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## European Court of Justice Case Law as a Means of Unification of Private Law?

Walter van Gerven\*

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# European Court of Justice Case Law as a Means of Unification of Private Law?

Walter van Gerven

## Abstract

This Essay does not focus on the feasibility of an European Community ("EC") civil code, but rather addresses questions of substance relating to the law of obligations, that is, the law of contract and tort, leaving aside the law of property and family law. Nevertheless, I must state that I do not believe in the feasibility of a uniform Civil Code for the European Community. Rather than employing legislation as the means of bringing about uniformity, I prefer discovering general principles common to statutes and case law of European Union Member State legal systems, as influenced and brought closer to each other, but not justified, by case law from the European Community ('EC') and the European Convention Human Rights judiciary. For indeed, the European Community courts, the European Court of Justice ("ECJ" or "Court"), and the European Court of First Instance ("ECFI") will not result in the unification of national private laws. Similar to the impact of EC directives on private law, the impact of ECJ case law on private law will only be piece-meal; that is, only visible in some limited fields of private law, and will tend to harmonize, rather than to unify, the national rules in those fields. Therefore, ECJ case law will never lead to any kind of a coherent statutory unification of contract law.

# EUROPEAN COURT OF JUSTICE CASE LAW AS A MEANS OF UNIFICATION OF PRIVATE LAW?

Walter van Gerven\*

## INTRODUCTION: THE ECJ'S ROLE IN THE INTERPRETATION OF COMMUNITY LAW

This Essay does not focus on the feasibility of an EC civil code, but rather addresses questions of substance relating to the law of obligations, that is, the law of contract and tort, leaving aside the law of property<sup>1</sup> and family law. Nevertheless, I must state that I do not believe in the feasibility of a uniform Civil Code for the European Community. Rather than employing legislation as the means of bringing about uniformity, I prefer discovering general principles common to statutes and case law of EU Member State legal systems, as influenced and brought closer to each other, but not justified, by case law from the European Community and the European Convention Human Rights judiciary.<sup>2</sup> For indeed, the European Community courts, the European Court of Justice ("ECJ" or "Court"), and the European

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\* Mr. van Gerven is a Professor at the Universities of Leuven and Maastricht and a former Advocate General at the European Court of Justice. A version of this Essay will appear in Chapter 8 of an upcoming book entitled, TOWARDS A EUROPEAN CIVIL CODE.

1. In *Spain v. Council*, the European Court of Justice ("ECJ") held that the European Community has the jurisdiction to promulgate substantive law provisions relating to property law. Case C-350/92, [1995] E.C.R. I-1985. This is so despite Article 222 of the Treaty Establishing the European Community ("EC Treaty") which requires, "[t]his Treaty shall in no way prejudice the rules in member-States governing the system of property ownership." Treaty Establishing the European Community, Feb. 7, 1992, art. 222, [1992] 1 C.M.L.R. 573, 711 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). Whether that includes the competence for the European Community to change the national property laws drastically is, in my view, unlikely. See S. Bartels, *Europees privaatrecht: over de bevoegdheidsverdeling tussen Unie en Lid-Staat met betrekking tot het eigendomsrecht*, ARS AEQUI 244 (1995).

2. See Walter van Gerven, *The Case-law of the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private law*, 3 EUR. REV. PRIVATE L. 367, 375-78 (1995).

Court of First Instance ("ECFI")<sup>3</sup> will not result in the unification of national private laws. Similar to the impact of EC directives on private law, the impact of ECJ case law on private law will only be piece-meal; that is, only visible in some limited fields of private law, and will tend to harmonize, rather than to unify, the national rules in those fields.<sup>4</sup> Therefore, ECJ case law will never lead to some kind of a coherent statutory unification of contract law.

Before assessing the impact of ECJ case law on the law of contract and tort, it may be useful to briefly describe the role which the ECJ plays in cooperation with national courts in the framework of the preliminary ruling procedure provided for in Article 177 of the Treaty Establishing the European Community ("EC Treaty").<sup>5</sup> The role of Article 177 is mainly to interpret primary and secondary Community law. Insofar as the Court's interpretation bears on EC Treaty provisions and provisions of regulations, that is, on provisions which are fully binding and uniform in all Member States, it assures uniformity in the application of such rules throughout the European Community. When the interpretation, however, bears on provisions of directives which are only achieving uniformity as to the result pursued by the directive but not with respect to the form and methods to be used by the Member States,<sup>6</sup> the ECJ's interpretation will only bring about uniformity in the interpretation of the concepts and principles contained in the directive and, eventually, taken over literally in the implementing national legislation. It will not be able to assure uniformity in the interpretation of the implementing national rules themselves, as those remain within the jurisdiction of the Member States.

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3. The European Court of First Instance ("ECFI") was established in Article 168a of the EC Treaty. EC Treaty, *supra* note 1, art. 168a, ¶ 1, [1992] 1 C.M.L.R. at 685-86. The ECFI is attached to the ECJ and has the "jurisdiction to hear and determine at first instance . . . certain classes of action or proceeding . . . [but cannot] hear and determine questions [regarding] a preliminary ruling under Article 177." *Id.* Reference to the Community courts or judiciary is a reference to both courts.

4. See THOMAS WILHELMSSON, SOCIAL CONTRACT LAW AND EUROPEAN INTEGRATION 89-101 (1994); Thomas Wilhelmsson, *European Contract Law Harmonization: Aims and Tools*, TUL. J. INT'L & COMP. L. 23, 25-29 (1993).

