at the outset of this paper, the use of directives as a legislative technique inherently puts the Court at a distance when it comes to interpretation. The reasons for the limitations of the Court in this context are not new, but a brief overview may be helpful to set the stage for the debate presented further on in this paper.

The initial restraint follows from the fact that the role of the ECJ in private law cases is mostly concentrated on providing preliminary references on primary and secondary instruments of EC law under Article 234 EC. As far as substantive matters of private law are concerned, this puts the Court in a position where it is unlikely to have a direct influence on the outcome of the actual dispute under consideration. The function of a preliminary ruling, after all, is merely to clarify rules of Community law of which the meaning is in doubt\(^{14}\). Even if the ECJ’s ruling clarifies such a point, it is unlikely that this will be of direct application to private law cases. This is firstly because the primary legislation of the EU (the Treaties) contains few provisions that relate to private law matters, besides a rule on non-contractual liability of Community institutions and their civil servants\(^{15}\). Secondly, the main instruments of secondary legislation, directives, do not include directly applicable rules; they bind the Member States as to the result to be achieved, but leave to the national authorities the choice of form and method (Article 249, paragraph 3, EC). The Court’s interpretation of directives, therefore, may be a factor in individual proceedings, but it will not directly influence the outcome of a case. Rather than the provisions of a directive, the outcome of a case will depend on the particular rules of national legislation that apply, as directives do not have direct horizontal effect and may therefore not be relied upon against an individual\(^{16}\). This point is of particular


\(^{14}\) The doctrine of *acte clair* prescribes in which circumstances the answer to a particular question may be deemed to be so clear that no reference to the ECJ is warranted; see Craig/De Búrca (n. 10) 445 ff.

\(^{15}\) Art. 288, paragraph 2, EC. See Van Gerven (n. 2) 113.

significance in relation to consumer law where, as said, directives have been the primary instruments for harmonisation.

In this context, an additional point to note is the different treatment by the ECJ of cases concerning the liability of private parties for breaches of Community law and cases concerning the liability that may befall private parties under domestic contract laws shaped by European directives. With regard to the first situation, the Court has made clear that it is willing to take active steps, in the absence of Community legislation, to lay down substantive law conditions for liability to arise between private parties, as it had done before for State liability. Thus, its decision in *Courage v Crehan* obliges Member States to provide a remedy in compensation for breach of directly applicable rules of Community law in relations between private parties. The way in which effect is given to this rule, for example whether a remedy is provided in contract or in tort, is up to the Member States. Nevertheless, while this solution resembles the functioning of European directives in the freedom that it leaves to the Member States to decide in which way to comply with the requirements of European law, the role of the ECJ – especially its interpretative function – is markedly different in both situations. In *Courage v Crehan*, the Court was concerned with the interpretation of primary rules of EC law, namely the competition rules laid down in Article 85 (now 81) EC. A tendency can be observed in relation to such rules, and even more with underlying general principles, for the Court to take a bold approach to interpretation. By contrast, a much more modest approach characterises the ECJ’s judgments on the interpretation of specific directive provisions, in which case the Court generally sticks to a textual interpretation. This may be explained by the fact that directives, as secondary legislation, mostly do not touch directly upon fundamental concepts or freedoms at the heart of Community law, but rather contain rules of a more technical nature.

Self-restraint on the part of the ECJ, furthermore, is promoted by the principle of autonomous interpretation. This principle, established in *Hoekstra*, holds that there is only one correct interpretation of a term used in EC legislation, and that this one correct meaning must be found independently from national or other interpretations of the same term. The principle thus gives a narrow circumscription to the interpretative function that the ECJ may exercise in relation to directives. If, for example, the application of a provision of national law derived from an EC directive requires a preliminary ruling, the ECJ is bound in its interpretation of the relevant directive to stick to its wording and purpose in light of the result referred to in Article 249, paragraph 3, EC. Some leeway is possible in case of general clauses,

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17 On this, see *Van Gerven* (n. 2) 110 ff.
19 ECJ, *Courage/Crehan* (n. 18) at [30]-[31].
20 Compare *Van Gerven* (n. 2) 103.
21 *ibid.*, noting also that exceptions may be made with regard to directive provisions that are based on Community concepts or freedoms, for example in relation to equal treatment of men and women in the social field.
22 ECJ 19.03.1964 case 75/63 (*Mrs MKH Hoekstra (née Unger)/Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*), [1964] ECR 379.
where it may be difficult for Member States to implement the provisions of a directive correctly, unless by simply copying the wording.23

These factors – the secondary nature of directives, textual interpretation, as well as autonomous interpretation of their provisions – set the stage for a restrictive approach of the ECJ in matters of private law. Nevertheless, the dynamics of European integration have led to different degrees of self-restraint on the part of the Court, as reflected in the case law. A good example can be found in cases dealing with the implementation of the Unfair Terms Directive. Judgments with a strong interventionist flavour, such as Commission v Netherlands, Commission v Italy and Commission v Spain24, illustrate how the Court is willing to push the boundaries of its interpretative role in relation to directives. The implementation of directives is subjected to strict principles, diminishing the freedom of the Member States in choosing the appropriate measure to give effect to their provisions. According to the test laid down in Commission v Netherlands, ‘whilst legislative action on the part of each Member State is not necessarily required in order to implement a directive, it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts’25. The Court thus lays down a strict test of compliance, followed in the cases against Italy and Spain, the result of which is that it will be exceedingly difficult for national legislatures to defend implementing measures where the directive has not been transposed word for word.26

Cases like these in which the ECJ limits the freedom of the Member States as to the manner in which to comply with EC law may find explanation in the Court’s central position in defining, and often defending, the position of European rules in relation to national laws. In its mediating role between the Community and the Member States, the Court has in the past often been proactive in its support of European rules. While it has been suggested that the Court’s interventionist practice has diminished after the Single European Act, in particular under the influence of the principle of subsidiarity, this opinion is not universal.27 In fact, the analysis of ECJ consumer case law made by Unberath and Johnston lends support to the proposition that ‘[e]ven 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’.28

23 For a discussion of this problem, see Rott, (2005) 1 Hanse Law Review 6, 8-9.
25 ECJ, Commission/Netherlands (n. 24) at [17].
27 Compare Craig/De Búrca (n. 10) 100-1.
Nevertheless, against the background of the principles of interpretation set out above, caution seems called for and the Court may, depending on the circumstances, need to exercise a greater degree of self-restraint. Its proactive stance may not be problematic when it comes to the interpretation of provisions of directives in an autonomous, European manner. The test laid down in *Commission v Netherlands* and subsequent case law may even be beneficial to achieving harmonisation, as it leaves narrower leeway for Member States to divert from the wording of directives. However, concerns arise where the Court’s case law has an effect on the application of Community law, or national legislation derived from it, in a manner which is more specific than the wording of a directive prescribes. The risk is then that the ECJ interferes with the application of national private laws at a level at which it is not competent, nor appropriately equipped, to do so. That the Court is not unaware of its limitations in this respect can be seen from its decision in *Freiburger Kommunalbauten*29. The case concerned the application of Article 3(1) of the Unfair Terms Directive, which lays down the test for unfairness: ‘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 obligations arising under the contract, to the detriment of the consumer.’ The Court showed self-restraint, holding that the application of this test in individual cases is a matter for the national court. While the ECJ may interpret general criteria used by the Community legislature in order to define the concept of unfair terms, ‘it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question’30. The fact that the ECJ did rule on the unfairness of a term in *Océano* was justified by the Court on the ground that the clause at issue was solely to the benefit of the seller and contained no benefit in return for the consumer and in all contracts undermined the effectiveness of the directive, irrespective of any circumstances surrounding the conclusion of the contract and irrespective of the national law applicable to the contract31.