5. EC Treaty, *supra* note 1, art. 177, [1992] 1 C.M.L.R. at 689; see generally Carl Otto Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18 FORDHAM INT'L L.J. 388, 388-409 (discussing purpose and function of preliminary ruling procedure in EC law).

6. See EC Treaty, *supra* note 1, art. 189, ¶ 3, [1992] 1 C.M.L.R. at 693.

It should be pointed out that ECJ case law concerning the interpretation of provisions of directives and of regulations is often of a more limited nature than ECJ case law concerning EC Treaty provisions and general principles, including those relating to the direct effect of directives, the requirement of directive conform interpretation, and the principle of liability for non-implementation of directives.<sup>7</sup> Whereas the ECJ's interpretation of EC Treaty provisions and, even more so, of the underlying general principles is frequently bold, or even audacious, that is normally not the case of the ECJ's interpretation of specific directive provisions which is, more often than not, of a rather textual nature relating, as it usually does, to precise and often technical expressions.<sup>8</sup> A recent example of such textual interpretation is the *Panagis Pafitis*<sup>9</sup> decision concerning Article 25 of Directive 77/91 (the "Second Company Directive").<sup>10</sup> In that decision, the Court held that Article 25 "precludes national legislation under which the capital of a bank constituted in the form of a public limited liability company [which, as a result of its debt burden, is in exceptional circumstances] may be increased by an administrative measure, without a resolution of the general meeting."<sup>11</sup> By doing so, the ECJ gave absolute precedence to the provisions of the Second Company Directive which require the approval of the shareholders' meeting for an increase of capital with the objective of reorganizing a bank which is in financial trouble in favor of the bank's creditors, namely small depositors. Indeed, if the increase of capital imposed by the national banking supervisory authority, in that case the Bank of Greece,

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7. See, e.g., *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case C-152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688; *Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.*, Case C-106/89, [1990] E.C.R. I-4135, [1990] 1 C.M.L.R. 305; *Francovich v. Italy*, Joined Cases C-6/90 and C-9/90, [1991] E.C.R. I-5357, [1991] 2 C.M.L.R. 66 [hereinafter *Francovich I*].

8. There are situations in which the ECJ displays bold interpretation techniques also in regard of directive provisions, namely when those are, like in the field of equal treatment of men and women in the social field, based on fundamental Community concepts or freedoms. See, e.g., *Walter van Gerven et al., Current Issues of Community Law Concerning Equality of Treatment Between Women and Men in Social Security*, in *EQUALITY OF TREATMENT BETWEEN WOMEN AND MEN IN SOCIAL SECURITY 7* (C. McCrudden ed., 1994) (detailing ECJ interpretation techniques in respect to social security benefits).

9. Case C-441/93, [1996] E.C.R. I-1347.

10. See Council Directive No. 77/91, O.J. L 26/1 (1977). This Directive concerns the formation of public limited liability companies and the maintenance and alteration of their capital. *Id.*

11. *Panagis Pafitis*, [1996] E.C.R. at I-1380, ¶ 60.

in accordance with domestic law has to be approved by the old shareholders, it is possible that no reorganization will take place or, if it does, will come too late. The Court based its decision on a textual interpretation of the Second Company Directive and on its previous case law, setting aside arguments drawn from existing or proposed, Community legislation with respect to credit institutions<sup>12</sup> as well as arguments relating to the cohesion of the national banking supervisory systems which contain a closed system of provisions designed to preserve public confidence in the financial structure and to protect depositors. The Court did not even try to balance the underlying and conflicting interests of shareholders and depositors as it might have done when dealing with the interpretation of Treaty provisions.<sup>13</sup> Whatever the merit of the solution created by the Court, the method of text abiding interpretation followed by the Court in that case seems typical for the Court's attitude when it is asked to interpret precise wording in directives or regulations. It is in sharp contrast with some of the Court's case-law relating to the interpretation of basic EC Treaty provisions and of general principles which the Court reads in, or deduces from, the general structure and features of the Community legal order.

I. *THE HARMONIZING EFFECT OF ECJ CASE LAW IN THE  
FIELD OF LEGAL REMEDIES: THE FACTORTAME  
JURISPRUDENCE*

An example of a field of Community law in which the case-law of the ECJ displays a great deal of creativity as it relates to the interpretation of EC Treaty provisions in light of general principles of Community law is the case-law regarding the requirement of an effective judicial protection. That the legal systems of the Member States must provide remedies of a judicial nature to secure individuals effective protection for the rights which they derive from Community law is indeed a principle of Community law which the ECJ has gradually developed. As a result, it is for

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12. *Id.* at I-1372, ¶ 27.

13. *Id.* at I-1377, ¶ 46. The defendants in the national proceedings specifically relied on the ECJ's judgments in *Hanns-Martin Bachmann v. Belgian State*, Case C-204/90, [1992] E.C.R. I-249, and *Commission v. Belgium*, Case C-300/90, [1992] E.C.R. I-305, where the ECJ addressed the interpretation of fundamental EC Treaty provisions and acknowledged the need to recognize the cohesion of a closed system of national rules in the field of taxation.

the national courts to disapply any national rule of whatever nature or importance which might jeopardize such legal protection.