## 2. Methodology of the ECJ in private law cases

Apart from the question of self-restraint in cases where the outcome depends on an interpretation of the rules of directives in the context of the national law of one of the Member States, another reason for the ECJ to refrain from active intervention in private law matters is the lack of an adequate methodology for it to rely on in this area of law. As set out in detail in Unberath and Johnston’s article on the matter, the case law of the Court shows a double-headed approach to consumer law: in relation to negative harmonisation, i.e. the removal of barriers to trade under the free movement provisions of the EC Treaty, the ECJ seems sceptical of any restrictions on trade at national level that are founded on consumer protection; in relation to positive harmonisation, which aims at approximation of the laws of the Member

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30 ECJ, *Freiburger Kommunalbauten* (n. 29) at [22].

States through EC legislation, a wide scope of application is given to consumer protection directives\textsuperscript{32}. These two lines of case law are not as much in contrast with one another as may be thought at first sight and may even be explained on the basis of a common goal or policy – namely for the Court to contribute to European integration by offering strong protection to EC law in relation to national laws of the Member States. In other words, the main guideline followed by the Court is the aim of giving practical effect to EC law, whether this lends support to consumer protection rules (in case of positive harmonisation) or whether, by contrast, it erases them in favour of internal market policy (in case of negative harmonisation).

A methodological obstacle results from this practice. It is described by Christoph Schmid as ‘schematic effect utile’: the Court tries to maximise the practical effectiveness of EC law, without adequately reflecting upon its systematic embeddedness in its national law environment and the overall objective of private law justice\textsuperscript{33}. In other words, what the case law fails to do is to reflect upon the weight to be attached to consumer protection in light of the context set by domestic laws, as well as on the overall question of where to strike the balance between consumer protection and the policy of market integration. The first point is of course difficult, as greater interference by the Court would be met with objections relating to the lack of competence in national law matters. Nevertheless, criticism on the general lack of direction with regard to consumer protection seems justified. The tension between different policies on consumer law has resulted in a meandering approach towards consumer protection within the Court’s case law, then giving effect to it, then not. In this respect, greater systemisation would be helpful as a means to balance the concurrent interests at stake in consumer law matters.

As to whether it is to the Court to set the first step in this direction, however, caution is advisable. The tension observed in the case law of the Court, after all, is related to the similar incoherence in the underlying framework of EC legislation\textsuperscript{34}. What is missing at this level as well, is a meta-principle steering the development of the law, as found for example in continental systems, where classic private law may be ascribed to the meta-principle of the realisation of a constitution of free and equal citizens\textsuperscript{35}. In light of the division of competence between the two institutions, it seems that the legisatory level is the more appropriate place to tackle the issue.

A wider role for the Court in private law, based on a more grounded methodology, may nevertheless be envisaged. The Court’s position is subject to the dynamics of European policy and decision-making and has changed over time depending on the state of the market and the role taken by other institutions in the integration of the European Union. In this context, there currently is at least one prominent factor that may influence the ECJ’s consumer policy in the near future: the project aimed at the review of the consumer acquis\textsuperscript{36}. This review concerns the


\textsuperscript{35} ibid.

\textsuperscript{36} Compare the Green Paper (n. 7).
legislative framework for consumer law in Europe. While it does not touch upon the freedoms laid down in the EC Treaty, and therefore will not directly influence the EC policy with regard to barriers to trade, the review does provide an opportunity for the European legislator at least to clarify its stance in consumer law. By clarifying the position taken towards the place of consumer protection in relation to the policy of market integration, the European legislator takes a conscious step towards a more coherent system of consumer law. It may even be possible to subtract a meta-principle of consumer policy from this project, which may be a guideline for future developments in EC consumer law. With the necessary caution, as the harmonisation of consumer law through legislation for the moment is at best fragmentary, it may be said that there are possibilities for a more principled approach and that, if a level of sufficient coherence is reached, this legislation may form the basis for a more systematic arrangement of European private law. In such a system, the role of the Court may also be greater, as the boundaries of its interpretative function will be more clearly defined through the presence of a controlling meta-principle.

With regard to the reliance on principles as a basis for decision-making in consumer cases, however, the ECJ will be faced with limitations. First, for the reasons set out above in section II.1, the Court appears ill-suited to act as an adjudicator in private law matters that touch directly upon the solution of individual disputes or the application of national law. Secondly, when it comes to relying on principles as a means to further the development of EC consumer law, the powers of the ECJ appear to be limited, even after its judgment in Mangold. In that case, the Court famously held that the principle of non-discrimination on grounds of age, as a general principle of Community law derived from international instruments and the constitutional traditions common to the Member States, could set aside rules of national law even where a directive regulating the matter had not yet entered into force. The decision is controversial because it disregards the rule that directives do not have horizontal effect, simply circumventing it through the application of a general principle. The basis on which that principle is found, moreover, is weak, as it seems doubtful that the ECJ’s reference to international conventions and the constitutional traditions of the Member States carries enough weight to overstep the competence of the European legislator to regulate this field under Article 13 of the EC Treaty. Not surprisingly, the case has encountered strong criticism, and a tendency can be observed in the opinions of the Court’s Advocate Generals in subsequent cases to search for a restrictive application of the reasoning proposed in Mangold. This would seem appropriate, especially since a clear methodology for the

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38 The case, concerning Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, O.J. 2000 L 303/16, was brought before the deadline for implementation of the Directive had passed. See ECJ, Mangold (n. 37) at [74]-[77].
identification of general principles appears to be lacking; as pointed out by Devroe, the definition of a general principle of Community law appears to extend to anything that the ECJ denominates as such\textsuperscript{41}.

Finally, an additional, methodological problem to keep in mind is that the ECJ lacks sufficient insight in the social and economic make-up of individual Member States to assess which outcome would be appropriate in individual cases. Unlike its other case law, which mostly deals with matters of public policy, adjudication in private law matters usually requires a balancing of the parties’ interests, for which knowledge of the sociological and economic background to specific transactions is invaluable\textsuperscript{42}.

III. HARMONISATION THROUGH INTERPRETATION OF DIRECTIVES

Against this background, the central focus for the ECJ with regard to private law matters becomes fixed on its potential to contribute to the development of a coherent framework for private law regulation at the European level through the interpretation of directives. To clarify, ‘European level’ in this context must be understood as a limitation for the Court to stick to the interpretation of European legislation, mainly directives, without interfering with the application of such rules to individual disputes before the national courts of the Member States. The ECJ may thus re-position itself in relation to the European legislator in such a way that it contributes to the harmonisation of private law through interpretation of legislation in a consistent manner, as long as in doing so it stays within the boundaries set by the principle of subsidiarity found in the Treaty.

Possibilities for the ECJ to engage with private law matters in this manner currently are most prominent in the field of consumer law, from which examples will therefore be taken. Two environments for the Court’s interpretative function may be distinguished: on the one hand, the interpretation of directives in light of the framework of European law following from the Treaty, or even specific provisions found therein such as the competition provisions found in Articles 81 and 82 EC; on the other hand, the interpretation of directives in light of similar provisions found in other directives. Following the terminology coined by Walter van Gerven, the first may be referred to as the ‘directive-related’ case law of the ECJ, the latter as ‘cross-directive interpretation’\textsuperscript{43}. From its case law, indications may be gleaned that the ECJ is taking heed of these methods and is placing its decisions in the wider context of EC legislation, on occasion even taking this as a ground for a bold interpretation comparable to its teleological approach in relation to Treaty provisions and general principles.

\textsuperscript{41} Devroe (n. 40) 136.
\textsuperscript{43} Van Gerven (n. 2) 113, 117. Though Van Gerven appears to use the term ‘cross-directive interpretation’ in a wider sense, including the situation where a directive is interpreted in light of provisions of the EC Treaty. For the sake of clarity, the term will be used in the narrower sense in this paper.
1. Directive-related case law: unfair terms

In his 2004 contribution to *Towards a European Civil Code*, Van Gerven noted the failure of the ECJ to take sufficient account of the framework set by European consumer legislation, expressing disappointment particularly in the ECJ’s argumentation in *Océano Grupo*. The weakest point in the Court’s reasoning in that case, according to Van Gerven, is its failure to base its decision on firmer conceptual ground44. The sanction of non-bindingness prescribed by Article 6 of the Unfair Terms Directive, at the heart of the *Océano Grupo* case, bears similarity to the nullity sanction provided for in Article 81(2) EC for competition cases, and it may be regarded as an oversight that the Court did not make use of this obvious point for comparison.

Since then, however, there have been indications of a greater awareness on the part of the Court to place questions of interpretation of directives in the wider context of European legislation. In the cases following on from *Océano Grupo*45, the judgment in *Mostaza Claro* provides at least one example where the ECJ does refer to the sanction prescribed by the competition provisions of the Treaty and its own interpretation thereof in the *Eco Swiss* case46. While one swallow does not make a summer, the case may be regarded as a welcome indication that the Court is willing to look beyond the text of the directive in question and to look for an interpretation that fits with a comprehensive system of consumer law in Europe. Let us contrast these two cases then.

In *Océano Grupo*, the preliminary reference put to the Court concerned the question whether a national court may determine of its own motion whether a term of a contract is unfair47. The facts of the case were set out above48, the term in question conferring exclusive jurisdiction on the courts of Barcelona where none of the consumer-buyers resided, but where the seller had his place of business. Two grounds persuaded the ECJ that national courts have power to evaluate terms of this kind of their own motion. First, as in these type of disputes the amounts involved are often limited, the lawyers’ fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. Secondly, in the opinion of the Court, where consumers under national law are able to plead their own case, there is a risk that the consumer, because of ignorance of the law, will not challenge the term pleaded against him on the grounds that this is unfair49. What may be of this reasoning, clear is that the Court fails to take account of wider considerations that may be of relevance, in particular the comparison with Article 81(2) EC.

*Mostaza Claro*, decided a few years later, gave the ECJ another chance to look at the question and this time around the court made use of the opportunity to consider it in light of the wider context of Community law. The case concerned an arbitration

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44 Van Gerven (n. 2) 120.
47 ECJ, *Océano Grupo* (n. 4) at [19].
48 Above, p. 3.
49 ECJ, *Océano Grupo* (n. 4) at [26]. For criticism, see Van Gerven (n. 2) 120.
clause in a mobile telephone contract, under which any disputes arising from the contract were to be referred to arbitration. In ensuing court proceedings, where the consumer sought to contest an arbitration decision made against her, the term was held to be unfair and the arbitration agreement, as a result, null and void. The Audiencia Provincial (Provincial Court) of Madrid, however, was faced with the question how to proceed from there, as national rules regulating arbitration prescribe that the invalidity of an arbitration agreement has to be pleaded before the arbitral tribunal. As the consumer had omitted to make a pleading to that effect, the Audiencia Provincial decided to stay the proceedings and to refer to the ECJ for a preliminary ruling, the question being whether it was required to determine that the arbitration agreement is void if it contained an unfair clause but the consumer did not raise this argument in the arbitration proceedings.

The answer found in the ECJ’s judgment is notable for its content, as it goes further than previous rulings on the matter. Not only must national courts have the power to test whether a term is unfair, and if so to make certain that it will not be applied, they are actually required to test the possible unfairness of a clause. Moreover, the judgment is of interest for its reasoning, as in this respect the Court goes beyond the argumentation found in previous decisions, explicitly placing the case in the wider context of Community law. Two bases of reasoning may be discerned here which, notably, also form the substantive core of the ECJ’s judgment in Eco Swiss.

a) The principle of effectiveness

Firstly, it is stated that the power of the national court to determine of its own motion whether a terms is unfair is ‘necessary for ensuring that the consumer enjoys effective protection’. The justification for the rule, therefore, is found in one of the basic requirements with regard to national responses to breach of Community law: the principle of effectiveness. While the Member States have a wide degree of procedural autonomy, with procedural matters falling primarily within their competence, the operation of this principle may lead to the disapplication of national rules where it is deemed necessary to give effect to EC law within the national jurisdiction. This is exactly what happened in Mostaza Claro, where a provision of Spanish procedural law was set aside on the ground that it hindered the application of the Unfair Terms Directive. Grounds which persuaded the ECJ to this ruling were in particular the ‘real risk’ that the consumer ‘is unaware of his rights or encounters difficulties in enforcing them’. With this, the Court places the case in the line of

50 ECJ, Freiburger Kommunalbauten (n. 29).
51 In accordance with Art. 6 of the Unfair Terms Directive; compare ECJ, Océano Grupo (n. 4) at [26].
52 ECJ, Mostaza Claro (n. 45) at [38], which goes further than ECJ, Cofidis (n. 45). See also Loos, (2007) 3 ERCL 439, 443.
53 ECJ, Mostaza Claro (n. 45) at [27]-[28].
55 ECJ, Mostaza Claro (n. 45) at [28].
cases following on from Océano Grupo, in which a similar intervention was made on national procedural autonomy in light of the Directive²⁶.