A striking example of the effect which the requirement of effective judicial protection may have on the legal system of a Member State is offered by *The Queen v. Secretary of State for Transport, ex parte: Factortame Limited* ("Factortame I").<sup>14</sup> There, the ECJ held that a national court should set aside a national rule if that rule is the sole obstacle to granting interim relief to a citizen who claims that a national measure, in that case an Act of Parliament, is threatening to jeopardize the rights which he derives from Community law.<sup>15</sup> The national rule precluding interim relief was:

the old common law rule that an interim injunction may not be granted against the Crown, that is to say against the government, in conjunction with the presumption that an Act of Parliament is in conformity with Community law until such time as a decision on its compatibility with the law has been given.<sup>16</sup>

In *Factortame I*, national legislation was at stake which the ECJ, in *Regina v. Secretary of State for Transport ex parte Factortame Ltd.* ("Factortame II"), held violated directly applicable EC Treaty provisions.<sup>17</sup>

Later, in *Zuckerfabrik Suderdithmarschen A.G. v. Hauptzollamt* and *Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*,<sup>18</sup> the Court extended its ruling to a situation where a national administrative measure implementing a Community regulation was challenged before a national court on the ground that the regulation was invalid for conflicting with general principles of Community law. The Court held:

The interim legal protection which Community law ensures

14. *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. I-2433, [1990] 3 C.M.L.R. 1 [hereinafter *Factortame I*].

15. *Id.* at I-2433, [1990] 3 C.M.L.R. at 1.

16. *Id.* at 2474, ¶ 23, [1990] 3 C.M.L.R. at 30.

17. *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, Case C-221/89, [1991] E.C.R. I-3905, [1991] 3 C.M.L.R. 589 [hereinafter *Factortame II*]; see also *Commission v. United Kingdom*, Case C-246/89, [1991] E.C.R. I-4585.

18. *Zuckerfabrik Suderdithmarschen A.G. v. Hauptzollamt* and *Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, Joined Cases C-143/88 and C-92/89, [1991] E.C.R. I-415.

for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself.<sup>19</sup>

The Court, however, did not stop there. Observing that national legal orders grant interim relief under differing conditions, the Court stressed the need to secure the uniform application of Community law, "a fundamental requirement of the Community legal order."<sup>20</sup> Following that remark, the Court described the substantive conditions for the granting of interim relief which must be equally applicable in all Member States and, thus, equally applied by all national courts. To do that, the Court took as a starting point the criteria which it uses when it exercises its own suspensory power under Article 185 of the EC Treaty with respect to Community measures,<sup>21</sup> thus, harmonizing the two sets of Community based legal rules on interim relief.

Following the *Factortame I* judgment, the English House of Lords granted interim relief in the underlying case and suspended the Act of Parliament which threatened to jeopardize the Community rights of the plaintiffs in the national proceedings.<sup>22</sup> The consequence of both the ECJ and the House of Lords jurisprudence in the *Factortame* judgments was, however, that individuals deriving rights from Community law were, in the

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19. *Id.* at 541, ¶ 20. That since the ECJ's judgment in *Foto-Frost v. Hauptzollamt Lubeck-Ost*, Case C-314/85, [1987] E.C.R. 4199, the invalidity of secondary Community law can only be decided at the occasion of preliminary proceedings by the Court itself, does not, the Court said in *Zuckerfabrik*, "preclude the power of national courts to suspend enforcement of a national administrative measure adopted on the basis of a Community regulation." *Id.* at 541, ¶ 21. Such suspension may, however, only be ordered if the national court is persuaded that "serious doubts exist as to the validity of the Community regulation" and provided that the suspension retains the character of an interim measure, meaning that it may apply "only until such time as the Court has delivered its ruling on the question of validity." *Id.* at 542, ¶¶ 23-24.

20. *Id.* at 542, ¶ 26.

21. See Walter van Gerven, *Bridging the Gap Between Community and National Law: Toward a Principle of Homogeneity in the Field of Legal Remedies?*, 32 COMMON MKT. L. REV. 679, 685-86 (1995). The *Zuckerfabrik* ruling was confirmed by the ECJ in *Atlanta Fruchthandelsgesellschaft mbH v. Bundesamt für Ernährung und Forstwirtschaft*, where the Court indicated that measures of interim relief may also include positive action. Case C-465/93, [1995] E.C.R. I-3761, 3792-93, ¶¶ 39-45.

22. *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, [1990] 3 C.M.L.R. 375, 406 (H.L. 1990).



United Kingdom, better protected than individuals deriving rights from national law. Indeed, by virtue of Community law, an interim injunction could be granted, even against the Crown, when Community rights of individuals were in danger. Interim relief could not be granted in purely national law matters, however, despite that the rights of individuals may be impaired as much in those matters. To remedy that potential situation, the House of Lords granted interim relief against the Crown also in purely English law situations in a later judgment.<sup>23</sup>

The foregoing illustrates three points. First, it demonstrates that Community law may have the effect that important national rules which hinder the legal protection of individuals with respect to their Community rights will have to be disapplied by national courts. Second, it shows that the ECJ may, in order to secure the uniform application of Community law, circumscribe the conditions under which a specific remedy, in *Factortame I* and *Factortame II* interim relief, must be applied by those courts. Finally, it makes clear that the national courts may, for reasons of consistency, be ready to extend the legal protection given to individuals by virtue of Community law to individuals who are confronted with similar impairments of their rights in a purely national situation.