Mostaza Claro takes the argument of effectiveness a level further than these cases, however. The judgment is of particular interest where it ties in with the application of the principle of effectiveness in relation to Treaty provisions, as exemplified by Eco Swiss²⁷. The problem there, as in Mostaza Claro, related to the fact that the initial proceedings between the parties, in which the unfairness of the term in question could have been, but was not in fact raised, took place in front of an arbitral tribunal. Since arbitrators do not have access to the ECJ through a preliminary reference procedure, as regular courts do, they would essentially be left to their own devices when it comes to the application of EC law. The concern then is that, since arbitration is governed by contractual principles and therefore in essence the subject of private autonomy, there would be insufficient control over the application of EC legislation by arbitrators. This motivated the conclusion of the ECJ that, in order to ensure the effectiveness of EC law – such as the competition provisions in Eco Swiss and the Unfair Terms Directive in Mostaza Claro – national courts need to monitor the correct application of EC law in arbitration, with the possibility under their procedural laws to set aside an arbitral award or to refuse its enforcement²⁸. In view of the Court, this argument takes precedence over the fact that such review may harm the efficiency of arbitration, though it stresses that that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances²⁹. Of interest here is that in its judgment in Mostaza Claro, explicit reference is made to the earlier decision in Eco Swiss, regardless of the fact that the latter case concerned the effectiveness of directly applicable, primary rules of EC law, whereas the first case relates to secondary rules of EC law. With regard to the effectiveness of EC legislation, these rules may be put on par. Through the principle of effectiveness, therefore, the ECJ may take up the challenge of playing an active part in the harmonisation of consumer law through the interpretation of directives in the wider context set by Community law³⁰.

b) Public policy

This does not mean, however, that the analogy with Eco Swiss made by the ECJ in Mostaza Claro is free from criticism. The second part of the Court’s reasoning is based

²⁶ See ECJ, Océano Grupo (n. 4) and ECJ, Cofidis (n. 45). CMDS Pavillon, De procedurele autonomie wijkt (opnieuw) voor de effectieve doorwerking van de Richtlijn oneerlijke bedingen (HvJ EG 26 oktober 2006, C-168/05, Elisa Maria Mostaza Claro v Centro Móvil Milenium SL), Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2007, 149, 152-53.


²⁸ ECJ, Eco Swiss (n. 46) at [40]; ECJ, Mostaza Claro (n. 45) by analogy. See also Komninos, (2000) 37 CMLR 459, 467-71.

²⁹ ECJ, Eco Swiss (n. 40) at [35], following ECJ 23.03.1982, case 102/81 (Nordsee Deutsche Hochseefischerei GmbH/Reederei Mond Hochseefischerei Nordstern AG & Co KG), [1982] ECR 1095, at [14]-[15]. ECJ, Mostaza Claro (n. 45) at [33]-[34].

³⁰ A possibility already envisaged by Van Gerven (n. 2) 118.
on an argument of public policy, stating that: ‘The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier’\textsuperscript{61}. In this respect, the ECJ places \textit{Mostaza Claro} within the context of a wider debate on the relation between Community rules of public policy and the national notion of public policy, for which the stage was set by \textit{Eco Swiss}. In that case, the Court had to judge the public policy argument in light of Dutch procedural law on the setting aside of arbitral awards, in particular Article 1065(1)(e) of the Dutch code of civil procedure (DCCP) which lists public policy as one of the grounds on which a court may set aside an arbitral award. The ECJ found that, though the disregard of Dutch competition law would not generally qualify as a violation of public policy under this provision, the same could not be said when EC competition law was at stake. According to the Court, Article 81 EC is of fundamental importance for the functioning of the internal market; a notion which is strengthened by the decision of the drafters of the Treaty to expressly provide, in Article 81(2), that any agreements or decisions prohibited pursuant to that article are to be automatically void\textsuperscript{62}. In accordance with the principle of equivalence\textsuperscript{63}, the ECJ deduced from this that ‘where … domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty [now Article 81(1); VM].’ In other words, the competition provisions of the EC Treaty are deemed to be rules of public policy which may, if national procedural rules so prescribe, lead to the annulment of an arbitral award. Notable is that this conclusion is reached without impinging the procedural autonomy of the Member States, in this case the Netherlands. The effect of the Court’s judgment is to feed into the national rule on public policy a notion of Community public policy, as a result of which the national court will have to set aside an arbitral award if at odds with EC rules of public policy\textsuperscript{64}.

The judgment in \textit{Mostaza Claro} extends this reasoning to the Unfair Terms Directive, which, like the rules of EC competition law, is deemed to contain rules of public policy\textsuperscript{65}. As with the nullity sanction found in Article 81(2) EC, therefore, national courts are required to test of their own motion whether a term is unfair and, if so, to set it aside in accordance with Article 6 of the Directive. In this respect, the ECJ makes a clear attempt to interpret the Directive in the wider context of EC law, and thus to contribute to a comprehensive treatment of EC consumer law. Nevertheless, the judgment leaves many questions unanswered.

\textsuperscript{61} \textit{ECJ, Mostaza Claro} (n. 45) at [38].
\textsuperscript{62} \textit{ECJ, Eco Swiss} (n. 46) at [36].
\textsuperscript{64} This may also be the case where no ground for annulment or non-enforcement can be found in national law, though this appears to be a theoretical problem, as the public policy exception is part of all national laws on arbitration; \textit{Komninos}, (2000) 37 \textit{CMLR} 459, 473-75.
\textsuperscript{65} \textit{Mostaza Claro} (n. 45) at [35]-[38].
For one thing, it may be debated whether the terms of the Unfair Terms Directive qualify as rules of public policy. Unlike EC competition law, which operates on a macro-economic level, the provisions of the Directive are aimed at the interests of private parties. Thus, while competition law may seek to enhance efficiency (e.g. in the allocation of resources), or to protect consumers and smaller firms from negative effects related to large aggregations of economic power (e.g. with regard to political liberty, or the possibility to enter a market), unfair terms regulation works at a smaller scale. It is a means of policing contractual relations, as such aimed at relations between private parties, and seeking to regulate the balance between the interests of those parties where one is a consumer and the other a professional party.

Rather than in public policy, therefore, the basis for these rules must be found in the policy of consumer protection – the notions do not necessarily overlap. As Advocate-General Tizzano argued in Mostaza Claro, to regard the two as equal might give too wide scope to the concept of public policy, which traditionally refers only to rules that are regarded as being of primary and absolute importance in a legal order. While consumer protection is an important policy in EC law as well as in national laws, it is not usually regarded as a primary policy but rather as a corollary. So, in the European context it may be seen as a corollary to the internal market policy, whereas in the context of general private law (whether of European or of national origin) it functions as a corrective influence on the principle of party autonomy, with the aim of relieving the inequality of bargaining power which is usually present in consumer-business relationships. To extend this notion to that of public policy, as the ECJ showed no qualms in doing, is a bold step that would have benefited from a more extensive justification than the one given in the Court’s judgment. It relies on two arguments, namely (i) that the aim of the Unfair Terms Directive to strengthen consumer protection makes it, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory, and (ii) that such an extension is justified by the nature and importance of the public interest underlying the protection which the Directive confers on consumers.

The first point in particular may be regarded as problematic, as it opens up the possibility for provisions of other directives aimed at consumer protection also to be regarded as rules of public policy, and in consequence to be subject to similar treatment. For example, this may be the case with Article 7(1) of the Consumer Sales Directive, which contains a non-bindingness sanction for terms or agreements that waive or restrict the consumer’s right to receive goods that conform to the terms of the contract which is concluded before the lack of conformity is

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66 Compare Van Gerven (n. 2) 121.
68 As an alternative, he suggested confining the ruling to the violation of the right to a fair hearing; ECJ, Mostaza Claro (n. 45) Opinion at [56]-[57].
70 See, for example, Edwin Peel, Treitel on the Law of Contract, 12th edn., London 2007, [1-004]-[1-005].
71 ECJ, Mostaza Claro (n. 45) at [37]-[38]. Compare ECJ, Eco Swiss (n. 46) at [36].
brought to the seller’s attention\textsuperscript{72}. Whether this wide scope for interference with national laws through a Community notion of public policy is in fact what the ECJ envisaged with its ruling remains unclear. It may be that the second point, which refers to ‘public interest’ in light of the inequality of bargaining power between business and consumer, is meant to create a narrower scope as to which Directives are included in the notion of public policy, though this interpretation itself is doubtful. It will be difficult to make a distinction on this basis, as legislation aimed at consumer protection is almost always related to, and seeking to alleviate, such an imbalance between the parties. Further case law will be necessary, therefore, to clarify the position of the ECJ on this matter. As to the idea that the ‘public interest’ may justify the inclusion of certain directives in the notion of public policy, true sceptics may even argue that the imbalance between business and consumer is overrated by the ECJ – after all, if Ms Mostaza Claro was able to plead the unfairness of a term before the court, then why did she not do so earlier, during the arbitral proceedings\textsuperscript{73}?

A further reason to be careful in extending the reasoning of Eco Swiss to unfair terms cases is that, as mentioned earlier, the ruling in that case was mainly inspired by the wish to create some control over arbitral proceedings within the preliminary reference system\textsuperscript{74}. While Mostaza Claro also concerned a claim for the annulment of arbitral proceedings and may thus be brought under this umbrella, the same was not the case in the other unfair terms rulings, in Océano Grupo and Cofidis. The ECJ nevertheless reached similar results on the question whether a national court may determine of its own motion whether a contractual term is unfair, in particular on grounds relating to the principle of effectiveness\textsuperscript{75}. Whether that justification will be enough after the ruling in Mostaza Claro, however, remains to be seen. It may be that the earlier rulings were also to some extent inspired by the thought of the Unfair Terms Directive as a measure of public policy, though this is not explicitly stated in either of the judgments. After all, similar arguments with regard to consumer protection and inequality of bargaining power would apply. A reference to public policy in future cases of a similar nature, in this light, could then be regarded as a clarification of earlier practice. What may be of this suggestion, it is clear in any case that the ECJ does not shy away from extending its reasoning in Eco Swiss to other situations even if they do not concern arbitral proceedings. In the Manfredi case, for example, the Court referred without further comment to the Eco Swiss formula, though the case had nothing to do with arbitration\textsuperscript{76}. Further case law will have to show whether the ECJ will do the same with Mostaza Claro and regard the Unfair Terms Directive as a matter of public policy also in cases which do not relate to arbitration.


\textsuperscript{73} Compare Pavillon, NTBR 2007, 149, 152.

\textsuperscript{74} Above, p. 15. Compare also Freudenthal/Van Ooik (n. 54) 74.

\textsuperscript{75} Cofidis (n 45) at [34]-[35]; Océano Grupo (n 4) at [26].

\textsuperscript{76} ECJ 13.07.2006, joined cases 295/04 to 298/04 (Manfredi), [2006] ECR I-6619 at [31]. See Freudenthal/Van Ooik (n. 54) 74-75.
2. Cross-directive interpretation: the consumer concept

Another way for the ECJ to contribute to the harmonisation of EC consumer law is through the interpretation of concepts found in directives in light of their use in other directives, so-called ‘cross-directive interpretation’. An area in which the Court has had the opportunity to engage in such interpretation is in the development of a European consumer concept, though it shows reluctance to divert from its usual method of textual interpretation. Furthermore, what should be noted at the outset is that, in this context, the directives subject to interpretation are mostly aimed at minimum harmonisation, therefore leaving it open for Member States to enact rules that are more favourable to the consumer than the regime prescribed by a directive. The role of the ECJ in this regard, therefore, is limited to ensuring a coherent interpretation of the rules found in the directives, i.e. the rules prescribed at the level of European legislation. The effect of this on actual harmonisation at the level of national laws is limited, seeing that Member States have the possibility to go beyond the minimum rules laid down in directives. Notwithstanding this limitation, the clarification of concepts within the framework of EC consumer legislation in itself may have beneficial effects on the process of harmonisation, as it may make it easier for Member States to define how to adapt their laws in order correctly to implement a directive. In addition, the intention of the European Commission to adopt a policy of maximum harmonisation in certain areas, once it takes shape in actual legislation, may lead to a more direct influence of the Court on the harmonisation of national consumer laws. After all, in that situation Member States would be compelled to adopt the rules laid down by European directives, without the possibility to upgrade the level of consumer protection prescribed therein.

The consumer concept found in European directives, in any case, has benefited from clarification in the case law of the ECJ. From the consumer law directives in which a definition of the concept is included77, the general notion that may be distilled is that a consumer is a natural person who is acting primarily for purposes not related to his trade, business or profession. This definition has also become the one included in the Draft Common Frame of Reference (DCFR), which is being

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developed under the aegis of the European Commission. To arrive at such a definition, which reflects a common core of the slightly divergent consumer definitions found in each of the directives, indications of its correct interpretation may be drawn from the case law of the ECJ. It could be argued, however, that the Court could have made a greater contribution by going beyond its usual method of interpretation of directives, in which it is inclined to stay close to the text of the provision at issue. A bolder method of interpretation, in which the consumer concept used in a particular directive is regarded in light of the wider context of EC consumer law and policy, would have helped to give greater substance to the Court’s rulings and, in due course, to the process of harmonisation of consumer law in Europe.