## II. *THE HARMONIZATION OF TORT LAWS*

### A. *The Francovich and Brasserie Jurisprudence*

The Community law requirement of effective judicial protection has led to another and even more important application in the field of legal remedies that is of direct concern for our subject. I am referring to the remedy of compensation for harm caused to individuals by Member States which have breached Community law. The first crucial step in that direction was taken in the ECJ's *Francovich* decision of November 19, 1991, where the principle of tort liability had been established in the case of a Member State that had not implemented a directive at all — provided that the directive intended to grant rights to individuals, that the contents of such rights could be determined on the basis of the directive, and that there was a causal link be-

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23. *M. v. Home Office*, [1993] 3 All ER 537, [1993] 3 W.L.R. 433 (H.L.).

tween the harm sustained by the plaintiff and the breach.<sup>24</sup> In later judgments, such a principle of liability was confirmed and applied in the situation of directives being transposed incompletely or incorrectly.<sup>25</sup> The second equally important step was taken in the *Brasserie* judgment of March 5, 1996 where the Court acknowledged the principle of Member State liability in the event of breaches of directly effective EC Treaty provisions by acts or omissions of the legislature of the Member State concerned.<sup>26</sup> Furthermore, the Court described in that judgment the substantive conditions that must be satisfied for such liability to be imposed. It did so with the help of rules which it found in its case law relating to Article 215, paragraph 2, of the EC Treaty with respect to legislative measures on the part of Community institutions involving choices of economic policy,<sup>27</sup> that is, in a context characterized by the exercise of wide discretion.<sup>28</sup> As a third step, the Court indicated in its *Hedley Lomas* judgment that the *Francovich* principle also applied to breaches of Community law which were the consequence of an administrative decision taken by a national administration.<sup>29</sup>

The consequence of this case law is that national courts will have to disapply national rules that are incompatible with the conditions which the ECJ, in the absence of rules given by the Community legislator, has held to govern the liability of Member States for breaches of Community law, "whatever be the organ of the State whose act or omission was responsible for the breach."<sup>30</sup> Thus, national rules which make it impossible to institute an action in damages for breaches of Community law by the national legislature proper or which make adequate compensation of pure economic loss impossible, will have to be set

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24. *Francovich*, [1991] E.C.R. at 5415-16, ¶¶ 38-42.

25. *Wagner Miret*, Case C-334/92, [1993] E.C.R. I-6911; *British Telecommunications*, Case C-392/93, [1996] ECR I-1631; *Denkavit*, [1996] E.C.R. I-2827.

26. Joined cases C-46/93 and C-48/93, [1996] E.C.R. I-1029.

27. By referring to its case law regarding Article 215 of the EC Treaty which governs the extra-contractual liability for breaches of Community law on the part of Community institutions, the ECJ followed the advice of Advocate-General Misho in his *Francovich II* opinion to harmonize the two Community based liability systems, *Francovich I*, and Article 215 of the EC Treaty. EC Treaty, *supra* note 1, art. 215, ¶ 2, [1992] 1 C.M.L.R. at 710; *see also* Walter van Gerven, *Bridging the Unbridgeable: Community and National Tort-Laws after Francovich and Brasserie*, [1996] INT'L & COMP. L.Q. 517.

28. *Brasserie*, [1996] E.C.R. at 1051-53, ¶ 41-45.

29. Case C-5/94, [1996] AJDA 489 96/1042.

30. *Brasserie*, [1996] E.C.R. at 1042, ¶ 32.

aside by national courts. Because of the basic character of the substantive conditions that the ECJ has spelled out, and will be asked to spell out even more so in the future,<sup>31</sup> such disapplication may lead, in the field of Member State liability, to a rather wide area of uniform application of tort rules between Member States. This is particularly so with respect to the condition of breach, where the Court has distinguished between situations of breach simpliciter, as in *Francovich*, for which a form of strict liability will obtain, and situations characterized by the exercise of wide discretion, as in *Brasserie*, to which it has applied the test of manifest and grave disregard of the limits on the exercise of public powers.<sup>32</sup> The conditions of causation and of harm, including the extent of compensation, are also concepts which the Court has already begun to interpret in a uniform manner<sup>33</sup> and which it may be called upon to interpret further in future cases. Moreover, it is not to be excluded that national courts, as in the case of the remedy of interim relief, will for reasons of consistency extend the ECJ's rulings regarding the remedy of compensation to apply in purely national situations as well, for example, to acknowledge the liability of the legislature proper for breaches of constitutional rules or basic principles of national law.

### B. *The Banks Situation*

Obviously, all of the foregoing relates to the extra-contractual liability of Member States and, accordingly, of Community institutions. The remaining question that is critical to this Essay is, however, whether the ECJ will also consider that a remedy should be made available in the national legal systems as an obligation under Community law,<sup>34</sup> for breaches committed by indi-

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31. See *Francovich*, [1991] E.C.R. at I-5614-15, ¶¶ 42-43. The expression "substantive conditions", as opposed to "procedural conditions" which the ECJ used in paragraph 43 of the *Francovich* judgment seems to relate to both the conditions imposed by the Court for liability to arise and those for determining the extent and kind of reparation of loss and damage. *Id.* In *Brasserie*, the Court distinguishes further between the conditions for liability to arise, the conditions under which reparation must be made, and the extent to which it must be made. *Brasserie*, [1996] E.C.R. at 1037-66, 1067-73, 1081-90.

32. *Brasserie*, [1996] E.C.R. at 1053, ¶ 46; see also van Gerven, *supra* note 27, at 530.