The prime example of a case in which the ECJ let pass by an opportunity for a more contextual interpretation of the consumer concept is *Idealservice*. The case concerned the interpretation of the consumer definition of Article 2(b) of the Unfair Terms Directive, which reads: "‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession’. The question was whether this provision must be interpreted as referring solely to natural persons. The ECJ’s interpretation, brief and to the point, was that it is ‘clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision’. In other words, a strictly textual interpretation was followed.

Regrettably, the Court did not look beyond this interpretation to see how the consumer definition of the Unfair Terms Directive fits in with EC consumer policy in general, and on which grounds a wider or narrower interpretation of the concept would be preferable in light of that policy. It is notable that Advocate General Mischo in this case did feel at liberty to make such a wider enquiry. He reaches the same conclusion as the Court on the textual interpretation of the provision, but goes on to state that this interpretation is confirmed by the objective of the Community legislation at issue, referring to the consumer protection policy that also inspired the ruling in *Océano Grupo*. As it will usually be the category of persons not acting in the course of their trade, business or profession that will be in a weaker position as compared to the sellers and suppliers referred to in Article 2(c) of the Directive, it makes sense to restrict protection to that group. Furthermore, in relation to another question put to the Court, the AG notes that the term ‘[to act] for purposes which are outside his trade, business or profession’ is hard to interpret without regarding the

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79 Above, p. 7.
81 ECJ, Idealservice (n. 80) at [16].
82 Notable since the full substance of the discourse before the Court is represented always in the combination at the two levels, the Court’s judgment and the opinion of the Advocate General; compare Mitchel De S-O-L'E Lasser, Judicial Deliberations, 2004, 141.
83 Discussed above, p. 13.
84 ECJ, Idealservice (n. 80), Opinion at [15]-[16].
fact that the person who acts is a natural person. He refers thereby to earlier case law of the ECJ, namely its ruling in *Di Pinto*\(^85\), drawing a parallel between the consumer definition of the Unfair Terms Directive and that of Article 2 of the Doorstep Selling Directive at issue there\(^86\). In relation to the latter definition, which is similar to that of the Unfair Terms Directive, the question was whether a trader who is canvassed for the purpose of concluding an advertising contract concerning the sale of his business must be regarded as a consumer entitled to protection under the directive. With regard to that question, the Court ruled that in these circumstances a trader was not to be regarded as a consumer, noting that the acts referred to as preparatory for the sale of a business were ‘managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader’ (emphasis added)\(^87\). This reference to family or personal requirements shows that it is difficult to separate the status of the consumer as a natural person from the interpretation of the term ‘outside his trade, business or profession’ or similar terminology\(^88\). The latter term will normally, at least in European legislation, be interpreted in a narrow sense relating only to natural persons. This is emphasized also in *Di Pinto* by the Court’s ruling that, with regard to acts performed in the context of a trade or profession, Community law does not draw a distinction between normal acts and those which are exceptional in nature\(^89\).

By placing the interpretation of the consumer definition in one directive in the context of the framework set by similar definitions in other directives, and the interpretation given to those by the ECJ, a contribution may therefore be made to the development of a coherent consumer concept in EC law. In this context, what may not go unmentioned is that harmonisation of the concept to some extent may be influenced by ‘directive-related interpretation’. AG Mischo in *Idealservice* refers to Article 13 of the Brussels I Convention (now Brussels I Regulation No. 44/2001), stating that the consumer definition found therein has been interpreted as to refer to natural persons only\(^90\). With regard to the interpretation of this provision, reference may also be made to the judgment of the ECJ in *Gruber*, which related to so-called mixed purpose transactions, where a contract is made partly for private and partly for professional purposes\(^91\). The Court ruled that a narrow interpretation must be given to the jurisdiction rules of the Brussels I Convention, so as to give standing only in respects of contracts where the trade or professional purpose is so limited as to be negligible in the overall context of the transaction. This interpretation, it has been suggested, may be extended to the consumer definitions found in the directives, as they are very similar in wording to the Regulation\(^92\). Nevertheless, whether it will become the standard interpretation for the European consumer concept remains


\(^86\) Directive 85/577 (n. 77), further: Doorstep Selling Directive.

\(^87\) ECJ, *Di Pinto* (n. 85) at [16].

\(^88\) ECJ, *Idealservice* (n. 80), Opinion at [28].


open. While in procedural matters it can be justified on grounds of legal certainty to give standing only in respect of contracts concluded entirely for use for private purposes, it may be that in substantive law terms the interests of consumers would be better protected by an interpretation that concentrates on the primary use purpose.93

IV. TOWARDS A CONCEPTUAL FRAMEWORK FOR EC CONSUMER LAW?

To sum up – kept in check by the constitutional structure and principles of EU law, the ECJ may, through the interpretation of directives in light of the wider framework set by EC legislation, contribute to the development of a coherent European consumer law. In fact, the contribution of the Court in this process may be very welcome, since it may help absolve some of the problems currently encountered in the development of European private law, in particular those resulting from the lack of a sufficiently developed normative framework and the absence of a clear methodology.94 Though the process is likely to be slow, as the Court will have to adjust its pace to that set by the Commission in its legislative efforts towards harmonisation, gradually a framework for consumer law may emerge from the Court’s case law in this area. With the main hooks and angles of the ECJ’s current position examined above, what remains is to look at the possibilities for development of the Court’s role as an interpreter and – if the balance between judicial activism and self-restraint allows – co-creator of future rules and principles of European consumer law.

1. The Role of the ECJ in Relation to the Review of the Consumer Acquis

To an extent, the unifying effect that the ECJ may have been able to pursue through its case law is brought about at an accelerated speed by the review of the consumer acquis currently underway under the aegis of the European Commission.95 The review covers eight directives and is aimed, according to the latest reports, at the creation of a horizontal instrument applicable to domestic and cross-border transactions, based on full targeted harmonisation; i.e. targeted to the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border.96 As it now stands, this instrument would take the form of a Framework Directive and would include in any event the Unfair Terms Directive, the Distance Selling Directive, the Consumer Sales Directive and the Doorstep Selling

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93 See Schulte-Nölke/Twigg-Flesner/Ebers (n. 89) 727.
95 See Green Paper (n. 7).
Directive, as well as horizontal aspects of other consumer directives\(^97\). Such a ‘super-directive’, therefore, brings together provisions and concepts that are common to a range of consumer directives, smoothing out inconsistencies and taking away ambiguities, thereby tightening the normative framework for EC consumer law\(^98\).