33. See van Gerven, *supra* note 27, at 530.

34. That means as an obligation and not only as a possibility; when, and to the extent that, the applicable national tort rules would allow such liability.

viduals of directly enforceable obligations which Community law imposes upon them. The classic examples are obligations imposed by Articles 85 and 86 of the EC Treaty which prohibit enterprises from concluding cartel agreements or abusing a dominant position. The question was raised before the ECJ in *Banks v. British Coal Corporation*<sup>35</sup> but was, for reasons particular to that case, not answered by the Court in its opinion. If that question is to be answered in the affirmative, as I think it should,<sup>36</sup> then it will be up to the ECJ, in the absence of Community legislation, not only to acknowledge that principle, but also, as it has done for Member State liability, to lay down the substantive law provisions which govern such tort liability between individuals, in a uniform way, throughout the Community. The harmonizing effect that ECJ case-law already has with respect to national laws on Member State liability would then be extended to national laws on torts committed by individuals.

### C. Product Liability

ECJ case law may impact on national tort rules through the elaboration of the substantive conditions of Community law under which extra-contractual liability is to arise in the event of breaches of Community legal rules by either Member States through *Francovich* or Community institutions<sup>37</sup> and their civil servants. As indicated before, the Court's boldness in interpreting EC Treaty provisions and general principles when the judicial protection of individuals is at stake, is in stark contrast with the Court's cautious approach when it comes to interpreting provisions of directives, at least of those which are not implementing fundamental Community law concepts. Therefore, it remains to be seen which role the ECJ will wish to play in the interpretation of directive provisions, such as those provisions of Council Directive 85/374 EEC of July 25, 1985 on product liability.<sup>38</sup> So far, I am not aware of any Court judgment interpreting the wording of the Product Liability Directive. But, that may change<sup>39</sup> taking into account the important concepts in the Di-

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35. Case C-128/92, [1994] E.C.R. I-1209.

36. See Opinion of Advocate General van Gerven, *Banks*, [1994] E.C.R. at I-1212, ¶ 43.

37. EC Treaty, *supra* note 1, art. 215, ¶ 2, [1992] C.M.L.R. at 710.

38. Council Directive No. 85/374, O.J. L 210/29 (1985).

39. Lack of litigation at the level of the ECJ is the normal consequence of lack of

rective relating to liability without fault<sup>40</sup> which may need clarification, such as those regarding the conditions under which the producer, importer, and supplier of a defective product may be held jointly and severally liable,<sup>41</sup> the definition of defectiveness,<sup>42</sup> and the kind of damage to be compensated,<sup>43</sup> to name only a few.<sup>44</sup>

Whether the Court, when given the opportunity, would apply more than a textual interpretation of the directive is doubtful<sup>45</sup> as will be seen hereafter.

#### D. *The Harmonization of Contract Laws: Only through ECJ Case Law Interpreting Directives*

##### 1. Reasons for a Lesser Impact in Contract Law than in the Field of Tort Law

There are at least two reasons why the impact of ECJ case-law on contract law will be less notable than its impact on tort law. The first is that the Court is not commissioned by the Community treaties, as it is with respect to non-contractual liability of Community institutions and its civil servants, to develop rules on contractual liability "in accordance with the general principles common to the laws of the member-States."<sup>46</sup> To the contrary, matters of contractual liability of the Community—for which the ECJ may have jurisdiction "pursuant to [an] arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private

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litigation in the courts of Member States. In the United Kingdom, the first Member State to implement the Directive, the success of the Directive in terms of litigation seems to have been rather low. JANE STAPLETON, *PRODUCT LIABILITY* 356 (1994).

40. Council Directive No. 85/374, *supra* note 38, art. 4, O.J. L 210/29, at 31 (1985).

41. *Id.* arts. 3, 5, O.J. L 210/29, at 30, 31 (1985).

42. *Id.* art. 6, O.J. L 210/29, at 31 (1985).

43. *Id.* art. 9, O.J. L 210/29, at 31 (1985).

44. A thorough investigation of the Product Liability Directive does not, however, provide conclusive evidence that the limited no-fault scheme which the directive introduces should serve as a model for similar situations, over-emphasizing, as it does, the "supply of the product," related element in injuries, to the exclusion of other factors. STAPLETON, *supra* note 39, at 342-43, 346.

45. See Ewoud Hondius, *Produktaansprakelijkheid: de voordelen van een dualistische rechtsorde*, 324/038 *ARS AEQUI* (May 1996) (discussing need to use truly comparative law approach).

46. EC Treaty, *supra* note 1, art. 215, [1992] 1 C.M.L.R. at 710.

law<sup>47</sup>—“shall be governed by the law applicable to the contract in question.”<sup>48</sup> The Commission which is normally the contracting party on behalf of the Community, could have tried to agree with the other contracting parties to designate general principles of contract law “common to the laws of the Member States” as the law being applicable to the contract, leaving it to the ECJ to find these principles.<sup>49</sup> It has been its practice, instead, to designate the national law of the Member State where the contract is concluded. The second reason is that it is hard to visualize a situation where the ECJ would be led to establish and define a principle of contractual liability for reasons of legal protection requiring an appropriate legal remedy, as it has done in the *Francovich* and post-*Francovich* judgments for the non-contractual liability of Member States. That would suppose, indeed, that an individual plaintiff should be able, in order to secure rights which he derives from Community law, to rely on the misperformance by a Member State under a contract which that Member State has concluded with the Community and for which, as said above, the ECJ has jurisdiction under an arbitration clause inserted in the contract which furthermore declares the general principles of contract law common to the laws of the Member States to be the law applicable to the contract.<sup>50</sup> It follows that the ECJ’s role in the shaping of private contract law will be limited to interpreting legal rules in the European treaties and directives which relate to problems of contract law.