The review does not, however, take away the potential for the ECJ to contribute to a more coherent framework for European consumer law. First, many points will remain open, since the review does not cover the entire field of consumer directives. Therefore, the possibility remains for concepts used in several directives to diverge in meaning and content. As the authoritative interpreter of European legislation, the ECJ may fulfil a useful function in diminishing such divergences.

Furthermore, a stronger output from the ECJ on the interpretation of directives, it is submitted, would be of benefit for ensuring correct implementation of directives into national laws not just at the superficial, textual level but beyond that, at a substantive level. Whereas, as we have seen, many Member States opt for the safe route and implement directives through a literal copying of their provisions\(^99\), this does not guarantee that harmonisation is achieved in substance. It is still very well possible, and in fact it often occurs, that provisions derived from directives are interpreted in quite different manners depending on the context set by a particular domestic legal system\(^100\). While the Court should exercise self-restraint in the interpretation of such provisions if in doing so it would directly influence the outcome of a private law dispute, an intensification of its practice of interpreting directives in light of the wider context set by EC legislation would at least lead to greater coherence at the European level. This would provide a framework not only for future legislation in the field of consumer law, but also a background against which national courts may interpret their legislation and ensure that it is in accordance with European consumer policy. As suggested by Whittaker, it would help ‘for the consumer contract directives to be much clearer in their definitions as well as more consistent. This would at least mean that a Member State can see their substantive significance and how, therefore, they relate to existing national concepts and rules’\(^101\). It may, in this way, be ancillary to the principle of autonomous interpretation and that of interpretation of national law in the light of the relevant directive\(^102\).

Even with a clearer set of concepts and definitions, however, the question remains by which standard the ECJ should interpret the provisions found in directives. If it were to adopt a broader view on the interpretation of directives, in which the general framework of EC law would form the background against which

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98 See also above, p. 11.

99 Above, p. 8.


to test the content of these directives, the Court may move towards a teleological method of interpretation. In order to do that, however, the aims of the EC’s consumer legislation must be clear enough to provide a guideline for interpretation. It must therefore be seen how and from where the Court may distil rules or principles on the basis of which to give substance to its interpretation of consumer directives.

2. The Conceptual Basis of European Consumer Law: PECL, DCFR, or Something Else?

Two examples were discussed above, in section III, as indications of the ECJ’s recognition of its potential for contributing to harmonisation of consumer law through what was called ‘directive-related’ and ‘cross-directive’ interpretation. Especially the Court’s interpretation of the Unfair Terms Directive in light of the wider framework set by the EC Treaty and principles derived from it exemplifies the way in which a more coherent framework for EC consumer law may take shape through the case law of the Court. An additional ground on which to presume that the Court is at least exploring its possibilities in this area may be gleaned from the second example, concerning the development of a uniform consumer definition, in which the opinions of the Advocate Generals discuss the interpretation of the concept in light of its use in several directives.

What fails, nevertheless, is a clearer view on where the ECJ finds a basis for such a more principled approach. Besides the acquis, two suggestions crop up at this stage of development of consumer law in the Court, though admittedly neither is free from difficulties. The first would be to distil principles of private law from the national laws of the Member States; the second to rely on uniform sets of principles, such as the Principles of European Contract Law (PECL) or the DCFR103.

Advocate General Tizzano in his opinion in the Leitner case made explicit reference to the examples provided by the legislation and case law of the Member States, in this case relating to liability for non-material damages.104 Without making a full comparative analysis of the matter, the Advocate General is of the opinion that these developments in the private laws of the Member States ‘have not only generally extended the possibilities of compensation for non-material damage, but more specifically have focused increasing attention in recent years on compensation for damage arising out of a ruined holiday, in the sense of non-material damage suffered by a tourist through not being able to derive full enjoyment, as the result of the tour operator’s non-performance of the contract, from the benefits of a trip organised for the purpose of leisure and relaxation’105. This is one of the factors – besides a literal analysis of the Package Travel Directive, a comparison with the damages notion in the Product Liability Directive, Community case law and a number of relevant international conventions – persuading the Advocate General to propose a wide interpretation of Article 5(2) of the Package Travel Directive; an

103 For a wider discussion of general principles in European private law, see Axel Metzger, Extra legem, intra ius – Allgemeine Rechtsgrundsätze im europäischen Privatrecht (forthcoming).
104 ECJ 12.03.2002, case 168/00 (Simone Leitner/TUI Deutschland GmbH & Co KG), [2002] ECR I-2631, Opinion at [40].
105 ibid.
interpretation which was followed, albeit on the basis of a much more limited argumentation, by the Court.\(^{106}\)

Apart from the possibility that one may disagree with the outcome of the case,\(^ {107}\) a problem with the approach adopted by the Advocate General is that it requires a comparative analysis to be made of solutions found in the national laws of the Member States. From a practical perspective, it would seem very difficult for the Court to engage in such an exercise in every case where the interpretation of a Directive would benefit from an analysis of national laws (since all directives go through a process of implementation in which their content is made part of national law, the potential scope of such litigation is vast). As a matter of substance, more importantly, it remains questionable whether the ECJ is competent to apply general principles in the field of private law that may set aside rules of national law. It was seen above that the Mangold case opened up possibilities for such an approach, but also that the case has had a lukewarm reception, and that subsequent case law shows a tendency towards a restrictive interpretation of the Court’s judgment.\(^ {108}\) The problem with this approach is that, where the Court derives general principles from national law and relies on those in the interpretation of directives, it is at risk of interfering with the field of competence of the European legislator and, moreover, of disregarding the rule that directives do not have horizontal effect. The scope for reliance on such principles in private law cases, furthermore, is not much larger when regarded against the background of primary EC legislation. While general principles of Community law may be invoked in order to fill gaps in the EC Treaty, it must be kept in mind that the Treaty itself is not a private law instrument, and that gap-filling at this level is not normally concerned with private law matters between private parties.\(^ {109}\)

A safer bet, then, would be for the ECJ to strengthen the framework for consumer law through rules or principles that have in one way or another found recognition in EC law. The question is one of legitimacy – what sets this approach apart from the first one, in which principles are distilled from national laws, is that it seeks to derive rules or principles from Community private law, to the extent that one can speak of such a body of law at this stage in its development. Such an approach ensures that the Court does not overstep its competence in relation to the European legislator, as it will seek to tighten the framework of EC consumer law through rules and principles that have found endorsement at the European level. It should nevertheless remain careful not to use those as a basis to interfere with the outcome in individual disputes, as the reservations with regard to its interpretation of directives remain the same.\(^ {110}\)

Which rules or principles would qualify for this purpose then? It would seem that only rules contained in the consumer directives themselves, or principles

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\(^{106}\) See ECJ, Leitner (n. 104) at [19]-[24].


\(^{108}\) See above, p. 11.