## 2. No EC Treaty-related Interpretation but only Directive-Related Interpretation

When one looks through the registers of the ECJ’s case law, references to contract principles do not seem to be absent including, for example, the duty to cooperate, the principles of legal certainty and of legitimate expectations, the concepts of *force majeure*, legitimate defense and reasonableness, the maxim

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47. *Id.* art. 181, [1992] 1 C.M.L.R. at 690.

48. *Id.* art. 215, ¶ 1, [1992] 1 C.M.L.R. at 710.

49. See van Gerven, *supra* note 2, at 373-74.

50. That would be different only if Community rights were granted to individuals by means of contracts concluded with Community institutions or with Member States to the advantage of Community institutions. In such a case, there might be room for the requirement of judicial protection to impose an obligation on Member States to make sufficiently uniform remedies available in the event of contractual misperformance.

*nemo auditur*, and even abuse of rights. Looking up the relevant judgments, one finds, however, that these principles either relate to international obligations of the Community, or to institutional obligations between Member States or Community institutions, or to principles of administrative law applicable to the dealings of Community institutions with individual enterprises or citizens.<sup>51</sup> If the ECJ would have for task to find general principles of contract law common to the laws of the member States, such principles might possibly have been applied by analogy. Because that is not the case though, those principles are of no direct or indirect concern here.

Of course, the word "agreement," in the sense of a private law contract concluded between undertakings, appears in Article 85 of the EC Treaty where it is used, within the framework of the prohibition on cartels, in combination with the terms "decisions by associations of undertakings and concerted practices."<sup>52</sup> Accordingly, there is substantial ECJ and Court of First Instance case law that defines the notion of agreement or contract in an effort to delineate the scope of the prohibition of Article 85 and to distinguish between "agreements" and "concerted practices." The issues resolved concern the question of which forms of consent between the contracting parties are to be deemed to be agreements as opposed to concerted practices. The questions arise, for example, in connection with exchanges of letters, circular letters, general conditions, so-called "gentlemen's agreements", verbal agreements, and unilateral acts taken within the framework of an agreement.<sup>53</sup> The problem with these court interpretations is that they are given, as they should be, in a context of determining whether the agreement is restrictive of competition. In other words, the interpretation is made with a view

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51. In the *Panagis Pafitis* judgment, at the request of the referring Greek court, the notion of abuse of rights was considered by the ECJ in a private law context. *Panagis Pafitis*, [1996] E.C.R. I-1382-83, ¶ 67-70. Before the Greek court, the defendants had put forward an argument based on Article 281 of the Greek Civil Code prohibiting abuses of rights to the effect that it also precluded the abusive exercise of rights conferred by Community law. The ECJ rejected that argument in *obiter dictum* and reasoned that to allow such a defense would undermine the uniform application and full effect of Community law. *Id.* at I-1382-83, ¶ 70. Because the referring judge did not ask the ECJ to address the question of whether there is a principle of Community law prohibiting 'abuses' of Community rights, the ECJ did not examine that point.

52. EC Treaty, *supra* note 1, art. 85, ¶ 1, [1992] 1 C.M.L.R. at 626.

53. See WALTER VAN GERVEN ET AL., *KARTELRECHT VAN DE EUROPESE GEMEENSCHAP* 113, 12-36 (2d ed. 1997).

to the aim which Article 85 pursues in the context of the EC Treaty provisions on the establishment and maintenance of a truly common market.<sup>54</sup> For being a “functional” interpretation, it cannot serve as a model when it comes to define the concepts in the context of contract law in general.

Outside the EC Treaty, the notions of “contract” and “agreement” also appear in the Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters,<sup>55</sup> more particularly in Article 5, section 1, on special jurisdiction in matters relating to a contract and in Article 17 on agreements and trust instruments conferring jurisdiction.<sup>56</sup> The interpretation of the Convention has been assigned by a protocol agreed on by all Member States to the ECJ through a system of preliminary rulings modeled after Article 177 of the EC Treaty. Here again, however, the interpretation of the Con-

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54. In my Opinion of October 10, 1989 in *Sandoz Prodotti Farmaceutici SpA v. Commission*, Case C-277/87, [1990] E.C.R. I-46, decided by judgment of January 11, 1990, [1990] E.C.R. I-45, I tried to put the concept of agreement in Article 85 of the EC Treaty into the wider perspective of the concept under contract law in general. The full text of the Opinion, only existing in Dutch, and the judgment have not been published in the European Court Reporter because of the decision at that time to publish some judgments of chambers only in summary form. The Dutch version of the Opinion is published, however, in *HANDBOEK EG (KARTELRECHT) XIV 227* (R. Barents ed.) The Opinion states:

It seems to me that the Commission is correct in regarding the invoices and the clauses contained therein (such as the export prohibition clause, but also the choice of jurisdiction and the risk transfer clauses) as part of a global contractual relationship. Such is fully in conformity with the present opinion concerning the formation of contracts according to which the content of a contractual relation is not to be derived exclusively from what the parties have mutually consented to, but also from the social context within which the consent is given and maintained. This means *in concreto* that, as of the coming into existence of the contractual relationship (in writing or orally), it is no longer necessary to justify the binding force thereof, for every and any one point, by virtue of an explicit exchange of wills. Where one of the parties has taken unilateral measures in the course of the contractual relationship of which the other party has, had, or may reasonably be regarded to have had notice, such measures may be held to govern the contractual relationship and, therefore, to come within the concept of “agreement” in Article 85, if that other party has not objected thereto and has, thus, acknowledged the binding force thereof.

*Id.*

55. Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, J.O. L 299/32 (1972), amended by O.J. L 304/77 (1978), amended by O.J. L 338/1 (1982), amended by O.J. L 285/1 (1989) (subsequent citations will be to the full text English version, at O.J. L 304/77 (1978)).

56. *Id.* art. 5 § 1, 17, O.J. L 304/77 at 79, 82 (1978).



vention occurs in a specific context, this time of private international law, which cannot serve as a model for the interpretation of contract law in general.<sup>57</sup>

It follows from the foregoing that the extent to which ECJ case-law will have an impact on private law depends on whether the interpretation which the ECJ gives to one or another of the many EC directives which the Council has promulgated is sufficiently far reaching. I do not believe that this will be the case, at least not to the same extent as the impact we have ascertained above with respect to tort liability for governmental acts or omissions. I will try to explain why in the following and last section of this Essay, using as an example the concept of good faith in Article 3, paragraph 1, of Directive 93/13, the Unfair Consumer Contract Terms Directive.<sup>58</sup> Before doing that, however, I would like to mention two points which indicate that expectations for a creative jurisprudence should not be raised too high. The first is that in the field of company law where a number of judgments have been rendered by the ECJ regarding the interpretation of one of the many company directives in force, all of these, including the recent *Pafitis*-judgment referred to above, are illustrations of how the Court strictly interprets the wording of the directive provisions.<sup>59</sup> The second indication is to be found in the

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57. See, e.g., *Jakob Handte & Co., GmbH v. Traitements Mecano-chimiques des Surfaces S.A. (TMCS)*, Case C-26/91, [1992] E.C.R. I-3967, I-3993, ¶ 10 (holding that the concept of obligations resulting from contract has to be construed in Article 5(1) as autonomous concept in light of system and objectives of Convention, that is, as exception to general rule laid down in Article 2(1)). The ECJ decided that proceedings by a sub-purchaser of goods against the manufacturer may not be regarded as contractual. *Id.* at I-3996, ¶ 21. With respect to Article 17, the Court said again that the concept of an agreement conferring jurisdiction must be interpreted in an autonomous way and that, because the relationship between a shareholder and a company is comparable to that existing between the parties to a contract, a jurisdiction clause contained in the articles of association of a company constitutes an agreement for the purpose of Article 17. See *Powell Duffryn Plc v. Wolfgang Petereit*, Case C-214/89, [1992] E.C.R. I-1745, I-1774-75, ¶¶ 14-16. As for the EC Convention on the law applicable to contractual obligations, no jurisdiction to interpret the Convention has been given, as yet, to the ECJ. The two protocols, 89/128 and 89/129, of December 17, 1988, published in [1989] O.J. L 48/1 and 48/17, which have been agreed on to that effect have not yet been ratified by a sufficient number of Member States to enter into force.

58. Council Directive No. 93/13, O.J. L 95/29 (1993).

59. One exception is the *Marleasing* judgment, but only insofar as it relates to the principle of directive conform interpretation which is a principle based on the interpretation of EC Treaty provisions. See van Gerven, *supra* note 2, at 371. Some of the judgments are merely applications of the principle of non-discrimination in the field of company law.

Court's case law concerning consumer directives where the Court, as shown in the *Criminal Proceedings against Patrice Di Pinto*<sup>60</sup> judgment, also follows a restrictive approach based on the aim and the wording of the directive. In that judgment, the term consumer in Article 2 of Council Directive 85/577 of December 20, 1985<sup>61</sup> was strictly interpreted contrary to the Commission's position before the Court.<sup>62</sup>

### 3. An Example: the Interpretation of "Good Faith" in the Unfair Consumer Contract Terms Directive

Article 3, paragraph 1, of the Unfair Consumer Contract Terms Directive<sup>63</sup> regards a non-individually negotiated contractual term 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."<sup>64</sup> Let us assume that the ECJ is requested to interpret that provision: how would it proceed? Allow me to give a tentative answer, after having first made a few general observations based on three legal writings, choosen at random among undoubtedly many others, concerning the technique of comparative law as used in the interpretation of Community law.

As pointed out by the former President of the ECJ, Professor Mertens de Wilmars, in an article published in 1991,<sup>65</sup> it is characteristic in general for the ECJ when it interprets Community law to look for the proper meaning of Community concepts and rules as distinguished from the meaning which the same term may have in the domestic laws of Member States. That does not mean that the Court does not look for concepts or principles which are common to the laws of Member States—as it is explicitly requested to do by Article 215, paragraph 2, of the

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60. Case C-361/89, [1991] E.C.R. I-1189.

61. Council Directive No. 85/577, O.J. L 372/31 (1985).

62. *Di Pinto*, [1991] E.C.R. at 1210-11, ¶¶ 14-19.

63. Council Directive No. 93/13, *supra* note 58, art. 3, ¶ 1, O.J. L 95/29, at 31 (1993).

64. In the Annex of the Directive, there is a list of examples of unfair contract terms which are not binding. They are an illustration of the unwillingness of the Council towards a greater harmonization of contract law, even in the field of consumer contracts, particularly when compared with the earlier drafts of the directive. See WILHEMSSON, *supra* note 4, at 93.

65. Mertens de Wilmars, *Le droit comparé dans la jurisprudence de la Cour de Justice des Communautés Européennes*, [1991] JOURNAL DES TRIBUNAUX 37-40.