\(^{110}\) Above, section II.
derived from these directives when interpreted in light of the wider framework of EC legislation would satisfy the requirement of legitimacy. These rules, and the principles derived from them – either laid down directly in the Treaty or in secondary legislation, or falling within the competence attributed to the ECJ to extrapolate such rules by means of gap-filling – find their origin in EC legislation and therefore have the necessary back-up from the European legislator to be relied upon as rules of law.

What is harder to define, is from where the ECJ may derive gap-filling principles in the field of consumer (contract) law. The Treaty itself does not provide much of a basis, being concerned mainly with constitutional and administrative matters. The consumer directives, including the Framework Directive envisaged by the review of the consumer acquis, may offer more in terms of substance, but also do not indicate where general principles may be derived from for gap-filling or simply for strengthening the coherence between the directives. As has been noted, the legislative framework of EC law does not help, since here, like in the ECJ’s case law, a tension can be observed between consumer policy considerations and the internal market policy, making it hard to define a clear line on where EC consumer law is headed\textsuperscript{111}.

This brings us back to methodological problems. In European consumer law, the difficulty is that principle is hard to separate from policy – unlike in national laws where it is possible to distinguish underlying principles of private or contract law, EC law lacks the basis provided by a meta-principle such as found in national private laws\textsuperscript{112}, and instead is centred around the policies that shape the competence of the Community in this field. This is reflected in the recitals preceding each of the consumer directives, where the internal market policy forms the general basis for legislation, with the consumer protection policy being invoked as a corollary under Article 95 EC\textsuperscript{113}. The provisions of the directives find their legitimation in these policies and, having an autonomous meaning in European law, should not be traced back to provisions (and principles!) of national consumer laws. The tension between the policies of market integration and consumer protection that permeates EC consumer law, therefore, is reflected in the provisions of directives, with the balance between them perhaps struck in a slightly different place in different directives. Though this does not mean that the ECJ will not be able to derive general principles from an analysis of the provisions of the directives (whether on their own or seen in the context of other EC legislation), it does entail that these ‘principles’ will not be principles \textit{pur sang}, but will be coloured by the policies pursued by EC law. In this regard, they are similar to the general principles of which it has since long been accepted that the ECJ is entitled to read them into EC law. What has to be kept in mind, however, is that unlike these principles, the principles that may be derived

\textsuperscript{111} See p. 10.

\textsuperscript{112} Above, p. 10. The distinction between policy and principle is a classic one; compare Ronald M Dworkin, Taking Rights Seriously, 1977, 22 ff. For a discussion of general principles of EC consumer law, see Hannes Rösler, Europäisches Konsumentenvertragsrecht. Grundkonzeption, Prinzipien und Fortentwicklung, 2004, ch. 3.

\textsuperscript{113} Compare, for example, Consumer Sales Directive (n. 72), recital 2; Unfair Terms Directive (n. 5), recital 6; Distance Selling Directive (n. 77), recital 3; Doorstep Selling Directive (n. 77), recital 1; Package Travel Directive (n. 77), recitals 1-3.
from the consumer directives come from a more uncertain background. First, the tension between the policies of market integration and consumer protection remains problematic and will need to be settled before a firmer course can be adopted by the ECJ in the development of a tighter framework for consumer law. Secondly, while the identification of such general principles at EC level may be helpful to Member States to ensure a correct implementation of directives, it remains to be seen whether they will be able to provide enough substance for the creation of a framework for European consumer law. After all, general principles found in national laws will remain the steering factor in the development of national consumer laws, especially for as long as minimum harmonisation remains the standard.

As an alternative, perhaps a more substantive background for the development of a coherent framework for EC consumer law by the ECJ could be found in uniform rules such as the PECL or the DCFR. Both, the DCFR being partly based on the PECL as well as on research projects undertaken by the Von Bar Group and the Acquis Group, find their origin in comparisons of solutions found in national laws. Though both sets of principles or model rules adopt a ‘best solution’ approach, looking for the solution that would offer the best rule rather than merely a common denominator of the rules prescribed by EC law and national laws\(^\text{114}\), they have a strong basis in underlying principles that set the aims for national and European law\(^\text{115}\). As such, they reflect a stronger and more coherent framework of private law than may be gleaned from directive-related or cross-directive interpretation – as it is currently applied by the ECJ – alone. Whether the ECJ may broaden its enquiry and rely on these sets of rules in the interpretation of directives, however, is debatable. The problem is that they are non-binding and therefore miss the necessary back up from the European legislator to be relied upon as rules of law\(^\text{116}\). The ‘principles, definitions, and model rules’ contained in the DCFR may of course become of greater significance should the Commission decide to adopt them formally in some form of legislation. Whether this happens, however, and if so which fields of private/contract law will be included, is a political decision to be made by the Commission\(^\text{117}\). The ECJ, therefore, will find itself bound to follow the pace of the legislator, in this case just as where it seeks to expound general principles of EC consumer law.

\(^{114}\) Ole Lando/Hugh Beale (eds.), Principles of European Contract Law. Parts I and II, 2000, xxv-vi; DCFR (n. 78) Introduction at [21].

\(^{115}\) DCFR (n. 78) at [22]-[36].

\(^{116}\) Relevant also in light of proposals to widen the scope of Article 3 of the Rome Convention so as to include sets of rules such as the PECL and the Unidroit Principles (PICC); compare Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (presented by the Commission) COM(2005) 650 final (15 December 2005) 5. The latest developments, nevertheless, seem to have back-pedalled on the original proposal; see Council of the European Union, Interinstitutional File 2005/0261 (COD) (3 December 2007), available at http://register.consilium.europa.eu/pdf/en/07/st15/st15832.en07.pdf, [15].

\(^{117}\) See DCFR (n. 78) at [6].
V. CONCLUDING REMARKS

The case law of the ECJ in private law, and as shown here in consumer law, may be seen to develop along two lines. On the one hand, it has been suggested that the Court is bound to exercise self-restraint in the interpretation of directives in order to prevent overstepping its competence and interfering unduly in individual cases. On the other hand, the development of a coherent framework of European consumer law (and, perhaps at a later stage, wider areas of private law) may benefit from a proactive approach of the Court in the interpretation of directives, seeking to align rules and concepts found in the directives with the wider body of European legislation through what may be deemed ‘directive-related’ or ‘cross-directive’ interpretation.

In either situation, the Court is restrained by the institutional framework set by the Community and the general principles of EC law from taking on a more active role as an adjudicator in private law matters. This seems appropriate in light of the fact that private law at European level is still relatively underdeveloped in comparison with the private laws of the Member States, which build on longstanding legal traditions in which a systemisation of rules, in part through the identification of general principles, has had a chance to develop. For the ECJ to have a greater role in private law, therefore, may take yet a while longer. It may, nevertheless, be that with the initiatives taken by the European Commission towards harmonisation of private law, the potential for the ECJ to contribute to the development of this field also increases.