EC Treaty<sup>66</sup> but is also doing in other instances<sup>67</sup>—in the national legal materials, which it does with the help of its research department. It uses these materials, however, as a “riche arsenal” of concepts and rules from which it may derive a common, but often the smallest common, denominator in order to support the interpretation of Community law which it deems to be appropriate. In a recent article on comparative law and the Courts,<sup>68</sup> former ECJ judge and current Hoge Raad Advocate-General Koopmans, gives some examples in *AM & S Europe Limited v. Commission of the European Communities*,<sup>69</sup> in which the ECJ used comparative legal materials drawn from the national laws to find general principles of Community law. He then gives a few examples drawn from the case law of the Hoge Raad to illustrate how national courts use comparative legal materials, “to find, a solution to the problem they are faced with” or “to justify a solution arrived at on different grounds.”<sup>70</sup> In another recent article,<sup>71</sup> Professor Ewoud Hondius emphasizes the necessity for national courts to take account of judgments rendered in other Member States in relation to national laws implementing Community law provisions, in that case the Product Liability Directive,<sup>72</sup> and points out that because the methods of interpretation of Community law based national laws are somewhat different<sup>73</sup> from those used with respect to “purely national law,” it is necessary that the national or European origin of the provisions concerned be indicated in consolidated, national codifications.

What appears from these considerations is that there are differences in the use of comparative legal materials by European and national courts, depending on whether the comparison is effected vertically, that is, as between Community and national

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66. EC Treaty, *supra* note 1, art. 215, ¶ 2, [1992] 1 C.M.L.R. at 710.

67. The Court follows the same approach in other fields as well. See *Brasserie*, [1996] E.C.R. at 1144, ¶ 27.

68. Thymen Koopmans, *AM & S Europe Limited v. Commission of the European Communities*, [1996] INT'L & COMP. L.Q. 825.

69. Case 155/79, [1982] E.C.R. at 1575.

70. van Gerven, *supra* note 27, at 550. Further in his article, Koopmans refers to Lord Goff's use of comparative materials in the House of Lords decision in *White v. Jones*, [1995] 1 All E.R. 691 (H.L. 1995).

71. See Hondius, *supra* note 45.

72. Council Directive No. 85/374, *supra* note 38.

73. I would think myself “very different” because of the determination of the ECJ, as indicated above, to attach a proper Community law meaning to Community law provisions.

legal systems,<sup>74</sup> or horizontally, that is, between national legal systems outside the field of Community law, or between European legal systems, such as EC and European Commission of Human Rights law. When used vertically, national comparative materials are used in function of Community law, that is, they are taken as a model not on the basis of their own intrinsic merits but because they are seen as useful building stones to construe Community law appropriately.

Let us now, in light of the foregoing, consider the "good faith" requirement in Article 3, paragraph 1, of the Unfair Consumer Contract Terms directive.<sup>75</sup> To find the appropriate meaning of Community law pursuant to the aim of the directive, the quest for interpretation must start with the reading of Article 3 and the Preamble in as many language versions as possible. From the text of Article 3, it is unclear whether the requirement of good faith constitutes a condition which comes in addition to that of a significant imbalance, or whether it aims only to put the latter condition in a wider perspective. I would opt myself for the latter taking into account the Preamble, where the requirement of good faith is said to amount to "an overall evaluation of the interests involved" and where it is specified that "in making an assessment of good faith, particular regard shall be had to the strength of the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer," all factors, it would seem, which allow to find out whether the contract may have given rise to "a significant imbalance . . . to the detriment of the consumer."<sup>76</sup> After which the Preamble adds, rather mysteriously, "whereas the requirement of good faith *may* (sic) be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account",<sup>77</sup> adding, so to speak, a flavor of reasonableness to the requirement.

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74. It is vertical because one of the legal systems compared is situated at a higher level than, and takes precedence over, the other. When referring to comparative law herein, we mean only external, not internal, comparative law. See van Gerven, *supra* note 27, at 540 (discussing distinction between external and internal comparative law).

75. Council Directive No. 93/13, *supra* note 58, art. 3, ¶ 1, O.J. L 95/29, at 31 (1993).

76. *Id.* art. 3, ¶ 1, O.J. L 95/29, at 31 (1993).

77. *Id.* p.mbl., O.J. L 95/29 at 29 (1993).

I wonder whether the ECJ or its Advocate-General, having read Article 3 and the preamble of the Directive, would go any further; that is, whether they would request the research department of the Court to spend time and money on a comparative study of the "good faith" requirement in the legal systems of all of the Member States. From legal writings available on the market, it is sufficiently known that the meanings attached to good faith vary from one extreme to another,<sup>78</sup> and that it will be difficult to find anything other than the smallest common denominator, namely that any contracting party must be reasonable when performing a contract. In the words of the directive's preamble, each contracting party should "take into account the legitimate interests" of the other. A more thorough investigation would certainly be helpful, as Advocate General Koopmans suggested, to justify, not to find, the solution which the Court would find in the first place in the meaning which the concept must have in that specific Community directive.

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78. Under Dutch and Belgian law, three different functions are assigned to the concept of good faith in relation to the text of a contract: the interpretative, the supplementing, and the derogating function. Under English and Scandinavian law, the requirement of good faith is said not to be part of contract law. See Jack Beatson & Daniel Friedmann, *Introduction: "From 'Classical' to Modern Contract law"*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* 14-15 (Jack Beatson & Daniel Friedmann eds., 1995) (stating that it appears that English law, nevertheless, offers specific solutions to a wide range of issues that involve question of unfairness).